wide range of issues that are difficult to satisfactorily deal with in an *ad hoc* arbitration clause. For these reasons, absent unusual circumstances and specialized advice, it is almost always wise to avoid lengthy arbitration agreements, drafted in an effort to suit a specific transaction, and instead to rely entirely or largely on short, model clauses.

Alterations or additions to the model provision should be made with care and expert counsel to avoid unforeseen inconsistencies, conflicts, or similar problems. There is also some risk that departures from the model wording of a particular institution may permit challenges to the arbitral tribunal's jurisdiction based upon speculation about the parties' intent in making such changes. For this reason, it is usually advisable to adopt the wording recommended by a particular institution except where specialized advice counsels otherwise.

Whatever basic approach is adopted, however, a number of issues should be considered in drafting an international arbitration agreement. These issues are outlined below. The discussion first addresses a handful of critical elements that must be included in virtually every international arbitration clause. It then considers a number of additional elements which may be either desirable or necessary in particular cases.

A. CRITICAL ELEMENTS OF INTERNATIONAL ARBITRATION AGREEMENTS

There are several critical elements that must be addressed in almost every international arbitration clause. These are:

- Agreement to binding arbitration
- Scope of the arbitration agreement
- Selection of an arbitral seat (or place of the arbitration)
- Use of an arbitral institution and its rules
- Appointment, number, and qualifications of the arbitrators
- Language of the arbitration
- Formalities, capacity, and validity
- Choice-of-law clause

In particular cases, other provisions may be either vital to an effective international arbitration agreement or advantageous to one party. These provisions are also detailed below. (See p. 77 to p. 113 below.)

1. Agreement to Binding Arbitration

It is elementary that any arbitration clause must clearly set forth the parties' agreement to arbitrate. This means that their agreement should expressly refer to "arbitration" (rather than to mediation, settlement, "ADR," accounting, or some other form of non-judicial resolution). These other forms of alternative dispute resolution are not categorized as "arbitration" under many international treaties and national arbitration statutes, and will often not qualify for the "pro-enforcement" safeguards provided by these instruments. Care should also be taken to avoid unfamiliar labels or qualifications, such as "*arbitrato irrituale*" in Italy, which can refer to forms of dispute resolution other than arbitration.

The requirement that the parties agree to arbitrate also means that a defined category of disputes should be referred to arbitration for a "binding" or "final" disposition (see p. 31 to p. 35 below on the "scope" of arbitration clauses). The clause ought not treat arbitration as a possible future option, applicable only if the parties so agree after a dispute arises, nor ought it suggest that arbitration will produce merely a recommended or precatory result, as opposed to a binding, enforceable award.

In essence, an appropriately-drafted arbitration clause should provide: "All disputes ***shall be finally resolved*** by arbitration ..." All the model clauses set forth below, and almost any usable arbitration agreement, include some variation of this formula.

2. Scope of Arbitration Agreement

Critical to any arbitration clause is its "scope" – that is, the category of disputes or claims that will be subject to the agreement to arbitrate. For example, are all disputes between the parties, bearing any conceivable connection to their contractual relations, subject to arbitration? Or, will only contract claims that clearly arise under the express terms of the parties' agreement be arbitrated? Alternatively, should particular types of claims be carved out or excluded from an otherwise broad arbitration agreement?

The contractual scope of an arbitration clause must be distinguished from the question whether particular issues or disputes are legally capable of being arbitrated. The latter issue, often referred to as whether a dispute is "arbitrable" or "objectively arbitrable," is discussed below. (See p. 56 and p. 127 below.)

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a. *Formulae for Scope of Arbitration Agreements*

As with forum selection agreements, there are a handful of formulae that are frequently used to define the scope of arbitration clauses. These formulae include: (i) "all disputes ***arising under*** this Agreement"; (ii) "all disputes ***arising out of*** this Agreement"; (iii) "all disputes ***in connection with*** this Agreement"; and (iv) "all disputes ***relating to*** this Agreement." Alternative formulations are also encountered, including: (v) "all disputes relating to this Agreement, including any question regarding its existence, validity, breach, or termination"; and (vi) "all disputes relating to this Agreement or the subject matter hereof."

As already discussed, some national courts have drawn surprisingly fine distinctions between these different formulae. For example, disputes often arise over the question whether an arbitration clause extends to tort (delict) or other non-contractual claims. A few national courts have reasoned that a dispute only "arises under" a contract if a party's claims are contractual ones, seeking to enforce the terms of its contract; under this rationale, some courts have concluded that tort, quasi-contract, statutory, or other non-contractual claims do ***not*** "arise under" the parties' agreement. In contrast, more expansive phrases like "relating to" and "in connection with" are generally held to extend broadly to contractual and non-contractual claims having some reasonable relation to the parties' contract.

Many other courts have refused to consider fine distinctions between the foregoing formulae (sometimes holding that this is properly a decision for the arbitral tribunal). Nonetheless, the possibility of such restrictive interpretations should be recalled when drafting arbitration agreements.

b. *Advantages of Arbitration Agreements with Broad Scope*

As a general rule, it is wise to draft international arbitration clauses as broadly as possible to encompass all disputes having any connection with the parties' dealings. It is usually better to avoid – except in fairly compelling circumstances – efforts to exclude particular types of disputes from arbitration.

Faced with a live dispute, and the temptations of forum shopping or perceived attractions of delay, few parties will lack the ingenuity to cast their claims or defenses in terms that purport to fall outside a narrow, or exception-filled, agreement to arbitrate. In turn, this will almost inevitably lead to parallel proceedings in both the arbitral forum and national courts, and to jurisdictional disputes over the application of a clause to particular claims. None of this fosters rational, efficient resolution of the parties' real dispute.

c. *Drafting Arbitration Agreements with Broad Scope*

Drafting a broad arbitration clause, like drafting an expansive forum selection clause, requires addressing several components. First, it is generally desirable to begin with a descriptive preamble broadly submitting "***all disputes, claims, controversies, and disagreements***" to arbitration, rather than a simple reference to "any disputes" or "all claims." This reduces the risk of litigation or arbitral proceedings over whether a "dispute" is involved (as distinguished, in some litigants' submissions, from a mere "claim" or "disagreement").

Second, this preambular formula should ordinarily be used together with one or more broad connecting phrases, such as disputes "***relating to***" or "***arising in connection with***" the parties' agreement. It is usually desirable to avoid confining an arbitration clause merely to disputes "arising under" or "arising from" an agreement, because of the risk that these formulae will exclude non-contractual claims. (See p. 31 to p. 32 above.)

In addition, disputes sometimes arise over the question whether an arbitration clause extends to disputes regarding the formation of a contract (*e.g.*, claims of fraudulent inducement or invalidity) or the termination of a contract. Some arbitral institutions' model clauses (such as that of the LCIA) address this possibility by expressly providing that disputes, including "any question regarding [the contract's] existence, validity or termination," will be arbitrated.

In general, courts in developed states have concluded that commonly used arbitration clauses extend to disputes about the validity, enforceability, and legality of the parties' underlying agreement. (See p. 125 to p. 127 below.) Nonetheless, where the issue is considered important, an arbitration clause can be drafted to apply expressly to disputes relating to the validity of the parties' underlying agreement, "including its existence, formation, validity, enforceability, performance, or termination." Where an institution's model clause contains such a reference, agreements to arbitrate in accordance with the institution's rules should virtually always preserve the reference.

Finally, references to the "subject matter of the Agreement" are also often appropriate. This widens the scope of the arbitration clause, and will often extend to disputes regarding the formation and validity of the underlying contract.

Taken together, the foregoing guidelines produce a "broad" clause along the following lines:

> All disputes, claims, controversies, and disagreements relating to or arising out of this Agreement, or the subject matter of this Agreement, shall be finally resolved by arbitration. …

Or:

> All disputes, claims, controversies, and disagreements relating to or arising out of this Agreement (including the formation, existence, validity, enforceability, performance, or termination of this Agreement), or the subject matter of this Agreement, shall be finally resolved by arbitration. …

An alternative formulation, drafted as concisely as possible, would provide:

> All disputes relating to this Agreement shall be finally resolved by arbitration.

As noted earlier, where a set of institutional arbitration rules are incorporated, care should be taken in considering alterations to the institution's model clause. Although the addition of language in order to broaden the scope of a clause is often appropriate, it is important to recall that any changes to a model clause will be subject to special scrutiny in the event of future disputes.

Finally, issues of interpretation and enforceability under the law(s) applicable to particular arbitration clauses must also be considered. The foregoing examples and commentary are useful as a general matter, and may be sufficient in particular cases. Nonetheless, they are not a substitute for advice in specific cases.

d. *Exclusions from Scope of Arbitration Agreements*

Even where the parties have agreed to a broad arbitration clause, there may be claims or disputes that one party does *not* want submitted to arbitration. Exceptions to the scope of arbitration agreements (like exceptions to forum selection clauses) should be used cautiously and drafted carefully, because they can lead to jurisdictional disputes and other uncertainties. In appropriate contexts, however, carefully drafted exceptions may be useful.

A generic provision providing for exclusion of particular matters from the parties' agreement to arbitrate can be drafted along the following lines:

> With the exception of those claims which are specifically excluded (pursuant to [Article X(2)] below) from arbitration under this [Article X(1)], all disputes, claims, controversies, and disagreements relating to or arising out of this Agreement shall be finally resolved by arbitration. …

Or:

> Claims under the following Articles of this Agreement are specifically excluded from arbitration hereunder: [Articles V, VII, and ...].

Ordinarily, exclusions from the scope of the agreement to arbitrate should be avoided except in unusual circumstances; the examples identified below are some of the instances where exclusions may be appropriate. Where such an exclusion is used, the excluded disputes should be the subject of a specific forum selection (or other dispute resolution) provision.

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i. Injunctive Relief for Intellectual Property Rights

Licensors of intellectual property sometimes expressly wish to retain the right to seek immediate remedies against unauthorized uses of their property by licensees. Among other things, licensors may insist on preserving their ability to obtain preliminary injunctive relief from national courts in the place where unauthorized use of their property occurs, rather than first proceeding through an arbitration and then, sometime later, enforcing the award locally. As discussed below, many institutional arbitration rules permit parties to seek injunctive relief in aid of arbitration from national courts, notwithstanding their agreement to arbitrate. (See p. 95 to p. 97 below.) In many cases, this may offer sufficient procedural protection for intellectual property licensors.

However, if further flexibility to seek injunctive relief against unauthorized use of intellectual property is desired, the following language can be used:

> Any violation of Article [X] hereof [relating to trademarks, patents, trade secrets, copyrights] would cause irreparable injury to [Licensor]. [Licensor] may, in addition to any other rights under this Agreement and notwithstanding the arbitration agreement contained in this Article [Y], seek specific performance of Article [X] and any other available provisional relief in any court of competent jurisdiction against any violation of such Article [X].

Such exceptions can also be graduated, depending upon the time at which they are invoked:

> Prior to the appointment of the arbitrator(s), either party may seek provisional or interim measures from any court of competent jurisdiction. After the appointment of the arbitrator(s), the arbitrator(s) shall have exclusive power to consider and grant requests for provisional or interim measures.

In general, exceptions such as these may create more problems than benefits. They may conflict with the parties' chosen institutional rules, or applicable law, while making parallel proceedings more likely.

ii. Validity of Intellectual Property Rights

Alternatively, some intellectual property owners wish to preclude any arbitral consideration of disputes concerning the ownership or validity of their intellectual property. This is because of the perception that arbitrators may lack the expertise to efficiently resolve complex intellectual property disputes or that the absence of appellate review in such circumstances is inappropriate. Where this view is adopted, the following clause may be used as a model:

> All disputes arising out of or relating to this Agreement, except "Licensed Mark Disputes" (as defined below), shall be finally resolved by arbitration in accordance with [identify institutional rules]. "Licensed Mark Disputes" shall constitute all disputes relating to the Licensor's ownership of, the validity of, or the registration of any Licensed Mark.

If such a provision is adopted, it should be combined with a forum selection clause applicable to the category of intellectual property disputes which is excepted from arbitration. (See p. 14 to p. 28 above.) A representative provision is as follows:

> All Licensed Mark Disputes shall be subject to the [exclusive] [non-exclusive] jurisdiction of ________.

In some jurisdictions, disputes over the ownership or validity of intellectual property (particularly patents) may raise "nonarbitrable" issues of public policy. (See p. 135 below.) In these instances, a forum selection clause should be used, preferably alone or alternatively in combination with an arbitration clause applicable to arbitrable issues.

iii. Payment Obligations

Parties also sometimes seek – usually unwisely – to exclude payment obligations from the scope of arbitration clauses. The theory underlying this approach is that arbitral proceedings will take several months to get underway and that arbitrators may be more likely than national courts to adopt Solomonic decisions that dilute contractually crisp payment obligations. Financial institutions in particular sometimes exclude payment obligations from the parties' arbitration agreement.

To implement this objective, one party's payment obligations can be placed in a single article, which can then be excluded from the scope of the arbitration clause:

> With the exception of Buyer's payment obligations under Article [X] hereof, all claims, controversies, disputes, and disagreements arising under or relating to this Agreement shall be finally resolved by arbitration in accordance with ...

In general, however, this approach should be avoided. The jurisdictional and other uncertainties that result from such a bifurcated dispute resolution scheme usually outweigh any potential benefits.

Of course, if payment (or other) obligations ***are*** excluded from an arbitration agreement, then a separate forum selection agreement for such disputes is usually appropriate. For example:

> All disputes [arising under] [in connection with] the Buyer's payment obligations under Article [X] hereof shall be subject to the [exclusive] [non-exclusive] jurisdiction of the courts of ________.

3. Institutional Versus *Ad Hoc* Arbitration

International (and domestic) arbitration can be either (a) institutional, or (b) *ad hoc*. Institutional arbitration is conducted pursuant to procedural rules promulgated by a particular arbitral institution, which generally also "administers" the arbitration. The administration of an arbitration typically involves performing administrative or supervisory functions such as selecting and removing arbitrators (whenever the parties default or fail to reach an agreement on these issues), serving requests for arbitration and some other submissions, scrutinizing awards, and dealing with the arbitrators' and arbitral institution's fees.

In contrast, *ad hoc* arbitration is conducted without an administering authority and, generally, without the aid of institutional procedural rules. It relies instead on the parties' cooperation, backed by potential recourse to national courts for such matters as appointment of arbitrators in case of defaulting or disagreeing parties. As explained in greater detail below, virtually all experienced international arbitration practitioners prefer institutional arbitration to *ad hoc* arbitration because of the heightened predictability, stability, and institutional expertise provided by the former, and because institutional arbitration rules often provide useful default mechanisms for enhancing the arbitral

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process (*e.g.*, replacing arbitrators, corrections to awards). For example, a 2015 Queen Mary University of London study found that 79 percent of the surveyed respondents' arbitrations over the past five years were administered by institutions.

a. Institutional Arbitration

If institutional arbitration is desired, the parties must choose an arbitral institution and refer to it in their arbitration clause. It is ordinarily wisest to rely on one of a few established international arbitral institutions. This avoids the confusion and uncertainty that comes from inexperienced administrative efforts.

All leading international arbitral institutions are prepared to, and routinely do, administer arbitrations seated almost anywhere in the world, and not merely in the place where the institution itself is located. There is, therefore, no need to select an arbitral institution headquartered in the parties' desired arbitral seat (*e.g.*, the London Court of International Arbitration or Singapore International Arbitration Centre can readily administer an arbitration seated in New York, while the American Arbitration Association/International Centre for Dispute Resolution can administer an arbitration seated in London or Singapore).

A number of organizations provide institutional arbitration services. Some of the best known of these organizations are discussed below. These institutions typically possess published arbitration rules, a decision-making body that appoints arbitrators and makes certain other decisions, and a professional staff that administers individual arbitrations. Importantly, an arbitral institution does ***not*** resolve the parties' underlying substantive dispute or otherwise act as an arbitrator; rather, it administers proceedings which are conducted and decided by individual arbitrators.

The precise functions of arbitral institutions vary among organizations. In general, however, an arbitral institution will receive requests (or notices) for arbitration made pursuant to its rules, serve such requests (or notices) on the respondent, confirm the parties' nominations of arbitrators, appoint arbitrators when the parties are not able or willing to do so, consider challenges to the independence of arbitrators, and decide on requests for extensions of time for the filing of initial submissions. In addition, some institutions also fix the amounts of the arbitrators' fees, collect the parties' advance payments of fees and costs, and (in some instances) review and comment on arbitrators' draft awards. The rules of each arbitral institution detail how the foregoing functions are performed.

Of course, the services rendered by professional arbitral institutions come at a price, in addition to the fees and expenses of the arbitrators. Every arbitral institution has a fee schedule that specifies what that price is. The amounts charged by institutions for particular matters vary significantly, as does the basis for calculating such fees. For example, some institutions use hourly charges while others charge based upon a percentage of the amount in dispute.

b. International Arbitral Institutions

Leading international arbitral institutions include:

- International Chamber of Commerce International Court of Arbitration ("ICC")
- American Arbitration Association ("AAA") and its international arm, the International Centre for Dispute Resolution ("ICDR")
- Singapore International Arbitration Centre ("SIAC")
- London Court of International Arbitration ("LCIA")

- International Centre for Settlement of Investment Disputes ("ICSID"), insofar as investment disputes are concerned

Also active in specialized or regional settings include:

- Australian Centre for International Commercial Arbitration ("ACICA")
- Cairo Regional Centre for International Commercial Arbitration ("CRCICA")
- China International Economic and Trade Arbitration Commission ("CIETAC")
- Dubai International Arbitration Centre ("DIAC")
- German Institution of Arbitration ("DIS")
- Hong Kong International Arbitration Centre ("HKIAC")
- Indian Council of Arbitration ("ICA")
- Inter-American Commercial Arbitration Commission ("IACAC")
- JAMS International
- Kuala Lumpur Regional Centre for Arbitration ("KLRCA")
- Netherlands Arbitration Institute ("NAI")
- Permanent Court of Arbitration ("PCA")
- Stockholm Chamber of Commerce Arbitration Institute ("SCC")
- Swiss Chambers' Arbitration Institution ("SCAI")
- Vienna International Arbitral Centre ("VIAC")
- World Intellectual Property Organization ("WIPO")

The contact details of these, as well as selected other national or regional institutions, are contained in Appendix F.

There are also a number of less widely known regional or national arbitral institutions. Many of these institutions were founded, or first promoted for significant international matters, during the 1980s, while others were founded only recently. Accordingly, they often lack the experience and track records that sophisticated users require.

i. International Chamber of Commerce

The ICC's International Court of Arbitration was established in Paris in 1923. The ICC is usually regarded as the world's leading international commercial arbitral institution, and has less of a national character than other leading arbitral institutions. Its annual case load was well above 300 cases per year during much of the 1990s, and, on average, has registered close to 800 cases per year from 2009 to 2015. In 2015, 801 requests for ICC arbitration were filed, involving parties from 133 countries and independent territories. Most of these cases were international disputes, with seats of arbitration located in 56 countries, and many involving very substantial sums. The ICC's caseload involves parties from around the world, with parties outside Western Europe involved in more than 50 percent of all ICC cases in many recent years.

The ICC's model arbitration clause provides:

> 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.

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The ICC has promulgated the ICC Rules of Arbitration (which are periodically revised, most recently in 2012, and which include the Emergency Arbitrator Rules) as well as the ICC Mediation Rules, the ICC Rules for the Administration of Expert Proceedings, the ICC Dispute Board Rules, and the ICC DOCDEX Rules.

Under the ICC Rules, the ICC (through the International Court of Arbitration ("ICC Court")) is extensively involved in the administration of individual arbitrations. Despite its name, the ICC Court is not, in fact, a "court," and does not itself decide disputes or act as an arbitrator. Rather, the ICC Court is an administrative committee that acts in a supervisory and appointing capacity under the ICC Rules. Among other things, the ICC Court and its Secretariat are responsible for service of the initial Request for Arbitration; fixing and receiving payment of advances on costs of the arbitration by the parties; confirming nominations of arbitrators (made by the parties and/or co-arbitrators or by other agreed appointing authorities); appointing arbitrators if a party defaults or if the parties are unable to agree upon a presiding arbitrator or sole arbitrator; considering challenges to the arbitrators, including on the basis of lack of independence; reviewing and approving so-called "Terms of Reference," which define the issues and procedures for the arbitration; reviewing a tribunal's draft award for formal and other defects (including drawing the tribunal's attention to the points of substance); and fixing the arbitrators' compensation and the final administrative expenses.

The ICC Court maintains a sizeable legal and administrative staff of over 100 persons, with more than 30 nationalities, organized as a Secretariat. Specialized teams of counsel, deputy counsel, and administrative staff are assigned to particular geographic, linguistic, or cultural regions.

The ICC Secretariat is substantially involved in the day-to-day supervision of arbitrations. The ICC Court's method of appointing arbitrators varies depending on whether a co-arbitrator, on the one hand, or a sole or presiding arbitrator, on the other hand, is involved. If the ICC Court is appointing a co-arbitrator (where a party has failed to do so), it will often select a national from that party's home country. In contrast, if the ICC Court is appointing a sole arbitrator or a president at the outset of a case, it will often act upon recommendations made by a neutral "national committee" of the ICC, which is usually an organization representing the international business interests in a specific country. Currently, about 90 countries and territories have ICC National Committees or Groups. The ICC will not select a presiding or sole arbitrator who is of the same nationality as one of the parties (unless the parties do not object). Although arbitrators from Northern and Western Europe have remained the majority of those appointed in ICC arbitrations (53.5 percent in 2015), the diversity of nationalities represented among ICC arbitrators has increased over the last two decades (arbitrators came from 62 different countries in 1995, 68 in 2005, and 77 in 2015).

ICC arbitrations can be (and are) seated almost anywhere in the world. As mentioned above (see p. 37 above), in 2015, ICC arbitrations were conducted in 56 different countries. Over the last fifteen years, an increasing number of arbitrations have been seated outside of Western Europe and North America, including in Asia, the Middle East, and Brazil. Nonetheless, by far the most common places of ICC arbitrations have been in France, Switzerland, England, other Western European states, and the United States, as well as Singapore and Hong Kong. (See p. 58 below.) In 2008, the ICC opened a regional office in Hong Kong, which is responsible for the administration of ICC arbitrations seated in Asia, and in 2014, established a facility in New York City to administer arbitrations in North America.

The ICC's administrative fees are based on the amount in dispute between the parties. With respect to arbitrators' fees, the ICC Rules fix both a minimum and a maximum amount which can be charged based on the amount in dispute. With respect to administrative fees and charges, the ICC Rules provide for a sliding scale of charges that is again based upon the amount in dispute between

the parties. The ICC Rules require that the parties pay an advance on the anticipated costs of the arbitration calculated by the ICC Court. The advance on costs is equally divided between the Claimant and the Respondent, although one party may pay the full amount in order to enable the arbitration to proceed if the other party defaults.

Amendments to the ICC Rules in 1998 and 2012 reflected a concerted effort to increase the efficiency and speed of ICC proceedings. Among other things, the 2012 Rules require arbitrators to conduct a case management conference and propose a number of case management techniques. The Rules also require arbitrators to provide statements of availability prior to appointment and to inform the parties at the close of the proceedings of the expected timing of the award.

ICC arbitration has sometimes been criticized as expensive and cumbersome, although recent amendments reflect a concerted effort to meet this concern. Despite criticism of its costs and delays, the ICC clearly remains the institution of preference for many sophisticated commercial users, particularly in Europe. The ICC's proven track record, worldwide reputation, and comparative predictability will likely help it maintain this position, at least in the near term.

ii. American Arbitration Association and International Centre for Dispute Resolution

The AAA was founded in 1926 and is based in New York (with approximately 25 regional offices throughout the United States). The AAA is the leading U.S. arbitral institution, and handles one of the largest number of arbitral disputes in the world. The AAA's caseload has increased significantly over the past two decades. In 1997, it reported a total annual caseload of 11,130 arbitrations (under its Commercial Rules), rising to 20,711 cases in 2007. Similar growth is reported in international cases. The AAA reports increases in its international caseload from 453 cases filed in 1999 to 1064 new international filings in 2015.

The primary arbitration rules administered by the AAA are the AAA Commercial Arbitration Rules ("AAA Rules"), most recently revised in 2013; these rules are used in a large number of domestic U.S. arbitrations.

Non-U.S. parties have sometimes been reluctant to agree to arbitration under AAA Rules, fearing parochial predisposition and unfamiliarity with international practice. In 1996, to enhance its position as an international arbitral institution, the AAA established the International Centre for Dispute Resolution ("ICDR"), which has exclusive responsibility for administering the AAA's international arbitrations. The ICDR International Dispute Resolution Procedures ("ICDR Rules"), most recently revised in 2014, are applied where parties have agreed to them or have agreed to AAA arbitration in an "international" dispute, but without specifying a particular set of AAA rules or where calling for the UNCITRAL Rules.

The ICDR Rules are based principally on the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules (discussed at p. 52 below), and were intended to permit a measured amount of flexibility and a minimum of administrative supervision. Under all versions of AAA rules, the AAA administrative staff plays a less significant supervisory role regarding certain substantive matters than does the ICC Secretariat. Among other things, the AAA does not receive or serve initial notices or requests for arbitration, does not require or review a Terms of Reference, does not scrutinize draft awards (except for non-substantive content and accuracy), and plays a less significant role in setting the arbitrators' fees. The AAA's administrative charges are based on the amount in dispute. With respect to the arbitrators' fees, arbitrators fix their own rates, which are published on their resumes for parties to consider when receiving a list of potential arbitrators. Compensation under

the ICDR Rules is based on the "time spent by the arbitrators," taking into account their stated rates and the "size and complexity of the case."

Most ICDR and AAA appointments of arbitrators in international cases are generally based on a list procedure, with names drawn from over 750 panelists maintained by the ICDR and presented to the parties for expressions of preference. Although the AAA's lists were historically dominated by U.S. practitioners, the ICDR increasingly seeks to appoint arbitrators with international experience in appropriate cases. The ICDR has administrative facilities in New York, Houston, Miami, and Singapore, and regional offices and hearing facilities in Mexico City and Bahrain, enabling it to administer arbitrations in many parts of the world. A model AAA arbitration clause, selecting the ICDR International Dispute Resolution Procedures, provides:

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

A model AAA arbitration clause, selecting the AAA's Commercial Arbitration Rules, provides:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Numerous other sets of AAA arbitration rules also exist, including for specialized types of disputes (*e.g.*, construction, employment, consumer), and can be selected in the parties' arbitration agreement. The AAA has also recently launched an online "ClauseBuilder" tool to assist users in drafting clear and appropriate arbitration and mediation agreements.

iii. Singapore International Arbitration Centre

The Singapore International Arbitration Centre ("SIAC") was established in 1991, initially for disputes arising out of construction, shipping, banking, and insurance. In recent years, SIAC has broadened its focus to all categories of commercial disputes and has become, by many accounts, the leading international arbitral institution in Asia and one of the most successful in the world. SIAC administered 271 new cases in 2015, and currently handles about 600 active cases involving parties from over 50 different nationalities.

SIAC-administered arbitrations are presumptively governed by the SIAC Rules, which are largely based on the UNCITRAL Rules and have been periodically revised (most recently in August 2016). The 2016 SIAC Rules are aimed at streamlining the efficiency and speed of proceedings and further enhancing the quality of SIAC-administered arbitrations, including by revised provisions providing for joinder and consolidation, a speedier timeline for appointment and the issuance of an order or award under the emergency arbitrator procedure, an early dismissal procedure for claims and defenses, and delocalization of the seat of the arbitration.

Under Rule 5 of the SIAC Rules, parties may opt to apply SIAC's Expedited Procedure to the proceedings. This is a fast-track arbitration procedure, requiring an award to be rendered within six months of the tribunal's constitution and providing that the Registrar may adjust or shorten relevant time limits under the SIAC Rules. The procedure is applicable if the President of the SIAC Court

determines that one of three criteria is satisfied: the amount in dispute does not exceed SG$ 6 million; the parties agree that they apply; or in cases of exceptional urgency.

In cases where emergency relief is needed, the SIAC Rules allow a party to make an application for emergency interim relief and provide the President with the power to appoint an emergency arbitrator, if the application for emergency relief is accepted. Under Rule 30.2 and Schedule 1 of the 2016 SIAC Rules, parties may apply for urgent interim relief prior to the constitution of an arbitral tribunal through an emergency arbitrator. The SIAC has considerable experience with emergency arbitrator applications: as of June 2016, the institution had seen 50 applications, with emergency arbitrators appointed in all cases, and interim relief granted in whole or in part in 29 cases.

The SIAC's organizational structure is similar to that of the ICC. It has a Court of Arbitration that comprises leading practitioners from the world over, and an experienced Secretariat with specialist lawyers to manage the administration of cases. Similar to the ICC, all SIAC draft awards are scrutinized by the Registrar for issues of both form and substance, and can only be rendered by the tribunal if approved by the Registrar as to their form. While the Registrar manages the formal review and scrutiny process, the Registrar may, where appropriate, consult the SIAC Court before approving the draft award. According to the SIAC, timelines for scrutiny are shorter than at the ICC: two to three weeks for final awards, and one to two days in the case of emergency arbitrator orders and awards.

The SIAC maintains a Panel of Arbitrators, composed of leading international and regional arbitration practitioners who reflect a broad base of expertise, knowledge and experience. In 2015, the SIAC launched an innovative Arb-Med-Arb clause, in collaboration with the newly-established Singapore International Mediation Centre ("SIMC"), which allows for a dispute to be referred to arbitration and then held in abeyance while mediation is attempted. If the dispute is settled through mediation, the agreement is recorded as a consent award and may be enforced under the New York Convention. If the dispute cannot be settled through mediation, the parties will resume arbitration proceedings. In June 2016, in addition to the revisions to the SIAC Arbitration Rules, a set of rules specifically for investment arbitration, came into force.

A model arbitration clause, as recommended by the SIAC, provides:

> 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.

iv. London Court of International Arbitration

Founded in 1892, the London Court of International Arbitration ("LCIA") is, by many accounts, the second most popular European arbitral institution. Its annual caseload, which is generally increasing, has exceeded 300 disputes in recent years (with 332 cases in 2015). The LCIA has made a determined, and generally successful, effort in recent years to overcome perceptions that it is a predominantly English organization. Among other things, it appointed five successive non-English presidents between 1994 and 2015, and its vice-presidents include non-English practitioners. In recent years, fewer than 20 percent of LCIA cases have involved any U.K. parties.

The LCIA administers a set of arbitration rules, the LCIA Rules, which were extensively revised in 1998 and 2014. Although identifiably English in drafting style and procedural approach, the LCIA Rules generally provide a sound basis for international dispute resolution, particularly for parties

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desiring a common law approach. Broadly speaking, LCIA arbitrations are administered in an efficient but less comprehensive fashion than ICC cases. Among other things, the LCIA Rules contain no Terms of Reference procedure and do not provide for institutional review of draft awards. The LCIA's administrative fees are calculated based upon the time spent by LCIA personnel (as of June 2016, £250/hour for the Registrar/Deputy Registrar, £225/hour for Counsel, and £150 or £175/hour for the Secretariat, depending on the activity).

In contrast to most other institutional rules, the LCIA Rules set out the powers of an LCIA arbitral tribunal in some detail. The powers to order disclosure of documents and security for legal costs (*i.e.*, a deposit or bank guarantee securing the estimated amounts which an unsuccessful claimant would be liable to reimburse to a successful respondent for its costs of legal representation) are prominently included among the arbitrators' powers.

The LCIA's appointments of arbitrators have historically been drawn frequently from the English bar and retired judiciary. This is in large part because many LCIA cases have involved contracts governed by English law and/or foreign parties specifically providing for the appointment of English qualified arbitrators, including explicitly requiring the appointment of QCs as arbitrators. When not constrained, the LCIA's selections of arbitrators are international. The LCIA fixes the arbitrators' fees according to the time expended by the arbitrators and subject to maximum hourly rates published by the LCIA.

Most LCIA arbitrations are seated in London. Absent contrary agreement by the parties or factors pointing to another more convenient location, London will ordinarily be selected as the arbitral seat by the LCIA. A particular procedural advantage of the LCIA Rules is their provision for expedited formation of the arbitral tribunal and expedited appointment of replacement arbitrators. The LCIA Rules also permit joinder of third parties in arbitrations, subject to prescribed conditions, and consolidation of arbitrations.

The LCIA has established a partnership in Dubai (the Dubai International Financial Centre-LCIA ("DIFC-LCIA") Arbitration Centre), which applies rules closely modeled on the LCIA Rules, as well as an arbitration center in Mauritius, the LCIA-Mauritius International Arbitration Centre ("LCIA-MIAC").

The LCIA model arbitration clause for future disputes provides:

> 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 LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.
>
> The number of arbitrators shall be [one/three].
>
> 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 [_________].

v. International Centre for Settlement of Investment Disputes

The International Centre for Settlement of Investment Disputes ("ICSID") is an international organization established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") or "Washington Convention" of 1965. As one of the five institutions of the World Bank Group, ICSID is headquartered in Washington, D.C., where it operates under the World Bank auspices. While most ICSID arbitrations are governed by the ICSID Convention and the ICSID Arbitration Rules, ICSID can also administer arbitrations under the UNCITRAL

Arbitration Rules or *ad hoc* arbitrations. The ICSID Convention and Arbitration Rules are discussed below (see p. 108 to p. 111 below).

ICSID jurisdiction is generally confined to "investment" disputes, involving claims by foreign investors against host states. Major international infrastructure and natural resource projects often include ICSID arbitration clauses. ICSID has also frequently been included as an arbitral institution to administer arbitrations pursuant to bilateral investment treaties ("BITs"), which proliferated during the 1990s.

ICSID's caseload has significantly increased over the past several decades, rising from, on average, one case filed per year in the 1970s and two cases filed per year in the 1980s, to 38 new cases in 2014 and 52 cases in 2015. ICSID has administered over 70 percent of all known investor-State disputes and is currently administering more than 210 cases.

vi. Australian Centre for International Commercial Arbitration

The Australian Centre for International Commercial Arbitration ("ACICA") was established in 1985 on the initiative of the Institute of Arbitrators, Australia. The ACICA promulgated new rules, based on the UNCITRAL Arbitration Rules, in 2005, which were revised in 2011 (incorporating emergency arbitrator provisions) and 2016 (adding provisions on consolidation and joinder). ACICA enjoys a growing reputation, particularly in arbitrations involving parties from the Asia/Pacific region. In such arbitrations, ACICA provides a credible alternative to either the HKIAC or SIAC. The ACICA will also act as appointing authority under the UNCITRAL Arbitration Rules.

vii. Cairo Regional Centre for International Commercial Arbitration

Established in 1979, the Cairo Regional Centre for International Commercial Arbitration ("CRCICA") is an independent non-profit international organization under the auspices of the Asian-African Legal Consultative Organization ("AALCO"). Pursuant to an agreement concluded in 1987 between AALCO and the Egyptian government, the CRCICA is recognized as an international organization and endowed with all necessary privileges and immunities ensuring its independent functioning. The CRCICA directs its services primarily towards Asian-African trade and investment disputes, particularly in the Arab world. The CRCICA has administered over 1,100 cases since its establishment, including 200 new cases from 2013 to 2015.

The CRCICA arbitration rules (the "CRCICA Rules"), most recently revised in 2011, are based on the UNCITRAL Rules, with slight modifications relating mainly to the CRCICA's role as an arbitral institution and an appointing authority. The CRCICA reportedly maintains a list of more than 500 national and international arbitrators. Both the administrative fee that is charged by the CRCICA and the arbitrators' fees are calculated by reference to the amount in dispute between the parties. Although distinctly regional in character, the CRCICA is not infrequently considered, both by parties within the region and without, as an appointing authority in international disputes.

viii. China International Economic and Trade Arbitration Commission

The China International Economic and Trade Arbitration Commission ("CIETAC") was established in 1956. Also known as the Court of Arbitration of China Chamber of International Commerce, CIETAC is headquartered in Beijing, with branches in some other Chinese cities and Hong Kong.

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In broad outline, the Convention requires national courts to: (a) recognize and enforce international arbitration agreements, subject to certain exceptions (Articles II(1), II(3)); and (b) recognize and enforce foreign arbitral awards, again subject to specified exceptions (Articles III, V). As a consequence of these provisions, and of national legislation implementing them, international arbitration agreements and awards are typically subject to an avowedly pro-enforcement international legal regime. As detailed below, this specialized regime materially increases the likelihood that international arbitration agreements will be given effect in the courts of Contracting States.

2. Other International Arbitration Conventions

Although the New York Convention is the most important international treaty affecting commercial arbitration, there are other more specialized treaties that are also of importance.

a. ICSID Convention

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") was drafted under United Nations and World Bank auspices in 1965. The ICSID Convention has been ratified by over 150 states.

As discussed above (see p. 108 to p. 111 above), the Convention provides a specialized arbitration regime for "investment disputes" between states and foreign investors that agree to arbitrate pursuant to the Convention. Where an arbitration agreement or award is subject to the ICSID Convention, the Convention's regime overrides inconsistent provisions of other treaties, including the New York Convention.

As also discussed above, the ICSID Convention contains a variety of unusual provisions. (See p. 108 to p. 111 above.) These include clauses regarding choice-of-law (providing, absent contrary choice, for application of the host state's laws and "such rules of international law as may be applicable"), an internal process for reviewing and potentially annulling arbitral awards, and theoretically direct enforceability of ICSID arbitral awards in Member States' courts without judicial review.

b. Panama Convention

The Inter-American Convention on International Commercial Arbitration ("Panama Convention"), drafted in 1975, has been ratified by the United States and 20 South and Central American states. The Convention was conceived at a time when long-standing distrust of international arbitration made many South American states reluctant to ratify the New York Convention, and it was intended as a more acceptable regional alternative.

The interplay between the Panama Convention and the New York Convention is complex. In acceding to the Panama Convention, the United States adopted a reservation according to which, if an agreement or award was otherwise subject to both the Panama and New York Conventions, the former would control where a majority of the parties involved were citizens of states that ratified the Panama Convention; this rule can be altered by agreement among the parties. The New York Convention is the subject of a larger, more developed body of precedent than the Panama Convention, which generally counsels in favor of selecting it when a choice is available.

The Panama Convention largely parallels the New York Convention in its treatment of international arbitration agreements and awards. In addition, however, the Panama Convention also provides that, where the parties' arbitration agreement does not incorporate any specific institutional arbitration

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rules, then the rules of procedure of the "Inter-American Commercial Arbitration Commission" will govern, and that the Commission will act as the appointing authority with respect to arbitrators. This can be useful in cases where the parties have not agreed upon an appointing authority, by reducing the likelihood of resort to local courts for the appointment of arbitrators.

c. European Convention on International Commercial Arbitration

The European Convention on International Commercial Arbitration ("European Convention") was drafted in 1961 and entered into force in October 1965. The European Convention has now been ratified by over 30 countries (the majority of which are in Europe), including a significant number of countries in Eastern Europe and the former Soviet Union. The European Convention imposes a variety of obligations upon signatory states, many of which mirror the New York Convention.

d. Bilateral Investment Treaties

Bilateral investment treaties ("BITs") became common during the 1980s and 1990s, as a means of encouraging capital investment in developing markets. Most capital-exporting states (including the United States and many EU states) have entered into numerous BITs with countries in developing regions. There are currently more than 2,400 BITs in force, with that number increasing annually.

In a typical BIT, the host state undertakes to accord fair and equitable treatment to investments; to treat investors and investments as favorably as investors and investments from the host state or any third state; to guarantee unrestricted transfer of funds and returns; and not to expropriate investments except for a public purpose and on payment of prompt, adequate, and effective compensation. In addition, the overwhelming majority of BITs provide for some form of arbitration. Under typical BITs, the host state ordinarily extends a generic invitation (or "standing offer to arbitrate") to all investors who are nationals of the other Contracting State to submit investment disputes to arbitration – even in the absence of an arbitration agreement in the contract(s) giving rise to the dispute. ICSID is the favored forum for this form of arbitration, although some BITs permit *ad hoc* arbitration under the UNCITRAL Rules or specified institutional arbitration rules on an equal footing with ICSID.

The possibility of "arbitration without privity" under a BIT is often an option to consider in international commercial disputes. For this reason, careful attention should be paid to whether disputes under a particular contract may fall within an applicable BIT and the effect that this may have upon the available dispute resolution procedures. A list of websites containing links to applicable BITs is included in Appendix G.

3. National Arbitration Legislation

The existence of the nearly-universal New York Convention enhances the likelihood that international arbitration agreements and arbitral awards will be enforceable. At the end of the day, however, it may well be necessary in particular cases for either arbitration agreements or arbitral awards to be judicially enforced. In some countries, these international treaties are directly applicable in national courts. In many nations, however, the New York Convention and other treaties are not automatically applicable in domestic courts, but must be implemented by national legislation.

Different nations have adopted widely differing types of arbitration legislation. Among other things, different countries apply varying standards to such matters as resolution of challenges to the arbitrators' jurisdiction, judicial review of arbitral awards made within national territory, and the

availability of effective procedural mechanisms to support enforcement efforts (*e.g.*, attachment). These differences can have substantial practical consequences for parties seeking to enforce an international arbitral award.

In recent years, there has been an increasing tendency towards uniformity of national arbitration statutes, in part by virtue of the UNCITRAL Model Law. This tendency continues, and has reduced somewhat the disparities among the arbitration regimes of different states. Nonetheless, the practical realities of arbitration, and judicial responses to arbitration, in different countries still vary widely. As a practical matter, this has significant effects on the enforceability of arbitration agreements and awards in different jurisdictions.

4. UNCITRAL Model Law

More than 70 states, including many major trading states, have adopted national arbitration legislation based on the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration. UNCITRAL Model Law countries include Australia, Austria, Bahrain, Bermuda, Canada, Egypt, England (to an extent), Germany, Hong Kong, India, Mexico, Russia, Singapore, and Spain. The UNCITRAL Model Law, which was first released in 1985, is reproduced in Appendix C. The purpose of the Model Law is to make international arbitration agreements and awards more readily, predictably, and uniformly enforceable. The Model Law also seeks to minimize the potential for judicial interference in international arbitral proceedings.

A number of provisions of the Model Law were revised in 2006; the 2006 Revisions, which have only recently started to be adopted by some jurisdictions, are included in Appendix D. A list of countries that have adopted legislation based on the UNCITRAL Model Law and its revisions is also included in Appendix D.

The UNCITRAL Model Law contains 36 articles, which deal comprehensively with the issues that arise in national courts in connection with international arbitration. Among other things, the Model Law contains provisions concerning the enforcement of arbitration agreements (Articles 7-9), appointment of and challenges to arbitrators (Articles 10-15), jurisdiction of arbitrators (Article 16), provisional measures (Article 17), conduct of the arbitral proceedings (including language, seat, and procedures) (Articles 18-26), evidence-taking and discovery (Article 27), applicable law (Article 28), awards (Articles 29-33), setting aside or annulling awards (Article 34), and recognition and enforcement of awards, including bases for non-recognition (Articles 35-36).

Under the UNCITRAL Model Law, written international arbitration agreements are presumptively valid and enforceable, subject to limited, specified exceptions. Article 8 of the Model Law provides for the enforcement of valid arbitration agreements, regardless of the arbitral seat, by way of a dismissal or stay of national court litigation. The Model Law also adopts the separability presumption (Article 16), and grants arbitrators authority (competence-competence) to consider their own jurisdiction (also in Article 16).

Article 5 of the UNCITRAL Model Law prescribes a principle of judicial non-intervention in arbitral proceedings. The Model Law also affirms the parties' autonomy (subject to due process limits) with regard to the arbitral procedures (Article 19(1)) and, absent agreement between the parties, the tribunal's authority to prescribe such procedures (Article 19(2)). The approach of the Model Law to the arbitral proceedings is to define a basic set of procedural rules which – subject to a very limited number of mandatory principles of fairness, due process, and equality of treatment – the parties are free to alter by agreement. The Model Law also provides for judicial assistance to the arbitral process

in prescribed and limited respects, including provisional measures, constitution of a tribunal, and evidence-taking (Articles 9, 11-13, and 27).

Article 34 of the UNCITRAL Model Law mandates the presumptive validity of international arbitral awards, subject to a limited, exclusive list of grounds for annulment of awards in the arbitral seat; these grounds parallel those available under the New York Convention for non-recognition of an award (*i.e.*, lack or excess of jurisdiction, non-compliance with arbitration agreement, due process violations, public policy, and nonarbitrability). In a parallel provision, Articles 35 and 36 of the Model Law require the recognition and enforcement of foreign awards (made in arbitral seats located outside the recognizing state), again on terms identical to those prescribed in the Convention.

The 2006 amendments to the Model Law made only modest changes. These included a revised (and significantly reduced) form requirement for arbitration agreements (in Article 7), revised provisions regarding interim measures (in Article 17), including allowing a party to seek orders from the tribunal *ex parte*, and a limited number of additional provisions (including technical amendments and statements of principle regarding interpretation of the Model Law).

B. PRESUMPTIVE VALIDITY AND ENFORCEABILITY OF INTERNATIONAL ARBITRATION AGREEMENTS

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One of the central purposes of the New York Convention was to make international arbitration agreements more readily enforceable. Article II of the Convention provides:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. ...
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article II supersedes provisions, still extant in some countries, that rendered arbitration agreements invalid or unenforceable. Under Article II, international arbitration agreements are generally valid and enforceable, save where a party can demonstrate that they are null and void, inoperative, or incapable of being performed.

Most national arbitration statutes contain provisions parallel to those of Article II of the New York Convention. In particular, Article 8 of the UNCITRAL Model Law provides for the presumptive validity and enforceability of international arbitration agreements.

C. SEPARABILITY OF INTERNATIONAL ARBITRATION AGREEMENTS

In many nations, including all major trading states, an arbitration agreement is presumptively "separable" from the underlying contract in which it appears. National arbitration legislation often expressly so provides. (See UNCITRAL Model Law, Article 16; Swiss Law on Private International Law, Article

178(3); U.S. Federal Arbitration Act §2; German Civil Procedure Act, Article 1040(1)). Most leading institutional arbitration rules do so as well. (See UNCITRAL Arbitration Rules, Article 23; ICC Rules, Article 6(9); LCIA Rules, Article 23(1)).

The separability presumption has important practical consequences. It means that challenges to the parties' underlying contract will generally not be regarded as affecting or vitiating the parties' "separate" or "autonomous" arbitration agreement. Specifically, if a party alleges that the parties' underlying contract was fraudulently induced or is invalid for lack of consideration, this will not provide a basis for challenging the validity of the arbitration agreement or for refusing to arbitrate. The theory is that the arbitration clause is a separate and independent agreement that validly exists even if the underlying contract is invalid.

National courts recognize a variety of exceptions to the separability presumption, which can be important in practice. Among other things, the separability presumption may not provide grounds for upholding the validity of the arbitration agreement where the very existence of the underlying contract is challenged.

Another consequence of the separability presumption is that a different law may apply to the parties' arbitration agreement than to their underlying contract. This has been relied upon by some national courts (*e.g.*, French and U.S.) to embrace avowedly "international" rules of substantive law that significantly limit the grounds for challenging the validity of international arbitration agreements. In other jurisdictions, the separability presumption can give rise to complex choice-of-law issues (whose practical importance should ordinarily be limited by the trend towards uniform, pro-enforcement national arbitration laws).

D. INTERPRETATION OF INTERNATIONAL ARBITRATION AGREEMENTS

Many national courts adopt a "pro-arbitration" approach to the interpretation of the scope of arbitration agreements. For example, U.S. courts apply a strong presumption favoring the interpretation of arbitration agreements to extend to disputed issues. In case of doubt regarding the scope of an arbitration clause, and its coverage of particular disputes, courts must resolve the issue in favor of arbitration. Swiss, English, Singaporean, and some other national courts also interpret international arbitration agreements relatively expansively. Although other national courts approach the task of interpreting an arbitration agreement as one of objectively ascertaining the parties' intent, as a practical matter, doubts about the scope of a concededly valid agreement are often resolved in favor of arbitration.

E. EXCEPTIONS TO PRESUMPTIVE ENFORCEABILITY OF INTERNATIONAL ARBITRATION AGREEMENTS

1. Invalidity of Arbitration Agreement

National courts have typically interpreted Article II in an avowedly "pro-arbitration" fashion. Generally-applicable contract rules govern most questions regarding the validity of arbitration agreements, including doctrines such as mistake, fraud, unconscionability, duress, and lack of capacity. Most courts in developed states have been reluctant to invoke such defenses to invalidate arbitration agreements subject to the New York Convention. Moreover, very few courts have been willing to entertain objections

(like those sometimes available in resisting forum selection clauses) that an arbitration agreement is "unreasonable" or "unjust" or that it selects an "inconvenient" arbitral seat.

In many cases, challenges to the validity of an international arbitration agreement are presented first to the arbitrators themselves. This may result from a party's unwillingness to incur the costs or other consequences of commencing litigation in national courts to challenge an agreement, because of concerns about alienating a tribunal, or otherwise. Although a tribunal's jurisdictional rulings are usually subject to eventual judicial review, they will often have substantial practical weight, either because many disputes settle before ultimate judicial review or because of deference to arbitral rulings.

2. Nonarbitrability Exceptions

Virtually all nations treat some categories of claims as incapable of resolution by arbitration – that is, "nonarbitrable." Consistent with this, Articles II(1) and V(2)(a) of the New York Convention do not require enforcement of arbitration agreements concerning a subject matter not "capable of settlement by arbitration."

The types of claims that are "nonarbitrable" are defined primarily by national law and differ from nation to nation. Among other things, various nations refuse to permit arbitration of disputes concerning labor or employment grievances, intellectual property, competition (antitrust) claims, real estate, consumer claims, and franchise relations. These categories of nonarbitrable disputes are roughly comparable to, if more limited than, those claims as to which forum selection clauses may be unenforceable. (See p. 117 to p. 119 above.) As a practical matter, however, nonarbitrability exceptions are often more narrowly applied, in part because they frequently are considered first by arbitral tribunals. Moreover, there are substantial arguments that the New York Convention limits the extent to which local public policy or legislation may be invoked to deny effect to an otherwise valid arbitration clause.

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H. FURTHER READING ON INTERNATIONAL ARBITRATION AGREEMENTS

There are a number of authorities that provide further discussion of the validity, enforceability, and interpretation of international arbitration agreements. Particularly useful commentaries include:

- G. Born, *International Commercial Arbitration* 230-36, 367-73, 401-72, 538-59, 635-818, 834-913, 948-49, 1046-306, 1320-26, 1343-82, 1394-401, 2076-80 (2d ed. 2014)
- G. Born, *International Arbitration: Law and Practice* 48-57, 73-82, 88-93, 221-31, 376, 383-88, 404-05, 417, 420 (2d ed. 2016)
- D. Joseph QC, *Jurisdiction and Arbitration Agreements and their Enforcement* 34, 87-96, 110-20, 136-46, 485-90, 643-54 (3d ed. 2015)
- H. Grigera Naón and P. Mason, *International Commercial Arbitration Practice: 21st Century Perspectives* §7.02, §8.06, §8A.05, §9.08, §10.06, §11.02[6], §11.03[2], §11.04, §11.05[2], §11.06[2], §12.03, §13.03, §14.03, §§15.02-15.05, §15.10, §16.04, §17.03, §18.03 (2010)

of foreign judgments is therefore still governed by either bilateral or regional treaties, or by domestic national law. Under these legal regimes, there are significant obstacles to obtaining effective enforcement of foreign court judgments in many cases.

B. PRESUMPTIVE ENFORCEABILITY OF FOREIGN MONEY JUDGMENTS IN MOST MAJOR TRADING STATES

Under the laws of many states, foreign money judgments are presumptively enforceable, subject to a variety of exceptions. This basic rule has been adopted in a substantial number of countries, including most EU states, the United States, developed Asian states, and elsewhere. In the United States, for example, both common law and statutory rules (based on the Uniform Foreign Money Judgments Recognition Act) treat foreign money judgments as presumptively enforceable. Applicable rules in many other nations, and in a number of bilateral treaties, are broadly similar.

Nonetheless, a substantial number of countries will generally not enforce foreign court judgments. Some states apply rules which deny recognition to any foreign judgment absent a treaty relationship with the rendering state (or "state of origin") providing for mutual recognition and enforcement of judgments. This includes a number of European states, principally Nordic and Eastern European countries. Other countries simply refuse to recognize any foreign judgments, or admit foreign judgments solely as evidence in support of a party's substantive claims, which must be relitigated.

Even in countries where it is theoretically possible, the recognition and enforcement of foreign judgments is infrequently sought and even less frequently obtained. This is particularly true with respect to judgments against local nationals – against whom enforcement is typically most important.

The enforcement of foreign judgments can be subject to procedural delays and other shortcomings, especially in states where courts lack experience with such efforts. The absence of treaty commitments means that there are few external checks on parochial obstacles to enforcement against local nationals. Additionally, as a practical matter, effective enforcement of money judgments often requires speedy and effective actions to attach assets. In many legal systems, this is not a realistic expectation for foreign judgment creditors, particularly those holding judgments against local parties.

The treatment of foreign judgments granting injunctive or other non-monetary relief is even less favorable in most states than the treatment of money judgments. In many countries, precedents or legislation according presumptive validity to foreign money judgments do not apply to equitable decrees, injunctions, and similar orders.

C. EXCEPTIONS TO PRESUMPTIVE ENFORCEABILITY OF FOREIGN MONEY JUDGMENTS

Even in countries which provide for the presumptive enforceability of foreign money judgments, this presumption is subject to a variety of important exceptions. These exceptions can pose significant obstacles to enforcing foreign judgments:

- *Inconvenient Forum* – Some states will refuse to recognize judgments rendered by a court that was unduly inconvenient. Inconvenience is often assessed by the standards of the enforcement forum, and can be a relatively malleable standard.

- *Conflicting Judgment* – Many states will refuse to recognize foreign judgments if they conflict with a local judgment. That is sometimes true regardless of the timing of the two judgments, or of the commencement of the two sets of proceedings, as in the case of Japan.
- *Procedural Regularity* – Many countries will not recognize foreign judgments unless they were the result of judicial proceedings which satisfy local standards of procedural fairness. Given the wide disparity of procedural rules around the world, this requirement provides ample grounds for non-recognition.
- *Lack of Notice* – Courts in almost all jurisdictions will refuse to recognize foreign judgments where the judgment-debtor did not receive adequate notice of the foreign proceedings. Differences in approaches to the service of process in different legal systems make this a more serious obstacle than might appear. A judgment debtor's participation in foreign proceedings will sometimes waive its objections to service in subsequent enforcement actions.
- *Personal Jurisdiction* – Courts in almost all states will refuse to recognize foreign judgments rendered by courts which lacked jurisdiction over the person of the judgment debtor. Personal jurisdiction is usually determined in accordance with the standards of the enforcement forum, not the rendering court. Where a valid contractual forum selection clause exists, and was complied with, jurisdictional challenges will be more difficult. In other circumstances, personal jurisdiction is often a significant hurdle to enforcing judgments abroad.
- *Subject Matter Jurisdiction* – Many nations treat various categories of disputes as falling within the exclusive competence of local courts. In some countries, for example, foreign judgments in disputes between nationals are unenforceable, on the grounds that such disputes are subject to the exclusive jurisdiction of local courts. In other states, disputes concerning matters such as real property, employment relations, certain questions of corporate affairs, and the like are regarded as within the exclusive jurisdiction of particular local courts.
- *Mandatory Law or Public Policy* – Almost all states refuse to recognize foreign judgments that violate local public policy or mandatory laws. Examples of such law and policies are set forth above (see p. 118 above), but in many countries public policy will permit novel and expansive arguments that a foreign judgment should not be enforced.
- *Reciprocity* – A number of states deny recognition to foreign judgments rendered in nations that will not recognize their local judgments.
- *Revenue and Penal Judgments* – Many jurisdictions adhere to the historic rule that foreign "revenue" and "penal" judgments will not be recognized. These exceptions are directed primarily at judgments obtained by foreign governmental and administrative entities, but can also extend to judgments based on quasi-public law protections (arguably, such as competition law).

The cumulative impact of these exceptions makes it difficult to seek the enforcement of foreign money or other judgments with any degree of confidence, at least where no bilateral or regional treaty governs the subject. The relative infrequency of efforts to enforce foreign judgments in many countries exacerbates the uncertainties that accompany such efforts. Even in developed jurisdictions with a substantial record of enforcing foreign judgments (*e.g.*, Switzerland, France, Germany, Canada, England, United States), questions of jurisdiction, procedural regularity, and public policy can present very substantial problems. Of course, where there are developed bilateral or regional arrangements for the mutual recognition of foreign judgments, such as the Brussels I Regulation and the Lugano Convention, enforcement will be much less complex.

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A. PLANNING AND DRAFTING CHOICE-OF-LAW CLAUSES

1. Scope of Choice-of-Law Clauses

In practice, choice-of-law clauses are sometimes drafted in narrower terms than forum selection or arbitration agreements. As discussed above, forum selection and arbitration provisions often (and prudently) extend to all disputes "relating to" or "arising in connection with" the parties' contractual relationship. (See p. 20 and p. 32 to p. 33 above.) These formulations usually reach non-contractual claims, such as those sounding in tort, as well as contractual ones.

In contrast, choice-of-law clauses are not infrequently drafted along the following lines:

> This agreement shall be interpreted in accordance with, and governed by, the laws of ________.

Formulations such as this can be interpreted as extending solely to the parties' contractual rights and duties, and not to questions of tort or other non-contractual rights.

Alternatively, choice-of-law clauses can be drafted even more narrowly, such as:

> This agreement shall be construed in accordance with the laws of ________.

This formulation should be avoided. It arguably applies only to questions of contract interpretation and construction, and not to issues of validity, enforceability, excuses for non-performance, and capacity, much less to questions of tort or other non-contractual rights.

It is generally wiser to draft choice-of-law clauses with a scope that is identical to the parties' contractual dispute resolution mechanism. This enhances predictability, by increasing the likelihood that quasi-contractual, tort, or statutory claims will be also resolved according to the parties' chosen law. As discussed below, there are issues regarding the enforceability of choice-of-law clauses, particularly where non-contractual claims are concerned. (See p. 145 to p. 146 below.) These issues generally should not detract from the wisdom of attempting to achieve uniformity between choice-of-law and dispute resolution provisions.

A suitable formulation for choice-of-law clauses, designed to track an appropriate dispute resolution provision, is as follows:

> This Agreement will be governed by, and all disputes relating to or arising in connection with this Agreement [or the subject matter of this Agreement] shall be resolved in accordance with, the laws of ________.

Whatever formulation is utilized, the important point is that – in contrast with what is often encountered in practice – the scope of the parties' choice-of-law clause should ordinarily be identical to that of the parties' forum selection or arbitration agreement.

2. *Renvoi* Versus "Whole Law"

It ordinarily should not be necessary, but parties frequently include a provision in their choice-of-law clause excluding the possibility of "*renvoi*." That is, the choice-of-law clause will make it clear that the ***substantive*** laws of the chosen jurisdiction, and not its ***conflict of laws rules***, are applicable. A suitable formulation is as follows:

> This Agreement will be governed by, and all disputes relating to or arising in connection with this Agreement shall be resolved in accordance with, the laws of ________ (to the exclusion of its conflict of laws rules).

Authorities in many developed jurisdictions will interpret choice-of-law clauses as accomplishing this result, even if an anti-*renvoi* provision is not included.

3. "Procedural" Issues

Choice-of-law clauses are often not interpreted as extending to "procedural" issues, which are instead considered to be subject to the generally-applicable rules of civil procedure of the parties' contractual forum. For example, most choice-of-law clauses would not be regarded as extending to pleading requirements, discovery mechanisms, and joinder of parties. Other questions, such as statutes of limitations, burdens of proof, rights to legal expenses, and interest raise more difficult issues; they are sometimes regarded as substantive (and thus subject to commonly-used choice-of-law provisions) and sometimes treated as procedural (and thus subject to the forum's rules).

Even if parties extend their choice-of-law clause to "procedural" issues, this may raise issues of enforceability, particularly in national court (as distinct from arbitral) proceedings. Procedural issues may be bound up with questions of judicial administration, as to which local public policy will require application of the forum's law. Moreover, application of foreign law to some procedural issues will often be regarded as impracticable (*e.g.*, pleading requirements).

4. Choice-of-Law Clauses in Investment Contracts

Choice-of-law clauses in investment contracts are sometimes drafted broadly to allow for the application of both national and international law to disputes relating to the agreement. ICSID suggests that the following model provision serve as a basis for a choice-of-law clause in an investment agreement:

> Any Arbitral Tribunal constituted pursuant to this agreement shall apply [specification of system of law] [subject to the following modifications: ________].

5. Which Law Should Be Chosen?

There is no single, simple answer to the question of what substantive law a party should seek to make applicable to a particular international commercial relationship. The answer to this question is influenced by a variety of considerations that are dependent upon the parties' identities, the nature of the transaction, and the potentially applicable national laws. Nonetheless, several general guidelines are useful.

a. Developed, Stable, and Commercially-Sophisticated Law

A party should generally seek agreement upon a law that is developed, stable, and well-adapted to sophisticated commercial dealings. Parties should pay particular attention to the existence of a well-articulated body of commercial, contractual and corporate law. The laws of England, New York, Singapore, France, and Switzerland meet this criterion. Some other developed jurisdictions also have suitable commercial and other laws.

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Parties should ordinarily avoid the law of a state that is newly-formed, or that has not yet formulated significant areas of law. This includes many of the recently-emergent states that established market economies during the late 1980s and 1990s. Equally important, parties should avoid jurisdictions which are potentially subject to future sea changes in legal order. These radical transformations can have unpredictable and undesirable consequences for pre-existing contractual relations.

b. *Familiarity and Ease of Access*

It is important to insist on a law with which the parties are either familiar or whose content they can ascertain with reasonable ease. That typically means the laws of a jurisdiction where a party conducts business, or where it can consult reliable counsel efficiently. A party must often require that it have existing counsel in the jurisdiction whose law is chosen, both for purposes of reviewing the initial agreement and for future issues. Finally, parties should select a law from a state which offers published statutes and judicial decisions, as well as commentaries, rather than only oral or expert opinion.

c. *Enforceability*

Counsel should ensure that the search for a neutral, predictable body of law is not inconsistent with mandatory national law applicable to local aspects of a transaction. Issues relating to real estate, corporate organization, and security interests are examples of matters which ordinarily cannot be contracted out of by means of a choice-of-law clause. Particular care must be devoted to this issue in joint venture or similar shareholder transactions, where the local law of the place where the parties' corporate vehicle is incorporated will frequently apply with mandatory force to certain matters relating to corporate organization.

d. *"Favorable" Laws*

Parties sometimes bargain for application of a law that they expect to be "favorable" to them. This effort is often chimerical, because of the difficulty of predicting in advance what issues will arise in some future dispute and on what side of these issues a party may be. Nonetheless, in specialized fields such an effort can be worthwhile. The laws of financial centers, such as New York and London, frequently are desirable for lenders or creditors.

Parties will often wish to avoid the law of the place where their counterparty has its principal place of operations. That predisposition frequently rests on the assumption that this law may be favorable to that party. In reality, this often will not be the case, although a party can be presumed to be reasonably well informed about its law and to have advantages in the future in ascertaining its content and pursuing legal proceedings (by reason of established relations with counsel).

In dealings with foreign states, parties will generally insist, rightly, on application of the laws of another jurisdiction. This reduces risks that the foreign state will enact legislation or other measures that are designed to improve its position in a contractual dispute.

e. *Literal Language Versus Equity*

It is often said that the laws of England and most U.S. jurisdictions are especially likely to give effect to the literal language of the parties' agreement. This is in contrast to the laws of civil law (and other) jurisdictions, which are said to be more likely to import general principles of good faith and reasonableness

into contractual relations. Although this observation is difficult to confirm, it is consistent with the anecdotal experience of most experienced international practitioners. Which approach is more appropriate, or more advantageous for a particular party, depends on the character of the transaction and potential future disputes.

f. *Interaction with Dispute Resolution Provisions*

It is important to consider how the parties' choice-of-law clause will interact with their dispute resolution provisions. Specifically, if the parties agree to a judicial forum for dispute resolution, they need to take into account the legal and linguistic capabilities of the tribunals in the chosen forum.

For example, if the parties agree upon an exclusive Swiss forum selection clause, is it desirable to select New York law to govern their dealings? Doing so will require a Swiss judge to apply New York law, derived from expert legal opinions and source materials in English. This can impose expense and inconvenience, when translations are required. There is also the distinct possibility that the contractual forum's tribunals will see the parties' chosen law through the prism of familiar local doctrine. Much may be lost, or changed, in the translation.

One of the attractions of international arbitration is that it permits tribunals with differing legal backgrounds, and with legal backgrounds that are different from that of the arbitral seat. That is, parties can agree upon the application of New York law, in an arbitration seated in Switzerland, with the expectation that one or more members of the tribunal will be familiar with New York law (and, of course, fluent in English).

Nonetheless, there are certain efficiencies and benefits from having the parties' chosen law coincide with the law of the forum for dispute resolution. This reduces the likelihood of disputes over what issues are "substantive" or "procedural," it increases the pool of local arbitrators that would be suitable for future disputes, and it makes subsequent judicial proceedings (including review of arbitral awards) more predictable. Thus, a common approach in international transactions is for the parties to agree upon dispute resolution in a neutral forum, and to the application of the laws of that forum to their dispute. England, Switzerland, New York, Paris, and Singapore are the most commonly chosen fora and legal systems for this approach.

Questions also arise as to whether it is wiser to obtain a favorable law, or a favorable forum, in contractual negotiations. Ordinarily, obtaining a satisfactory forum is significantly more important: as one experienced practitioner puts it, "better a French arbitration with Bolivian law, than a Bolivian arbitration with French law."

6. Non-National Legal Systems

Parties sometimes are asked to agree to choice-of-law clauses selecting "general principles of law" or some similar reference to rules not derived from a specific national legal system. The following examples are common: general principles of law; *lex mercatoria* or law merchant; the International Institute for the Unification of Private Law ("UNIDROIT") Principles of Contract Law; "principles common to the laws of states A and B"; "principles of international law"; or "the laws of state A, to the extent not inconsistent with international law." Provisions to this effect are only infrequently litigated, although they have been considered in several major arbitral awards involving oil concessions.

Except in unusual cases, almost always involving state contracts, these formulations should be resisted. There is much academic debate, but little judicial authority, about what such clauses mean, and there are doubts about how widely they are enforceable (*e.g.*, English courts in particular have

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expressed reservations). Save where there is some powerful countervailing reason, business enterprises should not expose themselves to the uncertainties or expenses that participation in this scholastic debate could entail.

a. *General Principles of Law*

Parties sometimes consider choice-of-law provisions requiring application of "general principles of law," either alone or in conjunction with some national system or international body of law. The meaning of this formula is controversial, but it is generally understood as referring to principles of law common to leading legal systems (*e.g.*, the principle that contracts should be performed in good faith (*pacta sunt servanda*)). There are inevitable difficulties in identifying the contents of such principles, particularly with sufficient specificity to provide meaningful guidance in commercial contexts. Because of these difficulties, provisions choosing "general principles of law" as the applicable "law" should generally be avoided, save in exceptional cases involving state contracts.

b. *UNIDROIT Principles of International Commercial Contracts*

Choice-of-law provisions occasionally specify the "Principles of International Commercial Contracts" published by UNIDROIT. The UNIDROIT Principles were designed to establish a neutral set of international rules of contract law, and cover interpretation, validity, performance and negotiation of contracts. A representative clause provides:

> This contract shall be governed by the UNIDROIT Principles (2010) [except as to Articles ______], supplemented when necessary by the law of [jurisdiction X].

Commercial parties should be cautious about adopting the Principles as the only "law" governing their contract. They inevitably lack the detail and supporting judicial precedent of leading national legal systems. Questions also arise about the interaction between a consensually-selected legal system (addressing matters of validity and similar issues) and generally-applicable national law.

c. *"Concurrent" Choice-of-Law Clause*

Parties sometimes consider "concurrent" choice-of-law clauses, which select both a national law and international law; these provisions are most likely to be considered in state contracts. An example of such a clause provides:

> The laws of [State] will apply, insofar as they are consistent with international law.

Such a formulation permits the state party's law to apply to the transaction, while still affording the commercial party a measure of protection if legislative actions by the state violate international law. The content of international law restraints on state actions in these circumstances remains a subject of controversy, but "internationalizing" a contract provides at least a degree of protection against unilateral state actions.

7. Stabilization Clauses

In some transactions, parties may seek protection against future changes in the applicable law. This protection can take the form of "freezing" or "stabilization" clauses, which fix the legal system applicable to the parties' agreement as that system stands at a specified date (without regard to subsequent legislative or other developments) or that, alternatively, either forbid giving effect to specified legislative changes or require compensation for such changes. Such provisions are generally used only in agreements between foreign investors and states or state-owned entities, where the possibilities for legislative interference are most substantial.

A representative example of a simple stabilization clause provides:

> No new laws, regulations, modifications or interpretation which could be conflicting or incompatible with the provisions of this Agreement shall be applicable.

Some stabilization provisions take the form of "economic equilibrium clauses." Under these provisions, the state party is required either to restore the economic equilibrium prevailing at the time of the contract or to compensate the commercial party for any adverse consequences of such changes.

An example of a hybrid freezing and economic equilibrium clause can be found in Article 37 of the Model Host Government Agreement for Cross-Border Pipelines developed by the Energy Charter Secretariat. That clause provides:

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> If any Change of Law has the effect of impairing, conflicting or interfering with the implementation of the Project, or limiting, abridging or adversely affecting the value of the Project or any of the rights, indemnifications or protections granted or arising under this Agreement or any Project Agreement, or of imposing (directly or indirectly) any Costs on any Project Investor, the Project Investor shall, within [one year] of the date when it could with reasonable diligence have become aware of the effect of the Change of Law upon the project as aforesaid, give notice thereof in writing to the Host Government. During the [90 days] following the Host Government's receipt of this notice, the Project Investor and the Host Government shall endeavour to resolve the matter through amicable negotiations. Failing such a resolution, the Host Government shall, by the end of this [90-day] period, do one of the following:
>
> a. take all actions available to it to reverse the effect of that Change of Law upon the Project, the value of the Project or the relevant rights, indemnifications or protections. The foregoing obligation shall include the obligation to take all appropriate measures to resolve promptly by whatever means may be necessary, including by way of exemption, legislation, decree and/or other authoritative acts, any conflict or anomaly between this Agreement and any Project Agreement and [insert name of State] law; or
>
> b. compensate the Project Investor for the Costs incurred by that Project Investor as a result of the Change of Law. Such compensation shall, if the relevant Project Investor so requires, be paid in Convertible Currency and shall, at the option of the Host Government, take the form of:

> – reimbursement by the Host Government of the Costs incurred by the Project Investor as a result of the Change of Law, promptly as and when such Costs are incurred;
>
> – reimbursement by the Host Government of the Costs incurred by the Project Investor as a result of the Change of Law, in the form of equal annual payments to the Project Investor during the remaining expected life of the Project ...;
>
> provided however that the obligation to take one of the actions referred to above shall not apply in relation to a Change of Law if the Host Government establishes that that Change of Law reflects a change in standards generally applicable in relation to standards of environmental protection, safety, employment, training, social impact or security in the [petroleum] [gas] industry internationally.

Stabilization clauses raise questions of enforceability and should be used with care.

8. Exclusion of CISG Convention

A substantial number of international sale of goods contracts are subject to the provisions of the 1980 United Nations Convention on Contracts for the International Sale of Goods ("CISG Convention"). The CISG Convention applies to contracts for the sale of goods between parties whose places of business are in different Contracting States (or in states whose conflict of laws rules provide for application of the Convention). Parties are free to opt out of the CISG Convention's substantive provisions (CISG Convention, Article 6), but such provisions must be express.

The following provision is a representative example of such an opt out clause under the CISG:

> The Parties agree that this Agreement, and any disputes, claims, controversies, or disagreements relating to or arising under this Agreement, shall not be subject to the 1980 United Nations Convention on Contracts for the International Sale of Goods ("CISG Convention") and that the provisions of the CISG Convention are hereby excluded. This Agreement, and any disputes, claims, controversies, or disagreements relating to or arising under this Agreement, shall be governed by the law of _________ (without regard to its conflict of laws rules and without regard to the CISG Convention).

A simple choice-of-law provision, selecting a national law (*e.g.*, "This agreement shall be governed by the law of New York.") is not sufficient to opt out of the Convention; rather, express language opting out of the CISG Convention, and selecting an alternative law, is necessary.

9. Amiable Composition and *Ex Aequo et Bono*

As discussed above (see p. 90 to p. 90 above), parties sometimes consider granting arbitrators the power to decide disputes "*ex aequo et bono*" or as "*amiable compositeur*." These formulations permit the arbitrator to decide disputes based on equitable considerations and without reference to or compliance with strict principles of law. In general, *ex aequo et bono* and "amiable composition" provisions give rise to significant risks and are almost always disfavored by commercial parties.

B. ENFORCEABILITY OF CHOICE-OF-LAW CLAUSES

1. Presumptive Enforceability of Choice-of-Law Clauses

In some countries, early authorities held that choice-of-law clauses were unenforceable. That view has been largely rejected by more recent authorities. It is now well-settled under the laws of most jurisdictions, including almost all major trading states, that choice-of-law clauses are presumptively valid and enforceable, subject to important exceptions. This basic principle of party autonomy is recognized in sources such as the CISG Convention and the Rome I Regulation (Regulation (EC) No 593/2008 on the Law Applicable to Contractual Obligations).

2. Exceptions to Presumptive Enforceability of Choice-of-Law Clauses

The general enforceability of choice-of-law clauses under the laws of most jurisdictions is subject to several significant exceptions. These exceptions are broadly similar to those applicable to forum selection clauses. (See p. 117 to p. 118 above.)

a. Reasonable Relationship Requirement

Some courts will not enforce a choice-of-law clause unless the parties' chosen law bears a "reasonable relationship" to the parties or their transaction. Section 1-105(1) of the original Uniform Commercial Code ("UCC"), applicable in most U.S. states, provides that: "When a transaction bears a reasonable relationship to this state and also to another state or nation the parties may agree that the law of either of this state or of such other state or nation shall govern their rights and duties."

In drafting documentation for a transaction which will include a choice-of-law clause, counsel should structure the transaction (and draft recitals and other provisions) with the reasonable relationship requirement in mind.

The reasonable relationship requirement has been criticized more frequently than it has been applied. Regrettably, the requirement gives rise to questions whether the choice of a "neutral" state's law is effective. Typically, however, parties select the law of a "neutral" jurisdiction precisely because it lacks any connection to either them or their transaction; by throwing the validity of such choices into doubt, the reasonable relationship requirement impedes the formation of stable, predictable commercial relations.

Fortunately, the legal regimes in many countries (as well as the Rome I Regulation) recognize that parties may validly select the laws of a neutral state, that has no other material relationship to the parties' transaction. As amendments in 2001 to the UCC illustrate, other jurisdictions are rethinking and/or abandoning the reasonable relationship requirement. The revised UCC provides, in Article 1-301(c)(2) that "an agreement by parties to an international transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State or country is effective, whether or not the transaction bears a relation to the State or country designated," subject to exceptions for consumer transactions. As a practical matter, international arbitrators, as distinguished from national courts, are more likely to give effect to choices of substantive law without a material relation to the parties or their dealings.

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Article 2 A: International origin and general principles

(As adopted by the Commission at its thirty-ninth session, in 2006)

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

CHAPTER II: ARBITRATION AGREEMENT

Option I

Article 7: Definition and form of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

1. "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
2. The arbitration agreement shall be in writing.
3. An arbitration agreement is in writing if its content is records in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
4. The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
5. Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
6. The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option II

Article 7: Definition of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

CHAPTER IV A: INTERIM MEASURES AND PRELIMINARY ORDERS

(As adopted by the Commission at its thirty-ninth session, in 2006)

Section 1: Interim measures

Article 17: Power of arbitral tribunal to order interim measures

1. Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.
2. An interim measure is any temporary measure, whether in the form of an award or in another form, but which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

   a. Maintain or restore the status quo pending determination of the dispute;
   b. Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
   c. Provide a means of preserving assets out of which a subsequent award may be satisfied; or
   d. Preserve evidence that may be relevant and material to the resolution of the dispute.

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Article 17 A: Conditions for granting interim measures

1. The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

   a. Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
   b. There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

2. With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2: Preliminary Orders

Article 17 B: Applications for preliminary orders and conditions for granting preliminary orders

1. Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

2. The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.
3. The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a), is the harm likely to result from the order being granted or not.

Article 17 C: Specific regime for preliminary orders

1. Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.
2. At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.
3. The arbitral tribunal shall decide promptly on any objection to the preliminary order.
4. A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.
5. A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3: Provisions applicable to interim measures and preliminary orders

Article 17 D: Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 E: Provision of security

1. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.
2. The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 F: Disclosure

1. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.
2. The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain

the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

Article 17 G: Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4: Recognition and enforcement of interim measures

Article 17 H: Recognition and enforcement

1. An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.
2. The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.
3. The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 I: Grounds for refusing recognition or enforcement [3]

1. Recognition or enforcement of an interim measure may be refused only:

   a. At the request of the party against whom it is invoked if the court is satisfied that:

      i. Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or
      ii. The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
      iii. The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

   b. If the court finds that:

3. The conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

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