An Introduction to International Arbitration

Ilias Bantekas

CAMBRIDGE
UNIVERSITY PRESS

An introduction to international arbitration 1

1.1 Introduction

This chapter is aimed at introducing the reader to the fundamentals of international arbitration. It will firstly cement the legal basis of the parties' autonomy to submit disputes to arbitration and subsequently trace the three phases within which international arbitration is conducted, from the drafting of the agreement all the way to the recognition and enforcement

of the award in a jurisdiction other than that in which it was rendered, where pertinent. Having comprehended how arbitration works we then go on to assess other alternative dispute resolution mechanisms and their benefits (as well as disadvantages) as compared to litigation. The chapter will then examine three fundamental distinctions, namely international versus domestic arbitration, commercial versus non-commercial arbitration and institutional versus ad hoc arbitration. It concludes with two fundamental concepts, namely separability and arbitrability, whose impact the reader will encounter throughout the book. Although many other principles are fundamental to arbitration they are best reserved for other chapters.

1.2 The theoretical foundations of arbitration

Four theories are generally employed to explain the legal foundations of arbitration, namely, the jurisdictional, contractual, mixed (hybrid) and the autonomous theories. Their common underpinning is the interplay between private control and state regulation of arbitration. Adherents of the *jurisdictional theory* suggest that the role of national law, particularly that of the seat of the arbitration, is of paramount importance. While the parties are free to choose arbitration over recourse to the courts and appoint their preferred arbitrators, it is the state which permits them to do so and as a result arbitrators are perceived as exercising a public function and possess a quasi-judicial status entitling them to the immunity enjoyed by ordinary judges.[1]

The *contractual theory* is predicated on the principle of party autonomy, which is explained more fully in the following section. According to this, it is the will of the parties as expressed in their contract that dictates the choice of dispute settlement mechanism. In fact, the parties' agreement to arbitrate overrides the jurisdiction or ordinary courts, the application of conflict of law rules, as well as the vast majority of procedural rules.[2] Unlike the jurisdictional theory, proponents of the contractual theory

[1] See J. D. Lew, L. Mistelis and S. Kröll, *Comparative International Commercial Arbitration* (Kluwer, 2003), 74–5; E. Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff, 2010), 15–23.

[2] Lew, Mistelis and Kröll, above note 1, at 76; Gaillard, above note 1, at 24–34.

suggest that arbitral tribunals do not exercise a public function and are instead under a mandate or contract with the parties to provide a service. It should be noted, however, that contractual theory in no way disregards the role of the state in safeguarding the arbitral process, both domestically and internationally.

The *mixed (hybrid) theory* takes the view that arbitration is neither wholly private nor wholly public. It suggests the existence of a synergy between the will of the parties and the role of the state, particularly the seat, in assisting the arbitral process. The role of the state is crucial in giving effect to the will of the parties, rather than assuming a controlling role. By way of illustration, arbitral proceedings would come to a standstill if the parties were unable to agree on the person of the chairman or if third parties refused to surrender evidence to the tribunal voluntarily; not to mention the futility of arbitration if there was no multilateral agreement to recognise and enforce arbitral awards internationally. A practical outcome from the application of the hybrid theory is that arbitral tribunals, although established by reason of contract, do exercise a public function that obliges them to adhere to fair trial guarantees. Moreover, the use of substantive and procedural rules in arbitration is no longer solely anchored to one or more legal systems. Parties are content to rely on trade usages, equitable principles and other transnational rules.[3]

The *autonomous theory*, while using the mixed theory as its platform, views arbitration as a process developed and operating solely to meet the needs of business and trade. In this light, the contractual basis of arbitration entails that national law can be bypassed by agreement of the parties and that even the law of the seat is of little, if any importance.[4] If the parties are able to communicate effectively the arbitral process need not have anything to do with domestic law or domestic institutions; it may be delocalised, as will be examined elsewhere. A particular outcome of the independence of international arbitration from domestic legal orders is the evolution of a discrete arbitral legal order, itself an expression of transnational law.[5]

In practice, all of these theories find a degree of application, although some are more prevalent than others. While reading the various chapters of this book the reader will come to realise the influence of each of these

[3] Gaillard, above note 1, at 35–51.
[4] Lew, Mistelis and Kröll, above note 1, at 80–1.
[5] Gaillard, above note 1, at 52–66.

theories in discrete fields of arbitration. The following section will discuss the principle of party autonomy, not as justification for the contractual theory, but as the key over-arching principle underlying the system of international arbitration.

1.2.1 Arbitration and party autonomy

Arbitration is a dispute resolution process that is consensual and private in nature and operation,[6] as opposed to ordinary litigation whereby the civil procedural rules are not generally amenable to party approval whether in whole or in part; in the majority of jurisdictions they are obligatory at all times. More specifically, the selection of judges in a particular case is determined by law and the parties cannot by agreement limit or restrict the competence or authority of the court, nor can they adapt the rules of evidence even among themselves, although it is true that this is sometimes debated in certain jurisdictions. The boundaries of party autonomy in arbitration are far wider than civil litigation and with few exceptions (especially mandatory rules concerning public interest and the parties' due process rights) the parties may choose or omit any procedural or substantive rules. This freedom is not derived from natural law, but is granted to physical and legal persons by formal law (the law of the seat of arbitration, codified in the law of contracts, civil procedure or other). Arbitration is not the only mechanism where such freedom exists. It is also encountered in other private alternative dispute resolution (ADR) mechanisms, such as mediation, conciliation, expert determination and negotiation.

Despite its otherwise private nature, arbitration would be meaningless if arbitral awards were not amenable to state-sanctioned enforcement. The losing party could unashamedly exhibit bad faith and refuse to abide with the terms of the award. As a result, it becomes obvious that unless the state sanctions, guarantees and protects the institution of arbitration, which includes the parties' agreements, arbitral process and arbitral awards, there would be no incentive to choose arbitration over litigation since it would be devoid of all legal certainty.

The fact that arbitration is based on private agreement and largely regulated by permissive rules of private law does not mean that it exists

[6] *Lafuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6, as per the RSA Constitutional Court.

wholly outside any sphere of public regulation. If this were so it would be subject to manipulation by the stronger parties and any abuses emanating from this system of dispute resolution (such as the use of arbitral awards to launder illicit proceeds) would never be resolved by reference to principles of justice and fairness. A good illustration of the public dimension of arbitration is offered in the field of consumer disputes. In European Union (EU) member states pre-dispute arbitration clauses are generally inadmissible and any post-dispute agreements must be individually negotiated between consumers and businesses.[7] Equally, although the parties are free to agree on the procedural rules governing arbitration they are not allowed to forego or circumvent due process guarantees ordinarily applicable in civil proceedings.[8] As will be discussed in other sections of this chapter, states may pose further limitations to party autonomy, such as those relating to arbitrability and public policy.

It is not, however, only domestic law that has an impact on party autonomy to arbitrate. In transnational commercial transactions, multiple legal systems will come into operation and unless states are willing to afford arbitration agreements and arbitral awards mutual recognition and enforcement, recourse to arbitration will always entail a serious risk factor. That is the reason why several international instruments have come into place to unify and harmonise international commercial arbitration. Chief among these is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the UNCITRAL Model Law on International Commercial Arbitration. The first sets out a restricted list of grounds which justify the non-recognition and enforcement of foreign awards, whereas the latter is a platform (or a standard-setting mechanism) for the unification of national arbitration laws.

Case study: The limits of party autonomy

The Bulgarian Supreme Court of Cassation was asked to determine the validity of an arbitration clause that provided only one of the parties with a unilateral right to decide whether to refer a dispute to a state

[7] See chapter 9.

[8] As a result, the right to fair trial applies to arbitral proceedings despite the fact that arbitral tribunals are not 'established by law' as dictated by Art 6 of the ECHR. See *Abel Xavier v UEFA* [2001] ASA Bull 566 and more generally chapter 7 section 7.6.3.2.

court or to an arbitration tribunal. It found this contractually based unilateral entitlement invalid under Article 26(1)(1) of the Bulgarian Obligations and Contracts Act. The Court's reasoning was that the unilateral right to choose the method for dispute resolution represented a potestative condition, thus rendering it unenforceable for lack of mutuality of obligation.[9]

1.3 Compulsory forms of arbitration

So far it has been demonstrated that it is solely in the discretion of the parties whether to submit a dispute to arbitration rather than the ordinary jurisdiction of regular courts. Once they have opted for arbitration, the law (of the seat, otherwise known as *lex arbitri*) will set some boundaries with the aim of ensuring the parties' equal treatment and the relative fairness of proceedings, but it will not impose arbitration on the parties. Exceptionally, states will *impose* arbitration on particular classes of private actors, typically in a limited number of disputes involving state entities or concerning some element of public interest (statute-based arbitration).[10] The exclusion of party autonomy here is allegedly justified by the speediness inherent in arbitration, the assurances of fairness provided by the state and the assumption that this is what the private actors would have chosen had they been given the option (essentially, that arbitration under the circumstances is pro-investor). By way of illustration, Greece's Public

[9] *Case (commercial) 193/2010*, Bulgarian Supreme Court of Cassation judgment no 71 (2 September 2011); confirmed also by the French Supreme Cassation Court judgment (26 September 2012) in *Mme X v Banque Privée Edmond de Rothschild* [2013] ILPr 12. This outcome should be distinguished from agreements whereby one of the parties will choose which among two appointing authorities would appoint the arbitrator. OLG Dresden, *case 11 Sch 01/01*, judgment (28 February 2001); see similarly *Mortini v Comune di Alidono*, Italian Constitutional Court judgment (9 May 1996), [1996] Foro pad 4, where compelling parties to submit disputes to arbitration under Italy's public procurement laws was held to be a breach of the private party's right of access to state courts.

[10] Exceptionally, compulsory arbitration has in some cases been extended to wholly private disputes. Part A of the Fourth Schedule to the Maltese Arbitration Act stipulates that condominium, traffic-related and agency disputes are subject to mandatory arbitration. Mandatory arbitration has also been introduced for any dispute in connection with building construction (to the exclusion of claims for personal injuries). Maltese Legal Notice 72 (2013).

Private Partnership (PPP) Law provides that all disputes arising from PPPs will be resolved by arbitration.[11]

Since 2001, pharmaceutical patent disputes concerning the commercialisation of generic medicines in Portugal are to be resolved through mandatory arbitration, in situations where one of the parties argues that the commercialisation of a generic medicine infringes its patent rights. In such cases a special procedure is envisaged whereby when the Portuguese national pharmaceutical agency (Infarmed) receives an application for approval of a generic pharmaceutical product, the innovator may, within thirty days, file a request for arbitration (either ad hoc or institutional), if it claims that the generic medicine is in breach of its intellectual property rights. This form of compulsory arbitration also covers interim injunctions, thus entirely excluding these disputes from the jurisdiction of ordinary courts.

Such mandatory forms of arbitration are exceptional and have rightly given rise to criticism. Given the absence of party autonomy as regards the application of substantive and procedural rules it is even questioned whether such processes have any affinity to arbitration whatsoever. In one case, the Maltese Constitutional Court held that the mandatory arbitration proceedings in question (including the appointment of arbitrators by the chairman of the Malta Arbitration Centre) did not breach the Constitution of Malta (Article 39(2)) or the right to fair trial under Article 6 of the European Convention on Human Rights (ECHR).[12] As we have already discussed, however, the Italian Constitutional Court in *Mortini v Comune di Alidono*, reached a different conclusion.[13]

1.4 Mediation and ADR

When a dispute arises between two or more persons they may choose to resolve it through several available means. If the parties are on speaking terms the natural inclination is to engage in negotiations on the basis of

[11] Art 31, Law No 3389/2005; Law No 3943/2011 on Tax Evasion equally provides for the settlement of relevant tax disputes in Greece through arbitration.

[12] *Untours Insurance Agency Ltd and Emanuel Gauci v Victor Micallef and Others*, App No 81/2011/1, Maltese Constitutional Court judgment (25 January 2013). It should be noted, however, that two years earlier the same court reached a different conclusion in *Vassallo & Sons Ltd v Attorney General Water Services Corp and Enemalta Corp*, App No 31/2008/1, judgment (30 September 2011).

[13] See above footnote 9.

face-to-face discussions. Negotiations are only meaningful if the parties truly desire to resolve their dispute and provided that they are prepared to make at least some concessions.[14] If they reach settlement outside an arbitral process the only way of recording their settlement is in the form of an agreement, whether a contract, a notarised deed or other. The parties may well decide to insert an arbitration clause in their agreement, in which case if a dispute were to arise in the future over the terms of the agreement they could have recourse to arbitration.

If the parties are not on speaking terms and at the same time are not bound by an agreement to arbitrate or do not otherwise wish to submit to the jurisdiction of the courts they may opt for mediation.[15] Mediation may be employed in the case of two feuding neighbours as well as in complex business disputes. The mediator listens to the parties' views and arguments and tries to come up with a proposed settlement that is acceptable to all parties. It is crucial therefore that the mediator understands what is important to each party and what are the interests and pursuits they hold as fundamental. The key to successful mediation is not the rendering of a legally accurate determination setting out which party has breached its obligations, because the breaching party will naturally reject the proposed settlement. Rather, the key is to demonstrate what went wrong, never drive any party to the corner and suggest sensible solutions for the rectification of the issue at hand. Mediators may, and usually do, have to go back and forth with amended terms before the parties reach a settlement. In many situations the most sensible solution is right before the parties' eyes but their mutual anger and resentment does not allow them to conceptualise it; divorce is the classic example!

[14] Controlling one's emotions and understanding the opponent's motivations and desires is key to successful negotiation. See R. Fisher, W. L. Ury and B Patton, *Getting to Yes: Negotiating Agreement without Giving In* (Penguin Books, 2011).

[15] Fromm convincingly argues that there is a human tendency to resort to authoritarianism and authoritarian institutions (such as law and the courts) in order to escape from freedom in the context of stressful situations, such as inter-personal conflicts. In such situations even rational people abandon their communicative and conflict engagement functions (or skills) and resort to the aforementioned authoritarian figures, be they mediators, judges or arbitrators. See E. Fromm, *Escape from Freedom* (Henry Holt & Co, 1986). Other scholars, such as Kuttner take Fromm's psychoanalytical analysis of authoritarianism to explain the extensive use of adjudicatory systems and proliferation of authoritarian legal institutions. See R. Kuttner, From Adversity to Relationality: A Relational View of Integrative Negotiation and Mediation (2010) 25 *Ohio St. J Disp. Resol.* 931.

Once the proposed settlement is accepted by all the parties three options are available in order to render it binding, namely: a) recording the settlement into a new contract; b) recording the settlement into an award (so-called consent awards or awards on agreed terms) in cases where the parties have already entered into an agreement to arbitrate the dispute at hand and the tribunal has already been constituted;[16] or c) recognition of the settlement by a court as having the same legal effect as a judgment, provided that this option in fact exists in the jurisdiction where the parties are situated. Article 6 of the EU Mediation Directive,[17] for example, obliges member states to ensure that the content of a written agreement resulting from mediation be made enforceable either on its own or through a court judgment, although in the latter case this does not necessarily constitute a form of judicial exequatur.

The judicial recognition of a mediated settlement differs from an arbitral award in several important respects. Firstly, the recommendations of the mediator are not binding on the parties; they are merely proposals. Secondly, an approved (by the courts) mediated settlement is binding but is enforceable internationally only under the legal regime applicable to civil judgments.[18] This means that the settlement/judgment is not enforceable as a foreign arbitral award under the terms of the 1958 New York Convention.[19] Thirdly, unlike arbitral awards, which may be subject to set aside proceedings, mediated settlements (that do not constitute consent awards) may be challenged under the law of contract, if recorded in the form of a contract, or by means of appeal or cassation if approved by a first instance court judgment. Other challenges may also be available.

1.4.1 Tiered dispute resolution

It is common for parties to complex contracts, especially in construction, to insert tiered dispute resolution clauses (also known as escalation clauses) in

[16] Art 30 UNCITRAL Model Law; see chapter 7 section 7.3.3.

[17] Directive 2008/52/EC of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters, OJ L 136 [2008].

[18] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ L 12 [2012].

[19] The practical significance is that membership to the 1958 New York Convention is by far higher as compared to membership in any other multilateral convention for the mutual enforcement of civil judgments.

their contracts. These provide for a series of steps in the overall dispute resolution process, whereby, subject to a definite time frame, if the dispute has not been resolved by one step (procedure) the following step is applied. By way of illustration, the first step may consist of structured negotiation, failing which the parties may turn to mediation, from there to early neutral evaluation, followed by expert determination and ultimately arbitration or adjudication. English courts have demonstrated an inclination to enforce escalation clauses, particularly where the language of the clause is mandatory, there is explicit reference to institutional rules or other defined procedure and time frames are clearly set out.[20]

The parties may well feel that traditional arbitration is unsuitable for their business needs. An enforceable award may be far lower on their agenda as compared to speedy resolution in the face of looming deadlines, especially where there exists a good deal of trust. In such cases the parties may simply desire the input of technical experts. As a result, particularly in construction disputes, it is usual for the parties to resort to expert determination whereby the dispute is submitted to an independent technical expert (chosen from a list pre-agreed by the parties) who determines purely technical issues (not matters of law) and whose decision is final and binding.[21] In large, long-term, construction projects there is usually a standing expert-determination panel because of the frequency of relevant disputes. Although expert determination is fast, technically accurate and binding, it does not constitute an arbitral award and is only enforceable as a contract.[22] The test used by Australian courts to distinguish arbitration from expert determination is whether the relevant process was in the nature of a judicial inquiry.[23]

1.4.2 Mediation and ADR as a condition precedent to arbitration

Mediation (and other forms of ADR) is usually designated as a first step in the parties' agreement to arbitrate. Where ADR procedures are stipulated as

[20] *Wah (aka Alan Tang) and Another v Grant Thornton Intl Ltd and Others* [2012] EWHC 3198 (Ch).

[21] *Douglas Harper v Interchange Group Ltd* [2007] EWHC 1834 (Comm); *Union Discount v Zoller* [2002] 1 WLR 1517.

[22] Under Italian law and practice, expert determination is a form of *irrituale* arbitral proceeding, which is discussed below.

[23] *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2003] VSC 307.

binding in the agreement the parties must exhaust these before turning to arbitration. In this manner, ADR procedures constitute conditions precedent to arbitration. The result is that the parties cannot proceed to arbitration without first exhausting these other forms of ADR.[24] Although most condition-precedent clauses are clear and precise others require the courts to interpret the parties' intent. Where the parties have designated a particular arbitral institution in their arbitration clause, and unless otherwise specified, the institution's rules may determine whether mediation was a condition precedent. In general, courts are disinclined to ignore a condition precedent and will stay arbitral proceedings until the condition is first exhausted.[25] Exceptionally, some courts have taken the view that the voluntary nature of mediation dictates that compelling the parties to mediate defeats its very purpose if one of the parties is opposed to this process.[26]

1.5 The three phases of arbitration

The operation of international commercial arbitration can best be described as encompassing three broad phases, namely: a) the drafting and insertion of an arbitration clause in a contract, or the drafting of an agreement to arbitrate (*compromis*) in the absence of an arbitration clause; b) the commencement of arbitral proceedings by the triggering of the *compromis* or the arbitration clause by one of the parties. This phase is concluded by the issuance of a final award by the arbitral tribunal provided that it clears all relevant challenges at the seat and; c) the recognition and enforcement of the arbitral award in one or several jurisdictions, where the winning party so desires. A brief discussion of the key issues of each phase will be provided in the subsequent paragraphs.

[24] In *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm), it was held that an agreement to resolve a dispute through a continuous four-week period of friendly discussion before turning to arbitration was a valid and enforceable condition precedent to arbitration.

[25] See *Kemiron Atlantic Inc v Aguakem Intl Inc*, 290 F 3d 1287 (11th Cir. 2002); but see chapter 10 section 10.5.3 for an analysis of the fork-in-the-road concept as applied to investment arbitration.

[26] *Jen-Weld Inc v Superior Court*, 146 Cal App 4th, 536 (2007), at 543.

1.5.1 Phase I: the agreement to arbitrate

The courts ordinarily possess jurisdiction over all disputes, private and otherwise,[27] and thus there is no need to insert a civil litigation clause in contracts or other agreements. Because arbitration is not an ordinary means of resolving disputes it may only be employed if the parties have expressly provided for it by mutual consent; it is therefore extraordinary. This consent may be recorded in a number of instruments, such as contracts, trust deeds, corporate articles of agreement and testamentary wills. In a limited number of countries an oral agreement equally suffices as long as it is verifiable.[28] It is now commonplace, especially in complex or transnational agreements, for the parties to insert an arbitration clause in the eventuality of a future dispute. The parties and their counsel are typically influenced by a variety of reasons in their choice of arbitration over litigation. Whatever the case, once the agreement comes into force the arbitration clause is binding throughout the duration of the agreement and if a dispute arises and one of the parties submits the dispute to a court the latter must (and will) stay the court proceedings in favour of arbitration.[29] Moreover, as will be explained shortly, even if the agreement in which the arbitration clause is contained is found to be null or void the clause itself *may* survive by virtue of the principle of separability.[30]

The arbitration clause is thus a contract within a contract. Although it is usually short, its contents are of immense significance. A typical clause will designate the seat of the arbitration, the scope and range of disputes subject to arbitral resolution, the arbitral institution (if any) under whose rules the dispute will be heard and perhaps the governing law(s) of the agreement in question. The arbitration clause will itself be governed by a discrete law, which may be different from the law governing the main agreement.[31] In practice, counsel spend the bulk of their billable hours on the intricacies of the main contract and in many cases the arbitration clause is inserted at the very end (deservedly labelled as the midnight clause), usually by adopting a standard clause recommended by a particular arbitral

[27] Except, of course, where jurisdiction lies with an inter-governmental court or tribunal through the operation of a treaty, as is the case with investment arbitration under bilateral investment treaties (BITs).

[28] See chapter 3 section 3.4. [29] See s 9(1) English Arbitration Act (AA).

[30] See s 7 English AA; equally, section 1.8.1 of this chapter.

[31] See chapter 2 section 2.2.4.

institution.[32] Counsel familiar with one arbitral institution and its rules have no reason to recommend another, especially since institutions do not impose restrictions on the seat of arbitration.[33] It is important to emphasise at this point that the choice of seat for the arbitration is crucial because the procedural law of the seat determines the legality of the proceedings and the ultimate validity of the award rendered. If the parties or the arbitrator violates the law of the seat the award may be challenged and set aside or refused enforcement later on. The parties and their counsel must additionally ensure that the law of the seat, otherwise known as *lex arbitri*, and the courts of the seat are not hostile to arbitration and that they are able to guarantee the substantive and procedural rights of the parties.[34]

Where the parties to an agreement that has gone sour omitted, for whatever reason, to insert an arbitration clause when the agreement was originally drafted they may still refer their dispute to arbitration through a discrete agreement to arbitrate, known as *compromis*, or submission agreement. This is essentially a new, post-dispute, agreement and because the parties now have a good idea of the dispute the *compromis* will typically be more elaborate as compared to a short arbitration clause and may contain other information, such as the names of the arbitrator(s).

1.5.2 Phase II: the arbitral process

Once there is a valid agreement to arbitrate any of the parties to the agreement may trigger it and initiate arbitral proceedings. This phase

[32] See chapter 3 section 3.6 for a discussion of model and non-model arbitration clauses. The scope of the clause is important because depending on the language employed the tribunal may interpret the range of disputes (or issues) encompassed under the clause in a restrictive manner.

[33] The choice of an arbitral institution does not in any way imply that the seat of the arbitration will be in the city or country of the institution's headquarters. Rather, by choosing institutional arbitration the parties choose to be bound by particular institutional rules, select arbitrators from a list supplied by the institution (although usually optional) and be assisted throughout the process by the institution, whether in respect of clerical, legal or other support.

[34] By way of illustration, if a dispute involves a sensitive matter which may cause problems on the basis of public policy considerations, the parties may opt for a seat that is flexible on public policy issues. Under French law, for example, international awards are subject to international (as opposed to domestic) public policy restrictions, which are largely inconsequential. See chapter 7 section 7.6.3.5. Equally, parties largely interested in an expeditious arbitration may be dissuaded from choosing as their seat jurisdictions that permit appeals against arbitral awards (very rare) or appeals on points of law.

may be distinguished sequentially as follows: a) that which exists before the constitution of the tribunal and; b) that following the tribunal's constitution.

Typically, the initiating party (the plaintiff or claimant) will commence the process by transmitting a statement of claim to the parties' chosen arbitral institution,[35] or directly to the respondent or its designated agent, depending on the pertinent institutional rules. In case of ad hoc arbitration the parties may choose any other method for initiating proceedings. The statement of claim will contain a copy of the agreement and explain the claims raised by the plaintiff, in addition to the remedies sought.[36] Depending on the law of the seat the plaintiff may be compelled to communicate the statement of claim to the respondent directly, in addition to the institution.[37] In any event, the respondent will be afforded a time frame within which to respond to the claim and raise any objections.[38] If the objections concern the validity of the agreement to arbitrate the respondent will seek to prevent the constitution of the tribunal through a variety of options. If permitted by the law of the seat he or she can request the courts to rule on the alleged invalidity or non-existence of the agreement. In most cases, disputes as to the existence of arbitral jurisdiction are decided by the tribunals on the basis of their authority to decide whether they possess jurisdiction in the first place (*kompetenz-kompetenz*).[39]

In the absence of jurisdictional disputes the parties will select the persons whom they want to appoint as arbitrators. Although this will be explained in a subsequent chapter it suffices to say that where there is provision for three arbitrators each party chooses one (party-appointed arbitrators) and in the event they cannot agree on the presiding arbitrator the president may be chosen by the other arbitrators. The institutional rules ultimately

[35] Art 4(1) International Chamber of Commerce (ICC) Rules; Art 1.1 London Chamber of International Arbitration (LCIA) Rules.

[36] Art 4(3) ICC Rules; Art 1.1 LCIA Rules.

[37] Art 3 ICC Rules stipulates that 'all notifications or communications from the Secretariat and the arbitral tribunal shall be made to the last address of the party or its representative for whom the same are intended, as notified either by the party in question or by the other party. Such notification or communication may be made by delivery against receipt, registered post, courier, email, or any other means of telecommunication that provides a record of the sending thereof.' See also Art 4(5) ICC Rules.

[38] See Art 5(1) ICC Rules, which contemplates a period of thirty days. This period may, however, be extended by the Secretariat in accordance with Art 5(2) ICC Rules; see Art 2 LCIA Rules.

[39] For a more detailed discussion, see chapter 4 section 4.3.2.

determine the process in situations where the parties and the two arbitrators reach an impasse, failing which the matter is resolved by the courts.[40] If the parties have not chosen any institutional rules, the procedure for the selection of arbitrators shall be determined by the courts on the basis of the law of the seat (*lex arbitri*). Once all arbitrators have been appointed the tribunal is considered as having been constituted.

Following its constitution the parties may still seek to resolve issues that are not relevant to the merits of their dispute. Examples include the tribunal's jurisdiction (if not already resolved by the courts), the granting of interim measures in order to safeguard sensitive evidence or assets (for fear of dispersal and unavailability), challenges against the independence or impartiality of the arbitrators and disputes over the applicable law.[41]

When all procedural challenges have been resolved by mutual agreement, or by the tribunal in accordance with the *lex arbitri* or the applicable institutional rules, the discussion of the merits will take place. This is typically undertaken through written submissions on the merits, followed by oral hearings if the parties so desire. By this time there will be no dispute as to the governing law of the agreement and the procedural rules of the arbitration, which unless otherwise stated will be institutional, ad hoc (UNCITRAL) or other, such as soft law in the form of the IBA Rules on Taking of Evidence in International Arbitration. With the exception of equal treatment and other due process guarantees, the parties are generally free to choose or modify the procedural rules governing the arbitral process. For example, they may opt to forego oral hearings altogether[42] or set a tight deadline for the delivery of the award.[43] However, such autonomy may be limited by the operation of institutional rules to the contrary.

Although tribunals, particularly in arbitration-friendly nations, possess broad powers there are some matters that are beyond their reach. By way of illustration, arbitral rulings on interim measures may require enforcement

[40] Art 12 ICC Rules; see also chapter 4 section 4.5.

[41] For a discussion of interim measures, see chapter 5 sections 5.5.3 and 5.5.4.

[42] The Swiss Federal Supreme Court has held that the right of the parties to be heard does not include a right to be heard orally (as long as this is consistently applied or is against the wishes of both parties). *Re TA G v H Company*, (1997) ASA Bull 316.

[43] Art 19 ICC Rules provides that: '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.' See also s 46 English AA.

by the courts[44] and equally the authority to compel witnesses, documents and experts will not be directly bestowed upon them. In such circumstances the *lex arbitri* will allow the parties or the tribunal to request the local courts for assistance. In any event, the role of the courts is not to arbitrarily intervene in arbitral proceedings but only to assist the tribunal.

Within the deadline set by the parties and following examination of the evidence the tribunal shall deliberate and render its award. Although the tribunal may decide to issue a single (final) award dealing with all the issues raised by the parties – including even jurisdictional challenges that arose in the course of proceedings – in practice tribunals are not averse to issuing multiple awards in complex cases, each dealing with a distinct issue, such as liability and *quantum* (of compensation).[45] The *lex arbitri* will set out certain formalities which the award must satisfy, namely the signatures of the arbitrators (or just the president), the date and place rendered, a reasoned statement and perhaps others.[46] Once the award becomes final it resolves the parties' dispute and binds the parties in their mutual relations. A final award further produces *res judicata*. The principle of *res judicata* provides that a fact or right (entitlement) already determined by a competent court or tribunal in a final award on the merits cannot subsequently become the subject of litigation or arbitration as between the same parties.[47] It should be noted that an award becomes final and produces *res judicata* once it has cleared any applicable set aside challenges, or alternatively where the time limits for bringing such challenges have elapsed. A final award has exactly the same legal effect as a final court judgment.[48] Some arbitration laws require either registration or deposit of awards[49] or a writ of exequatur from the local courts, which is essentially recognition of its existence and authority for enforcement within the seat.[50] The parties and the arbitrators must be cognisant of the grounds

[44] Interim measures ordered by tribunals are only enforceable between the parties and hence the assistance of the courts with respect to assets, documents or evidence in the hands of third parties is necessary. See chapter 5 sections 5.5.1–5.5.3.

[45] For a discussion of the various types of awards available to tribunals under national law, see chapter 7 section 7.3.

[46] See, for example, Art 31 UNCITRAL Model Law; Art 189(2) Swiss Private International Law Act; s 52 English AA.

[47] See chapter 7 section 7.2.2. [48] Art 824bis Italian CCP. [49] Art 825(1) Italian CCP.

[50] Art 1212 Polish CCP. The exequatur applies in respect of domestic awards. See also chapter 7 section 7.4.3 regarding the obligatory nature, where pertinent, of depositing or registering final awards.

for setting aside – a typical example being the formalities associated with the award – lest the award be vacated (set aside) by the courts.[51]

1.5.3 Phase III: recognition and enforcement of foreign arbitral awards abroad

The objective of the award is manifold. The claimant may seek declaratory relief, compensation, restitution, recognition of a new entitlement (e.g. usucaption, otherwise known as acquisitive prescription), contract adaptation and others.[52] Where compensation is sought, the assets of the losing party may not suffice in the country where the award was rendered. Therefore, the winning party will naturally seek to enforce the award in one or more countries in which the losing party has assets. This process is by no means cheap but it is the only way to collect and may also involve a series of injunctions – during the course of arbitral proceedings or even before[53] – in the relevant states to prevent the losing party from dispersing its assets. In most cases, particularly between businesses that wish to remain creditworthy and reputable, awards are complied with voluntarily without further challenges, but situations do arise where a party challenges not only the validity of the award but also the validity of the arbitral process and even the existence of an arbitration agreement.

Had there not been an international treaty with near-global participation, such as the 1958 New York Convention, the courts of the countries where enforcement was sought would have had no obligation (or incentive) to enforce a private award rendered in a foreign country, particularly if directed against the assets of one of its nationals. The regime set up by the 1958 New York Convention and other regional treaties[54] has made international arbitration both feasible and viable. Contracting states are now obliged to recognise the existence of foreign awards and enforce them in their territory against the assets of nationals and non-nationals alike, save for assets covered by the privilege of sovereign immunity.[55] The grounds

[51] Art 41 ICC Rules requires that arbitrators must 'make every effort to make sure that the award is enforceable'; equally, Art 32.2 LCIA Rules.

[52] Modern arbitral statutes do not generally limit the range of remedies available to the parties in arbitral proceedings, as is the case with s 48(1) English AA. See chapter 7 section 7.5 for a discussion of available remedies.

[53] Through so-called emergency arbitration. See Art 9B LCIA Rules.

[54] See chapter 2 section 2.3. [55] See chapter 8 section 8.6.

for refusal to enforce under the 1958 New York Convention are restricted and the general trend is to construe them narrowly with a view to avoid frustrating the enforcement of foreign awards for no good reason.

1.6 Perceived advantages of arbitration

The private nature of arbitration has given rise to several perceptions concerning its use and advantages over other traditional methods of dispute settlement. These perceptions have largely been offered without the benefit of empirical evidence because unlike the statistics available in litigation the confidential nature of arbitration necessarily means that no relevant statistics are freely available. The perceptions are generally that arbitration is: a) extensive across all industries; b) cheaper than litigation, or at least cost effective; and c) speedier. Alongside these perceptions there are several certainties that are absent in litigation, namely: a) minimisation of judicial bias by mutual appointment of arbitrators; b) confidentiality; and c) control of arbitral proceedings, including choice of seat.

Arbitration should not be viewed as a fit-all mechanism. What works for one entity on a particular occasion may not work for another under different circumstances. Moreover, the rise in the use of arbitration means that other dispute settlement mechanisms, as indeed entire jurisdictions, must become more competitive if they do not wish ultimately to become redundant. It is no accident that most countries aspire to become arbitration-friendly by adapting their arbitration laws to meet international standards and accommodate business concerns. In recent years several empirical studies have been undertaken in order to test the perceptions identified above. In a survey on corporate choices the respondents admitted that they settled 57 per cent of their disputes through negotiation or mediation and only 32 per cent of non-settled disputes were submitted to arbitration or litigation.[56] In another study by the EU it was demonstrated that despite its proven and multiple benefits, mediation in civil and commercial matters is still used in less than 1 per cent of the cases in the EU.[57] This study did not take into consideration complex (and largely transnational) commercial disputes where mediation

[56] Corporate Choices in International Arbitration: Industry Perspectives (2013), available at: www.arbitration.qmul.ac.uk/docs/123282.pdf.

[57] Rebooting the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the EU, available at:

is always the first port of call for legal counsel. The reality is that the end users of mediation will be attracted to it because of its perceived and actual benefits. When Italy introduced mandatory mediation this led to a significant decrease in the number of court cases, which in turn prompted the country's lawyers to go on strike and demand that the relevant law be declared unconstitutional. Despite the initial absence of a requirement for legal representation, 86 per cent of applicants in the first year of operation instructed a solicitor, thus demonstrating extreme caution.[58]

In a 2013 corporate perceptions study, the respondents raised concerns about the rising costs of arbitration, but neither this nor high legal fees were viewed as deterrent factors. In fact, the most important factors for deciding to engage in arbitration are the strength of the company's legal position, the weight of the available evidence and the amount of recoverable damages. It is clear, however, that business choices are conditioned by multiple factors, not just one. By way of illustration, the courts of England and Wales do not charge a daily hearing fee and hence they are the cheapest forum to settle disputes, not only as compared to other courts but also in relation to arbitration, where the fees are significant.[59] English courts are notoriously independent and produce excellently argued judgments. Even so, parties may still opt for arbitration because of the delay that may be caused by civil challenges[60] or the high legal costs in London; equally, the parties may have particular trade secrets whose exposure they would rather avoid (despite the possibility of *in camera* proceedings). Speed and confidentiality may therefore constitute factors that are more crucial to the parties in question than overall costs, in which case the choice of seat may be conditioned by the least number of challenges (both in theory and practice) against final awards. For example, one of

www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf.

[58] See G. De Berti, Mandatory Mediation: The Italian Experience Two Years On (7 June 2012), available at: www.internationallawoffice.com/newsletters/detail.aspx?g=78d73138-a934-465a-9bca-01bc490100fd.

[59] Queen Mary University, Report on Competitiveness of Fees Charged for Commercial Court Services: An Overview of Selected Jurisdictions (17 December 2013), available at: www.law.qmul.ac.uk/news/2013/118691.html.

[60] Under s 69 of the English AA the losing party may appeal to the High Court to review the substantive points of law in the arbitral award, either by way of remitting the arbitral award to an arbitral tribunal or by setting the award aside in whole or in part (the so-called 'appeal on points of law').

the perceived advantages of New York City arbitration is that "even mistakes of fact and law do not warrant vacatur of an otherwise rational award".[61]

It is not out of the question that the courts of several states are empowered to employ expedited procedures in order to attract the resolution of commercial and civil disputes with a view to satisfying the parties' demand for speed and overall cost-effectiveness.[62] Experienced counsel will advise their clients on arbitral institutions whose rules specifically preclude delay tactics, as well as jurisdictions whose courts (and laws) have demonstrated speed and a general unwillingness to entertain protracted civil suits in relation to ongoing arbitral proceedings.

Parties to arbitral proceedings, just like in litigation, may fund their costs through third parties (e.g. banks, insurers, funds). Although third-party funding raises several ethical and public policy issues,[63] chiefly because of the incentives provided to the funder to influence proceedings in order to recover his capital and profit (e.g. the funder may not secure any profit at all from a mediated settlement), many liberal jurisdictions, such as England and Wales, are happy to accept arbitration/litigation funding, albeit subject to some limitations in the interests of justice.[64] As a result, parties with insufficient funds may be prepared to opt for arbitration in countries where third-party funding is available, even if their first choice was litigation or other means of dispute settlement.

1.7 Fundamental distinctions and principles

The remainder of this chapter will discuss three distinctions that are fundamental to one's understanding of international arbitration, namely international versus domestic arbitration, commercial versus other types of

[61] *Hackett v Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146 (1995), at 154–5. What this means is that few, if any, stay claims will ever be successful in this jurisdiction.

[62] The US state of Delaware entertains expedited proceedings, subject to judicial control, through its court of chancery. In early 2015 Delaware adopted its Rapid Arbitration Act.

[63] *Sibthorpe v Southwark Borough Council* [2011] EWCA Civ 25, per Neuberger L.

[64] *Arkin v Borchard Lines Ltd & Ors* [2005] EWCA Civ 655; in *Harcus Sinclair v Buttonwood Legal Capital Ltd* [2013] EWHC 1193, the English High Court ruled that a third-party litigation funder was entitled to terminate the funding agreement when the likelihood of success in litigation had fallen below 60 per cent. The same principle should in theory apply to arbitration.

arbitration and ad hoc versus institutional arbitration. Moreover, it will explain two core principles that permeate arbitral proceedings, specifically, separability and arbitrability. Other concepts, such as *lis alibi pendens* (as well as stay of judicial proceedings in favour of arbitration), the role of public policy and *kompetenz-kompetenz* are examined in discrete chapters.

1.7.1 International versus domestic arbitration

The distinction between domestic and international arbitration is not crucial to all states. Whereas some national statutes apply distinct bodies of rules, most contemporary arbitration laws tend to expand the range of disputes which qualify as international and entertain the distinction for practical purposes, namely, for enforcement under the 1958 New York Convention, the inapplicability of local arbitrability and public policy limitations, and others of a similar nature.

Article 1(3) of the UNCITRAL Model Law proposes a broad definition of international arbitration, where:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states; or
(b) one of the following places is situated outside the state in which the parties have their places of business:
  (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
  (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

Paragraph 4 goes on to suggest that where a party has multiple places of business, as is the case with multinational corporations, the pertinent entity for the purposes of arbitration is that which has the closest relationship to the arbitration agreement.[65]

While most nations largely entertain the distinction they, nonetheless, extend the same regime (with minor differences) to both types of arbitration. One category of statutes focuses on the international nature of the

[65] But see chapter 3 section 3.9 for a discussion of third parties joining arbitral proceedings, particularly the group of companies doctrine.

dispute. An international arbitration under Article 1504 of the French Code of Civil Procedure (CCP) (a non-Model Law country) is dependent on the existence of international trade interests.[66] This is taken to mean that the arbitration is commercially linked to more than one country. The concept of 'international trade' need not involve more than one nation, so long as this is not just France.[67] Although the different nationalities of the parties or the law chosen may be relevant in distinguishing between domestic and international arbitration, neither of these is determinative in and of itself.[68] Equally, the intention of the parties as to the international nature of the arbitration is of no relevance.[69]

Elsewhere, an emphasis is placed on the parties' respective seats of business or residence,[70] as is the case with Article 176(1) of the Swiss Private International Law Act (PILA), according to which an arbitration is international if at the time when the arbitration agreement was concluded 'at least one of the parties had neither its domicile nor its habitual residence in Switzerland'. According to Article 21 of the Swiss CCP, which applies to domestic arbitrations, the domicile/seat of a legal person is that which is designated in its articles of incorporation. If no such seat is designated, this coincides with its place of effective management.[71]

Model Law nations subject all arbitrations to the same legal regime if they are seated in the country in question. This is the case, for example, with Article 46 of the Swedish Arbitration Act.[72] Even so, whereas in international arbitration the parties may choose any governing law,[73] in domestic arbitration certain restrictions as to the choice of a foreign law

[66] Equally, Art 49 of the 2011 Portuguese Arbitration Law.

[67] *Agence pour la Sécurité de la Navigation Aérienne en Afrique et à Madagascar [ASECNA] v M N'Doye Issakha*, French Court of Cassation judgment (17 October 2000), [2000] *Rev Arb* 648.

[68] *SARL Carthago Films v SARL Babel Productions*, Paris Court of Appeals judgment (29 March 2001), [2001] *Rev Arb* 543.

[69] *Chefaro International BV v Barrére and Others*, French Court of Cassation judgment (13 March 2007), [2007] *Rev Arb* 349.

[70] Equally, Art 1(2) of the 1993 Russian Law on International Commercial Arbitration.

[71] Even so, the parties may exclude the application of chapter 12 of the Swiss PILA (dealing with international arbitration) in writing if they have agreed to be bound by part 3 of the Swiss CCP (which deals with domestic arbitrations).

[72] The same is true also of Art 1(1) Spanish AA; Art 1154 Polish CCP; s 2(1) 2010 Scottish AA; Art 2(1) 2012 Lithuanian Commercial Arbitration Act; s 2(1) English AA; s 1025(1) German ZPO.

[73] Arts 3(1) and 9(6) of the Spanish AA.

may apply.[74] The nature of the arbitration may also impact on the right of the parties. In Belgium, for example, where none of the parties is Belgian they can agree to waive set aside proceedings before the courts, whereas if at least one of the parties is Belgian such a waiver is not possible.[75]

In Italy, prior to the 2006 Arbitration Law the CCP distinguished between domestic and international arbitrations. This distinction no longer exists. The Italian CCP has always distinguished between *rituale* and *irrituale* arbitral proceedings. This is unique to Italian law and what it essentially boils down to is that *rituale* proceedings constitute the classic form of arbitration whereby proceedings are subjected to the procedural rules of the CCP, whereas in *irrituale* proceedings the award is not enforceable but has the force of a binding contract. The Italian Supreme Court of Cassation has confirmed that *irrituale* awards have the effect of a binding contract.[76] Hence if a party subject to an *irrituale* award fails to comply the other party may commence an action for breach of contract.[77]

Overall, where statutes clearly distinguish between domestic and international arbitration, different rules will apply to each, although many will essentially be the same. Some will be radically different, as is the case with certain domestic public policy rules that are much broader than their international counterparts, such as those of France. Moreover, the seat of the arbitration is largely assessed by reference to its juridical dimension, namely as designated in the parties' agreement, or as determined by the tribunal in the absence of prior agreement. As a result, many arbitration statutes presume that the juridical seat coincides with the actual seat of the arbitral proceedings, but the parties should not stretch this presumption to its limits. Hence, according to the preparatory works of the 1972 Danish Arbitration Act, if the parties agree that the place of arbitration is Denmark

[74] See, for example, s 187(2) of the US Restatement (Second) of Conflict of Laws (1971); Art 34(2) of the Spanish AA refers specifically to the freedom of parties in international arbitration to choose their governing law, thus intimating that the same freedom does not exist, wholly or partially, in respect of domestic arbitrations.

[75] Art 1718 of the Belgian Judicial Code, as amended by the 2013 Arbitration Law.

[76] *Case no 527/2000*, Cassation Court judgment (13 August 2000).

[77] Even so, *irrituale* awards have several advantages, such as that they are not subject to tax, as is the case with *rituale* awards. Moreover, in certain cases where the parties' compliance is 'guaranteed' from the structure of the underlying relationship, as is the case with sports awards whose compliance is more or less automatic, there is no need for a formal award.

but the proceedings have no such connection with the country they would not fall within the scope of the Act.[78]

1.7.2 Commercial versus non-commercial arbitration

Disputes differ in many respects and it would make little sense to subject all of them to the same procedural rules. This is well recognised in arbitration. As a result, besides the distinction between domestic and international arbitration, domestic statutes and relevant treaties equally distinguish between commercial, investment, consumer (employment disputes are treated in largely the same manner in many but not all states)[79] and online disputes. Different procedures govern all of these types of disputes, albeit there are many common underlying principles. These distinctions are moreover significant because Article I(3) of the 1958 New York Convention allows member states to choose whether to subject non-commercial disputes to recognition and enforcement under the Convention, leaving the precise definition to national statutes. As a result, if a state has excluded non-commercial disputes, non-commercial awards (online awards may very well be of a commercial nature) will be refused enforcement and recognition there, although this is rare. The UNCITRAL Model Law provides a broad definition of commercial disputes, covering:

> matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.[80]

If national statutes did not view commercial disputes in broad terms the practice of arbitration would be seriously limited. In practice, arbitration-friendly states are willing to expand the list provided in the UNCITRAL Model Law. Thus Article 1504 of the French CCP is construed as also

[78] See O. Spiermann, National Report for Denmark (2009), in J. Paulsson (ed.), *International Handbook on Commercial Arbitration* (Kluwer, 2004, Supp no 57, 2009), 2.

[79] See Art 1(4) Spanish AA. [80] Footnote 2, UNCITRAL Model Law.

encompassing professional activities,[81] as well as consumer activities with a transnational nature, such as the sale of stocks and other financial instruments which may otherwise fall under consumer relations. Others go even further, rendering the nature of the dispute redundant. By way of illustration, under section 1(1) of the 1999 Swedish Arbitration Act the parties may instruct the tribunal to simply ascertain a particular fact; hence the Act is not specifically limited to legal disputes as such. Likewise, section 2(1) of the Scottish Arbitration Act defines a dispute as including any refusal to accept a claim and any other difference, whether contractual or not. Some statutes make no reference to the scope of applicable disputes as is the case with section 6(1) of the English Arbitration Act, and hence provided that the dispute in question is arbitrable it is regulated under the Act.

This does not, of course, mean that all arbitration statutes take this broad view of commercial disputes. Article 177(1) of the Swiss PILA stipulates that any dispute involving property may be the subject matter of arbitration. This has been held to encompass sports sanctions where they produce economic effects on the sanctioned party[82] and this is true of all competitive sport disputes.[83]

The other three types of non-commercial disputes, namely investment (although investments are covered in footnote 2 of the UNCITRAL Model Law) and consumer (as well as employment) will be discussed in relevant chapters. It is implicit that where arbitration statutes do not specifically exclude them from their scope[84] they may otherwise be referred to arbitration under the same terms as commercial disputes. In investment arbitration, on the other hand, what is at stake is whether the dispute in question arises from an 'investment'. A particular activity, whether or not it qualifies as *commercial* in the context of international commercial arbitration, is considered an investment if designated as such under relevant bilateral or multilateral investment treaties, the parties' agreement or in a national foreign investment statute.[85]

1.7.3 Ad hoc versus institutional arbitration

The operation and administration of arbitral proceedings requires some degree of organisation and capacity. This service is provided by a multitude

[81] As is explicitly provided for in Art 2061 of the French CC.
[82] *Gundel v Federation Equestre Internationale*, BGE 119 II 271ff.
[83] *Re Mendy et Federation Francaise de boxe v AIBA*, CAS award (31 July 1996).
[84] Art 7(2) Danish AA. [85] See chapter 10 section 10.3.3.

of arbitral institutions for a fee, although in their vast majority they are non-profit entities as is the case with national chambers of commerce. In addition, the majority of arbitral institutions have developed their own procedural rules[86] which are binding on the parties when they are designated as their chosen institution for the administration of arbitral proceedings. In such cases one speaks of institutional arbitration. Alternatively, the parties may decide to handle all the administrative issues themselves without the assistance of an arbitral institution and apply the procedural law of the seat (the *lex arbitri*) or the institutional rules of any other arbitral institution to the proceedings.[87] This is known as ad hoc arbitration. Both types of arbitration are recognised under the UNCITRAL Model Law and national statutes and awards rendered in both situations carry the same value.[88]

Although institutional arbitration may seem a sensible choice, there are several reasons why the parties may undertake all the administrative burdens associated with ad hoc arbitration. In small cases the institution's fee and the non-negotiable arbitrators' fees can be prohibitive. In large, complex, cases, particularly those involving state entities, the parties may wish to avoid the publicity associated with institutional arbitration. Ad hoc arbitration is no different from its institutional counterpart, given that proceedings will be subject to the law of the seat and the supervisory role of the local courts and the parties may apply any procedural rules of their choice, such as the UNCITRAL Rules.

The parties may request an entity to act as *appointing authority*, in the sense that it is granted the power to designate an arbitral institution or appoint the arbitrators once a dispute arises, although normally the designated arbitral institution is itself the appointing authority for the arbitral panel. By way of illustration, the Secretary-General of the Permanent Court of Arbitration (PCA) may be entrusted under the UNCITRAL Arbitration Rules and the Energy Charter Treaty with the task of appointing arbitrators in a particular case.[89] A unique emanation of this power is recognised in section 24 of the Scottish Arbitration Act, which introduces the concept of arbitral appointments referee (AAR). Experienced third

[86] Exceptionally, the London Maritime Arbitrators Association (LMAA) conducts arbitrations in London under the English AA.

[87] It is also common for ad hoc tribunals to manage all administrative aspects of a case, rather than the parties.

[88] Art 2(a) UNCITRAL Model Law. [89] Art 27(3)(d) Energy Charter Treaty.

parties are essentially responsible for the appointment of arbitrators or umpires in situations where the parties are unable to agree among themselves. AARs, moreover, are responsible for the training and discipline of appointed arbitrators. Ordinarily, in the absence of the parties' agreement, this task would have been undertaken by the courts although it is obvious that this is not a function with which the judges are (always) familiar and it makes perfect sense to appoint experts to decide on such matters. Several professional bodies are currently registered as AARs in Scotland, including the Chartered Institute of Arbitrators (CIArb), the Royal Institution of Chartered Surveyors (RICS) and the Law Society of Scotland.[90]

1.8 Separability and arbitrability

1.8.1 Separability

Two issues are considered customary in the law of international commercial arbitration. The first is that the agreement to arbitrate is based on the parties' mutual consent, in the absence of which arbitration is not possible. The second concerns the fate of the arbitration clause in situations where the main agreement (in which it is contained) is held to be void or voidable. In such situations it is now generally recognised that the arbitration clause is separable and severable from the rest of the ill-fated agreement and survives even if the main agreement (e.g. contract, trust deed or other) does not.[91] Such an approach is vital in order to preserve the parties' entitlement to arbitration and generally trumps the rule (principally in contract law) whereby null, void or voidable agreements produce no legal effects in their entirety.[92] This is known as the principle of separability. Its practical effect is that whereas it does not, and cannot, remedy or cure the substantive fault of the agreement, separability does preserve the agreement's procedural

[90] H. R. Dundas, Arbitration in Scotland, in J. D. M. Lew, H Bor et al. (eds.), *Arbitration in England with chapters on Scotland and Ireland* (Kluwer, 2013), 603.

[91] Art 16(1) UNCITRAL Model Law; Art 23(1) UNCITRAL Arbitration Rules. Separability is by no means a new concept. See *Heyman v Darwins Ltd* [1942] AC 356, at 374 per Lord MacMillan.

[92] In support of separability, for example, the Estonian Supreme Court has held that an arbitration agreement that is null and void may, in certain circumstances, violate or at least ignore Estonian public policy. *Case no 3-2-1-34-04*, Supreme Court judgment (15 April 2004).

(dispute resolution) validity. As a result, the arbitral tribunal will be established under the terms of the agreement to arbitrate with the arbitrator thereafter assessing the parties' accountability and damages arising from the void or voidable nature of the contract.[93]

There are, of course, sensible limits to the separability principle. Where the tribunal or the courts determine that the arbitration clause itself is null, void or inoperable the arbitral proceedings will equally be terminated.[94] Similarly, the entire agreement, including the arbitration clause, will be considered invalid where the contract was never entered into, or where the ground for invalidity encompasses also the arbitration clause as it does the rest of the agreement.[95] It would be very difficult to sustain the argument that the arbitration clause in a contract that was forged or signed under duress was otherwise perfectly consensual and legitimate, but such a conclusion may not prevent an arbitral tribunal from assuming jurisdiction. The case law of few nations whose domestic arbitration law is not based on the UNCITRAL Model Law continues to examine the arbitration clause through a strict construction of contract law. The Luxembourg Court of Appeals, for example, has held that since the arbitration clause is an accessory contract and an integral part of a contract that is null or void, the maladies of the main contract naturally also affect the arbitration clause.[96] Such an approach is contrary to international practice and trade usages and must be viewed as exceptional.

Separability would be meaningless if any of the parties could lodge anti-arbitration suits prior to the constitution of an arbitral tribunal with a view to assessing the validity of the arbitration clause. The *lex specialis* character of arbitration agreements dictates that this befalls the jurisdiction of

[93] s 7 English AA. The notion of separability is not restricted to arbitration clauses in civil and commercial contracts. Art 3(d) of the 2005 Hague Convention on Choice of Court Agreements stipulates that: 'an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.'

[94] s 9(3) English AA; see *Vee Networks v Econet Wireless International Ltd* [2005] 1 Lloyd's Rep 192, per Colman J.

[95] Exceptionally, s 5(3) of the Scottish AA stipulates that a dispute about the validity of an agreement containing an arbitration agreement may be arbitrated in accordance with that arbitration agreement.

[96] Court of Appeal judgment (12 March 2003), Pas Lux 32, 399. Even so, Luxembourg courts generally recognise the principle of separability. See Court of Appeal judgment (26 July 2005), Pas Lux 33, 117.

tribunals and not the courts. Some arbitration statutes provide express recognition to this (obvious) rule. By way of illustration, Article 5(4) of the Portuguese Arbitration Law emphasises that the 'invalidity, inoperativeness or unenforceability of an arbitration agreement cannot be discussed autonomously in an action brought before a state court to that effect or in an interim measure brought before the same court, aiming at preventing the constitution or the operation of an arbitral tribunal'.

1.8.2 Arbitrability

It is not self-evident that all types of disputes may be freely submitted to arbitration by mere agreement. In fact, there are valid policy reasons why states may wish to subject certain disputes to public hearings before the courts. For one thing, most states are averse to their citizens taking the law into their own hands, as would be the case with settling criminal conduct in private.[97] The same is true of prohibited transactions, such as money laundering or drug trafficking. Financial considerations, such as tax and loss of state revenue are equally important. In every case the arbitrability of a dispute is balanced against the harm to particular public interests. In Belgium, for example, the termination of an exclusive distributorship agreement of indefinite duration governed under a foreign law is not arbitrable.[98] The public interest here is the negotiating disparity between the parties.

There is no general international rule as regards which disputes are arbitrable and which are not. The UNCITRAL Model Law does not expressly refer to arbitrability but this is somewhat implicit by its application to commercial disputes only. Even so, there are discernible trends, both regional and global. By way of illustration, EU member states in their

[97] There are of course exceptions even to this rule, particularly through the concept of blood money (*diya*) in the Muslim world.

[98] See Belgium's Distribution Law of 27 July 1961 (as amended in 1971), which subjects distributorship agreements performed in Belgium to the exclusive jurisdiction of Belgian courts. The requirement under Arts 4 and 6 of this Law that the parties' governing law be exclusively Belgian law was confirmed by the Cassation Court in *Sebastian International Inc v Common Market Cosmetics*, judgment (14 January 2010). The Court held that such a restriction is permissible by virtue of the fact that the 1958 New York Convention does not specify the choice of law in determining arbitrability. The Court of Cassation affirmed the lack of arbitrability in such cases. See *Air Transat AT Inc v Air Agencies Belgium SA*, Court of Cassation judgment (3 November 2011).

vast majority attach strict conditions to the arbitrability of consumer disputes whereas it is increasingly permissible to submit the private aspects (essentially contractual or tort) of anti-trust disputes to arbitration in most jurisdictions in the industrialised world.

From a legislative perspective there are several paradigms of arbitrability under domestic arbitration laws. The first allows parties to submit to arbitration any issue which they are free by law to dispose of,[99] save for matters of civil status and capacity, as is the case with Article 2059 and 2060 of the French Civil Code.[100] Other nations retain this 'free disposal' paradigm but limit it to disputes with a proprietary nature.[101] The second paradigm, which is generally similar to the first, provides that arbitration is permissible in respect of matters upon which the parties may reach a settlement.[102] Despite its seeming simplicity this paradigm provides no real clarity and hence further enquiry is required as to which disputes are beyond doubt susceptible to settlement. Many domestic laws, for example, while providing for settlement of family disputes, do not (as a matter of public interest) allow the parties to submit them to arbitration,[103] albeit there are notable exceptions to this rule.[104] The same is also true of labour disputes, which despite entailing financial (proprietary) considerations are exceptionally viewed from the lens of employment relations entailing a disparity between the parties. The third paradigm posits no general rule but imposes discrete exceptions to arbitrability in specialised laws, as is the case with the 2010 Irish Arbitration Act. Typical examples of non-arbitrability, which feature also in the context of the aforementioned paradigms, include disputes over real estate transactions[105] and residential accommodation leases[106] among others.

[99] Art 2(1) Spanish AA.

[100] This rule applies only in domestic arbitration. There is no equivalent rule in respect of international arbitration, thus broadening arbitrability significantly.

[101] Art 177(1) Swiss PILA; s 1030(1) German ZPO.

[102] s 1(1) 1999 Swedish AA.

[103] Art 1225 Luxembourg New Code of Civil Procedure (NCCP); Art 542(1) Romanian CCP.

[104] See chapter 3 with respect to testamentary arbitration. In a recent case the English High Court agreed to a request by the parties to refer all issues (including those relating to the financial settlements, the status of the parties' marriage and the care and parenting of their children) to arbitration under a Jewish religious court, in this case the Beth Din of New York. *A.I v M.T* [2013] EWHC 100 (Fam), paras 31–3. Exceptionally, Art 1157 of the Polish CCP allows the parties to arbitrate all civil law disputes, save for alimony claims.

[105] s 48(5)(b) of the English AA stipulates that tribunals have no power to order the specific performance of a contract relating to land; Art 1(3) Slovak AA.

[106] s 1030(2) German ZPO; Art 582(2) Austrian CCP.

In recent years, irrespective of the paradigm employed, arbitration-friendly states have significantly expanded their ambit of arbitrability to cover disputes with a significant public interest dimension that would otherwise have precluded arbitral resolution. This includes principally anti-trust (or anti-competition) and intellectual property disputes. The key to this expansion is that arbitration is permissible only with respect to the parties' (inter se) private relations, as would be the case with a cartel member selling goods at inflated prices to a third party or in cases encompassing vertical agreements between producer and supplier, or even in respect of clearance issues arising from mergers. It goes without saying that the public dimension of the infringement is not arbitrable. The pioneer in this respect has been the US Supreme Court and below we shall examine in more detail one of its key judgments, namely the *Mitsubishi* case.

This line of thinking was not immediately welcome in other parts of the world, particularly the then European Community (EC, but later EU) because of the supranational status of EC competition law and its direct effect on EC member states. The Court of Justice of the European Union (CJEU) and EU institutions have not expressly endorsed arbitrability in respect of private anti-trust claims but their silence is viewed as tacit approval.[107] EU member states, with few exceptions, adopt the *Mitsubishi* approach, albeit subject to a variety of legal justifications. In the Netherlands, anti-competition cases are arbitrable if there are assurances that the foreign tribunal will apply EU competition law.[108] In Poland, anti-trust disputes are equally arbitrable, not least because under Polish law unfair competition disputes are viewed as disputes in tort, which are arbitrable under Article 1157 CCP. The Polish Supreme Court has held that a clause providing for arbitration of 'all disputes concerning the interpretation and implementation of the terms of the agreement' covers tort claims resulting from unfair competition.[109] Exceptionally, some statutes go as far as expressly conferring the authority to arbitrate anti-trust disputes on the parties, as is the case with section 1(3) of the Swedish Arbitration Act. As the English High Court emphasised in *ET Plus SA v Welter*, the issue is not whether private enforcement in respect of anti-competitive practices is arbitrable, but 'whether they come within the

[107] See *Eco Swiss China Time Ltd v Benetton International NV* [1999] 2 All ER (Comm) 44, where the CJEU simply required a public policy review of pertinent awards.

[108] *A v Vertex Standard Co Ltd*, Hague Court of Appeals judgment (24 July 2013).

[109] *Case No I CSK 311/08*, Supreme Court ruling (5 February 2009).

scope of the arbitration clause, as a matter of its true construction'.[110] Even so, certain areas of EU competition law are not arbitrable, including merger control and state aid, because the EU Commission possesses exclusive competence therein.

Case study: The Mitsubishi case[111]

The parties involved were incorporated in various jurisdictions, including the USA. A sales agreement had been entered into between three companies, Soler Chrysler (Puerto Rican), Mitsubishi (Japanese) and Chrysler International (Swiss). The agreement provided for arbitration in Japan under the rules of the Japan Commercial Arbitration Association, the governing law being Swiss. Mitsubishi filed a request for arbitration against Soler claiming damages for breach of the sales agreement and Soler counterclaimed under the US Sherman Act[112] alleging anti-trust practices. The question for consideration by the US Supreme Court was whether or not the counter-claims for anti-trust breaches were arbitrable. The fact that the plaintiff argued that the matter be settled in accordance with the parties' contractual undertakings through arbitration did not entail an expectation that the arbitral tribunal examine the anti-trust violation with the purpose of punishment and the imposition of fines. These functions remained within the exclusive prerogative of the state. Neither did the plaintiff entertain the demand that the arbitral award settle the matter for the future with respect to all interested parties. The claim only concerned losses incurred as a result of one of the parties' anti-competitive behaviour. The Supreme Court, therefore, by a majority of five to three, decided that international contracts of this nature were arbitrable under the Federal Arbitration Act. It concluded that:

> concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[113]

[110] See *ET Plus SA v Welter* [2005] EWHC 2115 (Comm), para 51.
[111] *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc*, 473 US 614 (1985).
[112] 15 USC § 1 et seq. [113] *Mitsubishi* judgment, at 628.

1.9 The inter-disciplinary character of modern arbitration

International arbitration is not just about the law. Law is simply the context within which arbitration operates. This suggests that there are other dimensions to arbitration which are important to practitioners and which in themselves raise interesting legal issues. As this chapter has already demonstrated it was only recently that the much-praised virtues of arbitration (speed, cost, efficiency and others) were put to the test by both qualitative and quantitative studies, which largely measure perceptions from the perspective of end users. Such studies have significantly assisted the arbitration community to understand the dynamics of arbitration as opposed to litigation, but it has also shaped other market forces competing for the same prize. By way of illustration, several national courts are offering themselves as contenders to arbitration on the basis of reduced, or no, fees and by promising experienced judges and speedy results.

Even so, it is surprising that arbitration experts have not (until recently that is) explored the use of sciences that are common in the study of litigation. By way of illustration, courtroom psychology, which includes jury profiling and the limitations of eyewitness testimony, among others, have received significant attention over the span of decades, culminating in a rich bibliography.[114] The psychological realms of arbitration are still in some confusion. For example, whereas party-appointed arbitrators understandably share some sympathy for the appointing party they are expected (and bound) to be impartial and truthful. This clearly leads to incongruent results. Similarly, it is no more clear whether certain entrenched arbitral practices assist arbitrators in making sound choices or whether instead they force them to make bad ones. Obvious examples include strict time limits for rendering awards (speed versus quality decision-making) and the imposition of civil liability upon arbitrators versus the benefits of immunity. Bias, moreover, is a significant factor in international arbitration, but we are no wiser today in quantifying it and applying sensible rules to the appointment and selection (filtering) of arbitrators than we have ever been. Even so, some progress has been made. Recent research suggests that arbitrators, as authoritarian figures,[115] have the potential of steering

[114] See, for example, B. L. Cutler and S. D. Penrod, *Mistaken Identification: The Eyewitness, Psychology and the Law* (Cambridge University Press, 1995).

[115] In the Frommian sense described in section 1.2 of this chapter.

parties in a manner that is different to our expectations of arbitrators. Kuttner believes that this transformation may be achieved if arbitrators appreciate more fully their leadership potential through which they can assist litigants to engage with each other in creative ways and see beyond their mutual conflict.[116]

And of what relevance are the views of those employing the services of legal professionals to conduct arbitral proceedings? The answer to this question pertains to the field of psychological anthropology. There cannot be a single psychological evaluation of more than one person because of the inherently unique traits and characteristics of each personality – this of course does not prevent the exposition of theories and conditions of general application. On the other hand, it is natural that shared or common understandings between a group of people (culture) exist in all members of the group, thus rendering them collective phenomena. It is thereafter a matter of appropriate methodology as to how they will be studied.[117] When we talk about the mores and norms associated with a grouping of individuals (society or social system) what we are really investigating is the culture of the group. Culture is, therefore, a set of shared meanings communicated by language or other forms (e.g. symbols) between group members. The role of the anthropologist is twofold; on the one hand, he or she must 'discover' these shared meanings and on the other these must be translated into (same, similar, approximate or other) concepts which the observer clearly understands. First and foremost, an intimate knowledge of local culture is the best and perhaps only platform for any marketing exercise. Ultimately, if one wants to 'sell' a product or an idea (in this case, arbitration) to a community of persons that distrust the product or idea he or she must first understand the cultural underpinnings of the mistrust. Once this has been achieved, the 'seller' must promote the use

[116] R. Kuttner, The Conflict Specialist as Leader: Revisiting the Role of the Conflict Specialist from a Leadership Perspective, (2011) 29 *Conflict Resol Q* 103.

[117] There have been numerous approaches to collective phenomena by non-anthropologists which possess a very solid anthropological dimension, even if not wholly intended. A prominent example is the theory of interpretative communities, coined by Stanley Fish, which posits that actors within a given community (be it social, intergovernmental, industry-related) share common understandings about the culture and environment of their community and as a result interpret relevant underlying assumptions in a uniform manner. The transnational arbitration, banking and construction industries no doubt verify Fish's theory. See S. Fish, *Is There a Text in the Class? The Authority of Interpretative Communities* (Harvard University Press, 1980).

of those cognitive tools (or heuristics) which are appropriate for the circumstances, as adapted to the cognitive tools of the subject community (e.g. arbitration with tribal values for Africans, Islamic arbitration and Islamic banking for pious Muslims),[118] while at the same time recognising the distinct moral intuitions[119] of the community under consideration.

Information technology is also making significant inroads in the practice of arbitration. This is evident from the advances in online dispute resolution, the use of video in arbitral proceedings, the use of technology to reduce the costs of arbitration and the impact of new communications technologies for the exchange of information in arbitration. Whereas some of these applications concern the field of psychology (e.g. arbitrator and party attitudes in faceless online dispute resolution), others require further inquiry with regard to their ethical and regulatory dimension. By way of illustration, the use of email or social media for the purposes of notification leaves open the question of receipt of acceptance, despite the fact that it is assumed that businessmen can access their email far better (remotely) than regular post. Moreover, while the use of skype and other forms of video conferencing in order to examine witnesses and experts saves the parties from incurring unnecessary costs, it is uncertain whether such taking of testimony is permissible in accordance with the law of the country where the witness and expert are situated. As a result, set aside and enforcement problems may well arise.

[118] This is known as the ecological rationality of the group. See G. Gigerenzer, Heuristics, in G. Gigerenzer and C. Engel (eds.), *Heuristics and the Law* (M.I.T. Press, 2006), 17ff.

[119] See D. Kahneman and C. R. Sunstein, Indignation: Psychology, Politics, Law, in J. M. Olin, Law and Economics Working Paper (2007) 346, available at http://chicagounbound.uchicago.edo/cgi/viewcontent.cgi?article=1262&context=law_and_economics.