Wolters Kluwer

德辅大律师事务所
DES VOEUX CHAMBERS

解决全球争端的艺术

引领国际商事仲裁

第一版

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5.030 新西兰：《1996年仲裁法》附表1第19条[11]，规定：

> "(1) 在不违反本附表规定的情况下，当事人可以自由约定仲裁庭在进行程序时应遵循的程序。
>
> (2) 未能达成协议的，仲裁庭可以根据本附表的规定，以其认为适当的方式进行仲裁。赋予仲裁庭的权力包括决定任何证据的可采性、相关性、实质性和重要性的权力。"

D. 机构仲裁或临时仲裁

5.031 从广义上讲，仲裁分为两类，即机构仲裁和临时仲裁。在机构仲裁中，仲裁机构被指定并管理仲裁程序。每个仲裁机构都有自己的一套规则，规定了仲裁的框架和进行。临时仲裁是指不由仲裁机构管理的仲裁。

5.032 在选择机构仲裁时，当事人同意采用特定仲裁机构的程序规则，并允许仲裁机构管理和监督根据仲裁协议启动的仲裁。

5.033 专业仲裁机构如国际商会国际仲裁院（ICC）、伦敦国际仲裁院（LCIA）、美国仲裁协会（AAA）、国际投资争端解决中心(ICSID)和世界知识产权组织(WIPO)，以及香港、新加坡、马来西亚、英国、法国、瑞士、德国、瑞典、澳大利亚、迪拜国际金融公司等区域和国家仲裁机构及中心名录，详见本章附录A。

5.034 制度规则之间存在差异，但总的来说，它们都制定了在其管理和监督下进行仲裁的程序框架，包括仲裁将如何开始，需要什么书状，如何指定仲裁庭，仲裁程序如何进行，在仲裁开庭之前交换什么信息，是否可以实施临时措施（根据某些规则，由紧急仲裁员实施），仲裁聆讯会如何进行，裁决的形式和如何评估费用等。

5.035 大多数领先或成熟的仲裁机构规则都采用了同样有利于当事人意思自治的做法：

11 http□//www.legislation.govt.nz/act/public/1996/0099/latest/DLM403277.html。

5.036 中国国际经济贸易仲裁委员会（CIETAC）：《CIETAC仲裁规则》第4条[12]，规定如下：

> "(二) 当事人约定将争议提交仲裁委员会仲裁的，视为同意按照本规则进行仲裁。
>
> (三) 当事人约定将争议提交仲裁委员会仲裁但对本规则有关内容进行变更或约定适用其他仲裁规则的，从其约定，但其约定无法实施或与仲裁程序适用法强制性规定相抵触者除外。当事人约定适用其他仲裁规则的，由仲裁委员会履行相应的管理职责。"

5.037 香港国际仲裁中心(HKIAC)[13]：2018年《香港国际仲裁中心机构仲裁规则》第1条规定如下：

> "1.2 当事人一旦同意按照第1.1款的规定仲裁，即视为接受仲裁由HKIAC管理。
>
> 1.3 本规则并不妨碍争议或仲裁协议的当事人只选择HKIAC为指定机构，或请求其提供某些管理服务，而不选择适用本规则。特此明确：本规则不适用于选择按照其他规则（包括HKIAC不时采纳的其他规则）仲裁的仲裁协议。"

5.038 新加坡国际仲裁中心(SIAC)：2016年《新加坡国际仲裁中心仲裁规则》第1.1条[14]规定："当事人同意将争议提交新加坡国际仲裁中心仲裁的，视为已同意按照本规则进行仲裁和管理。仲裁规则条款与仲裁适用法律的强制性规定相抵触的，从其规定。"

5.039 国际商会(ICC)国际仲裁院：《2021年国际商会仲裁规则》第6(1)条[15]规定："当事各方已同意根据《规则》进行仲裁，他们应被视

12 http□//www.cietac.org/index.php?m=Page&a=index&id=106&l=en。

13 https□//www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2018_hkiac_rules.pdf。

14 https□//www.siac.org.sg/our-rules/rules/siac-rules-2016。

15 https□//iccwbo.org/publication/arbitration-rules-and-mediation-rules/。

为已事实上在仲裁开始之日向规则提交了，除非他们已同意遵守其仲裁协议之日有效的规则。”

5.040 **伦敦国际仲裁院（LCIA）**：《2020年伦敦国际仲裁院仲裁规则》序言[16]规定：“凡以书面形式（无论是否签署）作出或证明有书面形式的任何协议或提交仲裁或委托仲裁的协议以任何方式规定根据伦敦国际仲裁院（LCIA, London Court of International Arbitration）、伦敦仲裁院（London Court of Arbitration）或伦敦法院（London Court）的规则进行仲裁的，或由伦敦国际仲裁院、伦敦仲裁院或伦敦法院进行仲裁的，应视为当事人均已书面同意，双方之间的仲裁应按照《伦敦国际仲裁院规则》或按照伦敦国际仲裁院其后采纳并于仲裁开始之前已经生效的修订过的规则进行，且《伦敦国际仲裁院规则》构成双方协议的一部分（统称“仲裁协议”）。”

5.041 **斯德哥尔摩商会仲裁院（SCC）**：《斯德哥尔摩商会仲裁院仲裁规则2023年》[17]规定：“根据任何提及SCC仲裁院或斯德哥尔摩商会仲裁院仲裁规则的仲裁协议，除非另有约定，否则各方应被视为已同意适用在仲裁开始之日或提交指定紧急仲裁员申请之日有效的下列规则或经修订的规则。”

5.042 《制度规则》可以通过使用适当的语言纳入当事人的仲裁协议。仲裁机构推荐示范仲裁条款供当事人采用。

5.043 例如，对于希望根据《香港国际仲裁中心机构仲裁规则》将其未来争议提交仲裁的当事人，香港国际仲裁中心（HKIAC）建议他们在合同中约定如下仲裁条款：

> “凡因本合同所引起的或与之相关的任何争议、纠纷、分歧或索赔，包括合同的存在、效力、解释、履行、违反或终止，或因本合同引起的或与之相关的任何非合同性争议，均应提交由香港国际仲裁中心管理的机构仲裁，并按照提交仲裁通知时有效的《香港国际仲裁中心机构仲裁规则》最终解决。
>
> * 本仲裁条款适用的法律为____（香港法）
>
> 仲裁地应为____（香港）
>
> ** 仲裁员人数为____名（一名或三名）。仲裁程序应按照（选择语言）来进行。
>
> * 仲裁条款的适用法在一般情况下管辖仲裁条款的存在、范围、效力、解释、履行、违反、终止及可执行性。其不得取代主合同的适用法律。
>
> ** 选择性条款，可约定也可不约定。”

16 https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx。

17 https://sccinstitute.com/our-services/rules/。

5.044 另一方面，在选择临时仲裁时，当事人将在没有任何仲裁机构介入的情况下进行自我管理；他们可以设计自己的一套启动仲裁所需的仲裁规则和一般进行仲裁所需的仲裁规则，采用规则例如《联合国国际贸易法委员会仲裁规则》，或在仲裁开始时将此事交由仲裁员酌情决定。

5.045 《联合国国际贸易法委员会仲裁规则》[18]提供一套全面的程序规则，当事人可以据此商定进行因商业关系而产生的仲裁程序。根据其第1条，当事人各方同意将他们之间因明确的法律关系（无论是否为合同）产生的争议提交仲裁，适用于《联合国国际贸易法委员会仲裁规则》，那么此类争议应根据《联合国国际贸易法委员会仲裁规则》，“但须经当事人同意进行此类修改”。

5.046 《联合国国际贸易法委员会仲裁规则》涵盖仲裁程序的所有方面，从提供示范仲裁条款[19]，制定有关仲裁员任命和仲裁程序进行

18 见《联合国国际贸易法委员会仲裁规则》，https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration。

19 《联合国国际贸易法委员会仲裁规则》合同中的示范仲裁条款如下：“任何争议、争执或请求，凡由于本合同而引起的或与之有关的，或由于本合同的违反、终止或无效而引起的或与之有关的，均应按照《联合国国际贸易法委员会仲裁规则》仲裁解决。

注：各方当事人应当考虑增列：

(a) 指定机构应为……[机构名称或人名]；

(b) 仲裁员人数应为……[一名或三名]；

(c) 仲裁地应为……[城市和国家]；

(d) 仲裁程序中使用的语言应为……。”

的程序规则，以制定与裁决的形式、效力和解释有关的规则。因此，它们适用于希望有一套规则来管理他们的仲裁而无需提交仲裁机构的当事人。

二、 仲裁员选择适用的实体法的权力

5.047 本章这一部分讨论的是管辖或适用于当事人潜在争议的法律或法律规则。此类法律或法律规则确定当事人的诉讼或抗辩理由、实质性案情和可用的补救措施（包括损害赔偿的类型和措施或量化），并解决他们的法律权利和义务，通常被描述或称为适用的、管辖的或实体的法律。

5.048 仲裁是一个完全协商一致的过程，当事人意思自治是其中的一个重要方面。国际商事仲裁的当事人可以自由选择管辖或适用其争议的实体法。他们可以选择任何国家法律或任何法律规则作为实体法。实体法不必是仲裁地的法律或与仲裁地的法律相关。当事人可能会选择与他们密切相关的国内法，或者选择一种法律体系，如果他们认为该法律体系是管辖他们的商业关系、交易和基础合同等的最合适或适当的体系。

5.049 仲裁庭的管辖权和权力本质上来自当事人的约定。一般而言，仲裁庭应根据强制性国家法律或法律规则或公共政策，使当事人对实体法的选择生效。这是国际公约所承认的。大多数已设立的仲裁机构的国家法律和规则也规定仲裁庭应适用当事人选择的法律或法律规则来规范其争议的实质内容。下文将对当事人依法律选择协议作出的实体法选择作进一步详述。

5.050 另一种情况是当事人未就管辖或适用于潜在争议的法律或法律规则达成一致。在某些案件中，仲裁地法（*lex arbitri*）或适用的机构规则采用了直接适用法（*voie directe* method），并赋予仲裁庭结合争议的实质与具体情况来确定合适的法律或法律规则的权力。在一些案件中，仲裁法或适用的机构规则采用了间接适用法（*voie indirecte* method），要求仲裁庭先确定适当的法律冲突规则，然后将该法律冲突规则用来确定实体法。下文将进一步详细讨论在当

事人没有任何法律选择协议的情况下仲裁庭在选择实体法方面的角色和方法。

A. 国际公约和贸法委示范法

5.051 《欧洲公约》第7条规定了适用法律，体现当事人意思自治原则。

5.052 第7条规定当事人可以通过协议自由决定仲裁员对争议的实质适用的法律。[20]仅在当事人未指明适用法律的情况下，仲裁员才应适用冲突规则下其认为适用的适当法律。在任何一种情况下，仲裁员都应考虑合同条款和贸易惯例。[21]

5.053 仲裁员应作为友好的调解人，即根据公平原则作出裁决，前提是当事人如此授意并且他们可以根据第7(2)条适用于仲裁的法律这样做。

5.054 《贸法委示范法》代表了公认的现代仲裁法国际立法标准，包括处理或确定管辖或适用于争议实质的法律规则的规定。根据其第28(1)条，仲裁庭应“根据当事人选择的适用于争议实质的法律规则”对争议作出裁决。除非另有说明，否则对特定国家的法律或法律制度的任何指定均应解释为直接指该国的实体法，而不是指其法律冲突规则。

5.055 当事人未指定的，仲裁庭应适用其认为适用的法律冲突规则确定的法律（见《贸法委示范法》第28(2)条）。

5.056 只有在当事人明确授权的情况下，仲裁庭才应公平公正地或作为友好调解人作出裁决（见《贸法委示范法》第28(3)条）。

20 因此，当事人可以自由选择管辖或适用于其争议实质的法律。他们可以选择国际或超国家规则：参见国际法协会(ILA)于1992年通过的决议，该决议规定：“国际仲裁员根据跨国规则（一般法律原则、共同法律原则、国际法、贸易惯例等……）而不是特定国家的法律作出裁决的这一事实本身不应影响裁决的有效性或可执行性……当双方同意仲裁员适用跨国法律规则时。”

21 见Dominique T. Hascher《1961年欧洲国际商事仲裁公约》一书的评论。在FN第68号中，指出符合当今仲裁实践的对欧洲公约的渐进式解释应允许仲裁员适用商事法（*lex mercatoria*）和国际法原则以及UNIDROIT国际商事合同原则（国际商会第8817号仲裁），https□//www.arbitration-icca.org/media/4/49305067580462/media113534204360520hascher_commentary_on__the_european_convention_1961.pdf。

5.057 对于所有仲裁案件，仲裁庭均应根据合同条款作出裁决，并应考虑适用于该交易的行业惯例（见《贸法委示范法》第28(4)条）。

5.058 《贸法委示范法》第28条具有以下重要意义。[22]首先，第28(1)条赋予当事人选择适用实体法的自由。仲裁庭应根据当事人选择的法律规则对争议作出裁决；仅当事各方未指定时，仲裁庭应适用其认为适用的法律冲突规则所确定的法律。

5.059 其次，《贸法委示范法》第28(1)条通过由当事人选择“法律规则”而不是“法律”来适用于争议的实质，扩大了当事人可选择的范围。因此，各方当事人可能就国际仲裁地制定的法律规则达成一致，即使这些规则尚未纳入任何国家法律体系。他们还可以选择管辖仲裁的实体法，而无需参考任何缔约国的任何国内法。

5.060 第三，各方当事人还可以授权仲裁庭以公平和善意的方式或作为友好调解人裁决争议，即，根据仲裁庭认为公正的原则，而不必援引任何特定的法律体系（见《贸法委示范法》第28(3)条）。但如果当事人希望仲裁庭这样做，他们必须在仲裁协议中作出澄清，并明确授权仲裁庭。

5.061 《关于解决各国和其它国家国民之间投资争端的公约》（“ICSID公约”）由国际复兴开发银行（“世界银行”）执行董事制定。[23]据此，国际投资争端解决中心(ICSID)成立。

5.062 ICSID根据《ICSID公约》的规定为缔约国和其他缔约国国民之间的投资争端提供调解和仲裁设施，并由ICSID行政委员会通过的条例和规则作为补充（“ICSID条例和规则”）。

22 参见贸易法委员会秘书处关于2006年修订的1985年国际商事仲裁示范法的解释性说明，https□//www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf。

23 《ICSID公约》于1965年3月18日提交世界银行成员国政府审议，并于1966年10月14日生效。参见世界银行集团国际投资争端解决中心(ICSID)，https□//icsid.worldbank.org。

5.063 《ICSID公约》没有提供适用于当事人之间关系的实体法律规则。但《ICSID公约》第42条规定了仲裁庭为特定争议选择适当法律规则的机制。[24]

5.064 《ICSID公约》第42(1)条规定，仲裁庭应“根据当事人可能同意的法律规则”裁决争端。如果没有此类协议，仲裁庭应适用争端缔约国的法律，包括其关于法律冲突的规则，以及可能适用的国际法规则。

5.065 根据《ICSID公约》第42(2)条，仲裁庭不得以法律的沉默或晦涩为由作出不合法（*non liquet*）的裁定。

5.066 《ICSID公约》第42(1)条和第42(2)条不应损害仲裁庭在双方同意的情况下依公平和善意（*ex aequo et bono*）裁决争议的权力。

5.067 《ICSID公约》第42条授予当事人意思自治原则。当事人可以自由选择实体法，正如第42(1)条第一句所明确的那样。仲裁庭应核实当事人是否选择了任何法律或法律规则作为实体法。根据第42(1)条第二句，只有当事双方未作出选择时，仲裁庭才适用缔约国的法律和国际法。

5.068 如果当事人已就适用的实体法达成一致，只有在实体法未对法律问题提供解答的情况下，仲裁庭才应诉诸《ICSID公约》第42(1)条第二句。仲裁庭必须首先用尽所有可能来填补此类法律的任何漏洞。[25]

24 见联合国贸易和发展会议，争端解决，国际投资争端解决中心，适用法律2.6(UNCTAD/EDM/Misc.232/Add.5)，https□//unctad.org/en/Docs/edmmisc232add5_en.pdf。

25 然而，这并不等同于根据《ICSID公约》第42(3)条适用公平原则。仲裁庭仅在当事人同意的情况下才以公平和善意的方式裁决争端。参见联合国贸易和发展会议，争端解决，国际投资争端解决中心，适用法律2.6(UNCTAD/EDM/Misc.232/Add.5)，适用法律协议、缩小差距、填补空白和应用公平之间的差异，第27页。

5.069 《ICSID公约》第42(1)条提到的是当事人可能同意的“法律规则”，而不是法律体系。这不妨碍当事人参照各种法律体系，或使协议的不同部分适用不同的法律体系。[26]

B. 国内法律

5.070 大多数国家法律承认当事人意思自治原则，并规定仲裁庭应适用当事人选择的实体法来管辖其争议实质。

5.071 至于仲裁庭在当事人未就适用的实体法达成一致的情况下应如何处理，各国国内法不尽相同，有的规定授权仲裁庭直接选择适当的法律作为实体法（即*voie directe* method，采用了直接适用法），有的要求仲裁庭先确定适当的法律冲突规则以适用于确定实体法（即*voie indirecte* method，采用了间接适用法）。

5.072 本章附录B[27]列出了不同国家法律中适用的法律规定，以供读者快速参考。举例来说，以下司法管辖区的仲裁法规定如下。

5.073 **香港**：《贸法委示范法》第28条通过《仲裁条例》（第609章）第64条在香港适用。

5.074 仲裁庭应“根据当事人选择的适用于争议实质的法律规则”对争议作出裁决。除非另有说明，指定适用某一国家的法律或法律制度应认为是直接指该国的实体法而不是其法律冲突规范（见第28(1)条）。

5.075 当事人没有指定任何适用法律的，仲裁庭应当适用其认为适用的法律冲突规范所确定的法律（见第28(2)条）。

5.076 仲裁庭只有在各方当事人明示授权的情况下，才应当依照公平和善意原则或作为友好仲裁员作出裁决（见第28(3)条）。

26 见第8页，联合国贸易和发展会议国际投资争端解决中心“争端解决“（2.6法律规则适用法）(UNCTAD/EDM/Misc. 232/Add. 5)。

27 见国家仲裁法，国际商事仲裁委员会（ICCA），https://www.arbitration-icca.org/related-links.html，和《纽约公约》，http://www.newyorkconvention.org/countries/national+law。

5.077 在任何情况下，仲裁庭都应当按照合同条款并考虑到适用于该项交易的贸易惯例作出裁决（见第28(4)条）。

5.078 **新加坡**：《国际仲裁法》（第143A章）规定，如果仲裁协议的各方【无论协议是在2001年11月1日之前或之后达成，即2001年国际仲裁（修正案）法（第38/2001号法案）的生效日期】明确同意(a)《贸法委示范法》或上述法案的第二部分不适用于仲裁，或者(b)《仲裁法》（第10章）或被废除的《仲裁法》（第10章，1985年版）适用于仲裁，那么《贸法委示范法》和该法案的第二部分均不适用于该仲裁，但《仲裁法》或被废除的《仲裁法》（如果适用）应适用于该仲裁（见第15(1)(b)和(c)条）。

5.079 **马来西亚**：根据2005年《仲裁法》，关于国际仲裁[28]，仲裁庭应“根据双方商定的适用于争议实质的法律”对争议作出裁决（见第30(2)条）。

5.081 除非另有说明，否则当事人对特定国家法律的任何指定均应解释为直接提及该国家的实体法，而不是其法律冲突规则（见《仲裁法》第30(3)条）。

5.081 如果当事人之间没有任何协议，仲裁庭应适用法律冲突规则确定的法律（见《仲裁法》第30(4)条）。

5.082 对于所有仲裁案件，仲裁庭均应根据协议条款作出裁决，并应考虑适用于该交易的行业惯例（见《仲裁法》第30(5)条）。

5.083 **英国**：1996年《仲裁法》规定仲裁庭应就争议作出裁决(a)“根据当事人选择的适用于争议实质的法律”；或(b)如果当事人同意，根据他们同意或仲裁庭确定的其他考虑（见第46(1)条）。

5.084 为此，一国法律的选择应理解为指的是该国的实体法，而不是其法律冲突规则（见《仲裁法》第46(2)条）。

28 国内仲裁受第30(1)条管辖：除非当事人另有约定，对于仲裁地为马来西亚的国内仲裁，仲裁庭应根据马来西亚实体法对争议作出裁决。

5.085 如果或在没有此类选择或协议的情况下，仲裁庭应适用其认为适用的法律冲突规则确定的法律（见《仲裁法》第46(3)条）。

5.086 **法国**：《民事诉讼法》第1511条规定，仲裁庭应“根据当事人选择的法律规则”作出裁决，或在未作出此类选择的情况下，根据其认为适当的法律规则对争议作出裁决。在任何一种情况下，仲裁庭都应考虑贸易惯例。

5.087 如果当事人授权，仲裁庭应作为友好调解人作出裁决（见《民事诉讼法》第1512条）。

5.088 **瑞士**：瑞士国际仲裁法载于1987年《国际私法》第12章。

5.089 仲裁庭应“根据当事人选择的法律规则”进行裁决，如果当事人没有选择，则根据与案件有密切联系的法律规则进行裁决（参见《国际私法》第187(1)条）。

5.090 当事人可以授权仲裁庭按照公平和善意的原则作出裁决（参见《国际私法》第187(2)条）。

5.091 **德国**：根据《民事诉讼法典》第十卷[29]，仲裁庭应“根据当事人指定适用于法律争议内容的法律规定”对争议作出裁决。除非另有说明，否则对特定国家的法律或法律制度的任何指定均应解释为直接指该国的实体法，而不是指其法律冲突规则（见第1051(1)条）。

5.092 当事人未指定的，仲裁庭应适用与程序标的最密切相关的国家的法律（见第1051(2)条）。

5.093 仲裁庭只有在当事人明确授权的情况下，才能按照公平和善意的原则或友好调解人的身份作出裁决。当事人可以在仲裁庭作出裁决之前授权仲裁庭（见第1051(3)条）。

5.094 对于所有仲裁案件，仲裁庭均应根据合同条款作出裁决，并应考虑适用于该交易的行业惯例（见第1051(4)条）。

29 《仲裁程序》第1025至1066条。

5.095 **瑞典**：2019年《瑞典仲裁法》[30]规定争议应“适用当事人约定的法律或规则”来解决。除非当事人另有约定，凡提及某国法律的适用，应视为包括该国的实体法，而不是其国际私法规则。如果双方未能达成协议，仲裁员应确定适用的法律。只有当事人授权他们这样做时，仲裁员才可以基于公平和善意的考虑作出裁决（见第27a条）。

5.096 **澳大利亚**：1974年《国际仲裁法》[31]赋予示范法在澳大利亚的法律效力（见第16条）。

5.097 **迪拜国际金融中心(DIFC)**[32]：根据《仲裁法》[33]，仲裁庭应“根据当事人选择的适用于争议实质的法律规则”对争议作出裁决。除非另有说明，否则对特定国家或司法管辖区的法律或法律制度的任何指定均应解释为直接提及该国家或司法管辖区的实体法，而不是其法律冲突规则（见第35(1)条）。

5.098 如果当事人没有指定，仲裁庭应适用其认为适用的法律冲突规则确定的法律，如果当事人书面同意仲裁庭可以适用其认为最适合争议事实和情况的法律或法律规则（见第35(2)条）。

5.099 对于所有仲裁案件，只有在当事人明确授权的情况下，仲裁庭才应根据公平和善意原则作出裁决（见《仲裁法》第35(3)条）。

5.100 对于所有仲裁案件，仲裁庭均应根据合同条款和适用法律作出裁决，并应考虑适用于交易的行业惯例（见《仲裁法》第35(4)条）。

30 SFS1999：116，2019年3月1日生效。

31 1974年第136号法案（经修订并于2018年10月26日生效）。

32 迪拜国际金融中心(DIFC)是根据阿拉伯联合酋长国(UAE)2004年第35号联邦法令成立的，作为迪拜实现经济资源多元化和吸引该地区资本和投资的战略愿景的一部分。迪拜国际金融中心是2004年第8号联邦法律定义的金融自由区。作为阿联酋境内的独立司法管辖区，DIFC有权为所有民事和商业事务创建自己的法律和监管框架。争议解决机构是在DIFC设立的三个独立机构之一，旨在促进和支持该中心企业的成长和发展。https□//www.difc.ae/business/laws-regulations/。

33 迪拜国际金融中心(DIFC)2008年第1号法律（合并版，2013年12月；经DIFC法律修正案修订，DIFC2013年第1号法律），https□//www.difc.ae/files/9614/5448/9173/Arbitration_Law_DIFC_Law_No_1_of_2008.pdf。

5.101 **非洲商业法协调组织(OHADA)**[34]：截至今天，它有17个成员国，即贝宁、布基纳法索、喀麦隆、中非共和国、科特迪瓦、刚果、科摩罗、加蓬、几内亚、几内亚比绍、赤道几内亚、马里、尼日尔、刚果民主共和国（刚果民主共和国）、塞内加尔、乍得和多哥。

5.102 新的《仲裁法统一法》[35]构成了所有OHADA成员国的普通仲裁法。

5.103 据此，仲裁员应适用“当事人指定适用于争议实质的法律”，如未能指定，仲裁员应在适用的情况下适用被认为最合适的法律，同时考虑适用于该交易的国际贸易惯例和惯例。他们还应在当事人授予他们此类权力的情况下以友好调解人做出裁决（见第15条）。

C. 《联合国国际贸易法委员会仲裁规则》和机构规则

5.104 《联合国国际贸易法委员会仲裁规则》和世界上几乎所有已成立的仲裁机构的规则都承认当事人对实体法约定的效力。没有约定的，仲裁庭可以直接确定实体法，也可以适用冲突法规则确定实体法。

5.105 《联合国国际贸易法委员会仲裁规则》第35(1)条规定，仲裁庭应适用“当事人指定适用于争议实质的”法律规则。当事人未指定的，仲裁庭应适用其认为适当的法律。

5.106 只有在当事人明确授权的情况下，仲裁庭才应以友好调解人或公平公正的方式作出裁决（见第35(2)条）。

5.107 对于所有仲裁案件，仲裁庭应根据合同条款（如有）作出裁决，并应考虑适用于交易的任何贸易惯例（见第35(3)条）。

34 https□//www.ohada.org/index.php/en/aua-droit-de-l-arbitrage-en/aua-presentation-et-innovations-en。

35 于2017年11月23日通过，取代1999年3月11日的初始文本，http□//www.ohada.com/content/newsletters/3247/jo-ohada-se-nov2016-official-translation.pdf。

5.108 世界不同地区的仲裁机构详见本章附录A。[36]大多数主要或已建立的国际或区域仲裁机构的规则包含适用的法律规定（见本章附录C）。举例说明如下：

5.109 **中国国际经济贸易仲裁委员会（CIETAC）**：根据《CIETAC仲裁规则》，仲裁庭应当根据事实和合同约定，依照法律规定，参考国际惯例，公平合理、独立公正地作出裁决（见第49(1)条）。

5.110 当事人对于案件实体适用法有约定的，从其约定。当事人没有约定或其约定与法律强制性规定相抵触的，由仲裁庭决定案件实体的法律适用（见第49(2)条）。

5.111 **香港国际仲裁中心（HKIAC）**：根据2018年《HKIAC机构仲裁规则》，仲裁庭应根据当事人约定的法律规则裁决实体争议。除非另有说明，指定某一司法辖区的法律或法律体系，应理解为直接指此司法辖区的实体法律，而不包括其冲突法规则。若当事人未指定，仲裁庭应适用其认为适当的法律规则（见其第36.1条）。

5.112 只有在各方当事人明确授权时，仲裁庭才能以友好公断人身份或依公允善良原则裁决争议（见第36.2条）。

5.113 在任何情况下，仲裁庭均应按相关合同条款裁决争议，并可考虑交易所适用的商业惯例（见第36.3条）。

5.114 **新加坡国际仲裁中心(SIAC)**：2016年《SIAC规则》规定，仲裁庭应适用当事人指定的法律或法规，作为争议实体的准据法。当事人未指定的，仲裁庭应适用其认为适当的法律或法规（见第31.1条）。

5.115 只有在当事人明确授权仲裁庭的情况下，仲裁庭才可以作为友好公断人或依公允善意的原则作出裁决（见第31.2条）。

5.116 对于所有仲裁案件，仲裁庭应当依据合同条款（如有规定）作出裁决，并应当考虑任何适用的商业惯例（见第31.3条）。

36 见国家仲裁和ADR机构，国际商事仲裁委员会(ICCA)，https□//www.arbitration-icca.org/related-links.html。

5.117 **国际商会国际仲裁院（ICC）**：根据2021年《ICC仲裁规则》，当事人应自由“商定仲裁庭对争议实质适用的法律规则”。如果没有任何此类协议，仲裁庭应适用其认为适当的法律规则（见第21(1)条）。

5.118 仲裁庭应考虑双方之间的合同条款（若有）和任何相关贸易惯例（见第21(2)条）。

5.119 仅当双方同意赋予其此类权力时，仲裁庭应行使和蔼可亲的调解人的权力或按照公平和善意的原则作出裁决（见第21(3)条）。

5.120 **伦敦国际仲裁院（LCIA）**：根据1020年《LCIA仲裁规则》，仲裁庭应“根据当事人选择的适用于其争议实体的法律或法律规则”裁决当事人的争议。如果仲裁庭裁定当事人未做出此类选择，仲裁庭应适用其认为适当的法律或法律规则（见第22.3条）。

5.121 根据2020年《LCIA仲裁规则》第22.4条，仅当双方书面同意时，仲裁庭应当依“公允善意”（*ex aequo et bono*）、“友好调解人”（amiable composition）或“诚实约定”（honourable engagement）原则解决争议实质。

5.122 **斯德哥尔摩商会**：2023年《SCC仲裁规则》第27(1)条规定，仲裁庭应“根据当事人商定的法律或法律规则”决定争议的实质。如果没有此类约定，仲裁庭应适用其认为最合适的法律或法律规则。

5.123 2023年《SCC仲裁规则》第27(2)条进一步规定，指定州的法律当事人作出的任何指定应被视为指的是该州的实体法，而不是其法律冲突规则。

5.124 根据2023年《SCC仲裁规则》第27(3)条，仲裁庭只有在当事人明确授权的情况下，才能按照公允和善意的原则或以友好调解人的身份作出裁决。

三、根据法律选择协议选择法律以管辖当事人争议实质

5.125 仲裁的主要特征之一是当事人意思自治。当事人可以自由选择协商一致和保密的程序来解决他们的争议，这通常被认为是仲裁作为替代争议解决机制的最具吸引力的特征。

5.126 这种自治的一个方面是当事人可以自由选择管辖其争议实质的法律体系，并期望这种法律选择在仲裁中得到尊重和支持。在合同纠纷中，此类法律通常被称为合同的实体法（substantive law）、适用法（applicable law）或准据法（governing law）。该法律体系规管合同的解释、当事人的权利和义务、履行方式以及违约后果。[37]

5.127 这通常是通过引发争议的基础合同中的法律选择条款来实现的。仲裁庭有义务使当事人有效选择的法律生效，以管辖争议的实质。

5.128 该法律将管辖当事人合同的存在、有效性和解释，履行方式和违约后果，以及当事人的权利、义务和补救措施等。几乎所有的仲裁规则和法律都允许当事人以很少的条件选择管辖争议实质的法律。[38]

5.129 法律选择条款的存在增强了当事人合同义务的解释和执行的可预测性。

5.130 仲裁庭必须决定的第一个问题是法律选择协议是否可以强制执行，如果可以，有什么例外。第二个问题是法律选择条款的内容以及如何解释。

A. 选择法律协议的可执行性

5.131 由于广泛承认当事人可以自由选择适用于其争议的实体法，因此法律选择协议具有推定效力，正如许多国际公约的明文规定所反映的那样，这些公约承认当事人可以通过协议自由确定适用于其争议的法律。

37 《Redfern和Hunter论国际仲裁》（第6版），2015年，第3.92段。
38 《香港仲裁：实用指南》（第4版），2017年，第6.005段。

5.132 例如，《贸法委示范法》第28(1)条规定，仲裁庭应根据当事人选择的适用于争议实质的法律规则对争议作出裁决。《欧洲公约》第7(1)条具有类似的效果。大多数国家的仲裁立法，例如法国、瑞士和英国的仲裁立法几乎相同（见本章附录B）。当事人选择管辖其争议的实体法的自主权在当代主要的机构仲裁规则中也得到承认，如《联合国国际贸易法委员会仲裁规则》、《国际商会规则》和《香港国际仲裁中心规则》（见本章附录C）。

5.133 人们普遍认为，可分离性原则适用于法律选择协议，类似于仲裁和管辖权协议。因此，法律选择协议的可执行性并不仅仅因为可能存在法律选择条款的基础合同无效而受到影响。

5.134 在符合诚信、合法性和没有公共政策异议等条件的前提下，大多数国际仲裁公约和机构规则允许当事人自行选择适用于争议的法律。[39]

5.135 尽管法律选择协议被推定为有效，仲裁庭仍然需要选择适当的法律来确定法律选择协议的有效性和可执行性。一些国家法规在当地仲裁中提供了直接适用的法律冲突规则，而另一些则没有。在当事人没有相反约定的情况下，更为广泛接受的观点是，仲裁地冲突规则可以适用于确定法律选择协议的有效性。

5.136 如果法律选择条款还选择了适用于该条款有效性的法律，即使法律选择协议的存在或有效性受到质疑，这一推定适用的法律通常被视为确定有效性问题的正确法律。[40]

5.137 法律选择协议的有效性可能会受到依赖合同法抗辩的挑战，例如虚假陈述、胁迫、不合理和错误等索赔。也可能存在法律选择协议不够明确的情况，例如当事人选择的法律有缺陷或自相矛盾。

B. 默示选择法律协议

5.138 大多数国家法律通常没有法律选择协议的一般形式要求。因此，它可以是书面的、口头的或通过行为证明的。仲裁庭通常寻求确

39 《Redfern和Hunter论国际仲裁》（第6版），2015年，第3.107段。
40 Gary B Born所著《国际商事仲裁》（第2版），2014年，第2686至2687页。

定和探明当事人的意图，如作为仲裁协议一部分的基础合同中明确的独立法律选择条款，或其他文件中例如审理范围书或者仲裁中当事人的书面陈述。

5.139 当事人对法律的选择也可能是默示的或默认的。这在大多数法律体系中得到认可，并在国际仲裁中得到广泛接受。例如，《罗马规则》第3(1)条规定，当事人的法律选择协议必须明示或清楚地在合同条款或案件情况中体现出来。

5.140 基础合同是否为已知受特定法律体系管辖的标准格式合同，以及双方是否有过根据明确选择法律的合同进行交易的过程，也是仲裁庭可能考虑的相关考虑因素。[41]在某些特定案件下，当事人对仲裁地的选择，以及交易性质、合同语言和仲裁程序适用法律等其他事实，可以支持默示选择所在地的实体法来管辖当事人的合同。[42]但是，当事人对仲裁地的选择不应等同于默示的法律选择协议。

C. 当事人选择法律的时间

5.141 大多数法律选择协议是在双方签订基础合同时签订的。但是，有效的择法协议可以在合同订立后，甚至在争议发生后或提起仲裁后订立。当事人选择争议适用法律一般没有时间的限制。

D. 法律选择协议的解释

5.142 通常，法律选择协议（如果明示）包含在独立于仲裁或法院选择条款的条款中。这可以避免混淆法律选择是否也是或仅旨在为仲裁指定程序法而不是当事人的合同。

5.143 法律选择协议通常被解释为不涉及程序问题，例如举证责任、诉状要求等。这些问题通常被认为受当事人合同地的民事诉讼规则的约束。

41 同上，第2731页。
42 同上，第2733页。

Des Voeux Chambers

The Art of Resolving Global Disputes

Navigating International Commercial Arbitration

Editors-in-Chief

Dr. William M.F. Wong SC

Look Chan Ho

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and to Anthony Neoh SC for providing the foreword. Their contributions have been invaluable in making this book a reality.

William Wong SC
Look Chan Ho
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difficult to satisfied. It will be satisfied if, cumulatively, the evidence is cogent and arguable, and not dubious or fanciful.[8] Unless the point is clear, the court should not resolve the issue and the matter should be stayed in favour of arbitration. It is for the arbitral tribunal to rule on its own jurisdiction pursuant to Art 16 of the *Model Law*.[9]

B. A Binding Arbitration Agreement or Clause

4.006 Option I of Art 7 of the *Model Law*, enshrined in s 19 of the *Arbitration Ordinance*, provides for the definition of an arbitration agreement. "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. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement.[10] The arbitration agreement also has to be in writing. As to what constitutes "in writing", Art 7(3) to (6) of the *Model Law* and s 19(2) to (3) of the *Arbitration Ordinance* (Cap 609) provide for a wide-ranging scenarios. The inclusion of all these scenarios as provided thereunder is to broaden the meaning of a "written" arbitration agreement. Again, this is consistent with the "pro-arbitration" approach as well as to cope with the evolving commercial needs.

4.007 The arbitration agreement is a distinct and separable agreement from the underlying or principal contract.[11] The validity or existence or effectiveness of the arbitration agreement is not affected by the invalidity of the underlying or principal contract, for example when the same is voidable for misrepresentation or discharged by breach

8 *Pacific Crown Engineering Ltd v. Hyundai Engineering & Construction Co Ltd* [2003] HKCFI 924, §16. See also: *PCCW Global Ltd v. Interactive Communications Service Ltd* [2006] HKCA 434, §§50-51.

9 See also: *Neo Intelligence Holdings Ltd v. Giant Crown Industries Ltd & Ors* [2017] HKCFI 2088, §10.

10 Section 19 of the *Arbitration Ordinance* (Cap 609).

11 *Lesotho Highlands v. Impreglio SpA* [2005] 3 WLR 129, §21.

or void for illegality.[12] However, where there was no contract in existence in the first place, it would necessarily follow that there was never any agreement to arbitrate. In *Cathay Pacific Airways Ltd v. Hong Kong Air Cargo Terminals Ltd*[13], it was held that there was no meeting of minds as there had only been an offer and a counter-offer but no acceptance and thus no contract. Despite the fact that each offer contained an arbitration clause, the parties could not be bound by these terms when they were free to walk away from the negotiating table.

4.008 This is a matter of contractual interpretation which is inevitably fact sensitive although the courts are likely to lean in favour of deferring to the arbitral tribunal if possible. A question arose in *Tommy CP Sze & Co v. Li & Fung (Trading) Ltd & Ors*[14] as to whether the arbitration clause only provided for an option to have their disputes or differences resolved by arbitration. If it merely provided for such an option as opposed to compelling the parties to arbitration, the requirement for a binding arbitration agreement would not be satisfied. On the facts, it was held that the clause was clearly an arbitration agreement and nothing in the clause mentioned an option as such.[15] More recently, it has been held that a valid arbitration agreement can be expressed in permissive terms, as by use of "may" in the arbitration clause.[16]

4.009 In *Tai-ao Aluminum (Taishan) Co Ltd v. Maze Aluminum Engineering Co*[17], the clauses in question read "合約未盡事宜按《中華人民共和國合同法》之規定執行" ("clause 1"); and "本合約的仲裁權屬賣

12 *Cathay Pacific Airways Ltd v. Hong Kong Air Cargo Terminals Ltd* [2002] HKCFI 9, §26.

13 *Ibid.*

14 *Supra* note 6, §§29-34.

15 *Ibid.*

16 *Polytec Overseas Ltd & Anor v. Grand Dragon International Holdings Co Ltd* [2017] HKCFI 604, §45; following *Hermes One v. Everbread Holdings Ltd & Ors* [2016] 1 WLR 4098 (UK Privy Council, appeal from Eastern Caribbean Supreme Court), §§33-36.

17 *Tai-Ao Aluminium (Taishan) Co Ltd v. Maze Aluminium Engineering Co Ltd & Anor* [2006] HKCFI 220.

方所在地方法院" ("clause 2"). The Hong Kong Court dismissed an application for stay in favour of arbitration on the ground that Clause 2 was so uncertain and one could not tell whether it required the parties to settle their difference by private arbitration in the Taishan courts (which could not be done), or arbitration at certain arbitration institute in Taishan or litigation in the Taishan courts.[18] However, in *William Co v. Chu Kong Agency Ltd*[19], a dispute resolution clause which provided for litigation or arbitration in the PRC was held not to be void for uncertainty. On the assumption that the choice to arbitrate was made by the defendant validly, i.e., by applying for stay, this created a binding choice on the plaintiff who had chosen to litigate in Hong Kong which was not an agreed choice or method of dispute resolution.

4.010 On the other hand, it has been held that an exclusive jurisdiction clause which compelled the parties to submit to the exclusive jurisdiction of local courts was not inconsistent with the arbitration clause in the same agreement.[20] The courts have construed and harmonized these two co-existing clauses by giving effect to the arbitration clause while the exclusive jurisdiction clause merely provides that the local courts are the supervisory courts over the arbitration.[21]

4.011 In principle, it is not a requirement that an arbitration agreement must exist in the same underlying or principal contract. In such a situation, whether the court will stay the court proceedings in favour of arbitration will depend on whether there is reference to the arbitration agreement in the contract which does not contain the arbitration

18 *Ibid*, §§8-10.
19 *William Co v. Chu Kong Agency Co Ltd & Anor* [1993] HKCFI 215.
20 *Neo Intelligence Holdings Ltd v. Giant Crown Industries Ltd & Ors* [2017] HKCFI 2088, §19.
21 *Paul Smith Ltd v. H & S International Holdings Inc.* [1991] 2 Lloyd's Rep. 127; *Axa Re v. Ace Global Markets* [2006] Lloyd's Rep. 683; *Lee Cheong Construction & Building Materials Ltd v. The Incorporated Owners of the Arcadia* [2012] HKCFI 473; *Bluegold Investment Holdings Ltd v. Kwan Chun Fun Calvin* [2016] HKCFI 415; *PCCW Global Ltd v. Interactive Communications Service Ltd* [2006] HKCA 434.

agreement.[22] This is again a matter of contractual construction. However, mere reference to the contract with an arbitration agreement is not sufficient reference to make the terms of that contract (and in particular the arbitration agreement) part of the other contract which does not contain an arbitration agreement.[23]

4.012 Where there are two agreements and the first agreement has an arbitration agreement or clause whilst the second agreement – being either a settlement agreement or supplemental agreement – is silent on how disputes are to be resolved, the courts will generally give effect to the arbitration clause in the first agreement and construe a dispute arising under the second agreement as also arising under the first agreement. It is immaterial whether or not new or third parties who are not privy to the first agreements are involved in the second agreement.[24] The determining factor appears to be whether the agreement which contains no arbitration clause can be clearly said to be a stand-alone agreement or one which has superseded or cancelled the first one or they should be read as a composite agreement.[25]

C. Null and Void, Inoperative or Incapable of Being Performed

4.013 The applicant for a stay has the burden to prove the existence of the arbitration agreement. Once a *prima facie* case of existence is demonstrated, the respondent to a stay application has the onus to prove that the arbitration agreement is in fact null and void, inoperative

22 Article 7(6) of the *Model Law*.
23 *Polytec Overseas Ltd & Anor v. Grand Dragon International Holdings Co Ltd* [2017] HKCFI 604, §58.
24 *New Sound Industries Ltd v. Meliga (HK) Ltd* [2005] HKCA 7; *Polytec Overseas Ltd & Anor v. Grand Dragon International Holdings Co Ltd* [2017] HKCFI 604, §58.
25 *Ibid*. See also: *Xu Yi Hong .v Chen Ming Han & Ors* [2006] HKCFI 1136, §§18-19 & 29, 31 & 34. *Cf. Hannice Industries Ltd v. Elite Union (Hong Kong) Ltd & Anor* [2012] HKCFI 413, §11; *Link Wide International Investment (Hong Kong) Ltd v. Devi Trading Co Ltd* [2010] HKDC 299; *Sunglow Supplies & Engineering Ltd v. Shing Hing Construction Co Ltd* [2014] HKDC 58, §40.

or incapable of being performed.[26] Again, the Court will usually take a generous approach to support the parties in their intention where possible.

4.014 An arbitration clause may be null and void because the parties had not agreed to it or that it otherwise falls foul of the requirements under s 19 of the *Arbitration Ordinance* (Cap 609). It may also be void for uncertainty. Other examples also included where there is an initial supervening illegality directing to the arbitration clause itself.[27] An arbitration clause is however not void for uncertainty simply because a non-existent arbitration institution was named.[28]

4.015 The Court may find an arbitration clause inoperative where a matter does not fall within the scope of the clause.[29] A party may also be estopped from seeking a stay of proceedings where he refused to proceed with arbitration or has otherwise made an election to abandon such right. This is of course fact sensitive. In *Polytech Overseas Ltd & Anor v. Grand Dragon International Holdings Co Ltd*,[30] it was held that the conduct on the part of the applicants, namely, by commencing civil proceedings in the High People's Court of Hunan Province in the PRC was not sufficiently unequivocal to be estopped from having the claim to be arbitrated. It was unclear whether the Hunan Proceedings were commenced before or after the application to stay the Hong Kong proceedings or whether the respondents were

26 *Overseas Union Insurance Ltd v. AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd's Rep. 63, §70.

27 See the discussion and authorities above. See also *Fiona Trust & Holding Corp. & Ors v. Yuri Privalov & Ors* (HL) [2007] Bus LR 1719.

28 *Lucky-Goldstar International (HK) Ltd v. Ng Moo Kee Engineering Ltd* [1993] HKCFI 14, §§77-78.

29 *York Airconditioning & Refrigeration Inc. v. Lam Kwai Hung t/a North Sea A/C elect Eng Co* [1994] HKCFI 166; *Al-Naimi v. Islamic Press Agency* (CA) [2000] 1 Lloyd's Rep. 522.

30 *Polytec Overseas Ltd & Anor v. Grand Dragon International Holdings Co Ltd & Ors* [2017] HKCFI 604, §§50-55.

served with the Hunan Proceedings. The applicant had also applied to the Hunan Court for leave to withdraw the Hunan Proceedings.[31]

4.016 The phrase "incapable of being performed" would seem to apply to a case where the arbitration cannot be effectively set in motion, e.g., the clause may be too vague or other terms in the contract contradict the parties' intention to arbitrate.[32] However, an arbitration clause will not be considered as incapable of being performed simply because a non-existent arbitration institution is named.[33] The expression does not appear to encompass the situation where a contractual limitation period barring a claim has expired. In such circumstances, arbitration can proceed, only that the claim is at risk of being dismissed.[34] A party to an arbitration agreement may apply to an arbitral tribunal for an extension of time under s 58 of the *Arbitration Ordinance* (Cap 609).

D. Dispute Between the Parties

4.017 The threshold for concluding there is in reality a dispute between the parties is easy to meet. Where there is a matter being a subject of an arbitration agreement and provided there is no clear or unequivocal admission of liability and quantum, a dispute is said to exist.[35] The Court will not investigate into the merits of the dispute as the same is a matter for the arbitral tribunal.

31 *Cf. "Thor Scan"* [1998] HKCA 420 where the applicant had commenced proceedings in the Netherlands, and pursued it to judgment being handed down whereby it was held that such conducts amounted to clear and unequivocal abandonment of their right to arbitrate.

32 *Lucky-Goldstar International (HK) Ltd v. Ng Moo Kee Engineering Ltd* [1993] HKCFI 14.

33 *Ibid.* However, see the recent position in Singapore to be discussed below.

34 *Supra* note 6, §42.

35 *Ibid*, §51.

E. Dispute Within Ambit of Arbitration Agreement or Clause

4.018 This part of the inquiry requires the court to construe the arbitration agreement to identify what matters are required to be referred to arbitration. It has been held that words like "in connection with" or "connected therewith" are wide in nature and will cover all disputes other than those entirely unrelated to the transaction covered by the contract in question. These words are wide enough to cover claims in constructive trust as long as they are related to the transaction covered by the arbitration agreement.[36] These words are also wide enough to include tortuous claim if the same was closely connected with the contractual claim.[37] Where the wordings of the arbitration agreement clearly intended to cover the tortuous claim, it is not necessary to refer to the "close connection test".[38] This is consistent with the wide construction approach adopted by the Court.[39]

F. Exceptions to Stay

4.019 In Hong Kong, legal proceedings in respect of claims within the exclusive jurisdiction of the Labour Tribunal[40] yet being the subject of an arbitration agreement are exempted from a mandatory stay under Art 8 of the *Model Law*. Rather, s 20(2) of the *Arbitration Ordinance* (Cap 609) confers a discretion on the court before which an action has been brought, to stay those proceedings and refer the parties to arbitration. Before exercising such discretion in favour of stay, the court has to be satisfied that:

(1) there is no sufficient reason why the parties should not be referred to arbitration in accordance with the arbitration agreement; and

36 *Ibid*, §§54 & 57 .
37 *Xu Yi Hong v. Chen Ming Han & Ors* [2006] HKCFI 1136, §§35-48.
38 *Gossip Daily Ltd v. Next Media Magazines Ltd & Ors* [2018] HKCFI 1946, §§21-25.
39 *Secretary for Justice v. HP Enterprise Services (Hong Kong) Ltd* [2012] HKCFI 1328, §38.
40 See: s 7 and Schedule to the *Labour Tribunal Ordinance* (Cap 25).

(2) the party requesting arbitration was ready and willing at the time the action was brought to do all things necessary for the proper conduct of the arbitration, and remains so.

4.020 Section 20(3) of the *Arbitration Ordinance* (Cap 609) in Hong Kong provides a further exception to mandatory stay under Art 8 of the *Model Law*. It makes express reference to s 15 of the *Control of Exemption Clauses Ordinance* (Cap 71) which provides that as against a person dealing as consumer[41], an agreement to submit future differences to arbitration cannot be enforced except – (1) with his written consent signified after the differences in question have arisen; or (2) where he has himself had recourse to arbitration in pursuance of the agreement in respect of any differences. In *Fung Hing Chiu Cyril v. Henry Wai & Co (a firm)*[42], the court stayed the proceedings in favour of arbitration under an arbitration agreement between a firm of solicitors and its former clients. The Court held that there is nothing in Hong Kong law or public policy to indicate that a dispute between a firm of solicitors and its clients over the issue of fees is not arbitrable. The court rejected the claimants' case that they were "dealing as consumer" and hence s 15 of the *Control of Exemption Clauses Ordinance* could not be invoked to resist the stay of proceedings.[43]

G. Procedure for Stay

4.021 Applications for stay of proceedings under s 20(1) of the *Arbitration Ordinance* (Cap 609) shall be made by summons to the Judge.[44] Under s 16 of the *Arbitration Ordinance* (Cap 609), such an application is to be heard "otherwise than in open court", i.e., in Chambers unless otherwise ordered by the Court on the application of a party or of

41 See the definitions of "dealing as consumer" at s 4 of the *Control of Exception Clauses Ordinance* (Cap 71).
42 *Fung Hing Chiu Cyril v. Henry Wai & Co (a firm)* [2018] HKCFI 31.
43 *Ibid*, §§32 & 36-50.
44 Order 73, rr 1, 3 & 6 of the *Rules of High Court* (Cap 4A); Practice Direction 6.1.

its own motion. A short supporting affidavit should be filed together with the summons to explain the relevant circumstances and to set out the grounds for stay which should include why the dispute comes within the arbitration agreement. The said arbitration agreement and other supporting documents should be exhibited to such an affidavit.

4.022 An application for stay of proceedings should be made as swiftly as possible and must be made "not later than when submitting his first statement on the substance of the dispute".[45] This should generally be referred to as filing of the defence. A defendant will not be prejudiced by taking steps to protect his position e.g., by simply filing an acknowledgement of service of the writ since failure to do so will result in default judgment being entered against him. In short, an application for stay should be made after filing the acknowledge of service but before filing of defence.[46]

4.023 Parties should expect that the court will enforce arbitration agreements as a matter of course. Challenges to the courts should be exceptional events. A party who takes an exceptional and high-risk strategy to challenge the validity of either an arbitral award made pursuant to an arbitration agreement or such an arbitration agreement itself will have to take the risk and accept the higher costs consequences of its action.[47] A party who commenced court proceedings in breach of the arbitration agreement and having failed to resist an application for stay may well be ordered to pay costs on an indemnity basis.[48]

45 Article 8(1) of the *Model Law*; s 20(1) of the *Arbitration Ordinance* (Cap 609).

46 In *ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH* [1996] ADRLN 34, 7 May 1996, the Ontario Court (Gen Div) overturned an appeal and held that a stay would still be validly made if an application was made at the same time as the defence and counterclaim filed.

47 *A v. R (Arbitration: Enforcement)* [2009] HKCFI 342.

48 *Fung Hing Chiu Cyril v. Henry Wai & Co (a firm)* [2018] HKCFI 31, §57.

III. STAY OF PROCEEDINGS IN FAVOUR OF ARBITRATION IN OTHER COMMON LAW JURISDICTIONS

4.024 Many other common law jurisdictions also introduced the mandatory application of the *Model Law* and/or the *New York Convention* by way of local legislation.

4.025 The Canadian courts had affirmed mandatory application of the *Model Law*. It was said that the decisions reflected the important policy considerations in favour of a liberal approach to international commercial arbitration and judicial deference to arbitration agreements.[49] It should be noted that on 22 March 2017, Ontario[50] adopted the new *International Commercial Arbitration Act 2017* (repealing its 1990 version)[51], which explicitly adopted the *New York Convention*. In addition to the *Model Law*, s 2 expressly adopts and applies the *New York Convention* set out in Schedule 1. Both the *Model Law* and the *New York Convention* therefore have the force of law in Ontario. Section 9 of the *International Commercial Arbitration Act 2017* further provides that where pursuant to Art II(3) of the *New York Convention* or Art 8 of the *Model Law*, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.[52] Therefore, the same

49 *ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH* [1996] ADRLN 34, 7 May 1996, the Ontario Court (Gen Div), §11. See also: *Automatic Systems Inc. v. Bracknell Corp.* (1994), 113 D.L.R. (4th) 449, 12 B.L.R. (2d) 132, 13 C.L.R. (2d) 171 (Ont. C.A.); *Nanisivik Mines Ltd v. F.C.R.S. Shipping Ltd* (1994), 113 D.L.R. (4th) 536, [1994] 2 F.C. 662, 167 N.R. 294 (C.A.)

50 In Alberta, the *International Commercial Arbitration Act SA 1986* adopted the test in the *New York Convention: Kaverit Steel & Crane Ltd v. Kone Corp.*, XIX Y.B Comm. Arb 643 (1992 ABCA 7) (Alberta Court of Appeal, 1992), §47.

51 Previously, s 2 and the Schedule of the 1990 version expressly adopted and applied the *Model Law* including Art 8 concerning mandatory stay. Section 8 provided for stay of proceedings pursuant to Art 8 of the *Model Law*, https://www.ontario.ca/laws/statute/90i09#BK7.

52 https://www.ontario.ca/laws/statute/17i02b#BK11.

requirements set out above in Part II of this Chapter will need to be satisfied for a stay to be granted.[53]

4.026 In United States, the *Federal Arbitration Act* incorporated the *New York Convention* at 9 US Code s 201 (i.e., Enforcement of Convention). Pursuant to s 3 of the *Federal Arbitration Act*, "*if any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of action until such arbitration has been had in accordance with the terms of the agreement…*".[54] Likewise, it expresses a "liberal federal policy favouring arbitration agreements" and "any doubts concerning the scope of arbitration issues should be resolved in favour of arbitration".[55]

4.027 In Singapore, s 3 of the *International Arbitration Act* (Chapter 143A) provides that the *Model Law* produced in its First Schedule shall have the force of law.[56] Section 6(2) further provides for mandatory stay of court proceedings in respect of any matter which is the subject of the arbitration agreement, unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of

53 *Supra* note 49. See also: *Joseph Popack, United Burlington Retail Portfolio Inc. & United Northeastern Retail Portfolio Inc. v. Moshe Lipszyc & Sara Lipszyc* (Ont. SC) 07-CV-339295-0000, 2 September 2008, where the requirements for stay were discussed.

54 See, e.g., the grant of stay pursuant to s 3 of the *Federal Arbitration Act in Danisco v. Novo Nordisk No. 1 Civ.* 10557 (LTS) (S.D.N.Y. 10 February 2003).

55 *Louis Dreyfus Negoce S.A. v. Blystad Shipping Trading Inc.* 252 F.3d 218, 233 (2d Cir. 2001); *Bischoff v. DirecTV*, 180 F. Supp.2d 1097, 1103 (C.D Cal. 2002) opt. cited in *Danisco v. Novo Nordisk, ibid.*

56 The intention is that the *Model Law* shall apply to international commercial arbitration: s 5 of the *International Arbitration Act* (Chapter 143A).

being performed.[57] Likewise, the applicant for stay of proceedings only needs to show on a *prima facie* basis that (1) there is a valid arbitration agreement between the parties; (2) the parties' dispute falls within the scope of the arbitration agreement; and (3) the arbitration agreement is not null and void, inoperative or incapable of being performed.[58] Recently, in *TMT Co Ltd v. The Royal Bank of Scotland PLC & Ors*[59], the Singapore High Court held that an arbitration agreement did not meet such a *prima facie* standard for a mandatory stay on the basis that there was no valid arbitration agreement. It took the view that the relevant clause which provided that "*any dispute arising from or relating to these terms of any Contract made hereunder shall be referred to arbitration under the arbitration rules of the relevant exchange or any other organization as the relevant exchange may direct…*" was either not a valid arbitration agreement or otherwise incapable of being performed because there was in fact no such "relevant exchange".[60] This approach is in stark contrast from that of the Hong Kong Courts where an arbitration agreement would still be construed as valid notwithstanding a non-existent arbitration institution is named.[61] Indeed, the Singapore courts had on previous occasions tried to construe a somewhat defective arbitration agreements to be a valid one even where a non-existent arbitration institution was named. [62]

4.028 Unlike many other developed common law jurisdictions, the England and Wales has not fully adopted the *Model Law*.[63] However, s 9 of the *Arbitration Act 1996* intends to reflect Art 8 of the *Model Law*. It

57 Section 6(1) of the *International Arbitration Act* (Chapter 143A) provides that an application for stay of proceedings in favour of international commercial arbitration should be made "after appearance and before delivering any pleading or taking any other step in the proceedings", https://sso.agc.gov.sg/Act/IAA1994#pr7-.

58 *Tomolugen Holdings Ltd & Anor v. Silica Investors Ltd* [2016] 1 SLR 373 (CA), §63.

59 *TMT Co Ltd v. The Royal Bank of Scotland PLC & Ors* [2017] SGHC 21.

60 *Ibid*, §§65-68.

61 *Supra* notes 32 & 33.

62 *HKL Group Co Ltd v. Rizq International Holdings Pte Ltd* [2013] SGHCR 5.

63 *Arbitration Act 1996 by Merkin & Flannery* (5th Ed), Part 1, p.1.

confers upon a party to an arbitration agreement who is being sued in court proceedings the right to apply for stay of proceedings[64], even if there are other co-defendants who are not parties to such an arbitration agreement.[65] The statutory conditions for a mandatory stay under s 9(4) of the *Arbitration Act 1996* are broadly similar to other jurisdictions which have fully adopted the *Model Law*.[66] An applicant for stay needs to show an arguable case as to (1) the validity of the arbitration agreement[67] which must be in writing[68] and (2) the dispute is in respect of a matter which under the arbitration agreement is to be referred to arbitration i.e. subject to the scope of the arbitration agreement. Once that is shown, a stay must be granted unless the respondent to the stay application, i.e., the claimant in the court proceedings can show that the arbitration agreement is null and void, inoperative or incapable of being performed.[69] Section 9(3) of the *Arbitration Act 1996* provides that an application for stay may not be

64 Section 9(1) of the *Arbitration Act 1996*.

65 However, each of the applicant for the stay and the respondent to the application must either be a party to the arbitration agreement or be regarded as claiming "through or under" a party i.e., no stay may be ordered as against a non-party: s 82(2) of the *Arbitration Act 1996*. See also: *Wealands v. CLC Contracts Ltd* [1999] 2 Lloyds Rep. 739.

66 The decisions discussed in Part II of this Chapter above are therefore relevant in determining whether the statutory requirements or conditions for mandatory stay under s 9 of the *Arbitration Act* are met.

67 Unless the Court can resolve the issue of validity either on the application or by directing an issue to be tried then a merely arguable case as to validity will not be sufficient. In other words, the court must first decide if it considers it appropriate to resolve the issue of validty itself, if it does, the higher standard will apply: *Golden Ocean Group Ltd v. Humpuss Intermoda Transportasi Tbk Ltd* [2013] EWHC 1240 (comm), §54. Normally, the arbitral tribunal ought to be the proper forum to determine the issue of validity such that the standard for proving validity before the court for the purpose of a stay should be one of a good arguable case i.e., an approach consistent with other common law jurisdictions discussed in this chapter. See also: *Fiona Trust & Holding Corp. & Ors v. Yuri Privalov & Ors* (HL) [2007] Bus LR 1719.

68 Section 5(1) of the *Arbitration Act 1996*.

69 Section 9(4) of the *Arbitration Act 1996*; see also *JSC Aeroflot Russian Airlines v. Berezovsky & Ors* [2013] EWCA Civ 784, §77, and *Associated British Ports v. Tata Steel UK Ltd* [2017] 1 CLC 826, §20.

made before taking the appropriate procedural step to acknowledge the legal proceedings against him or after he has taken any step in the proceedings to answer the substantive claim.

IV. POSITION IN THE PRC

4.029 The PRC acceded to the *New York Convention* which came into effect as of 22 April 1987.[70] The PRC also enacted the *Arbitration Law* (2017 Revision) in 1994 amended in 2017 which is different from the *Model Law* in a number of respects.[71] Article 5 of the *Arbitration Law* provides that if the parties have concluded an arbitration agreement and one party institutes an action in a people's court, the people's court shall not accept the case, unless the arbitration agreement is null and void (当事人达成仲裁协议，一方向人民法院起诉的，人民法院不予受理，但仲裁协议无效的除外).[72] It therefore appears that the people's court will refuse to accept a court case brought in breach of an arbitration agreement where (1) there is a concluded arbitration agreement that do not cover disputes which may not be arbitrated pursuant to Art 3 of the *Arbitration Law* and (2) the arbitration agreement is not null and void. In such circumstances, the parties should instead be notified to apply to an arbitral institution for arbitration.[73]

4.030 In this regard, Art 16 of the *Arbitration Law* provides that an arbitration agreement shall include arbitration clauses stipulated in the contract and agreements of submission to arbitration that are concluded in other written forms. It must contain (1) an expression

70 *Circular of Supreme People's Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China*, http://www.newyorkconvention.org/implementing+act+-+china.

71 *The Practice of International Commercial Arbitration – A Handbook for Hong Kong Arbitrators*, (2018), §3.3.1.

72 See also: Arts 124 & 271 of the *Civil Procedure Law of the People's Republic of China* (2017 Revision).

73 Article 124(2) of the *Civil Procedure Law of the People's Republic of China* (2017 Revision).

of intention to apply for arbitration; (2) matters for arbitration; and (3) a designated arbitration commission. Article 17 of the *Arbitration Law* further provides that an arbitration agreement shall be null and void if (1) the agreed matters for arbitration exceed the range of arbitrable matters as specified by law; (2) one party that concluded the arbitration agreement has no capacity for civil conducts or has limited capacity for civil conducts; or (3) one party coerced the other party into concluding the arbitration agreement. However, the validity of the arbitration agreement would not be affected by the invalidity of the underlying or principal contract[74]. In addition, the Interpretation of the *Supreme People's Court Concerning Some Issues on Application of the Arbitration Law of the Republic of China* (effective from 9 September 2006) is also relevant in construing the relevant provisions including Arts 16 and 17 of the *Arbitration Law*.

4.031 In particular, practitioner should note that even where the name of an arbitration institution as stipulated in the arbitration agreement is inaccurate, if the specific arbitration institution can be determined, it shall be ascertained that the arbitration institution has been selected.[75] Therefore, where "深圳市仲裁委员会" as specified in an arbitration agreement is inaccurate but only contained an extra word from the arbitration institution "深圳仲裁委员会"which actually existed, the arbitration agreement was held not to be null and void and the parties were directed to go to arbitration.[76]

4.032 Where a party brings court proceedings in breach of the arbitration agreement, the counter party must make sure to raise objection pursuant to Art 5 of the *Arbitration Law* and/or Arts 124 & 271 of the *Civil Procedure Law of the People's Republic of China* (2017

74 Article 19 of the *Arbitration Law*.

75 Article 3 of the *Interpretation of the Supreme People's Court Concerning Some Issues on Application of the Arbitration Law of the Republic of China* (effective from 9 September 2006).

76 *广州兴艺展览服务有限公司与上海钧爵展览展示服务有限公司承揽合同纠纷上诉案* (2018)粤01民终2811号(Judgment of Intermediate People's Court of Guangzhou City, 11 February 2018) CLI.C.10863922.

Revision) at the first available opportunity. A defendant who fails to raise any objection that the People's Court should not accept the case or ask to refer the matter to arbitration before the first hearing will be deemed as having waived or given up his right to arbitration pursuant to the arbitration agreement.[77]

77 Article 26 of the *Arbitration Law*. See also: *蔡登峰等与调兵山市嘉纳置业有限公司房屋买卖合同纠纷上诉案*(2018)辽12民终782号(Judgment of Intermediate People's Court of Tieling City, 23 March 2018) CLI.C.10961974.