THE PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION

A HANDBOOK FOR ARBITRATORS AND ARBITRATION LAWYERS IN ASIA

SECOND EDITION

ANSELMO REYES

informa law
from Routledge

Second edition 2026
by Informa Law from Routledge
4 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Informa Law from Routledge
605 Third Avenue, New York, NY 10158

Informa Law from Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library

First edition published 2018

Library of Congress Cataloging-in-Publication Data
Names: Reyes, Anselmo, author.
Title: The practice of international commercial arbitration : a handbook for arbitrators and arbitration lawyers in Asia / Anselmo Reyes.
Description: Second edition. | Abingdon, Oxon ; New York, NY : Routledge, 2026. | Series: Lloyd's arbitration law library | Includes bibliographical references and index. |
Summary: – Provided by publisher.
Identifiers: LCCN 2025028095 | ISBN 9781032329390 (hardback) | ISBN 9781041062936 (paperback) | ISBN 9781003634751 (ebook)
Subjects: LCSH: Arbitration and award–China–Hong Kong. | International commercial arbitration.
Classification: LCC KNQ9337.5 .R49 2026 | DDC 347.5125/09–dc23/eng/20250612
LC record available at https://lccn.loc.gov/2025028095.

ISBN: 9781032329390 (hbk)
ISBN: 9781041062936 (pbk)
ISBN: 9781003634751 (ebk)

DOI: 10.4324/9781003634751

Typeset in Times New Roman
by Deanta Global Publishing Services, Chennai, India

For Product Safety Concerns and Information please contact our EU representative GPSR@taylorandfrancis.com Taylor & Francis Verlag GmbH, Kaufingerstraße 24, 80331 München, Germany.
Batch No. NP106009

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A third aspect of arbitration, confidentiality, is often touted as a distinct advantage of arbitration over litigation. To ensure transparency, court proceedings are normally open to the public. In court hearings not involving state security, anyone should be able to walk unannounced into court on a given day and listen to what is happening in a case. Open justice is a paramount principle of the rule of law. Save in exceptional circumstances, court hearings must not be conducted in secret. Otherwise, there would be no check on judges, leaving it open to them to act arbitrarily, with scant regard for the rule of law. Proceedings should be conducted in the glare of public scrutiny, and there must be no perception among the public of something private or furtive going on behind closed doors. Justice has nothing to hide. No such considerations apply in arbitration. Arbitrations are private arrangements between the parties to a dispute. Hearings take place in secret in the sense that the public are excluded. Persons who are not connected with the parties may not walk into arbitration hearings, whether interlocutory or substantive, without the permission of the parties and the tribunal. Thus, arbitrations afford a means to parties of settling their disputes without unflattering and inconvenient details of their conduct becoming known to the public. In commercial disputes, the private nature of arbitration enables sensitive information (financial details, secret manufacturing processes, customer information, etc.) to be disclosed to the tribunal with minimized risk of the information leaking out to the public. Nevertheless, despite confidentiality being a significant feature distinguishing arbitration and litigation, it likewise apparently ranks relatively low among stakeholders as a reason for preferring arbitration. The reality seems to be that users are not overly concerned about confidentiality. It is nice to have, but it is not the principal reason for preferring arbitration as a mode of dispute resolution.

What seems to be most important to the users of arbitration is the relative ease of enforcing an arbitral award in other countries. The perception is that, by reason of the New York Convention, an arbitral award will be recognized and enforced just about anywhere in the world. In contrast, there is no equivalent instrument to the New York Convention as far as concerns the enforcement of an originating court's judgment by a court in another country. The instrument that comes closest to enabling judgments by the court of one state to be enforced in another is the 2005 Hague Choice of Court Agreements Convention.[4] By that instrument, where the parties to an international commercial contract designate the court of a contracting state as the forum to resolve disputes arising out of the contract, the designated court alone will have jurisdiction to resolve such disputes. Other than in a limited number of circumstances, the courts in other contracting states to the 2005 Convention must decline jurisdiction. Once a designated court has rendered a judgment on the merits, then that judgment will be recognized and enforced in all other contracting states to the 2005 Convention, except in a limited number of situations. Those limited situations are analogous to the situations when a court may refuse recognition and enforcement of an arbitral award under the New York Convention.

The 2005 Hague Convention came into effect on 1 October 2015. However, as of 1 January 2025, there are only 37 state parties (including the EU as a Regional Economic Integration Organization (REIO)) to the instrument. That is nothing like the 172 countries that are parties to the New York Convention. The position is unlikely to change dramatically in the near future. Looked at crudely in terms of numbers of states in which

4 Available at www.hcch.net/en/instruments/conventions/full-text/?cid=98.

enforcement might be expected to occur automatically, an arbitral award would seem to be clearly superior to a court judgment in terms of portability across borders.

The second most popular reason for choosing arbitration over other forms of dispute resolution (including litigation) according to the 2015 survey is the avoidance of the legal systems of national courts. The percentage of respondents citing avoidance (64%) was nearly the same as the percentage giving enforceability as the reason for preferring arbitration. The two reasons are likely to be related to each other. Where the judicial system of state X is notorious for being slow, costly, corrupt, or unpredictable, businesses are likely to shun the courts of state X. They will prefer arbitration, especially where an arbitral award obtained in state Y may be readily recognized and enforced in state X as a party to the New York Convention. Arbitration becomes a way of getting around the inconvenience and expense of litigation in state X. It would be a further plus for arbitration that, at least to an extent, the parties can determine the composition of the tribunal deciding their dispute. The parties would not be left to the vagaries of state X's judicial system which could assign a judge lacking the commercial expertise to deal with their dispute.

1.3 Problems of Cost and Due Process Paranoia

It is instructive to look at the flip side of the equation. The 2015 Survey also asked those canvassed to identify the three worst characteristics of international arbitration. The result was as follows: "cost" (68%); "lack of effective sanctions during the arbitral process" (46%); "lack of insight into arbitrators' efficiency" (39%); "lack of speed" (36%); "national court intervention" (25%); "lack of third party mechanism" (24%), "lack of appeal mechanism on the merits" (17%), "lack of insight into institutions' efficiency" (12%), "other" (9%), and "lack of flexibility" (3%).[5] From this, the greatest threat to international arbitration as a preferred means of dispute resolution would be its high cost.

The 2015 Survey found, during interviews on how international arbitration might be improved, that "due process paranoia" was "repeatedly raised in responses, and in nearly all the personal interviews." The 2015 Survey defined "due process paranoia" as the "reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully."[6] It was suggested by some of the interviewees that "due process paranoia" might partly explain the increased cost of arbitration.

Under article V(1)(b) of the New York Convention, the court of a state in which enforcement is sought may refuse to recognize an arbitral award on the ground that the party against whom enforcement is sought (the respondent) was not given a fair opportunity to present one's case. For this reason, given that a tribunal is under an obligation to produce an enforceable award, many arbitrators may hesitate to impose strict deadlines on parties or to refuse last minute evidence, prolix submissions, and late applications. A tribunal may be afraid that, come the time for enforcement of an award, it will be accused of having failed to give the losing party a reasonable opportunity to be heard and the enforcing court will consequently refuse to recognize or enforce the tribunal's award. The unfortunate result is that arbitrations can become overly long with costs racked up because

5 Survey (n 9), p.7.
6 Survey (n 9), p.10.

tribunals bend over backwards to accommodate the demands of the respondent to an arbitration. In so conducting the arbitration, the tribunal may believe that it cannot be accused of having denied the respondent a reasonable opportunity to present its case and be heard. Similarly, in drafting its award, the tribunal may feel that it must summarize every procedural twist and turn that the arbitration proceedings have taken (including every interim application (however minor) by one or other party), and every argument pleaded and piece of evidence adduced (including nearly verbatim paraphrases of what each witness has said). All this is done to pre-empt an enforcing court from finding that the tribunal (1) failed to take account of an argument that it ought to have considered or (2) took account of an argument that it ought not to have considered because no one raised the same. The lengthy award that results will be costly, as the tribunal will need to take more time in its drafting, but (the thinking goes) at least the award will be safe and will not be set aside or refused recognition or enforcement.

All this is contrary to what arbitration is supposed to be as a mode of alternative dispute resolution (ADR). Arbitration is supposed to offer a cost-effective and time-efficient alternative to court proceedings. It is meant to offer an alternative to litigation, precisely because it is supposed to be less technical and more robust than court proceedings. Ironically, it seems that, because of due process paranoia, the very success of arbitration in establishing itself as a means of cross-border dispute resolution is in danger of causing it to become more technical, more costly, and less time-efficient, by contrast with court proceedings. International arbitration is the preferred mode of dispute resolution because of the perceived ease of enforcing an arbitral award in a multitude of jurisdictions. But the perception of many arbitrators and arbitral institutions is that arbitration proceedings and awards must comply with a great number of formalities if they are to be capable of recognition and enforcement elsewhere. Paradoxically, the supposed ease of enforcement of arbitral awards across borders apparently comes with an ever-increasing price tag. If arbitration is to remain a preferred mode of dispute resolution for international commercial disputes, the related problems of cost (in the sense of value for money) and due process paranoia will have to be confronted. What can be done to solve the twin problems, and what (if any) limits there are to any solutions are themes that will run through this book as it describes and reflects on the process of international commercial arbitration.

1.4 Appendix

Throughout this chapter, there has been repeated reference to the Model Law and the New York Convention. These instruments will be mentioned over and over in this book. Accordingly, it may be helpful for the reader who is unfamiliar with either instrument briefly to describe what they contain.

1.4.1 UNCITRAL and the Model Law

The United Nations Commission on International Trade Law (UNCITRAL) promulgated the Model Law on International Commercial Arbitration on 21 June 1985. It was approved by the United Nations General Assembly on 11 December 1985. UNCITRAL issued a revised Model Law on 7 July 2006. The revisions largely concern the form of arbitration

agreements and the granting of interim measures by arbitral tribunals. The General Assembly approved the revised Model Law on 4 December 2006.

The structure of the Model Law is straightforward and logical. The succession of articles in the Model Law mirrors the progress of an arbitration from the agreement to arbitrate; to the constitution of a tribunal; to the granting of interim measures; to the making of procedural directions and the substantive hearing; to the making of an award; to applications to set aside an award; and to the recognition and enforcement of an award.

Thus, chapter I of the Model Law contains "General Provisions." That is followed by chapter II dealing with the "Arbitration Agreement." Chapter III then covers the "Composition of the Arbitral Tribunal," while chapter IV concerns the "Jurisdiction of the Arbitral Tribunal." Chapter IVA was introduced in 2006 and involves "Interim Measures and Preliminary Orders." Chapter V deals with the "Conduct of Arbitrations." Chapter VI concerns the "Making of Awards and Termination of Proceedings." Chapter VII sets out ways of "Recourse Against Award," and finally chapter VIII deals with the "Recognition and Enforcement of Awards." The provisions of chapter VIII (articles 35 and 36) are very much like (but are not identical to) articles IV, V(1), and V(2) of the New York Convention.

UNCITRAL suggests in an Explanatory Note to the 2006 Model Law that, over the years, the Model Law "has come to represent the accepted international legislative standard for a modern arbitration law." This is because the Model Law is "easily recognizable, meets the specific needs of international commercial arbitration and provides an international standard based on solutions acceptable to parties from different legal systems." Consequently, where a country adopts the Model Law, "the smooth functioning of ... arbitral proceedings is enhanced."

Countries are free to adopt as many or as few of the provisions of the Model Law as may be conducive to their needs. Among Asian jurisdictions, Singapore, Hong Kong, Japan, South Korea, and Malaysia have adopted the 2006 Model Law, while Cambodia, Vietnam, and the Philippines have adopted the 1985 Model Law. The arbitration laws of Mainland China and Taiwan reflect the provisions of the 1985 Model Law, but they are not regarded as Model Law jurisdictions. Indonesia is an outlier in not being a Model Law jurisdiction or reflecting its provisions.

1.4.2 New York Convention

The 1958 New York Convention is also a United Nations instrument. It offers a convenient mechanism for the recognition and enforcement by a contracting state of an arbitral award made in another contracting state. The Convention contains 16 articles. Provisions worth noting for the purposes of this book are summarized below.

Article I(1) sets out the operative principle of the Convention, namely, the recognition and enforcement of "arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal." However, by article I(3), a state "may on the basis of reciprocity declare that it will apply the Convention to … awards made only in the territory of another Contracting State." A state may under article I(3) also declare that the Convention will only apply to "differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the [relevant state]."

The Convention imposes two important obligations on a state. These are found in articles II and III. Article II obliges a state party to recognize arbitration agreements in writing. This means that if an action arising out of a dispute covered by an arbitration agreement is brought before the court of that state, then such court "shall, at the request of one of the parties, refer the parties to arbitration." The court is required to do so, unless the arbitration agreement is "null and void, inoperative or incapable of being performed." Article III is in a sense the corollary to article II. By article III, a contracting state must "recognize arbitral awards as binding" and "enforce them in accordance with the rules of procedure of the [contracting state]." Moreover, a contracting state cannot require more onerous conditions or fees for enforcing a foreign award than are imposed for the enforcement of a domestic award.

Articles IV to VI qualify the duty to recognize and enforce foreign awards imposed by article III.

Article IV deals with the formalities that a court may require before recognizing or enforcing an award. For instance, a state may require the production of a "duly authenticated original award or … certified copy thereof" and of the "original [arbitration] agreement … or … certified copy thereof." The state may also request translations of the award or arbitration agreement.

Article V sets out the limited grounds upon which the court or competent authority of a contracting state may refuse to recognize or enforce an award. Article V merits being set out in full:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI states that, if there is a pending application to stay or set aside an award in the seat of arbitration, the court of a contracting state may adjourn any decision on recognizing or enforcing the award.

One other provision worth noting is article VII. By the article, if it would be more advantageous to enforce an arbitral award through some other treaty, a party is free to rely on that other treaty. The New York Convention is without prejudice to a party's rights under the other treaty.

CHAPTER 2

Theory

A tribunal is expected, many say that it has a duty, to produce an enforceable award. By itself, an award is just a piece of paper. It is worthless if it cannot be enforced elsewhere against a losing party and in effect converted to cash. But what makes an enforceable award? To put it another way, what is the source of an award's validity beyond the seat or jurisdiction in which the award was issued?

This chapter will consider three different theories purporting to explain what gives validity to an arbitral award. It will do so by summarizing Emmanuel Gaillard's seminal 2008 Hague Academy of International Law lecture[1] on the philosophical aspects of international arbitration and by teasing out the implications of Professor Gaillard's account on the conduct of international commercial arbitrations.

This chapter will argue that a person acting as an international commercial arbitrator, whether in Asia or elsewhere, will need to identify to which one of the three theories he or she subscribes. The necessity of choosing a theory arises because the way in which one conducts an international commercial arbitration will be heavily influenced by the theory that, consciously or subconsciously, one espouses. How an arbitrator copes with due process paranoia will hinge on the theory to which he or she adheres.

It is possible that many arbitrators today are unaware (or are only dimly aware) of the different theories described here. However, a failure actively to consider the three theories might lead to arbitrations being conducted too pedantically, essentially as pale imitations of court proceedings, without a full appreciation of the wide range of procedural options that are available to a tribunal and that distinguish arbitration from litigation as a means of settling international commercial disputes.

2.1 Theory 1: The Law of the Seat as the Source of Validity

This is probably the theory to which, consciously or not, most arbitrators dealing with international commercial disputes would subscribe. Professor Gaillard identifies this theory as one that is strongly held within common law jurisdictions, having been defended by prominent lawyer-academics such as Dr Francis Mann and Professor Sir Roy Goode.[2]

The theory is that an award is valid to the extent that it would be recognized and enforceable within the seat of the arbitration. Accordingly, if an award is set aside by the court

1 E Gaillard, *Aspects philosophiques du droit de l'arbitrage international* (Martinus Nijhoff, 2008).
2 Gaillard (n 1), at [11]–[22].

DOI: 10.4324/9781003634751-2

of the arbitral seat for some reason or another, the award will cease to have validity and will be incapable of recognition and enforcement in any other state. Having been set aside by the court of the seat, the award becomes a nullity, and it will be impossible to enforce something that has ceased to exist.

This simple theory is intuitively appealing, not least because it appears to be extremely logical. However, Professor Gaillard criticizes the theory because it runs contrary to the spirit of international commercial arbitration. If such an arbitration is truly an "international" means of resolving cross-border commercial disputes, then it would be contradictory to that spirit to allow the arbitration laws of one jurisdiction (the seat of the arbitration) to dictate whether an award should be recognized and enforced elsewhere.[3]

The reality is that the Model Law has become the *lingua franca* of international commercial arbitration. As a result of more and more countries adopting the Model Law, there should be a gradual harmonization of the general regulatory framework governing international commercial arbitration throughout the world. That regulatory framework will not necessarily be identical across jurisdictions in terms of detail. There may be variations in what different states adopt of the Model Law. In a bid to be perceived as arbitration friendly and attract more foreign direct investment (FDI), some states will adopt more of the Model Law's provisions than other states. Some jurisdictions may go further than the Model Law requires, due to competition among countries to become leading international, regional, or sub-regional dispute resolution centres, and bring in a more lucrative share of the cross-border dispute resolution market. However, the essential framework for international commercial arbitration across jurisdictions should broadly be the same and increasingly reflects a best practice in respect of the Model Law provisions commonly adopted by states.

In such an environment, espousal of the first theory provides little incentive for a jurisdiction to embrace a more global perspective and modernize its regulatory framework for international commercial arbitration along the lines of the Model Law. If every state and every arbitrator were to adhere to the first theory, there would be the danger of the "tail wagging the dog." The regulatory framework of one state (the seat of arbitration), however restrictive and unenlightened, would determine the extent to which an award rendered in that state in respect of a cross-border dispute can be recognized internationally. Nevertheless, even if only tacitly, precisely because it is intuitively appealing as a matter of practical logic, many international commercial arbitrations in Asia today are conducted based on the first theory. Tribunals thus run international commercial arbitrations as if they were just court litigations in the seat of arbitration. Whenever a procedural question arises in such arbitrations, extensive reference is made by the parties and the tribunal to the codes of civil procedure regulating court litigation within the relevant jurisdiction, as a means of determining how the procedural question should be decided.

The Model Law only provides the barest of guidelines as to the procedures to be followed in an arbitration. Arbitral rules are equally skeletal. Much is left to a tribunal's discretion in light of the circumstances of a given case. Therefore, questions will inevitably arise as to whether and (if so) how the tribunal should exercise some power (for instance, the power to grant interim measures or the power to order security for costs) in interlocutory proceedings or substantive hearings. Lip service may be paid to the notion

3 Gaillard (n 1), at [20]–[22].

that an arbitration is not bound by court practice. But, when push comes to shove, many arbitrators simply end up applying "by analogy" the court practice of the seat whenever a question arises as to how the tribunal is to exercise its power.

From the viewpoint of due process, that may be understandable within the context of the first theory. Mimicking domestic court procedure is a safe option. If a tribunal closely adopts the court practices and procedures of the seat, the likelihood of the supervising court (that is, the court of the seat of arbitration) setting aside an award for failing to follow due process or for acting in excess of a tribunal's jurisdiction will be small. The court of the seat can hardly say that adherence to its own procedures and practices amounts to an abuse of process. But the danger is that the procedure followed in international commercial arbitration will become just as technical, if not more so, than that followed in court litigation. There is much talk about arbitration being "hijacked" by lawyers. There is a danger that procedures will become more technical than in court because many arbitrators come to international commercial arbitration after substantial careers as judges or lawyers. The former will be tempted to conduct arbitrations in the same way that they have conducted litigation. The latter, especially those coming to arbitration after having had substantial practice in litigation, may see arbitration as little different from what they used to do in court. On procedural matters, many non-lawyers on a tribunal will often defer to the professional experience of the judge or lawyer sitting with them because such a strategy will probably best ensure that an award is not set aside by a supervising court. The non-lawyers will assume that the judge or lawyer turned arbitrator knows best when it comes to following court practice and procedure.

Given that to a lesser or greater extent all arbitrators will be prone to due process paranoia (that is, the fear that their award will be set aside or not be enforced because of a failure to observe due process), a tribunal operating under the first theory will be concerned that the arbitral process passes muster when compared to court procedure. Otherwise, the award may be susceptible to being set aside in the seat and there will be nothing left to enforce elsewhere.

Consider an example of how adherence to the first theory can lead to too much readiness to plug procedural or substantive gaps by reference to the seat's rules of court procedure. In common law jurisdictions (including Hong Kong and Singapore), foreign law is treated as a matter of fact. As far as court proceedings are concerned, this means that, where the applicable law of a dispute is foreign law, a party must specifically plead the foreign law upon which it proposes to rely. That party must then adduce evidence, typically evidence from an expert (such as a foreign lawyer or law professor), that the operative foreign law is as it has been pleaded. The expert is subject to cross-examination, much as any other witness. Where a party fails to plead foreign law or if a party does not adduce evidence of foreign law, the court will proceed on an assumption that the foreign law and the law of the forum are identical.

Many common law arbitrators hearing an international commercial arbitration will mechanically follow such court practice on foreign law. They will feel uncomfortable hearing submissions on foreign law directly from an advocate (even an advocate qualified in the foreign law) appearing before them. Where foreign law has not been pleaded, they will simply assume that foreign law on the relevant issue is the same as the law of the seat on the matter.

But why should common law practice be assumed to be applicable in an international commercial arbitration merely because it has a seat in a common law jurisdiction and the substantive hearing is taking place there? ML article 28 requires, where the parties to an international commercial contract have failed to designate the applicable law in their commercial contract, that the tribunal "shall apply the law determined by the conflict of laws rules which it considers applicable." The tribunal will therefore have to be more pro-active than simply assuming, if foreign law is not pleaded by the parties, that foreign law can automatically be treated as the law of the seat by analogy with court practice. ML article 28 instead imposes a duty on a tribunal (I suggest) to apply foreign law, where it considers that such law applies to an issue before it. The tribunal should therefore at least invite the parties to address it at some point on the applicable foreign law. If the parties respond that they are content for the tribunal to proceed on the footing that the applicable foreign law is the same as the law of the seat, the tribunal may safely proceed based on the parties' consensus. What one cannot do is blithely to ignore a glaring possibility of foreign law applying to a dispute on the slim basis that, since a common law jurisdiction is the seat of the arbitration, the law and practice of the seat court can apply by default. In other words, if an award solely derives its validity from the law of the seat, the typical practice followed by many common law arbitrators might be justifiable. But ML article 28 suggests that the first theory is far too crude and that an arbitral award derives its validity from something more than just the law and practice of the seat.

A narrow approach to foreign law based on the first theory can lead to alternative, potentially more economical or practical, approaches to the determination of foreign law in international commercial arbitration being rejected out-of-hand for no good reason. In civil law countries, questions of foreign law are treated as questions of law, not fact. There would seem to be no good reason for an arbitration in a common law seat automatically (1) to accept the domestic court's approach of treating foreign law as a matter of fact, and (2) to regard that approach as the only way of proceeding. If one regards questions of foreign law as questions of law (as would be the more intuitively obvious approach), that opens several avenues of proving foreign law in an international commercial arbitration taking place in a common law jurisdiction. The tribunal can of course always direct that normal common law court practice (that is, resort to foreign law expert evidence) will be followed. But that way of proceeding will typically involve experts preparing and exchanging "without prejudice" expert reports, meeting to work out points of agreement and disagreement, issuing a joint report identifying points of agreement and disagreement, and submitting "with prejudice" reports dealing only with points of disagreement. The procedure could be far too expensive, in the sense of being disproportionate to the amount at stake, for many international commercial arbitrations.

There may be a prevailing view among the public that international commercial arbitrations involve large sums of money running to the millions of Hong Kong dollars. But the reality is far from being so glamorous. Many international commercial arbitrations involve relatively small sums of money. The typical shipping arbitration, for example, might only involve a few hundred thousand US dollars. It would be too costly in such cases to use the traditional common law means of proving foreign law through expert evidence.

In civil law jurisdictions (where judges are under a duty to apply foreign law even if none of the parties has pleaded the same), it is open to courts to determine substantive foreign law in different ways, depending on the circumstances. The way in which the law is determined can be calibrated to the amount at stake in a case. In disputes involving relatively low values, a judge may even ascertain foreign law by resorting to the internet. That would, of course, be subject to (1) the judge being satisfied that a website purporting to set out foreign law on a matter is reliable and (2) the parties being afforded a reasonable opportunity to support or challenge what is stated on such website about the relevant foreign law. Alternatively, judges may hear submissions directly from suitably qualified counsel on matters of foreign law.[4] Similar methods can be applied as appropriate in international commercial arbitrations, regardless of whether the seat is a common law or civil law jurisdiction. The approach, where a tribunal hears submissions directly on matters of foreign law, may be particularly apposite in arbitration. That is because often, where an arbitration involves foreign law, one or more members of the tribunal will be appointed on account of their knowledge of (or at least acquaintance with) that foreign law. In the interests of due process in such a circumstance, the tribunal would need to give interlocutory directions to ensure that each side was made aware in good time of the other side's position on the substance of the relevant foreign law. In this way, the direct submissions on foreign law heard by the tribunal will be responsive to each other and no one will be taken by surprise.

The method of hearing direct submissions from advocates appearing before a tribunal may be less expensive and time-consuming than the traditional mode of expert evidence used in common law courts. However, this method might be too readily dismissed as inappropriate if a tribunal was slavishly to follow common law court procedure merely because that is the safest way of ensuring under the first theory that an award will not be set aside.

2.2 Theory 2: The Laws of All Enforcing States as the Source of Validity

The second theory takes its cue from the New York Convention. It posits that the validity of an award hinges on whether enforcing states will or will not recognize and enforce the award. Thus, the validity of an award stems from the sum of the laws of enforcing states.[5]

This does not mean that the law of the seat of arbitration becomes irrelevant. This is because, in deciding whether to recognize and enforce an award, the court in an enforcing state may take account of the fact that the award has been set aside by the court of the arbitral seat. In this respect, article V(1)(e) of the New York Convention provides that "[r]ecognition and enforcement of the award *may* be refused … [i]f the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made" [emphasis supplied]. The fact that the court of the arbitral seat has set aside an award or has held an award to have been made outside of a tribunal's jurisdiction will undoubtedly be a factor, perhaps a significant factor, in an enforcing court's deliberations whether to recognize and enforce an award. But the status of an

4 For detailed information on how foreign law is proved in the countries of the EU, see *Institut suisse de droit comparé*, "The Application of Foreign Law in Civil Matters in the EU Member States and Its Perspective for the Future: Synthesis Report with Recommendations," JLS/2009/JCIV/PR/005/E4 (Lausanne, 2011). Available at: op.europa.eu/en/publication-detail/-/publication/c92e8d95-ac55-4c9c-91b6-36a5a7564838/language-en.

5 Gaillard (n 1), at [23]–[39].

award in its seat will not be conclusive.[6] An award can nonetheless still be recognized and enforced, despite having been set aside in its seat. This outcome is explicable under the second (but not the first) theory because what ultimately matters (and what gives validity to an award) is not what has happened in the seat but whether the laws of other states will or will not permit recognition and enforcement.

A corollary of the second theory is that there is no necessity for the losing party (the respondent) to apply to set aside an award in the seat of arbitration. It is instead open to the respondent to sit tight and only contest recognition and enforcement of the award in states other than the seat.

The precursor to the New York Convention was the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.[7] Article 4(2) of the Geneva Convention required a claimant seeking to enforce an arbitral award in a state other than the seat to provide "[d]ocumentary or other evidence to prove that the award has become final, in the sense defined in Article 1(d), in the country in which it was made." Article 1(d) of the Geneva Convention stipulated that an award would not be enforceable elsewhere unless (among other matters) the award:

> has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending.

The two articles in conjunction gave rise to the "double *exequatur*" requirement under the Geneva Convention. By this requirement, it had to be shown that an award was valid in the seat of arbitration before an award could be recognized and enforced as valid in another state.

Article VII(2) of the New York Convention explicitly does away with the cumbersome double *exequatur* requirement. Instead, under the New York Convention, the respondent can adopt a "come and get me attitude." The respondent can refuse to take any part in arbitration proceedings in the seat and opt instead to contest an award when the claimant seeks to enforce it in the respondent's home state or in a jurisdiction in which the respondent has assets. This supports the thesis that it is the plurality of the laws of enforcing states, rather than the law of the seat, that validates an arbitral award.

But the second theory has its difficulties. For instance, there are widely discrepant practices among states on the implementation of the New York Convention within their territories. The second theory could thus easily lead to the situation where a state that gives an idiosyncratically wide interpretation to the New York Convention grounds in articles V(1) and V(2) for refusing recognition and enforcement can dictate whether an award is or is not recognized. By what principles is one able to say to such a state that its practices are not consonant with the exigencies of international commercial arbitration? Is there a universally accepted standard by which one can argue that the implementation of the New York Convention in a state is erroneous, because what should be regarded as valid awards

6 Articles V(1) and (2) of the New York Convention state that recognition and enforcement "may be refused" (not "shall be refused") if any of the grounds listed in Articles V(1)(a) to (e) or V(2)(a) or (b) are established. The court of an enforcing state thus retains a discretion to recognize and enforce a foreign arbitral award, even when the award has been set aside in its seat.

7 Available at www.trans-lex.org/511400/_/convention-on-the-execution-of-foreign-arbitral-awards-signed-at-geneva-on-the-twenty-sixth-day-of-september-nineteen-hundred-and-twenty-seven/.

are wrongly being refused recognition and enforcement in that state? It is this universal or transnational standard that the second theory does not offer.

It is worth examining how arbitrators who espouse the second theory might conduct an international commercial arbitration. The tribunal's purview will need to extend beyond the law of the seat and examine the laws of enforcing states on recognition and enforcement. The tribunal's duty would be to make all reasonable effort to produce an award that was enforceable in a relevant state. But how? Obviously, a tribunal cannot be expected to know the requirements for an enforceable award in every one of the 172 contracting states to the New York Convention. That would be extreme.

Fortunately, the major financial centres of the world (London, Paris, New York, Geneva, Hong Kong, Singapore, Seoul, and Tokyo) are arbitration-friendly. Their courts can be expected to be pro-enforcement, provided that widely accepted standards of due process are observed. Where an award is to be enforced in such jurisdictions, the tribunal should be able to conduct an arbitration in accordance with well-established standards of fairness. In contrast to the position under the first theory, the tribunal should not feel bound religiously to ascertain the court practices of the seat of arbitration. As long as it is fair, the tribunal can be more robust under the second theory if recognition and enforcement are to be in a well-known international financial centre.

Nonetheless, many jurisdictions (especially in Asia) may be less sophisticated. These jurisdictions may not yet have a well-developed jurisprudence as to what constitutes fair or unfair procedure. Judges there may lack experience in handling court cases involving the setting aside or the recognition and enforcement of awards. The courts in such jurisdictions may require evidence that formal procedures have been strictly observed, to be satisfied from their point of view that there has been due process. Such jurisdictions may place a high premium of procedural formality, over substantial fairness. They may have little experience in assessing whether the procedures adopted by a tribunal have been reasonable. They may regard any deviations from procedural rules, however trivial, as signs that a party's right to be heard or presenting its case have been curtailed.

It may therefore be incumbent on a tribunal espousing the second theory to inquire of the parties precisely where it is intended to enforce an award that may result from the arbitration. This must of course be done in a way that does not suggest that the tribunal has come to a conclusion favouring one or other party. If the arbitrators are told that their award is to be enforced in a jurisdiction with unfamiliar rules as to recognition and enforcement, the tribunal may wish to inquire of the parties what the requirements for recognition and enforcement in such places are. Then, in addition to observing generally accepted standards of fairness in terms of procedure, the tribunal may have to take account of any special requirements for recognition and enforcement in the jurisdictions identified. That may be a more practical way of proceeding than the impossible approach of tailoring one's award to meet the sum total of requirements for enforcement of all contracting states to the New York Convention.[8] To proceed in the latter extreme manner would lead to the worst of all possible words. One would follow the technicalities of court procedure in the seat, as well as real or imagined constraints on recognition and enforcement in other jurisdictions. The jurisdiction with the strictest procedural requirements will dictate what constitutes a

8 Care will need to be taken, in asking where an award is to be enforced, that the tribunal does not appear to favour one party over the other.

valid award. The tribunal will forever be worried about being seen as too robust in dealing with interlocutory applications from the vantage point of some obscure jurisdiction where enforcement may be conceivable. One will then be prone to due process paranoia with the danger that nothing is ever decided as the arbitration proceeds. There will instead be case management paralysis. Times will always be extended, and everything will be left to be determined at the end of the day once all the evidence that either party wishes to adduce has been submitted. This will be done because such a mode of proceedings will be perceived as the safest way of ensuring that each party has had a full opportunity to be heard. This cannot be a right way of conducting an arbitration.

2.3 Theory 3: Transnational Commercial Law as the Source of Validity

The third theory, the one favoured by Professor Gaillard, is that the validity of arbitral awards hinges on transnational legal principles or an independent arbitral juridical order. Thus, international commercial arbitration is "de-localized" in the sense of not being tied to the law of a seat or of an enforcing state. Instead, the regime of international commercial arbitration transcends the domestic law of any state. The enforceability of an award is governed and validated by international commercial law principles that exist independently from the laws of any given state. The consequence is that, even where an award has been set aside in its seat or is not enforceable within one or more contracting states to the New York Convention, the award can still be regarded as valid and enforceable in other states.[9]

The obvious question is how these transnational principles are to be identified. I do not think that there can be a comprehensive answer to this question. It may be possible to say, at a given point in time, that a principle is a transnational legal principle because it has been widely accepted by custom or by universal or near universal acceptance in the arbitral laws and practice of many states. But it will not be possible to draw up an exhaustive list of all principles that will be accepted by all stakeholders in the arbitration industry as applying to international commercial arbitration for all time. Thus, the "arbitral juridical order" posited by Professor Gaillard is a theoretical construct, akin to the *lex mercatoria* or law merchant, used to justify the notion that international commercial arbitration floats above all domestic legal systems without being tied to a particular body of domestic law.

Does that mean that the third theory should be rejected as overly metaphysical?

On the contrary, there is much to commend the theory. Support for the third theory may be found in the 2006 Model Law, which provides in article 2A that, in interpreting the Model Law, "regard is to be had to its international origin and to the need to promote uniformity in its application" and "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." The "general principles" on which the Model Law is based would be synonymous with the transnational commercial principles of the third theory.

A non-exhaustive list of transnational commercial principles as deduced from the Model Law would (I submit) include the following:[10]

9 Gaillard (n1), at [40]–[58].

10 The list of principles is taken from A Reyes, "Judicial Support of International Commercial Arbitration under the Model Law: A Précis of Available Options for Judges" in R Gulati, T John, and B Köhler eds, *The Elgar Companion to UNCITRAL* (Elgar, 2023), 101–103, 107.

(1) Lacunae in the Model Law may be filled by reference to (a) the Model Law's international origin, (b) the need to promote uniformity in the application of the Model Law globally, and (c) the general principles underlying the Model Law.[11]
(2) In an international commercial arbitration, the parties are under an obligation to act in good faith.[12]
(3) In matters of international commercial arbitration, a court should only intervene where allowed by the Model Law.[13]
(4) The arbitral tribunal and the court have concurrent jurisdiction in respect of interim measures.[14]
(5) An arbitral tribunal may rule on its own jurisdiction.[15]
(6) An arbitration clause is to be regarded as separate from the rest of a contract in the situation where a tribunal is ruling on its jurisdiction.[16]
(7) The parties are to be treated with equality.[17]
(8) A party is to be afforded a full or reasonable opportunity of presenting its case.[18]
(9) Except where the Model Law does not allow, the parties may agree on the procedure to be followed in an arbitration.[19]
(10) Subject to the Model Law and the principle of party autonomy, the arbitral tribunal may adopt the procedure that it considers appropriate.[20]
(11) The court should not review the merits of an award.[21]
(12) The test for an interim measure is (a) to assess whether the party seeking relief has an arguable case and (if so) (b) to balance the harm to that party of wrongly refusing interim relief against the harm to the other party of wrongly granting interim relief.[22]
(13) Subject to principle 14, an interim measure granted by an arbitral tribunal "shall be recognised as binding and … enforced upon application to the … court, irrespective of the country in which [the interim measure] was issued," and the court "shall not … undertake a review of the substance of the interim measure."[23]
(14) A court may refuse to recognise or enforce an interim measure on the limited grounds set out in ML article 17I.[24]

11 The principle of internationality: ML article 2A.
12 The principle of good faith: ML article 2A.
13 The principle of minimum interference: ML article 5.
14 The principle of concurrent jurisdiction in interim measures: ML article 9.
15 The principle of competence-competence: ML article 16(1), 1st sentence.
16 The principle of the separability of the arbitration agreement: ML article 16(2), 2nd sentence.
17 The principle of equality: ML article 18.
18 The principle of due process: ML article 18. On the equivalence between the expressions "full opportunity" and "reasonable opportunity" of presenting a case, see the Singapore Court of Appeal in *China Machine New Energy Corporation v Jaguar Energy Guatemala LLC and AEI Guatemala Jaguar Ltd* [2020] SGCA 12, 96–8.
19 The principle of party autonomy: ML article 19(1).
20 The principle of the tribunal's procedural discretion: ML article 19(2).
21 The principle of no *revision au fond* by the court: This is to be deduced from ML articles 34 and 36, which provide for the setting aside of awards or the refusal of recognition and enforcement on narrow grounds.
22 The principle of the balance of convenience in the grant of an interim measure: ML article 17A.
23 The principle of deference to the arbitral tribunal in respect of the grant of an interim measure: ML article 17H.
24 The grounds are similar (with some differences) to those for refusing recognition and enforcement of an arbitral award under ML articles 36(1)(a) and (b) and New York Convention articles V(1) and (2). The court may also refuse recognition or enforcement of an interim measure (1) where the requesting party has failed

Adherence to the notion of a transnational validating regime can liberate one's approach as arbitrator to international commercial arbitration. As far as due process paranoia is concerned, an arbitrator advocating the third theory would wish to ensure that an award conformed to transnational norms of fairness and due process, regardless of any idiosyncratic notions of fairness and due process followed in the seat of the arbitration or the jurisdiction where the award is to be enforced.

2.4 Conclusion

Each of the three theories has its pros and cons. It is not necessary to choose definitively once and for all from among the three theories. This chapter has merely argued that how an arbitrator conducts an international commercial arbitration will likely be dictated by the theory that the arbitrator consciously or unconsciously considers as giving validity to an award and making it enforceable. Given that tribunals will understandably "play safe" to produce an enforceable award, the theories will guide the extent to which arbitrators will feel free to be robust and deviate from court practice in the seat of arbitration and from the requirements for enforcement imposed by the most stringent states that are parties to the New York Convention.

The third theory will liberate arbitrators to go beyond state or national laws to discern the underlying principles that apply in all international commercial disputes. The more widely applied those transnational principles are, the more harmonized commercial practice will become. That may be a welcome outcome for cross-border businesses. But the problem is that many jurisdictions (and arbitrators) do not currently accept that arbitration can be validated in the way that Professor Gaillard has argued based on the third theory. There may therefore be difficulties in enforcing awards which are motivated by the third theory, in conservative jurisdictions, many of which may be found in Asia.

to provide security or (2) where the interim measure has expired. A court may further refuse recognition or enforcement of an interim measure which the court itself has no power to grant (ML article 17I(b)(i)).