CHAPTER VII

Checklist of Areas to Consider

Model arbitration clauses promulgated by the ICC, LCIA, ICDR and UNCITRAL are set out in Annex 1. However, those model clauses are very basic and might well require adaptation to suit the needs of a particular case. We set out below a checklist of the principal matters to be considered in drafting an arbitration agreement (or determining whether and, if so, how to modify one of the model clauses).

ADR: The parties might wish to include provision for them to attempt an ADR procedure (such as mediation) prior to commencing (and as a means of potentially avoiding) arbitration. A sample ADR and arbitration clause is set out in Annex 1.

Parties are always free to agree to an ADR procedure at any stage, but providing for it in advance avoids concerns that proposing ADR after a dispute has arisen might be seen as a sign of weakness. However, parties might be more inclined to settle (in which case ADR proceedings will have a greater chance of success) after a dispute has reached a stage where their respective positions are better defined.

There are a number of organisations which will assist parties with ADR procedures, such as CEDR (Centre for Effective Dispute Resolution), which is based in London, and the Center for Public Resources, which is based in the US. Many arbitral institutions, including the ICC, LCIA and ICDR will also administer ADR proceedings.

Option clauses: Parties sometimes wish to provide an option for one or more parties to choose between referring a dispute to arbitration or the courts. As well as raising drafting issues, this requires careful legal analysis as, under some laws (but not English law), option clauses can, by their very nature, invalidate the arbitration provision (for uncertainty or, where the option is one-sided, lack of mutuality).

Capacity/authority: The capacity and/or authority of the parties and signatories to the arbitration agreement should be checked. For example, some laws require governmental entities to obtain parliamentary (or other) approval before executing an arbitration agreement.

Mandatory requirements: The governing law of the arbitration agreement and/or the law of the seat of arbitration and/or the law of the place of enforcement might impose mandatory requirements on the parties as to the form and/or contents of the arbitration agreement (especially if a governmental party is involved). For example, the arbitration agreement might have to be initialled or signed, the seat might have to be that of a governmental party and/or the involvement of an arbitral institution might have to be clearly stated.

Scope and arbitrability: The parties should decide what disputes they wish to be referred to arbitration. Generally, clauses are drafted very broadly so as to capture all disputes which might arise between the parties. However, sometimes parties wish certain categories of disputes to be resolved by other means, such as expert determination. This requires careful drafting, including provision for the resolution of disputes regarding the category into which a dispute falls. It should also be noted that, as a matter of public policy, some disputes might not be arbitrable under the applicable law.

The tribunal and its powers: The selection of the tribunal is addressed in Chapter III. The parties should also consider the powers of the tribunal under the chosen rules and applicable law, and whether they wish to adjust or clarify them by express provision (for example, the parties might prohibit awards of punitive damages or empower the tribunal to reach a decision in simple cases upon documents alone or to decide

the dispute according to notions of fairness rather than strictly according to the law).

Procedural rules, including disclosure/discovery: The choice of suitable arbitration rules is addressed in Chapter IV. Consideration should be given as to whether, in light of the applicable law or otherwise, any amendments should be made to the selected rules. For example, whilst the ICC and LCIA Rules both exclude any appeal to the courts on the merits of the dispute, there is no such provision in the UNCITRAL Rules. The incorporation of the UNCITRAL Rules into a contract might therefore need to be supplemented by a specific provision excluding any right of appeal under the applicable law. Consideration might also be given as to whether to provide for the application of the IBA Rules on the Taking of Evidence in International Commercial Arbitration, or the application or exclusion of other rules addressing disclosure/discovery.

Seat: The selection of the seat of arbitration is addressed in Chapter V.

Language: If the language of the arbitration might otherwise be open to debate, it is preferable, in order to save time and costs, to make an express selection in the arbitration agreement. The language chosen should generally be that of the underlying contract and/or the majority of the documentation.

Governing law: Unless stated elsewhere, the governing law of the contract (and, where there might be some argument, the governing law of the arbitration agreement) should be stated in the arbitration agreement. If there is a separate governing law clause, it is advisable to check that it does not also contain a submission to courts which would be inconsistent with the arbitration agreement.

Confidentiality: The extent to which (if at all) the confidentiality of the arbitration will be protected by the rules or applicable law varies and parties might wish to make an express contractual provision.

The powers of the courts (including appeals): The parties should consider the powers of the courts of the seat under the selected rules and applicable law, and whether they wish to adjust or clarify them by express provision. Courts often have power to make orders in support of the arbitration (for example, interim relief prior to the appointment of the tribunal). They also usually have limited powers to review the award. Court powers to challenge the award for lack of jurisdiction or procedural irregularities are usually (but not always) mandatory. However, where the courts have power to hear appeals against the award (such as the English law right of appeal on a point of law) these can often be excluded by agreement.

Multi-party/agreement issues: Where any disputes might be between more than two parties and/or under more than one contract, specific drafting issues might arise. For example, where there are only two parties to a dispute and they wish to appoint a tribunal of three arbitrators, they often agree to select one each. However, if there are three or more parties, this method will not work. One common solution is for the claimant parties to select one arbitrator and the respondent parties another. However, this assumes that the interests of the claimants and respondents respectively are aligned. Moreover, in some jurisdictions (notably France), concerns have been raised that stipulating in advance that multiple parties must agree upon one arbitrator between them (out of a tribunal of three) might be held contrary to public policy. Where this is a concern, parties can avoid the issue by, for example, providing for a sole arbitrator or that all three arbitrators are to be appointed by an appointing authority.

Other multi-party/agreement issues arise out of the fact that arbitration is based upon the contract between the disputing parties. For example, it is generally not possible to join a third party to an arbitration unless all of the parties concerned agree (which, if you are likely to want joinder, should preferably be done in advance in the arbitration agreement). Where there are two or more related contracts, this can be achieved by the parties entering into a separate "umbrella" arbitration agreement. This also provides the parties with an opportunity to agree that the same tribunal will hear all disputes between them and empower it to consolidate related arbitrations where appropriate.

State immunity: Where a contract is to be made with a state or one of its instrumentalities, consideration should be given to the express waiver of any immunities or privileges attaching to that party which might impact upon the resolution of disputes. In particular, whilst entering into an arbitration agreement will itself often be treated as a waiver of any immunity from suit, an express waiver will normally be required to deal with immunity from enforcement of any award.

CHAPTER VIII

Arbitration Between Foreign Investors and States

Arbitration between foreign investors and states under bilateral investment treaties and multilateral agreements

No guide to international arbitration would be complete without a brief discussion of the availability of international arbitration as a means to resolve disputes between investors and states that fall within the scope of bilateral investment treaties ("BITs") or multilateral trade agreements (such as the North American Free Trade Agreement).

In recent years, the value and significance of arbitration as a dispute resolution mechanism has grown as the number of BITs has increased, and as foreign investors (or their lawyers) have become progressively more familiar with the substantive protections and procedural rights that many BITs create. With more than 2,500 BITs concluded throughout the world, savvy foreign investors are wise to consider obtaining specialist legal advice both when they structure a foreign investment, which will determine whether these protections and rights will ultimately be available, and after a dispute actually arises. The discussion here is intended to introduce BITs, but should not be understood to serve as a replacement for that advice.

BITs: A BIT is a treaty between two states that is designed to promote and reciprocally protect investments made by nationals of one state (the "home state") in the territory of the other (the "host state"). BITs confer covered investors with a wide range of legal rights that are directly enforceable against the host state and usually provide for international arbitration. Importantly, investors enjoy these rights, including the right to enforce them through international arbitration in a neutral forum, even if they are not parties to a contract with the host state. In international dispute resolution circles, this is commonly referred to as "arbitration without privity".

> **BITs confer covered investors with a wide range of legal rights that are directly enforceable against the host state and usually provide for international arbitration.**

Core investment protections: Because each BIT is a product of negotiations between two states, the content and scope of the investment protections differ from BIT to BIT. Nevertheless, there are a number of core protections that are common to most BITs. These include the following:

- Protection against the expropriation of investments or other forms of severe interference with property rights, except where accompanied by the payment of "prompt, adequate and effective" compensation. It is generally understood that expropriation is not limited to the outright nationalisation of a sector or the seizure of a specific investment. Rather, it encompasses actions tantamount to expropriation, including incremental acts attributable to the state that unreasonably interfere with an investment to such a degree that the investor is essentially deprived of its fundamental rights of ownership. Whilst the line between expropriatory and non-expropriatory state action is always case-specific, tribunals have concluded that actions such as the forced renegotiation of contracts and the cancellation of an operating licence can give rise to a right to compensation.

- The right to "fair and equitable treatment" and full protection and security to investors and their investments. This standard is understood to protect investors against arbitrary, deliberate or grossly

careless actions by host states that harm the investors' legitimate interests. This standard could be breached, for example, if the host state manifestly disregarded an investment agreement or failed to implement the required authorisations for an approved investment project. Since the judiciary is an organ of the state, this standard could similarly be breached if an investor faced a denial of justice before the courts or the host state.

- Prohibition against discriminatory treatment, frequently combined with a requirement that the host state treat investors no less favourably than it treats its own nationals or the nationals of any third state (also known as "most-favoured-nation" or "MFN" treatment). This basic protection allows investors to rely on and invoke more favourable provisions in other investment treaties binding on the host state, as well as how the host state has actually treated other investors in like circumstances.

- The right to transfer funds into and out of the host state, in freely transferable currency and without delay. This protection would include, for instance, the right to make dividend or debt payments outside of the host state.

The right to resolve disputes directly with the host state through international arbitration: Most modern BITs allow foreign investors to enforce their treaty rights directly against the host state through international arbitration. The most frequent types of arbitration specified in BITs are institutional arbitrations under the auspices of ICSID and ad hoc arbitrations using the UNCITRAL Rules. Significantly, a series of recent decisions rendered by ICSID tribunals confirm that when an investor pleads that the host state has violated the rights established by a BIT, the investor has a right to arbitrate under the BIT even if the same conduct would also constitute a breach of contract, and the underlying contract limits recourse to the host state's courts or some other form of dispute resolution.

Conclusion: The degree of the legal protections granted by most BITs is significant, both in terms of the substantive and procedural rights they create, and in terms of the types of investments that they cover (ranging, for instance, from tangible property such as a factory or an

If an investor is to maximise the possible benefits of BIT protection against the host state, the key time for the investor to consider whether a BIT will be available is when it structures the investment.

oil field, to intangible property such as concession rights, shares in a corporation, a licence or IP rights). Whilst it is natural for an investor to consider what, if any, recourse it may have under a BIT once a dispute has materialised, in some cases this may be too late. If an investor is to maximise the possible benefits of BIT protection against the host state, the key time for the investor to consider whether a BIT will be available is when it structures the investment. For instance, all other things being equal, an investor might decide to invest through a subsidiary incorporated in a state which has a comprehensive BIT in force with the host state, rather than a subsidiary incorporated in a state that does not.

Although this is not an exhaustive list, these are the types of questions that an investor should take into account at the project formation and contract negotiation stages:

- What BITs or other investment treaties are in effect with the host state?
- What is the scope of those BITs or other investment treaties? How do they define covered investors and investments? Do they require investment registration?
- What substantive rights do they confer?
- Does it make sense to structure the company making the investment so that it is directly or indirectly controlled by a national of a state that is party to a BIT or another investment treaty?
- If the investment vehicle is an offshore entity organised in an overseas territory of another state (such as Bermuda, the British Virgin Islands, the Cayman Islands or the Netherlands Antilles), has the state extended the treaty to cover investors from that territory? If not, does it make sense to re-structure the investment vehicle in another territory?

ANNEX 1

Model Arbitration Clauses

The following standard clauses are recommended by their respective organisations as basic provisions for arbitration. However, the clauses might well need amending to suit the needs of particular cases (*see* the checklist for drafting an arbitration agreement in Chapter VII).

ICC

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

LCIA

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the LCIA, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one / three].

The seat, or legal place, of arbitration shall be [city and / or country].

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

The governing law of the contract shall be the substantive law of [ ]".

ICDR International Rules

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

The ICDR also provides the following guidance:

"The parties should consider adding:

- *The number of arbitrators shall be (one or three).*
- *The place of the arbitration shall be [city, (province or state), country].*
- *The language(s) of the arbitration shall be [ ]".*

UNCITRAL

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

The following guidance is provided:

"Note: Parties should consider adding:

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

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

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

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

A sample ADR and arbitration provision

"If any dispute, controversy or claim arises out of or in connection with this contract, including any question regarding its existence, validity, interpretation, breach or termination (a 'Dispute'), it shall be referred, upon written notice (a 'Dispute Notice') given by one party to the other, to a senior executive from each party.

The senior executives shall seek to resolve the Dispute on an amicable basis within 14 days of the Dispute Notice being received.

Any Dispute not resolved within 14 days of the Dispute Notice being received may be referred by either party to mediation before a mediator to be agreed between the parties or, failing such agreement, to be appointed by [CEDR / CPR]. The parties shall share (equally) the costs of the mediator, the mediation venue and [CEDR / CPR].

If either party fails or refuses to agree to or participate further in the mediation procedure or if, in any event, the Dispute is not resolved within 35 days from receipt of the Dispute Notice, the Dispute shall be referred to and finally resolved by arbitration pursuant to the Rules of the [ICC / LCIA], which Rules are deemed to be incorporated by reference into this Clause.

The tribunal shall consist of three arbitrators, two of whom shall be nominated by the respective parties. The Chairman of the tribunal shall be nominated by agreement between the two party-nominated arbitrators within 14 days of the nomination of the second such arbitrator. Failing such agreement, the Chairman shall be appointed by the [ICC / LCIA Court].

The seat of arbitration shall be [ ].

The language of the arbitration shall be [ ].

The governing law of this contract shall be the substantive law of [ ]".

ANNEX 2

New York Convention States

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides for the enforcement of arbitral awards in more than 145 countries worldwide, subject only to limited defences set out in the Convention. To take advantage of the Convention, it is often necessary for the award to be made in a country that is a party to the Convention.

Key Articles of the Convention

Article III of the Convention sets out the basic obligation undertaken by contracting states, being to recognise and enforce foreign arbitral awards:

"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards".

Article V of the Convention sets out the limited grounds upon which contracting states may refuse to recognise and enforce foreign arbitral awards:

"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".

Convention states

The following states had acceded, ratified or succeeded to the Convention as of 15 February 2013:

Afghanistan
Albania
Algeria
Antigua and Barbuda
Argentina
Armenia
Australia
Austria
Azerbaijan
Bahamas
Bahrain
Bangladesh
Barbados
Belarus
Belgium
Benin
Bolivia (Plurinational State of)
Bosnia and Herzegovina
Botswana
Brazil
Brunei Darussalam
Bulgaria
Burkina Faso
Cambodia
Cameroon
Canada
Central African Republic
Chile
China
Colombia
Cook Islands
Costa Rica
Côte d'Ivoire
Croatia
Cuba
Cyprus
Czech Republic
Denmark
Djibouti
Dominica
Dominican Republic
Ecuador
Egypt
El Salvador
Estonia
Fiji
Finland
France
Gabon
Georgia
Germany
Ghana
Greece
Guatemala
Guinea
Haiti
Holy See
Honduras
Hungary
Iceland
India
Indonesia
Iran (Islamic Republic of)
Ireland
Israel
Italy
Jamaica
Japan
Jordan
Kazakhstan
Kenya
Kuwait

Kyrgyzstan
Lao People's Democratic Republic
Latvia
Lebanon
Lesotho
Liberia
Liechtenstein
Lithuania
Luxembourg
Madagascar
Malaysia
Mali
Malta
Marshall Islands
Mauritania
Mauritius
Mexico
Monaco
Mongolia
Montenegro
Morocco
Mozambique
Nepal
Netherlands
New Zealand
Nicaragua
Niger
Nigeria
Norway
Oman
Pakistan
Panama
Paraguay
Peru
Philippines
Poland
Portugal
Qatar
Republic of Korea
Republic of Moldova
Romania
Russian Federation
Rwanda
Saint Vincent and the Grenadines
San Marino
Sao Tome and Principe
Saudi Arabia (Kingdom of)
Senegal
Serbia
Singapore
Slovakia
Slovenia
South Africa
Spain
Sri Lanka
Sweden
Switzerland
Syrian Arab Republic
Tajikistan
Thailand
The Former Yugoslav Republic of Macedonia
Trinidad and Tobago
Tunisia
Turkey
Uganda
Ukraine
United Arab Emirates
United Kingdom of Great Britain and Northern Ireland
United Republic of Tanzania
United States of America
Uruguay
Uzbekistan
Venezuela (Bolivarian Republic of)
Vietnam
Zambia
Zimbabwe

ANNEX 3

Arbitral Institutions

The following is a non-exhaustive list, by region, of some of the best known arbitral institutions:

Asia

- **China:** the China International Economic and Trade Arbitration Commission ("CIETAC" – visit www.cietac.org);
- **Hong Kong:** the Hong Kong International Arbitration Centre ("HKIAC" – visit www.hkiac.org);
- **India:** LCIA India (visit www.lcia-india.org);
- **Japan:** the Japanese Commercial Arbitration Association ("JCAA" – visit www.jcaa.or.jp); and
- **Singapore:** the Singapore International Arbitration Centre ("SIAC" – visit www.siac.org.sg).

Europe

- **Austria:** the International Arbitration Centre for the Austrian Federal Economic Chamber (visit www.wko.at/arbitration);
- **England:** the London Court of International Arbitration ("LCIA" – visit www.lcia.org);
- **France:** the International Court of Arbitration of the International Chamber of Commerce (the "ICC" – visit www.iccwbo.org);
- **Germany:** the German Institute of Arbitration ("DIS" – visit www.dis-arb.de);

- **The Netherlands:** the Netherlands Arbitration Institute ("NAI" – visit www.nai-nl.org);
- **Sweden:** the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC" – visit www.sccinstitute.com); and
- **Switzerland:** the Swiss Arbitration Association ("ASA" – visit www.arbitration-ch.org); the Chamber of Commerce & Industry of Geneva (visit www.ccig.ch); the Zurich Chamber of Commerce (visit www.zurichcci.ch); the World Intellectual Property Organisation ("WIPO") Arbitration and Mediation Centre (visit www.wipo.int).

Middle East and Africa

- **Bahrain:** the Bahrain Chamber for Dispute Resolution ("BCDR-AAA" – visit www.bcdr-aaa.org);
- **Dubai:** the Dubai International Arbitration Centre (visit www.diac.ae);
- **Egypt:** the Cairo Regional Centre for International Commercial Arbitration (visit www.crcica.org.eg); and
- **Mauritius:** the LCIA-MIAC Arbitration Centre (visit www.lcia-miac.org);

The United States

- The American Arbitration Association ("AAA" – visit www.adr.org); and
- The International Centre for Settlement of Investment Disputes ("ICSID" – visit www.icsid.worldbank.org).

ANNEX 4

Glossary

AAA: The American Arbitration Association – *see* Ch. IV and visit www.adr.org.

ADR: Alternative Dispute Resolution – *see* Ch. I.

Ad hoc arbitration: An arbitration which is not administered by an institution – *see* Ch. IV.

Amiable compositeur: A tribunal empowered to decide a dispute in accordance with its notions of fairness / "ex aequo et bono" / according to "equity", rather than being bound to decide according to the parties' strict legal rights. The effect of empowering a tribunal in this way differs depending upon the applicable law. For example, under English law it might rule out any possibility of an appeal on a question of law.

Appeal: Referral of an award to another tribunal or to a national court for reconsideration of its merits. For many arbitrations, there is no right of appeal, either because the applicable law does not provide such a right or because the parties have waived it. Appeals should not be confused with challenges – *see below*. *See also* "Remission" and "Set aside" below.

Applicable law: The law which applies. Many international arbitrations require the application of more than one law. *See also* "Governing law", "Lex arbitri", "Lex fori", "Lex mercatoria" and "Procedural law" below.

Arbitrability: Whether, under the applicable law, a particular dispute can be settled by arbitration. This is essentially a question for the public policy of the state in question, and which types of dispute (for example, bankruptcy, matrimonial and criminal matters) it wishes to reserve to the jurisdiction of its national courts. If a dispute is not arbitrable under an applicable law (for example, the law of the agreement, the place of arbitration or the place of enforcement) any award might be unenforceable.

Arbitral tribunal: The arbitrator(s) – *see* Ch. III.

Arbitration agreement: The parties' agreement to submit their disputes (future or existing) to arbitration. Whilst such agreement usually consists of a clause(s) within another contract, it is generally deemed by the applicable law to be a separate agreement which will, for example, survive the termination of the contract of which it forms a part. *See also* "Competence – Competence", "Submission agreement", Ch. VII and Annex 1.

Arbitration: A private form of final and binding dispute resolution by an impartial tribunal, based upon the agreement of the parties but regulated and enforced by the state – *see* Ch. I.

Arbitrator: The decision-maker in an arbitration (akin to a judge in court proceedings).

Award: The decision of an arbitral tribunal on a substantive issue (as distinct from a merely procedural order or direction). Awards are often referred to as "interim", "partial" and/or "final" awards, although, confusingly, the term "interim" is also sometimes used to mean "partial". Interim awards have only temporary effect and do not finally decide an issue (which can, accordingly, be revisited by the tribunal at a later stage of the arbitration). A partial award finally decides one or more (but not all) of the issues before the tribunal. A final award decides all the (or all the remaining) issues and (subject to any corrections) essentially ends the arbitration. *See also* "Consent award" below.

BITs: Bilateral Investment Treaties – *see* Ch. VIII.

CEDR: The Centre for Effective Dispute Resolution, an independent body (based in London) which provides a broad range of services in connection with ADR procedures – visit www.cedr.com.

Challenge to award: The word "challenge" is often used to describe the procedures, other than an appeal on the merits, by which awards can be impugned in the courts of the seat of arbitration. Challenges are usually concerned with the jurisdiction of the tribunal or the procedure followed. In contrast to rights of appeal, most major jurisdictions provide rights to challenge awards and, in many cases, the parties cannot waive such rights. *See also* "Appeal", "Remission" and "Set aside".

CIETAC: The China International Economic and Trade Arbitration Commission. Based in Beijing but with sub-commissions elsewhere in China, CIETAC is an international arbitral institution with its own rules and panel of arbitrators – visit www.cietac.org.

Competence—Competence: The legal doctrine by which an arbitral tribunal can decide upon its own jurisdiction, even where the contract containing the arbitration agreement is invalid or has been terminated. *See also* "Separability" below.

Conciliation: A form of ADR, similar to mediation *(see below)*, whereby an independent third party "conciliator" assists the

parties in attempting to settle their dispute. A conciliator cannot force parties to settle but may be requested to express his opinion on the possible outcome of any legal proceedings.

Conflict of laws: The legal rules in each jurisdiction by which the applicable law is determined. Factors which might be taken into consideration in deciding the law applicable to the merits of the dispute include the parties' nationality, the place of performance of the contractual obligations and the place and subject-matter of the arbitration.

Consent award: An award recording the terms agreed by the parties to settle their dispute. The principal advantage of obtaining a consent award is that, if not complied with, it may be enforced as with any other award (whereas a settlement agreement is merely a contract). *See also* "Award" above.

Consolidation: The merger of separate arbitrations. This normally requires the agreement of all of the parties and, where consolidation is a possibility, consideration should be given to including appropriate language in the arbitration agreement. *See also* "Joinder" below.

Costs of the arbitration: Depending upon the applicable law, rules and the discretion of the tribunal, the successful party will often be awarded all or part of its costs of the arbitration, including the fees and expenses of the lawyers, the tribunal, any institution, experts, witnesses and the costs of hearing facilities, interpreters, translators and reporting services. Although possible in limited circumstances, parties will not normally recover sums in respect of their management and employee time engaged on the arbitration.

CPR: The Center for Public Resources is an independent body established in the US to promote ADR – visit www.cpradr.org.

Designation of arbitrator: The proposal of an arbitrator for appointment by an institution – *see also* "Nomination of arbitrator" below and Ch. III.

Disclosure / Discovery: The process by which the parties make available to each other certain documents in their possession or under their control which are relevant to the dispute. There is a range of possibilities as to the extent of disclosure (from none at all to all relevant documents) and the order made is usually a matter for the discretion of the tribunal (which is often influenced by the legal traditions of the jurisdiction to which each arbitrator belongs – civil law jurisdictions generally having far more restricted disclosure than common law jurisdictions). The obligation to disclose normally arises whether or not the documents are damaging to the position of the party handing them over.

Domestic arbitration: Some jurisdictions distinguish between "international" and "domestic" arbitrations, according to criteria such as the nationality of the parties, the nature of the dispute and the applicable law. The importance of the distinction lies in the different rules which are applied to the two categories (for example, the distinction sometimes affects the ability of the parties to set aside, remit or appeal an award).

Enforcement of award: If a party does not comply with an award, the other party may apply to a court for the recognition (*see* "Recognition of award" below) and enforcement of the award using that court's enforcement processes (for example, the seizure of assets). For the wide scope for the international enforcement of awards; *see* Ch. II and Annex 2.

Equity clauses: *See* "Amiable compositeur" above.

Ex aequo et bono: *See* "Amiable compositeur" above.

Experts: Experts appointed by the parties and/or the tribunal for an arbitration provide their impartial opinions on specified matters in dispute by drawing on their experience and/or qualifications. For the distinction between expert determination and arbitration, *see* Ch. I.

Geneva Convention: The Convention on the Execution of Foreign Arbitral Awards. Signed in Geneva in 1927, this Convention provided for the recognition and enforcement of certain foreign awards in convention states but has now largely been superseded by the New York Convention *(see below)*.

Governing law: The law according to which the relevant contract is to be interpreted.

IBA: The International Bar Association – visit www.ibanet.org.

IBA Rules of Evidence: The IBA's Rules on the Taking of Evidence in International Commercial Arbitration.

ICA: The International Court of Arbitration – *see* ICC Court below.

ICC: The International Chamber of Commerce. The ICC provides a number of services to the international business community. The most significant aspect of the ICC's work in the context of arbitration is the ICC Court (*see below*), but it also provides other dispute resolution assistance (for example, a conciliation service, a centre for expertise and a pre-arbitral referee procedure to enable parties to obtain urgent interim relief).

ICC Court: The International Court of Arbitration of the International Chamber of Commerce – *see* Ch. IV and visit www.iccwbo.org.

ICSID: The International Centre for the Settlement of Investment Disputes – *see* Ch. IV, Ch. VIII and visit www. icsid.worldbank.org.

ICSID Convention: The Convention on the Settlement of Investment Disputes between States and Nationals of Other States made at Washington, D.C. in 1965 (also referred to as the "Washington Convention"), which provides for the resolution of investment disputes through ICSID *(see above)*.

Impartiality and independence: All arbitrators in international arbitrations must act impartially (*i.e.*, not be biased towards or against a party or in relation to the issues in dispute), failing which they may be removed, the award challenged or its enforcement resisted. As part of this, many arbitration rules and laws emphasise the need for arbitrators to be independent of (*i.e.*, unconnected to) the parties.

Interim relief: National courts are sometimes able to support an arbitration by granting interim relief (for example, ordering a party to preserve property or assets) pending the tribunal's award. This is particularly helpful if urgent relief is needed before the tribunal has been appointed and/or where the powers of the courts to impose criminal sanctions in the event of non-compliance are required (the tribunal not having such powers).

International arbitration: *See* "Domestic arbitration" above.

Investment treaties: *See* Ch. VIII.

Joinder: Bringing a new party into an ongoing arbitration. Joinder generally requires the agreement of all of the parties and, where anticipated, a term providing for joinder should be included in the arbitration agreement (thereby providing the consent to joinder in advance). *See also* "Consolidation" above.

Jurisdiction: A jurisdiction is a national legal system. The tribunal's jurisdiction is its scope of authority or competence.

Language(s) of the arbitration: The language(s) in which all matters connected with the arbitration will be conducted, including the parties' written submissions, evidence (whether written or oral) and the award itself.

LCIA: The London Court of International Arbitration – *see* Ch. IV and visit www.lcia.org.

Lex arbitri: The procedural law of the arbitration, which is usually that of the seat of the arbitration (and is often different from the law governing the matters in dispute). *See also* "Seat of the arbitration" below.

Lex fori: The law of the country where the arbitration takes place.

Lex mercatoria: A set of legal principles based on concepts found in developed legal systems and widely recognised by the international business community. The existence, scope and application of lex mercatoria is the subject of much debate. However, it has been successfully invoked in arbitrations as the basis on which the tribunal should resolve issues in the absence of any clearly applicable law. In such cases, the UNIDROIT principles *(see below)* are frequently used.

Mandatory requirements: Those provisions of the applicable law which are not subject to any contrary agreement of the parties.

Model Law: The Model Law on International Commercial Arbitration. The Model Law, which was adopted by UNCITRAL in 1985, was promoted as the basis for the reform and harmonisation of arbitration legislation around the world. To date, the arbitration laws of at least 40 countries have been reformed having regard to the Model Law.

Mediation: A form of ADR *(see above)* involving an independent third party "mediator" who seeks to facilitate the settlement of the parties' dispute. A mediator cannot impose a settlement and tends not to give his opinion on the legal merits. *See* "Conciliation" above.

NAFTA: North American Free Trade Agreement – *see* Ch. VIII.

New York Convention: The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards – *see* Ch. II and Annex 2.

Nomination of arbitrator: The proposal of an arbitrator for appointment by an institution – *see* "Designation of arbitrator" above and Ch. III.

Panama Convention: The 1975 Inter-American Convention on International Commercial Arbitration. This Convention provides for the enforcement of awards in more than 15 countries in the Americas (including the United States) subject to specified grounds of refusal. In order for an award to be enforced under the Convention, it must normally have been made in a Convention state.

Party autonomy: The parties' freedom of choice (for example, to determine the procedure to be followed).

Permanent Court of Arbitration: Established in 1899 and based in The Hague, the Permanent Court of Arbitration ("PCA") deals with disputes between states which are party to the 1899 or 1907 Hague Conventions (*see* www.pca-cpa.org). Under the UNCITRAL Rules, the Secretary-General of the PCA will designate an appointing authority if the parties fail both to make the necessary appointment(s) of an arbitrator(s) and to designate an appointing authority themselves – *see* Ch. IV.

Preliminary issue: An issue decided in advance of the main hearing, usually in an attempt to save time and costs by resolving an important issue (such as jurisdiction) at an early stage.

Public policy: A state's notions of justice and public morality. Public policy considerations may affect whether a dispute is arbitrable or an award enforceable (for example, where the dispute arises out of a contract regarded as void for public policy reasons).

Procedural law: The law applicable to the procedure for the arbitration (typically the law of the seat). In many cases, the procedure for the arbitration will be a mixture of the rules adopted by the parties (often through the incorporation by reference of a recognised set of rules, such as those of the ICC, LCIA, AAA or UNCITRAL) and the rules set down by the law of the seat. *See also* "Lex arbitri", "Mandatory requirements" and "Seat of the arbitration".

Recognition of award: Confirmation by a court that an award is valid and binding.

Remission: The power of a court, upon the application of one of the parties, to refer an award back to the arbitral tribunal for reconsideration in whole or in part. *See also* "Appeal", "Challenge to award" and "Set aside".

Rules of arbitration: The procedural rules pursuant to which the arbitration is conducted – *see* Ch. IV.

Seat of the arbitration: The jurisdiction in which the arbitration is deemed to take place and the award made (regardless of the physical location of the tribunal) – *see* Ch. V.

Separability: The legal doctrine by which the arbitration clause (agreement) is deemed to be separate from the contract in which it is included (allowing, for example, the arbitration agreement to survive the termination of the main contract). *See also* "Competence – Competence" above.

Settlement: The voluntary resolution of a dispute by the parties involved. *See also* "Consent award" above.

Set aside: A court in the seat of the arbitration generally has the power, in certain circumstances, to set aside (*i.e.*, annul) the award. *See also* "Appeal", "Challenge to award" and "Remission" above.

Slip rule: A rule allowing a tribunal to correct minor (for example, typographical or mathematical) errors in its award.

Sovereign (or state) immunity: The protection enjoyed by sovereign states and/or their entities both against the jurisdiction of other state's courts or tribunals and from the execution of any judgment or award – *see* Ch. VII.

Stay of court proceedings: A court order suspending proceedings before it, which were commenced in breach of an agreement to submit disputes to arbitration.

Submission agreement: An arbitration agreement in respect of existing disputes. *See also* "Arbitration agreement" above.

Terms of Reference: A document required by the ICC Rules, which sets out the names and addresses of the parties and their representatives, a summary of their claims, the place of arbitration and, if appropriate, a list of the issues to be determined.

Trade usages: The standard terms on which members of a particular business community are accustomed to deal. Under some arbitration rules (notably those of the ICC), the tribunal is required to take account of any relevant trade usages.

UNCITRAL: The United Nations Commission on International Trade Law. The UNCITRAL arbitration rules are discussed in Ch. IV. *See also* "Model Law" above and visit www.uncitral.org.

UNIDROIT Principles: A system of international contract law rules published by the International Institute for the Unification of Private Law in 1994. The UNIDROIT Principles are based on concepts familiar to many legal systems and are therefore reflective of lex mercatoria (*see above*).

Washington Convention: The ICSID Convention – *see above*.

WIPO: The World Intellectual Property Organisation – *see* Ch. IV and visit www.wipo.int. ■

Other relevant Latham & Watkins materials that may be of interest are:

- Public International Law Practice brochure
- International Investment Protection Practice brochure

Should you wish to receive a copy of either of these publications, please contact your local Latham office. You may also be interested in signing up to our Arbitration mailing list or visiting our Public International Law Web site. To do so, please visit **LW.com**.

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Guide to International Arbitration

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