

International Commercial Arbitration and the Arbitrator's Contract

Emilia Onyema



Routledge Research in International Commercial Law

International Commercial Arbitration and the Arbitrator's Contract

This book examines the formation, nature and effect of the arbitrator's contract, addressing topics such as the appointment, challenge, removal and duties and rights of arbitrators, disputing parties and arbitration institutions. The arguments made in the book are based on a semi-autonomous theory of the juridical nature of international arbitration and a contractual theory of the legal nature of these relationships. From these premises, the book analyses the formation of the arbitrator's contract in both ad hoc and institutional references. It also examines the institution's contract with the disputing parties and its effect on the arbitrator's contract under institutional references. The book draws from national arbitration laws and institutional rules in various jurisdictions to give a global view of the issues examined in it. The arbitrator's contract is analysed from a global perspective of arbitral law and practice with insights from various jurisdictions in Africa, Asia, Europe, North and South America.

The primary focus of the book is an analysis of the formation of the arbitrator's contract and the terms of this contract and the institution's contract. The primary question of the consequences (if any) of the breaches of the terms of these contracts and its impact on the exclusion or limitation of liability of arbitrators and institutions is also analysed with the conclusion that since these transactions are contractual and the terms can be categorised as in any normal contract, then normal contractual remedies can be applied to the breaches of these terms.

International Commercial Arbitration and the Arbitrator's Contract will be of great value to arbitration practitioners and researchers in arbitration. It will also be very useful to students of arbitration on the topics of arbitrators and arbitration institution.

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Contents

<i>List of figures</i>	vi
<i>Acknowledgments</i>	vii
<i>List of abbreviations</i>	viii
<i>Table of cases</i>	xi
<i>Table of statutes</i>	xiv
Introduction	1
1 Arbitration agreement	8
2 Juridical and relationship theories	32
3 Parties to the arbitrator's contract	60
4 Formation of the arbitrator's contract	84
5 Terms of the contracts	118
6 Remedies	167
7 Termination of the contracts	174
<i>Notes</i>	180
<i>Bibliography</i>	231
<i>Index</i>	253

Figures

3.1	Single arbitrator's contract theory	80
3.2	Multiple arbitrators contracts theory	82
4.1	Sole arbitrator jointly appointed by the disputing parties	86
4.2	Sole arbitrator appointed by the appointing authority	88
4.3	Arbitrator appointed by national court	91
4.4	Arbitrator appointment subject to institution's confirmation	96
4.5	Institution acting as principal	99
4.6	Institution acting as agent of disputing parties	100

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Abbreviations

AAA	American Arbitration Association
AALCC	Asia-African Legal Consultative Committee
ABA	American Bar Association
AC	Appeal Cases (England)
ADR	Alternative Dispute Resolution
ADRLJ	Arbitration and Dispute Resolution Law Journal
All ER	All England Law Reports
ALM	Arbitration Law Monthly
ALR	Australian Law Reports
Am Rev Int Arb	American Review of International Arbitration
Arb	Arbitration
Arb Int	Arbitration International
Arb Journ	Arbitration Journal
ASA	Swiss Arbitration Association
BCLR	British Columbia Law Reports
BLR	Building Law Reports
Bull	Bulletin
CA	Court of Appeal
CCP	Civil Code of Procedure
CIARB	Chartered Institute of Arbitrators
CIETAC	China International Economic Trade Arbitration Commission
CILS	Centre for International Legal Studies
Cir	Circuit
CLC	Construction Law Cases
CLOUT	Case Law on UNCITRAL Texts
CLR	Commonwealth Law Reports
CMLR	Common Market Law Reports
Co	Company
Corpn	Corporation
CPR	Centre for Public Resources
CRCICA	Cairo Regional Centre for International Commercial Arbitration

CUP	Cambridge University Press, Cambridge
DIS	German Institution of Arbitration
DRJ	Dispute Resolution Journal
Ed	Editor
Edn	Edition
Eds	Editors
ER	English Reports
EWCA	England & Wales Court of Appeals
EWHC	England & Wales High Court
FAA	Federal Arbitration Act, 1925 (United States of America)
HKIAC	Hong Kong International Arbitration Centre
HKLR	Hong Kong Law Reports
HL	House of Lords (England)
IAR	International Arbitration Report
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council of Commercial Arbitration
ICLQ	International Comparative Law Quarterly
ICSID	International Centre for the Settlement of Investment Disputes
ILM	International Legal Materials
ILR	International Law Reports
Inc	Incorporated
Ins	Insurance
Int, Int'l	International
Int ALR	International Arbitration Law Review
JIA	Journal of International Arbitration
KB	King's Bench (England)
LCIA	London Court of International Arbitration
Lloyd's Rep	Lloyd's Law Reports
Ltd	Limited
Mealey's IAR	Mealey's International Arbitration Report
Medt & ME AQ	Mediterranean & Middle East Arbitration Quarterly
NAFTA	North American Free Trade Agreement
NSWL	New South Wales Law Report
NWLR	Nigerian Weekly Law Report
NY	New York
NYLJ	New York Law Journal
NZLR	New Zealand Law Reports
OJ	Ontario Judgements
OR	Ontario Reports
OUP	Oxford University Press, Oxford
PC	Privy Council
PCA	Permanent Court of Arbitration
PIL	Private International Law

Plc	Public Limited Company
PRC	People's Republic of China
Pty	Property
Publ	Publisher(s), Publishing
QB	Queen's Bench (England)
QBD	Queens Bench Division
QMC	Queen Mary College
Rep	Report
Rev Arb	Revue de l'Arbitrage
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
SLR	Singapore Law Reports
Supp	Supplement
TCLR	Technology & Construction Law Report (England)
TDM	Transnational Dispute Management
Tex ILJ	Texas International Law Journal
UNCITRAL	United Nations Commission on International Trade Law
Url	Uniform Resource Locator
VJ	Vindobona Journal of International Commercial Law and Arbitration
WIPO	World Intellectual Property Organisation
WLR	Weekly Law Report
WTAM	World Trade & Arbitration Materials
YBCA	Year Book Commercial Arbitration

Table of cases

Aita v Ojeh, Rev Arb, 1986, 583	143
Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA, The Leonidas D, [1983] 3 All ER 737	25, 143
Annahold v L'Oreal Rev Arb 1996, 483	148
AT&T Corporation & Lucent Technologies Inc v Saudi Cable Company [2000] 2 All ER (Comm) 625; [2000] 2 Lloyd's Rep 127	148–9, 154
Bovis Land Lease Pty Ltd v Jay-Tech Marine & Projects Pte Ltd, Case No O/S 77/2005, 166/2005, decision of The High Court Singapore of 06 May 2005	25
Buckeye Check Cashing Inc v Cadegna, 546 US 440 (US S Ct 2006)	21
Carter (T/A Michael Carter Partnership) v Harold Simpson Associates (Architects) Ltd [2004] 2 Lloyd's Rep 512	135
Christopher Michael Linnett v Halliwells LLP [2009] EWHC 319 (TCC), [2009] All ER (D)	36, 52–4, 133
Commonwealth Coatings Corporation v Continental Casualty Co 393 US 145 (1968)	148
Compania de Aguas del Aconquija S A & Vivendi Universal v Argentine Republic ICSID Case No ARB/97/3	151
Continental Grain Co v China Petroleum Technology & Development Corporation (Unreported) (1998)	126
Corporation Transnacional de Inversiones, SA de CV v STET International SpA & STET International Neterlands, NV (1999) 45 OR (3d)	183, 213, 145
Dentirol AB v SwissCo Services AG, Case No T 4805-03 decision of the Court of Appeal of Western Sweden of 30 September 2005	10–11
Esso Australian Resources Ltd v Minister for Energy and Minerals (1995) 183 CLR 10, (1993) 8 (6) Mealey's IAR D1	143
Exel v Logitech, decision of Rotterdam District Court of 08 June 2006	154–5

Fiona Trust & Holding Corporation and Others v Privalov and Others [2007] UKHL 40, [2008] 1 Lloyd's Rep 254	10, 16, 20–1
Goldtron Ltd (Singapore) v Media Most BV (Netherlands) XXVIII YBCA 814 (2003)	145
Hilmarton v Omnium de Traitement et de Valorisation (OTV) XX YBCA 663 (1995)	35
Himpurna California Energy Ltd (Bermuda) v PT (Persero) Perusahaan Listruik Negara (Indonesia), Final Award of May 4 1999, XXV YBCA 13 (2000); 14(12) Mealey's IAR A1-A58 (1999)	11
ICC Case No 10623	129
Iran Aircraft Ind v Avco Corporation 980 F 2d 141 (2nd Cir 1992); XXVIII YBCA 599 (1993)	145
K/S Norjarl A/S v Hyundai Heavy Industries (1992) 1 QBD 863; [1991] 1 Lloyd's Rep 260; On appeal to CA [1991] 1 Lloyd's Rep 524	48, 63–4, 137–41
Maternaco SA v PPM Cranes Inc and Others, decision of the Tribunal de Commerce, Brussels of 20 September 1999, YBCA, 2000, Vol XXV, p. 673	19
Minmetals (Germany) v Ferco Steel XXIV YBCA 739 (1999)	145
Parsons & Whittemore Overseas Co. Inc. v Societe Generale l'Industrie de Papier (RAKTA) 508 F 2d 969 (2nd Cir 1974)	145
Peterson Farms Inc v C & M Farming Ltd. [2004] EWHC 121 (Comm) 4 February 2004	12
Prima Paint Corp v Flood & Conklin Mfg Co, 388 US 395 (US S Ct 1967)	21
Raffineries de Petroles D'Homs et Bamas v ICC, decision of Tribunal of First Instance, Paris, 28 March 1984	75
Raoul Duval v V Rev Arb 411 (1996)	148
Republic of Indonesia v Himpurna California Energy Ltd XXV YBCA 469 (2000)	129
Road Rejuvenating & Repair Services v Mitchell (1992) 1 ADRLJ 46 ...	173
Robinson v Moody (1995) ADRLJ 262 68	
Ruolas v Professor J Tepora, Case No KKO 2005:14, decision of Supreme Court Finland 31 January 2005 ADRLJ 262	170
Sacheri v Robotto, Vol XVI YBCA 156 (1991)	66
Sea Containers Ltd v ICT Pty Ltd [2001] NSWCA 84	140

Siemens AG & BKMI Industrienlagen GmbH v Dutco Construction Co, Cass Civ 7 Jan 1992, YBCA, 1993, Vol XVIII, p. 140	101
SNF SAS v ICC, Paris Court of Appeal, First Section C, decision of 22 January 2009, 07-19492	69, 107–8, 110, 122, 173
Spiliada Maritime Corpn v Cansulex Ltd [1987] AC 460	90
State of Israel v Desert Exploration 1976 Incident (1992) 3 Am Rev Int Arb 177	147
State of Israel v National Iranian Oil Company with Note by P Fouchard, Rev Arb (2002) 407	90
Town Centre Securities Plc v Leeds City Council [1992] ADRLJ 54	138
Tradax Export SA v Volkswagenwerk AG ('La Loma') [1970] 1 Lloyd's Rep 62, [1970] 1 QB 537	68
York Hannover Holding AG (Switzerland) v AAA, Vol XX YBCA (1995) 856	128, 146

Table of statutes

International Conventions

United Nations Convention on Recognition and Enforcement of Arbitral Awards, New York, 10 June 1958	4, 9, 17–20, 23, 34–6, 38, 41, 43, 120, 151, 162
European Convention on International Commercial Arbitration, Geneva, 21 April 1961	20, 23
EC Regulation No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)	159–61, 163

Model Law

United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, 21 June 1985, as amended 2006	2–4, 14, 18–19, 41, 64, 66–7, 126, 144, 147, 15
---	---

National Laws

Argentina

National Code of Civil and Commercial Procedure Law 17.454 of 19 September 1967, as reformed by Law 22.434 of 16 March 1981, text consolidated according to Decree 1.042 of 1981 – Book IV Arbitral Procedure	4, 65
---	-------

Brazil

Arbitration Law No 9.307 of 23 September 1996	4, 60, 91
---	-----------

China

Arbitration Law of the People's Republic of China, 31 August 1994	4, 62, 91, 146
--	----------------

England

Arbitration Act, 1950	137
Arbitration Act, 17 June 1996	4, 21, 52, 66, 123–4, 137, 144, 172–3

France

Code of Civil Procedure, Book IV – Arbitration, 14 May 1981	35, 61–2, 67
--	--------------

Germany

Tenth Book, German Code of Civil Procedure, Arbitration Law, 1 January 1998	4
--	---

The Netherlands

Arbitration Act 1986	155
----------------------------	-----

Nigeria

Arbitration and Conciliation Act 1988	4
---	---

Sweden

Arbitration Act 1999	4
----------------------------	---

Switzerland

Swiss Private International Law Statute 1990	4, 13–14, 22–3
--	----------------

United States of America

Federal Arbitration Act, 12 February 1925	4, 148
---	--------

Arbitration Rules

Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration 2007	4
---	---

Arbitration Rules of the Lagos Regional Centre for International
Commercial Arbitration 2008 4

Arbitration Rules of the United Nations Commission on International
Trade Law, 15 December 1976 4, 25, 72, 87, 129, 153

AAA International Arbitration Rules, 1 July 2008 4, 95, 107, 128

CIETAC Arbitration Rules, 11 January 2005 4, 129–30, 158

DIS Arbitration Rules 1998 4

ICC Rules of Arbitration 1998 ... 4, 12, 27–8, 69, 73, 97, 107–8, 122, 128–9,
135–6, 149, 153, 159, 172–3

LCIA Arbitration Rules 1998 4, 94, 99, 108, 127, 142, 163

SIAC Arbitration Rules 2007 4, 25, 95, 100

SCC Arbitration Rules 2007 4, 10

Swiss Rules of International Arbitration, January 2004 4

Soft Laws

IBA Guidelines on Conflict of Interest in International Arbitration, 22 May
2004 147, 153

IBA Rules of Ethics for International Arbitrators, 24 July 1964
..... 68–9, 142, 146, 149

AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, 1 March
2004 142–3, 149

Introduction

The primary focus of this book is an analysis of the contractual nature of the relationships between the disputing parties, arbitrators and arbitration institutions. Principles of general contract law are applied to the formation of the arbitrator's contract and the performance of its terms. Some presumptions are made in analysing the formation of the arbitrator's contract while the conclusions drawn from the analysis of arbitral practice on the appointment of arbitrators and the role of the arbitrator in international arbitral references are tested against certain case studies.

One of the presumptions is that the disputing parties contract jointly with the arbitrator and arbitration institution in concluding the arbitrator's contract and other collateral contracts all of which emanate from the arbitration agreement. In situations where one disputant refuses to join in the constitution of the arbitral tribunal, various theories have been proposed to justify binding this party to the arbitrator's contract and other collateral contracts. These theories (the agency or power of attorney) are analysed and another theory (the partnership) is proposed in chapter two. The need to explain the rationale for presuming the disputing parties act as joint contracting parties after concluding the arbitration agreement arises from the desire to align theory to international arbitral practice.

The objective of this chapter is to establish the context of the seven substantive chapters of this book. It commences with a brief historical background and working description of international commercial arbitration. The examination of the formation of the arbitrator's contract is divided between (i) the two forms of international commercial arbitration and (ii) an outline of the case studies in which the arguments on the formation and effect of the arbitrator's contracts are tested. The chapter concludes with an outline of the chapters of the book.

1 Brief historical background and description of international arbitration

Arbitration is a private process of dispute resolution.¹ It is one of a catalogue of alternatives to litigation in state courts.² It is a dispute resolution

mechanism that has been adopted by commercial parties over a long period of time.³ Historically, arbitral procedure was not governed by legal rules as it is presently. Arbitration was (and in some instances still remains) a mechanism for dispute resolution adopted by members of various trade and specialist associations.⁴ In these associations commercial men enlisted the assistance of other (usually senior) members of the same trade association, to resolve disputes which arose in the course of their business relationship. The dispute is resolved in accordance with the practices of the particular trade association.⁵ These arbiters were not required to decide according to the law. They operated more akin to present day conciliators or as arbitrators in *ex aequo et bono* proceedings. The arbitrators were required to render a decision binding on the disputing parties in the form of an award though not necessarily accompanied with reasons.

The disputing parties voluntarily complied with the arbitrator's decision. Such compliance resulted possibly from the fact that the disputing parties as members of the same trade association usually had continuing business relationships and so judged compliance more commercially expedient. Each trade association also had ways of 'punishing' a defaulting judgment debtor. An example of this 'informal enforcement method' is the posting of the names of such members on the association's public Information Board. This resulted in bad publicity for the recalcitrant member, who might have lost business and definitely its reputation in the particular trade association.⁶ This account evidences the presence of the disputing parties, arbitrator and arbitration institution in the arbitral reference.

In the period before the Model Law,⁷ the process of arbitration in various trade associations was both faster and cheaper than litigation in state courts and the arbitrator was not remunerated, as he most often rendered his services for free, being content with the recognition accorded him by his peers/nominees.⁸ This earned arbitration the reputation of being cheap and fast. However, this is no longer the case, as has been recognized by the consumers of the process.⁹ These seeming negative aspects of international commercial arbitration have not diminished its use by commercial entities. To the contrary, the use and popularity of arbitration has increased to an extent that arbitration is now asserted as the preferred method of resolving commercial disputes in the international arena. This assertion invariably means that the benefits to the users of the mechanism far outweigh its disadvantages.¹⁰ These perceived advantages have generated several important outcomes: spurring the development of the law and practice of arbitration; creating new and better structures both in terms of modern arbitration laws¹¹ and arbitration institutions;¹² increased ratification of relevant international conventions;¹³ initiating a review of the arbitration rules of various institutions in the last two decades; and ensuring a continued support of international arbitration by national courts.¹⁴

Lew, Mistelis and Kröll, in distinguishing the international character of commercial arbitration gave the following three distinguishing criteria:

(i) the objective criterion encompassing the notion of a ‘foreign element’ or ‘international character’ to the dispute, (ii) the subjective criterion which relates to the nationality or place of business of the parties which should be in different states, and (iii) the modern criterion which combines both the objective and subjective criteria.¹⁵ The learned authors then described international arbitration as:

A specially established mechanism for the final and binding determination of disputes, concerning a contractual or other relationship with an international element, by independent arbitrators, in accordance with procedures, structures and substantive legal or non-legal standards chosen directly or indirectly by the parties.¹⁶

This description clearly mentions the presence of two core participants, the disputing parties and arbitrators, while the reference to structures may refer to arbitration institutions as well. The description of international¹⁷ commercial¹⁸ arbitration with the express addition that this may involve the administration of the arbitral reference by another neutral third party (arbitration institution) contained in the Model Law is a good example.

The following definite questions are answered in this book:

- i How is the arbitrator’s contract concluded?
- ii Does each arbitrator or the arbitral tribunal conclude the arbitrator’s contract?
- iii What are the general terms of the arbitrator’s contract?
- iv What are the consequences of the conclusion of the arbitrator’s contract on the arbitrators, disputing parties and arbitration institution involved in the arbitral reference?

The analysis of these questions is primarily based on the provisions of national arbitration laws and arbitration rules, decisions of national courts and arbitral awards, and arbitral practice. On the basis of these, the formation of the arbitrator’s contract is analysed through the application of general principles of contract law. This analysis leads to the conclusion that each arbitrator concludes his own contract for service when he accepts appointment from the disputing parties or arbitration institution. Having determined that the arbitrator’s contract is a contract for the provision of services, the next task was to determine what the terms of this contract are and whether the terms are enforceable. The analysis on the enforceability of the terms leads to the analysis of the remedies parties to this contract may seek and the methods by which this contract can be terminated.

Any analysis of any aspect of international commercial arbitration law involves the examination of various national laws, while its practice involves the analysis of various arbitration rules, decisions of national courts, arbitral awards and commentaries. Therefore the issues raised in this book are

examined through textual analysis of both primary and secondary sources of law applicable in international commercial arbitration. Arbitration laws exist in almost every jurisdiction and it is not practicable to examine all of these laws, however laws from representative jurisdictions that cut across legal traditions and continents are examined.¹⁹ On arbitration rules, those of the most prominent institutions involved in international commercial arbitration²⁰ are examined along with some 'young' arbitration institutions from the continent of Africa to present a more balanced picture of the typography of international commercial arbitration. The primary sources include: multilateral treaties,²¹ international conventions²² and national laws on international commercial arbitration. The primary laws referenced are: the New York Convention of 1958; UNCITRAL Model Law on International Commercial Arbitration 1985 and its 2006 revision;²³ Argentina National Code of Civil and Commercial Procedure Law, Decree 1.042 of 1981 Book IV;²⁴ Brazil Law No 9.307 of 23 September 1996;²⁵ Arbitration Law of the People's Republic of China 1994;²⁶ English Arbitration Act 1996; French Code of Civil Procedure Book IV 1981; Book Ten of the German Code of Civil Procedure;²⁷ Arbitration and Conciliation Act 1996 of India;²⁸ Arbitration and Conciliation Act 1988 of Nigeria;²⁹ Swedish Arbitration Act 1999; Federal Statute on Private International Law of Switzerland; and the Federal Arbitration Act 1925 of the United States of America. The primary arbitration rules referenced are: the UNCITRAL Arbitration Rules 1976;³⁰ AAA International Arbitration Rules 2008;³¹ Arbitration Rules of the Cairo Regional Centre for International Commercial Arbitration 2007;³² CIETAC Arbitration Rules 2005;³³ DIS Arbitration Rules 1998; ICC Rules of Arbitration 1998;³⁴ Arbitration Rules of the Lagos Regional Centre for International Commercial 2008;³⁵ LCIA Arbitration Rules 1998;³⁶ SIAC Arbitration Rules 2007; SCC Arbitration Rules 2007; and Swiss Rules of International Arbitration 2004.³⁷ The jurisprudence of international commercial arbitration includes a number of soft laws, codes, guidelines and practice. The disputing parties however must contract into these soft laws for them to apply in the particular arbitral reference,³⁸ while the codes, guidelines and practices appear to be adhered to as best practice or with a moral force of their own. Where relevant in the text, these soft laws are also referred to.

2 Case study

The analysis of the formation of the arbitrator's contract in Chapter Four is tested against the following arbitrator appointment methods:

Under ad hoc references

- i Party C and Party R jointly agree on and appoint Arbitrator A as sole arbitrator. It is proposed in Chapter Three that both parties C and R are clearly joint parties to the arbitrator's contract with the sole arbitrator.

- ii Party C appoints Arbitrator A while Party R refuses to join in the appointment or in the arbitration mechanism, contesting the jurisdiction of the arbitrator. Will Party R be a contracting party to the arbitrator's contract where Arbitrator A acts as a sole arbitrator?
- iii Party C nominates and appoints Arbitrator A. Party R nominates and appoints Arbitrator B. Arbitrators A and B then appoint Arbitrator D. Arbitrator D then agrees the terms of appointment for all the arbitrators with Party C and Party R. In this case all arbitrators (the arbitral tribunal) appear to contract with the disputing parties implying that one arbitrator's contract is concluded with the arbitral tribunal when it is fully constituted.
- iv Party C nominates and appoints Arbitrator A. Party R nominates and appoints Arbitrator B. Each party agrees terms of appointment with its own appointed arbitrator. Arbitrators A and B then nominate Arbitrator D for the appointment of the parties. Arbitrator D agrees terms of appointment directly with the parties. In this case, arbitrators A and B appear to contract with different parties while Arbitrator D contracts with both parties.
- v Party C nominates and appoints Arbitrator A. Party R nominates and appoints Arbitrator B. Each party agrees terms of appointment with its own appointed arbitrator. Thereafter, arbitrators A and B appoint and agree terms of appointment with Arbitrator D on behalf of parties C and R.
- vi Party C unilaterally requests the appointing authority (or national court) to appoint the sole, co- or presiding arbitrator. Again the question that arises here is whether Party R will be bound as party to the arbitrator's contract.
- vii Party C and Party R jointly request the appointing authority (or national court) to appoint the sole or presiding arbitrator on their behalf. In this scenario both parties jointly make the requests and so are clearly bound to the arbitrator's contract.

Under institutional references

- viii Party C requests the nominated arbitration institution to appoint the sole arbitrator. The institution appoints Arbitrator A (and possibly arbitrators B and D in the case of an arbitral panel) directly without any input from Party C or Party R. The institution communicates directly with the arbitrator and appoints him. The question that arises is who then concludes the contract with the appointed arbitrator? It is argued in Chapter Four that the institution concludes the arbitrator's contract with the sole arbitrator (or each of the arbitrators forming the panel of arbitrators) either as principal or agent of the parties.
- ix Party C and Party R jointly agree on Arbitrator A as sole arbitrator and nominate him for appointment by the arbitration institution. It is argued

that in this scenario the institution contracts with the arbitrator as agent of the disputing parties.

- x Party C nominates Arbitrator A for appointment by the institution. Party R also nominates Arbitrator B for appointment by the institution. Parties C and R thereafter appoint the presiding Arbitrator D. It is argued that the institution concludes the arbitrator's contract with each arbitrator as agent. In this scenario the institution acts as agent of the disputing parties so that there is a contract between the disputing parties and arbitrator directly (Dr Melis' position). This is possible because the parties choose the arbitrators appointed by the institution.
- xi Party C and Party R nominate two arbitrators for appointment by the arbitration institution. The arbitration institution appoints the presiding Arbitrator D. In this case, it is argued that the institution contracts as agent with the two party appointed arbitrators nominated by the disputing parties while it contracts as principal with the presiding arbitrator it appointed.
- xii Party C appoints Arbitrator A and notifies the institution. Party R appoints Arbitrator B and notifies the institution. The two party appointed arbitrators appoint Arbitrator D and also notify the institution. In this appointment method it is argued that the institution concludes the arbitrator's contract as long as the institution itself makes an offer to the arbitrators. However, this conclusion is difficult to substantiate where parties directly appoint arbitrators and notify the institution for its imprimatur as it were. The argument that the institution concludes the arbitrator's contract becomes tenuous in this appointment method. It is argued that in such a scenario, the arbitration institution acts just like an appointing authority and not as a principal and thus will contract as agent of the disputing parties.

3 Outline of the chapters

Chapter One gives a contextual discussion of the arbitration agreement, which is the fundamental contract from which all the other contracts examined in this book emanate. In Chapter Two the juridical theories of arbitration and the relationship theories are examined as part of the contextual analysis of the subject matter of international arbitration. In Chapter Three the nature of the individuals or entities that are parties to the various contracts examined in this book are discussed. Chapter Four then analyses the formation of the arbitrator's contract and the contracts involving the arbitration institution. In Chapter Five the terms of the arbitrator's contract are discussed. The same terms are mirrored in the contract between the arbitration institution and the disputing parties. Chapter Six examines the remedies that parties to these two contracts may have recourse to; and Chapter Seven discusses how these contracts may be terminated.

There are two recent publications which appraise the topics discussed in

this book, one in French by Thomas Clay³⁹ and the other in English by Patrik Schöldstrom⁴⁰ which examine the position under the English, Swiss and Swedish laws. This book examines the same questions but in a more autonomous manner without dwelling on any particular jurisdiction, though a major bias is noticeable towards sources and doctrines based predominantly on the common law.

1 Arbitration agreement

The arbitration agreement is the basis of any consensual arbitration, so that there cannot be an arbitral reference in the absence of a valid and enforceable arbitration agreement.¹ The whole realm of arbitration commences with the existence of such an arbitration agreement. In effect if there is no consent to arbitrate, there is nothing for the arbitral reference to stand on.² This state of affairs will result in the nullity of the arbitral proceeding and any arbitral award made pursuant to it, but will not nullify the arbitrator's contract or the contract between the disputing parties and the arbitration institution.³

The arbitration agreement may be in the form of a clause in the main contract evidencing the transaction between the parties or as a separate submission agreement.⁴ Arbitration clauses evidence the intention of the parties to submit future disputes arising out of the underlying main contract to resolution by means of arbitration, while the submission agreement is a separate document evidencing the intention of the parties to submit existing disputes that have arisen over a defined legal relationship to resolution by means of arbitration. Thus both forms of arbitration agreement have the same primary purpose – that of resolving disputes by means of arbitration.⁵ This chapter gives an introductory discourse on aspects of the arbitration agreement relevant to matters affecting the arbitrator's contract and the disputing parties' contract with the arbitration institution.

This chapter examines: (1) the legal nature of the arbitration agreement; (2) the requirements for a valid arbitration agreement under selected arbitration laws and rules; (3) the doctrine of separability or autonomy of the arbitration agreement; (4) the law applicable to the arbitration agreement; (5) the termination of the arbitration agreement; (6) the two primary forms of arbitration references; and (7) the relationship between the arbitration agreement and the arbitrator's contract and the contract between the institution and the disputing parties.

1 Legal nature of the arbitration agreement

The arbitration agreement is a contract in which the parties exchange promises with the legal intention to be bound to the performance of those promises. Thus parties to the arbitration agreement must possess legal capacity to conclude such a contract. This sub-section examines: (1.1) the parties to the arbitration agreement and their legal capacity to contract, (1.2) the agreement to arbitrate, (1.3) the intention of the parties to conclude legal relations, and (1.4) the nature of the promise contained in the arbitration agreement.

1.1 Parties and their capacity to contract

Parties to the arbitration agreement are the main disputants in the arbitral reference and also are the same parties to the underlying or main transaction from which the dispute evolves. The disputing parties are therefore the physical persons or legal entities that are empowered by their personal laws or the law of the place of their incorporation to opt out of litigation into the private dispute resolution mechanism of arbitration in the settlement of their underlying dispute.⁶ It is these parties that trigger the whole arbitral process by taking the first step of entering into a valid and enforceable arbitration agreement pursuant to a 'defined legal relationship, contractual or not', quoting the New York Convention.⁷ Since the arbitration agreement is a contract, the disputing parties must have capacity to conclude a contract, to sue and be sued.⁸ The parties must not only have legal capacity to enter into the arbitration agreement but must also have legal capacity to conclude the arbitrator's contract and all other collateral contracts relevant to the international arbitral reference. This sub-section examines: (1.1.1) the nature of the parties to the arbitration agreement, and (1.1.2) their capacity to contract.

1.1.1 The parties

Identifying the parties to any particular arbitration agreement is of primary importance since it is only such persons or entities that shall be bound by its terms, as in any other contract.⁹ Usually an examination of the arbitration agreement will reveal those who are parties to it. The need to identify parties to the written arbitration agreement arises in situations where one party denies that it is bound by the arbitration agreement. Such enquiries are usually found in arbitration references dealing with multiparty, joinder and non-signatory issues, and where the very existence of the agreement is contested.

Identifying parties to a written document is relatively straight forward since the names and description of the parties will be contained in the document. Where however there is no written record of the agreement, identifying

parties to the agreement becomes problematic. Where the arbitration agreement is contained as a clause in another contract, the wording in the clause will usually refer to the same parties covered by the main contract. So for example the arbitration clause in the relevant part of *Fiona Trust* reads

(c) Notwithstanding the foregoing ... either party may, by giving written notice of election to the other party, elect to have any such dispute referred ... to arbitration in London.¹⁰

The parties mentioned in this clause clearly refer back to the parties to the Shelltime 4 charterparty form (in which it forms a part) which are the owners of the vessel (members of the Sovcomflot group of companies) and the charterers.

Physical persons who can sue and be sued under their personal laws can be parties to arbitration agreements, the arbitrator's contract and the contract between the disputing parties and the arbitration institution.¹¹ In an ICC final award, between a French manufacturer as claimant and a German distributor as defendant, the arbitrator declined to exercise jurisdiction over the couple that signed the contract on behalf of the distributor-company, since there was no valid arbitration agreement between the couple and the French manufacturer. In this case under German law, the company had not been registered by the time the arbitration agreement was signed.¹² This decision reflects the fact that an individual needs to validly conclude an arbitration agreement to be a party to it and, by extension, to all other contracts emanating from it.

There are other forms of arrangements or entities clothed with legal personality under various legal systems that participate in international arbitration.¹³ Such entities are mainly registered companies or corporations. Generally, a registered company can sue and be sued in its own name, until it is liquidated or goes into administration. In liquidation, the liquidator is sued (or sues) as representative of the company. The test applied to determine if an association can be a party to an arbitration agreement (and the arbitrator's contract and contract with the arbitration institution) is whether such association can conclude legal contracts pursuant to the law of its incorporation or registration.¹⁴ This presupposes that the association is in existence at the relevant time of concluding the arbitration agreement.¹⁵ Where the association or entity merges with another entity, it remains in existence, though in its merged form¹⁶ so that it will still be bound by the promises it made in any arbitration agreement it has already concluded.¹⁷ In a dispute between *Dentirol AB v SwissCo Services AG*, arising from arbitration proceedings under the SCC Arbitration Rules, Dentirol challenged the arbitration proceedings commenced by SwissCo on the grounds that SwissCo was not a party to the underlying contract containing the arbitration clause. Unknown to Dentirol, SwissCo had merged with the original company, which was a party to the arbitration agreement. The sole arbitrator held that as a

result of the merger, SwissCo had become the legal successor and party to the arbitration agreement. The arbitrator took jurisdiction and issued an award against Dentirol who appealed his decision. The Court of Appeal of Western Sweden agreed with the arbitrator and held that SwissCo was a proper party to the arbitration agreement and proceedings.¹⁸ Registered corporations are the predominant parties in arbitration agreements concluded in international commercial transactions.¹⁹

Though these corporations act in their own name and enjoy an independent or separate legal existence and personality (from their shareholders, directors and management), they act through various officers, agents and servants and are ultimately owned by individuals or groups of individuals. The question of applying the principle of apparent or ostensible authority of company officers to lift the corporate veil of a registered entity is governed by the law of the place of incorporation but does not affect the issues examined in this chapter in any fundamental way and therefore does not merit an exhaustive discussion. Mention may be made here of the arbitral awards in the *Himpurna California Energy Ltd (Bermuda) v PT (Persero) Perushahaan Llistruik Negara (Indonesia)* saga in this regard.²⁰ The arbitral tribunal recognized the participation of the Government of Indonesia (who was not a party to the arbitration agreement) through its Minister of Mines and Energy. The Minister had approved and signed the Energy Sales Contract and the Joint Operating Contract, guaranteed payments to the claimant company and frustrated the contract by its promulgation of Decrees 39/1997 and 5/1998, thus forcing the suspension of the energy project. The arbitral tribunal imputed this intervention of the Minister to the Government of Indonesia.²¹

This effectively leads into the discussion on the group of companies' doctrine in international arbitration. Corporations that drive international business transactions are mainly designed using the 'group of companies' structures in various forms of major joint venture and partnership projects. These organizations have very complex corporate structures.²² The size and volume of financial investment in a majority of large international projects demand the formation of such joint ventures and/or consortia. The subsidiary members of a group of companies may be registered under the laws of various states where they carry out their business concerns.²³ Some groups of companies are structured in such a way that the parent company retains control over the management of the subsidiaries²⁴ while in some other group of companies structure, the subsidiaries are more autonomous and exercise more powers independently of the parent company.²⁵ From decisions (both arbitral awards and court judgments) on the 'group of companies' doctrine, it appears that where the member companies of a group are actively involved in the formation, performance and possible termination of the contract, such member companies of the group will be more likely to be bound by any arbitration agreement arising from the transaction. This is so even where these member companies are not named as parties in the underlying

contract and have not signed the relevant arbitration agreement.

Decisions of national courts differ across various jurisdictions regarding the applicability of the principle of separate legal personalities as it affects the 'group of companies' doctrine. Two examples that reflect this divergence of opinion in international arbitration references are the decision of the French courts upholding the 'group of companies' doctrine as applied in the *Dow Chemicals* ICC arbitral award and the judgment of the English Commercial Court in the *Peterson Farms* case also arising from an ICC arbitral award. In the *Dow Chemicals* award decided under the ICC Rules, the arbitral tribunal decided that, Dow (the parent company) though not a signatory to the arbitration agreement would be granted leave to participate in the arbitration reference. This was because it had participated in the formation and performance of the underlying contract, so that in effect Isover dealt with all the members of the Dow Group in the contract. This award was upheld by the Paris Court of Appeal.²⁶ This decision in effect meant that the parent company and other members of the Dow Group joined in the arbitration had *de facto* become parties to both the arbitration agreement and the arbitrator's contract and the contract with the ICC.²⁷ A contrary decision on the applicability of the group of companies doctrine was reached by Langley J of the English Commercial Court in *Peterson Farms Inc v C & M Farming Ltd*.²⁸ The ICC arbitral tribunal in *Peterson Farms* applied the group of companies' doctrine and principles of agency to assume jurisdiction to determine the claim by C&M Farming for losses suffered by itself and other member companies of the C&M Group (who were themselves not party to the arbitration agreement). On this basis, the ICC arbitral tribunal found that Peterson Farms was also liable for the losses suffered by other members of the C&M Group. This was as a result of the sale of live poultry infected with an avian virus by Peterson Farms and in addition to the loss suffered by C&M Farming Ltd itself who was party to the arbitration agreement.²⁹ The judge held that the group of companies' doctrine did not apply to the particular facts of the case governed by the law of Arkansas (which the judge determined is the same as English law on the point) as the proper law of the contract which also governs the question of parties to the contract.³⁰ In *Dow Chemicals*, the arbitral tribunal and Paris Court of Appeal applied international principles while the English Commercial Court applied substantive law to determine the applicability of the group of companies' doctrine, arriving at different conclusions.

Arbitration agreements have been held to also bind non-signatories in certain situations. The discussion on non-signatories relates to situations where one or more individuals or entities that have not signed either the submission agreement or the main contract containing the arbitration clause, are held to acquire rights and liabilities under the arbitration agreement³¹ contrary to the doctrine of privity of contract.³² Gary Born in analysing various authorities on the subject comes to the conclusion that it is not a question of extending the arbitration agreement to third parties but of identifying the

true parties who have consented to the arbitration agreement and effectively holding them to their agreement.³³

In all of this, it is universally agreed that a total stranger to the arbitration agreement cannot be a party to it on the basis of the doctrine of privity of contract.³⁴ In recognition of this fact, various national courts have held that in certain circumstances non-signatories cannot be bound to an arbitration agreement.³⁵ In the same manner, an independent company with a proprietary interest in the underlying contract does not automatically become party to the arbitration agreement.³⁶ The effect of this is that such stranger cannot be party to either the resulting arbitrator's contract or the contract with the arbitration institution. Where a third party commences arbitration proceedings in a connected dispute against one of the parties to another arbitration agreement, both arbitration proceedings may be consolidated or heard concurrently.³⁷ This connection does not make the parties members of one consolidated arbitration agreement but of the particular arbitration agreement they consented to. The relevant point here is that in multi-contract arbitration references, a party to the arbitration agreement on the basis of which the arbitrator's contract is concluded is party to that particular arbitrator's contract and bound by its terms, and also party to the contract with the arbitration institution.

The foregoing discussion is relevant in identifying parties to the arbitrator's and institution's contracts. The non-signatory company becomes bound to the arbitrator's contract from the moment it is declared party to the arbitration agreement. It is therefore possible that the non-signatory company may not have participated in the formation of the arbitrator's contract (depending on the stage of the arbitral reference the non-signatory company joined in the arbitration agreement). However the appointing parties who concluded the arbitrator's contract will be held to act for and on behalf of all parties to the arbitration agreement. These are parties identified at the time of formation of the arbitrator's contract and those parties that subsequently become bound by the arbitration agreement. Thus, non-signatory companies become parties to the arbitrator's contract and the contract with the arbitration institution retrospectively.³⁸

Sovereign states also participate in international commercial transactions and to this end conclude commercial contracts that usually also contain arbitration agreements. To effect such transactions, sovereign states conduct their commercial activities through pure commercial entities that are registered as such, or through various state departments, agencies and other state controlled public entities. Arbitration laws recognize that states or their agencies or departments (public law entities) can validly conclude arbitration agreements in their names,³⁹ for example, Article 177(2) of the Swiss Federal Arbitration Law provides

A state, or an enterprise held by, or an organisation controlled by a state, which is party to an arbitration agreement, cannot invoke its own law in

order to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement.

The direct implication (for purposes of this book) of this is that states and state-owned entities will also be parties to the arbitrator's contract and all other contracts emanating from their conclusion of the arbitration agreement.

1.1.2 Capacity of parties to the arbitration agreement

A party concluding an arbitration agreement must have legal capacity to enter into a legally binding contract.⁴⁰ In other words, such party must have capacity to sue and be sued.⁴¹ In most legal systems, an adult person⁴² without any legal impediment⁴³ can conclude an arbitration agreement.⁴⁴ The authors of *Russell on Arbitration* are of the opinion that

It is important to give consideration to the capacities of the parties to an arbitration agreement in order to establish whether they are capable of creating a legally enforceable obligation to arbitrate and to determine the nature of their role.⁴⁵

The legal capacity of an individual or entity is regulated under the personal law of the individual and the law of the place of incorporation or registration of the legal entity. Since the arbitration agreement emanates from the underlying transaction, it is the same law that governs questions of legal capacity of the parties under the main contract that will determine the same question as it affects the arbitration agreement. Legal capacity is necessary as a requirement because the arbitration agreement is a contract entered into by the disputing parties.⁴⁶ The parties to an arbitration agreement must have legal capacity to contract under the relevant regulatory law. This may be the law of the individual's place of habitual residence or domicile⁴⁷ or the law of the place where the company is registered or has its principal place of business.⁴⁸ Where a registered company has more than one place of business, the Model Law provides that, 'the place with the closest relationship to the arbitration agreement', shall be deemed the place of business.⁴⁹ Therefore the law of that place⁵⁰ would apply to determine the capacity of the company to enter into the arbitration agreement and by implication the arbitrator's contract and the contract with the arbitration institution.

In most jurisdictions, an individual who is an adult, not adjudged bankrupt by law and mentally fit can conclude a binding contract; while a legal entity duly incorporated in accordance with the relevant company law and authorized by its articles of association or company constitution can also conclude a contract. Generally, it is legal entities that dominate the realm of international commercial arbitration as disputants so that challenges of lack of capacity to contract are usually raised against or by such corporations.

These matters arise in the context of one party alleging that it lacked capacity to enter into the arbitration agreement (usually as a corollary to lack of capacity to conclude the underlying contract) in support of a jurisdictional challenge. This allegation may be upheld where the agent of the company acting on its behalf did not have the requisite authority to enter into the arbitration agreement on behalf of the company.

1.2 Existence of an agreement

Generally an agreement comes into existence when a valid and unequivocal offer is accepted. The arbitration agreement is a bilateral contract in which both parties make legally binding promises to each other. To amount to a valid offer, the communication, has to be ‘an expression of willingness to contract on specified terms, made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed’.⁵¹ Acceptance on the other hand is defined as ‘a final and unqualified expression of assent to the terms of the offer’.⁵² Applying these objective definitions to the conclusion of the arbitration agreement, one party (offeror) makes an offer to arbitrate disputes arising from the underlying transaction to the other party (offeree) which the offeree accepts.

This description of how the arbitration agreement is concluded is quite straightforward. The difficulty lies in identifying the exact time when the offer is accepted and by which of the parties to the agreement. This will depend on whether the agreement is a clause in a main contract or a stand-alone submission agreement. In the case of a clause, it can be argued that the offer is made at the same time as the offer in the underlying contract, since the arbitration agreement is a clause or more appropriately a term of the main contract. If this analysis is correct then the offeror is the same party in both the main contract and the arbitration agreement. In a submission agreement the offer is made after the dispute arises by the party who unequivocally communicates its intention to arbitrate the resulting dispute to the other contracting party. The initiating party is the offeror while the party to whom the offer was made becomes the offeree. The offeree is at liberty to accept or reject the offer to arbitrate the dispute.⁵³ If the offeree accepts the offer, then the arbitration agreement is concluded.⁵⁴ It is only after this offer has been accepted and an agreement concluded that the parties can commence the arbitral reference. This same analysis will apply in a battle of forms situation, to determine whether the parties actually concluded an arbitration agreement, where the clause is contained as a clause in the standard form contract of one of the contracting parties.⁵⁵

1.3 Legal intention to contract

In commercial transactions there is a general presumption that parties intend to be bound by their agreement. The issues examined in this book

relate to international commercial transactions concluded by legal entities and so reliance can be placed on that assumption that parties involved in the various contracts pursuant to such arbitral references intend to be legally bound by their agreement. This presumption that the parties intend to arbitrate all disputes covered by the arbitration is displaced where all contracting parties effectively repudiate the arbitration agreement and litigate their dispute or where one party commences litigation before a national court and the other party does not request the court to enforce the promise to arbitrate the covered dispute but submits to the jurisdiction of the court and participates in the proceedings. In practice, most contracting parties faced with this situation will opt to enforce the promise to arbitrate and apply for an anti-suit injunction to compel the other party to the arbitration agreement to arbitrate such covered disputes.⁵⁶

1.4 Nature of the promise in the arbitration agreement

The primary promise or purpose of any arbitration agreement is the final resolution of disputes that fall within its scope through the mechanism of arbitration. Lord Hoffman in *Fiona Trust v Privalov* describes the purpose of the arbitration agreement as: ‘The parties have entered into a relationship, an agreement ... which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen ...’⁵⁷ Therefore each party to the arbitration agreement promises that upon a covered dispute arising, it will take steps to initiate arbitral proceedings to resolve the dispute in accordance with the terms of the arbitration agreement it has concluded with the other party. Both (or all) parties to the arbitration agreement make this same promise to each other so that when the conditions on which to invoke the arbitration agreement arise, either party (or any of the parties) has a right to commence arbitration proceedings in accordance with the terms of the arbitration agreement.

The benefit of concluding an arbitration agreement is the right to arbitrate the dispute, while the liability incurred is the joint funding of the arbitration reference. This benefit and liability analysis also satisfies the requirement for consideration in those jurisdictions where it is required for the valid conclusion of a contract. It therefore can be argued that where one party takes steps to perform the promise contained in the arbitration agreement, that party does not merely act for itself and on behalf of the other party to the agreement (as an agent) but it acts to fulfil its promise (in their joint bargain as partners) under the arbitration agreement.⁵⁸ As long as the claimant party acts in accordance with and within the terms of the arbitration agreement, the respondent party will be bound by his actions (and may therefore incur liabilities, for example, to pay the arbitrator’s fees). However, where the claimant party acts outside or beyond the terms of the arbitration agreement, he then acts beyond his promise in the arbitration agreement.⁵⁹ The claimant party in such a situation will become solely responsible for the

liabilities incurred for his unauthorized actions (so that, for example, where the claimant party agrees exorbitant fees with the arbitrator for his services, any unreasonable portion of the fees agreed with the arbitrator shall not be binding on the respondent party, to the extent of the unreasonableness).

2 Validity of the arbitration agreement

To achieve the purpose for which it was concluded by the parties, the arbitration agreement must be valid under the law applicable to it. Matters on the validity of the arbitration agreement are divided into two parts, those that deal with issues of formal validity which seek to prove that there is an arbitration agreement in existence, and those on substantive validity which seek to prove what the parties agreed on (the scope of the arbitration agreement). Matters on the validity of the arbitration agreement are determined by the law applicable to the arbitration agreement or the law of the country where the award was made,⁶⁰ or the proper law of the main contract,⁶¹ or in accordance with the intention of the parties to the arbitration agreement without reference to any particular national law.⁶²

To prove the existence of a party's consent to arbitrate, most arbitration laws require that this consent be evidenced in writing, (see 2.1). Some require that the agreement should be signed (see 2.2), most require that the agreement should be over a defined legal relationship (see 2.3), and on matters which are arbitrable (see 2.4). The scope of the arbitration agreement affects the arbitrator's contract to the extent that it determines the jurisdiction of the arbitrator, whether the arbitral reference will be ad hoc or institutional, the powers of the arbitrator and any limitations thereon and the remit of the arbitral reference.⁶³

2.1 Writing

Under most arbitration laws, the arbitration agreement is required to be in writing. An agreement to arbitrate contains a legally enforceable promise made by an individual or entity to opt out of its legally protected right to apply to a national court for the resolution of a covered dispute, and to seek resolution of the same dispute through the private dispute resolution mechanism of arbitration. Most national laws consider this a promise of utmost seriousness, consent to which should be clearly evidenced, and the best means of evidencing such consent is by writing. Article II (1) of the New York Convention provides

Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Article II (2) of the New York Convention continues with a definition of 'writing'

The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

This definition of writing represents the state of technological development in 1958 when the convention was agreed. Since 1958 there has been (and continues to be) great technological advancement in the area of communication. The commercial world has embraced these developments and frequently utilizes them in their international commercial transactions. Thus in the modern age there are many more means of communication (especially in electronic format) so that national laws are now more concerned with drafting provisions that will recognize any means of communication that will create a record of the arbitration agreement and reproduce this when required. This means most modern arbitration laws have more flexible writing requirement provisions. An example is Option I of the amended Article 7 of the Model Law which provides⁶⁴

- (3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means.
- (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages, magnetic, optical or similar means, including but not limited to electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
- (5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
- (6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.⁶⁵

Thus an arbitration agreement in writing is still the best evidence of the promises made by the parties on this issue and is still to be encouraged.⁶⁶

2.2 Signature

The New York Convention requires the arbitration agreement to be signed so that where the arbitration agreement is contained as a clause in the main contract then the signature of execution of the main contract suffices for purposes of the validity of the arbitration clause.⁶⁷ The Model Law Option I requirement quoted above in (2.1) takes into account modern forms of communication including in particular electronic communication. The option carefully does not mention signature, though signature is required under the original version of the Model Law (1985).⁶⁸ This reflects the generally accepted view that signature is not required as long as the arbitration agreement is in writing or its existence not denied by one party when alleged by the other party.

2.3 Defined legal relationship

The requirement for a defined legal relationship means that the underlying transaction is not limited to those of a contractual nature but will cover disputes arising from tortious or delictual liabilities. Article II (1) of the New York Convention quoted above in (2.1) requires the arbitral reference to be 'in respect of a defined legal relationship, whether contractual or not ...' The requirement of a defined legal relationship also affects the issue of arbitrability examined below and is also a requirement under some national laws⁶⁹ and arbitration rules.⁷⁰

2.4 Arbitrability

Objective arbitrability refers to the nature of the subject matter of the underlying transaction from which the disputes to be arbitrated emanate. The discussions on objective arbitrability concentrate on the question of whether disputes arising from a particular subject matter can be submitted to arbitration for resolution. Article II (1) of the New York Convention concludes, '... concerning a subject matter capable of settlement by arbitration'. It is obvious that not every type of subject matter can be arbitrated effectively. Various jurisdictions regulate this matter differently so that there is no uniform treatment of the arbitrability question.⁷¹ This lack of uniformity means that it is important to check the laws of each jurisdiction connected to the underlying transaction to determine whether the subject matter is capable of settlement by arbitration. This is so since arbitrability will be revisited at the stage of enforcement or annulment proceedings pursuant to Article V (2) (a) of the New York Convention.⁷² Questions of arbitrability are governed by various laws. It may be determined under the same law that governs the arbitration agreement. This was the decision of the Tribunal de Commerce of Brussels in *Maternaco v PPM Cranes* through the application of Articles V (2) (a) and II (1) of the New York Convention.⁷³ Other laws that will be relevant to

matters of arbitrability are the law of the seat of arbitration, the law of the place of performance of the underlying transaction, the proper law of the substantive contract, the personal law of the disputing parties and the law of the place of enforcement of the arbitral award.⁷⁴

3 The doctrine of separability or autonomy of the arbitration agreement

The doctrine of separability or autonomy of the arbitration agreement affects the relationship between the arbitration clause and the underlying main contract.⁷⁵ Gary Born describes this doctrine as ‘of central significance in international commercial arbitration’.⁷⁶ The arbitration clause is an arbitration agreement contained as a clause or term in the same document evidencing the terms of the main contract on the underlying transaction.⁷⁷ The value or importance of the arbitration agreement is not diminished just because it is contained as a clause in the main contract. It can be quite difficult to conceptualize a clause in a contract as a separate contract or agreement with its own separate or independent legal existence. However, that is exactly what the arbitration clause is. It is this fact that is asserted by the legal fiction which has now crystallized into the doctrine or principle of separability or autonomy or independence of the arbitration agreement.

One legal consequence of the doctrine of separability or autonomy of the arbitration clause is the possibility of two different proper laws or rules governing any international commercial contract containing an arbitration clause: one law or set of rules govern the underlying main contract and the other law or set of rules govern the arbitration agreement. The arbitration agreement may therefore remain valid even though the underlying main contract has become non-existent, invalid, illegal or terminated and vice versa. The New York Convention does not expressly mention the doctrine of separability but it however treats the arbitration agreement or clause as having a separate legal existence from the underlying main contract. This is evident from the provisions of Articles II (1) (2) and Article V (1) (a) of the New York Convention and Articles I (2) (a), V and VI of the European Convention.⁷⁸

The House of Lords very recently in *Fiona Trust v Privalov*,⁷⁹ deliberated on these issues. *Fiona Trust* concerned a dispute between parties to eight charterparties which the owners alleged were procured by bribery. The charterparties all contained both an English jurisdiction clause and a right to refer disputes to arbitration in London. The charterers commenced arbitration in London on 25 April 2006 and the owners applied for an anti-arbitration injunction on 12 June 2006. The owners application was on the ground that, ‘there was no valid arbitration agreement since the charterparties and therefore the arbitration agreements, had been rescinded for bribery’.⁸⁰ On the principle of separability, Lord Hoffman clarified the law in England as follows

The principle of separability enacted in section 7 [of the English Arbitration Act 1996] means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a 'distinct agreement' and can be void or voidable *only* on grounds which relate directly to the arbitration agreement.⁸¹ [Emphasis added]

The fundamental point to note here is that the ground on which the claim for avoidance of the arbitration clause is based must affect the arbitration agreement itself, in validation of the application of the principle of separability of the arbitration agreement. In the United States case of *Prima Paint Corporation v Flood & Conklin Manufacturing Co*, the US Supreme Court recognized that arbitration clauses are separate from the underlying main contract.⁸² The court again recently reaffirmed the application of the doctrine of separability even where the subject matter of the substantive contract was illegal (making the main contract void) under the relevant State (Florida) law in *Buckeye Check Cashing Inc v Cardegna*.⁸³

However where the same legal issue that invalidates the underlying main contract equally affects the arbitration agreement or clause, the same shall also invalidate the arbitration clause. So for example where the party who signed the main contract containing the arbitration clause lacked legal capacity to contract, then obviously this incapacity affects the arbitration clause as well and will invalidate both the main contract and the arbitration agreement contained therein. Lord Hoffman in *Fiona Trust v Privalov* gave some examples

Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. *But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a 'distinct agreement', was forged.*⁸⁴ [Emphasis added]

Other factors that have similar invalidating effects on the arbitration agreement include fraud, mistake, misrepresentation and duress in procuring the arbitration agreement. The critical point to note from the authorities is that a party wishing to challenge the validity of the arbitration agreement must direct its challenge at the arbitration agreement itself and not the underlying main contract. A challenge against the validity of the underlying main contract is a question to be determined under the substantive dispute between the parties which fall within the preserve of the arbitral tribunal to decide and not national courts.⁸⁵ The US jurisprudence from relevant case law is

that unless parties agree otherwise, the arbitration agreement is separate from the underlying main contract. The effect of this is that the parties can contract out of this rule which is only a presumption.⁸⁶

4 Law applicable to the arbitration agreement

It must be noted at the outset that it is the existence of the doctrine of separability or autonomy of the arbitration clause that gives relevance to this discussion.⁸⁷ The submission agreement being a separate contract, both physically and legally, clearly makes the concept of its own governing law easy to grasp unlike the arbitration clause, which raises the (legitimate) question of why one clause in a contract should be governed by a separate law from all other clauses in the same contract. The law applicable to the arbitration agreement refers to the proper law of the arbitration agreement. This may be a national law or set of legal rules. It has been identified in section 1 above (1. Legal Nature of the Arbitration Agreement) that the legal nature of this agreement is contractual, so that, just as in any other contract, it must have a law by which the obligations and rights of the parties to it shall be regulated. It is therefore important to determine what law applies to the arbitration agreement for this purpose. A party can challenge the validity of the arbitration agreement at any time before it is performed, upon commencement of its performance and when challenging an arbitral award made on the basis of the arbitration agreement. A jurisdictional challenge will be pursued before a national court (or arbitration institution) when one party seeks to enforce the arbitration agreement (before the commencement of an arbitral proceeding). Upon commencement of the arbitral reference, jurisdictional challenges will be pursued before the arbitral tribunal in the first instance with the opportunity of challenging the decision of the arbitral tribunal before a national court.⁸⁸ At the stage where recognition and enforcement of the resulting award based on the arbitration agreement is sought, a jurisdictional challenge can still be raised before a national court.

The first consideration in the analysis to determine the law applicable to the arbitration agreement is to determine whether the parties have expressly chosen a law or set of legal rules to govern the interpretation and regulation of the arbitration agreement. In such situations the choice made by the parties (by virtue of the principle of party autonomy) will apply whether the arbitration agreement is a clause or a self standing agreement. In support of this assertion, Article 178 (2) of the Swiss Federal Arbitration Law provides, 'an arbitration agreement is valid if it conforms to the law chosen by the parties'.⁸⁹ However, it must be acknowledged that in practice it is very rare for parties to expressly agree on a distinct law that will apply to the arbitration clause in their contract. It is more probable for parties to agree on such a proper law in a submission agreement.⁹⁰ Thus in identifying the law applicable to the arbitration agreement, the first option is to apply whatever express or implied law the parties have chosen.

Where the parties have not made any choice, the Swiss Federal Arbitration Law will then subject the arbitration agreement to, 'the law governing the subject matter of the dispute, in particular the main contract or to Swiss law'.⁹¹ Another option will be to apply conflict of law rules. This may be the conflict of law rules of the place with the closest connection to the arbitration agreement. This test implicates analysing various connectors to identify that (or those) which are closest to the arbitration agreement. There are various connectors that may influence the determination of the law applicable to the arbitration agreement. These include the place where the agreement to arbitrate was made or concluded.⁹² Another connector exists where the parties have made an express choice of a substantive law to govern the main contract as provided under the Swiss Federal Arbitration Law. Redfern and Hunter support this connector on the ground that, it is reasonable and safe to assume that the choice of a substantive law in the main contract also applies to govern the arbitration agreement which is one clause in the main contract.⁹³

The third connector is the seat of arbitration (provided for under s 48 of the Arbitration Act of Sweden, for example). The application of the law of the seat of arbitration is supported by Article V (1) (a) of the New York Convention which refers to the arbitration agreement being valid under the law to which the parties have subjected it or in the absence of such law, 'under the law of the country where the award was made' and in some national laws the award is deemed to be made under the law of the seat of arbitration.⁹⁴ The European Convention provides a hierarchy of laws in determining the law applicable to the arbitration agreement. It requires the courts of contracting states faced with the question to examine, (a) the law to which the parties have subjected the arbitration agreement (choice by the parties); (b) the law of the country in which the award was made (by default, the law of the seat of arbitration); (c) the application of conflict rules of the court seised of the question; (d) if the validity question is based on arbitrability then the law of the country whose courts are seised of the question.⁹⁵ Lew, Mistelis and Kröll in support of the application of the law of the seat posit

Where the actual existence of an arbitration agreement is challenged and in the absence of an otherwise clearly applicable law, it is the law of the place of arbitration which determines the standards against which the existence of the arbitration agreement has to be verified.⁹⁶

An examination of some cases show that courts may apply a law under which the arbitration agreement will be valid and enforceable (which may fall within any of the categories discussed above) as against one under which the same agreement will be invalid.

5 Termination of the arbitration agreement

The arbitration agreement can be terminated like most contracts by agreement of the parties, in the event of the breach of a fundamental term or condition of the contract and by abandonment. The agreement may be rendered ineffective if it is found to be inoperable or incapable of being performed. An agreement that is found to be null and void evidences a lack of the parties' consent to arbitrate and so never came into existence.⁹⁷ While an agreement that is inoperative indicates the parties' intended to arbitrate but the agreement was drafted in such a vague, ambiguous or pathological manner that this intention (to arbitrate) became difficult or impossible to effect.⁹⁸ An arbitration agreement is incapable of being performed when there is again a clear intention by the parties to arbitrate their dispute but a frustrating event (external to the agreement) that happens subsequent to its conclusion makes its performance impossible.⁹⁹ So, an arbitration agreement that is null and void culminates in the termination of the agreement while one that is either inoperative or incapable of being performed may still be rescued.

It has already been clarified above that the arbitration agreement will not be terminated simply by the termination (or repudiation) of the underlying substantive contract.¹⁰⁰ It has been argued that the primary obligation of the parties under the arbitration agreement (as identified above) is to refer any resulting and covered dispute to arbitration in accordance with its terms. This act of referral is fundamental to the performance of the arbitration agreement. It therefore means that where a covered dispute arises and one party takes steps for the resolution of the dispute that is contrary to the terms of the arbitration agreement, such a party is in repudiatory breach of this fundamental obligation under the contract. The other party to the arbitration agreement has the right to seek a remedy for this breach of obligation. This remedy can be sought by either accepting the repudiatory breach and terminating the contract or seeking specific performance of the contract. The remedy of specific performance must be provided for under the proper law of the arbitration agreement. It is on this basis that a party can seek specific performance of the contract through the application for an anti-suit injunction to compel arbitration in accordance with the terms of the arbitration agreement.

A party to the arbitration agreement can also repudiate its right to arbitration either actively or passively. To actively repudiate its right, the party may, where the other party has commenced litigation, join in the litigation without raising the existence of the arbitration agreement or the party may take steps in the proceedings so as to consent to the repudiation of the obligation to arbitrate the covered dispute.¹⁰¹ Either of these positions in effect results in the parties to the arbitration agreement mutually consenting to the termination of the agreement. This method of terminating the arbitration agreement through the parties' agreement to repudiation does not throw

up any major difficulties since such decision remains in the realm of party autonomy.

One party to the arbitration agreement can abandon it (which is treated as an offer) and once this abandonment is accepted by the other party, it terminates the agreement to arbitrate (but not the substantive contract).¹⁰² In *The Leonidas D*,¹⁰³ the court held that an arbitration agreement can be abandoned by either estoppel or accord and satisfaction, and that under the contract evidenced by the arbitration agreement, inactivity or silence could amount to an offer or acceptance for the purpose of accord and satisfaction.¹⁰⁴ In this dispute, the charterer's conduct (inactivity of five and a half years after appointing two arbitrators) could properly be interpreted as a tacit offer to abandon the arbitration reference and the claim which was accepted by the owners to terminate the arbitration agreement.¹⁰⁵ The arbitration agreement will also be terminated by vitiating factors such as fraud, mistake, misrepresentation, duress and undue influence, which affect the consent of one or more parties to the arbitration agreement.¹⁰⁶

6 Forms of arbitration references

The two primary forms of international commercial arbitration references are (6.1) ad hoc and (6.2) institutional and have already been referred to above but are explained in this section. Matters affecting the arbitrator's contract and the contract with the institution are analysed under these two forms of arbitration references in this book. The results show that the parties to the arbitrator's contract are different in both forms of arbitral reference. Under both forms of arbitral reference, the provisions of national arbitration laws and arbitration rules are relevant and govern various aspects of the relationships between the parties to these contracts.

6.1 Ad hoc arbitration

This refers to an international commercial arbitration reference not held under the auspices or rules of any arbitration institution. In *Bovis v Jay-Tech*, the High Court of Singapore reached a different definition. The arbitration clause in a sub-contract provided for appointment of the arbitrator by the Institute of Architects with SIAC Arbitration Rules as the governing rules. The High Court (Singapore) held that the parties' agreement is not a reference to institutional arbitration (under the auspices of SIAC) but to ad hoc arbitral proceedings applying SIAC Arbitration Rules.¹⁰⁷ Under ad hoc references, the parties opt to create their own procedural rules for the particular arbitration reference. In furtherance of this, they may adopt or adapt the UNCITRAL Arbitration Rules of 1976 or any other arbitration rules.¹⁰⁸ The disputing parties may equally decide to leave the determination of the arbitral procedure to the arbitral tribunal.¹⁰⁹ Where the parties fail or neglect to agree on a set of arbitration rules to apply,

the arbitration law of the juridical seat¹¹⁰ will apply by default and also as a gap-filler.¹¹¹

Arbitration institutions are not actively involved in ad hoc arbitration references so that parties do not pay fees for their administration of the arbitration as in institutional references. However, arbitration institutions may play minimal roles in ad hoc arbitration references. Examples of such roles are where ad hoc proceedings are held in the premises of an arbitration institution (with the disputing parties paying for its administrative assistance and facilities¹¹²) and/or the parties nominate an arbitration institution as its appointing authority.¹¹³ The involvement of arbitration institutions in this capacity in ad hoc arbitral references does not thereby transform such references into institutional ones neither does it affect the formation of the arbitrator's contract under ad hoc or institutional references.¹¹⁴ To assist with the administration of the ad hoc reference (especially in high value and complex disputes) the arbitral tribunal may appoint a tribunal secretary for a fee to oversee the administration of the arbitration proceeding.¹¹⁵

The major limitation on the parties of arbitrating disputes ad hoc arises from the inability of the disputing parties to provide for all eventualities that may occur after the dispute arises and during the arbitral proceedings, so that recourse is made to the arbitration law of the seat of arbitration. Whatever matters the disputing parties do not make provision for or agree on, they fall back on the *lex loci arbitri* and the competent court with supervisory jurisdiction over international arbitration at the seat of arbitration to rule on or give directions.¹¹⁶ An example is where the respondent fails to appoint an arbitrator in a three-person arbitral tribunal. One option before the claimant is to apply to the relevant court (in the absence of an appointing authority) in the place of arbitration for its assistance in making the appointment. This may frustrate the purpose of the arbitration agreement, which as has been stated above is primarily to avoid recourse to national courts in favour of arbitration. But in this situation, national courts become involved even before the arbitration reference commences.

All national arbitration laws recognize the fact that the disputing parties may not foresee all possible eventualities that may arise in the arbitral proceedings, and therefore, make default procedural rules that the disputing parties and the arbitral tribunal can fall back on if the need arises. These are contained as provisions in national arbitration laws and apply where the disputing parties have not provided otherwise and as a guide to the arbitral tribunal. These arbitration laws also contain mandatory provisions that apply to all arbitration references subject to the regime of the particular law.¹¹⁷ The parties and arbitral tribunal must comply with such mandatory rules or laws.

The national law (whose arbitration law provisions would apply) that applies to any arbitral reference must be identified at the very outset of the reference. The sphere of application of some national laws is limited to their territorial jurisdiction or express choice of the parties,¹¹⁸ while some appear

to have extra territorial application.¹¹⁹ The disputing parties may (in their arbitration agreement) expressly choose the law to apply to the procedure of the arbitration.¹²⁰ In default, the law of the seat of arbitration will usually apply.¹²¹ This is because the courts at the juridical seat will have supervisory jurisdiction over the arbitration procedure and will have to apply their own law in the absence of a choice of another law or rules agreed by the disputing parties.¹²²

As already mentioned the law of the seat may contain mandatory provisions that apply irrespective of the provisions of the parties' agreement.¹²³ These mandatory provisions are a limitation on party autonomy. They also evidence the basic legal norms of a state regarding procedural issues as an aspect of the public policy of the relevant state. They are usually territorially based and apply where the arbitral proceedings are subjected to such mandatory provisions.¹²⁴ The relevant law may also contain provisions that affect the powers to be exercised by the disputing parties and the arbitral tribunal. The common thread in all national laws is that the various arbitrator appointment methods (which is the focus of this book) are not treated as mandatory provisions. On this issue national laws give deference to the agreement of the disputing parties in recognition of party autonomy while their provisions apply in default.

6.2 Institutional arbitration

Institutional arbitration refers to an international commercial arbitration reference held under the auspices of the arbitration rules of a particular institution. The parties incorporate by reference the arbitration rules of an identified arbitration institution into their arbitration agreement. For an effective incorporation of the arbitration rules, parties may adopt the model arbitration clauses of the identified institution either with or without modification, or simply correctly identify or describe the institution and its arbitration rules.¹²⁵ The important point to note here is that the incorporation of the rules of the arbitration institution must be effective.¹²⁶

Institutions make provisions in their arbitration rules for their administrative court or secretariat to render all necessary assistance to the arbitral tribunal and disputing parties. This is evident when the institution on a preliminary basis (to enable it to take action towards the commencement of the arbitral reference) determines the existence of a *prima facie* valid arbitration agreement, appoint arbitrators in default of a party not appointing,¹²⁷ decide on challenge and removal of arbitrators,¹²⁸ and in some cases request interim applications before the constitution of the arbitral tribunal.¹²⁹ When disputing parties choose to have an institutional arbitration and appoint an institution located in a particular place, they are not bound to hold their arbitral hearings or proceedings in that locale or even within the state where the arbitration institution is located. If, for example, the parties nominate to have their arbitration under the ICC Rules, they can sit in London, or

elsewhere, other than Paris where the ICC headquarters is located.¹³⁰ This fact makes it difficult to support the recent expansionist movement by the major institutions such as the LCIA (now with a branch office in India). This movement may stifle the development of local arbitration institutions.

All arbitration institutions are staffed with experienced and professional personnel to guide and assist the disputing parties, their counsel and the arbitral tribunal through the arbitral reference. They also see to all the administrative needs of the arbitral tribunal and the arbitration process from filing of the Request or Notice of Arbitration to the publication of the award to the parties.¹³¹ The members of the arbitral tribunal then can devote their time and resources to the substantive arbitral proceeding before them. Some arbitration institutions assume additional responsibilities. For example under the ICC Rules, the ICC Court of International Arbitration has the additional responsibility of approving the Terms of Reference to be drawn up under its arbitration rules¹³² and scrutinizing arbitration awards to ensure compliance with requirements of formal validity.¹³³ These additional tasks assist the ICC in monitoring the quality of arbitration proceedings (and resultant awards) held under its arbitration Rules.¹³⁴

The major drawback of institutional arbitration to the disputing parties is the additional cost they pay to the arbitration institution for its services. Such costs may be quite significant for example the ICC fees are calculated *ad valorem* to reflect the value of the dispute.¹³⁵ The fees charged by the arbitration institutions may not be a major disadvantage when assessed against the services they provide to the parties and arbitral tribunal.

This analysis leads to the conclusion that the more involved an arbitration institution is in the arbitral reference, the greater its possible contractual liability to both the disputing parties and arbitrator. However, most (if not all) arbitration institutions exempt themselves and their staff from liability in their arbitration rules.¹³⁶ The Paris Court of Appeal recently ruled that the exemption of liability clause in the ICC arbitration rule is not enforceable.¹³⁷ A different result will possibly be reached in jurisdictions where the arbitration institution is exempt from liability under the national arbitration law of the state.¹³⁸

As already mentioned an institutional arbitration proceeding can be held anywhere in the world applying the arbitration rules of the institution.¹³⁹ It is possible (and frequently happens) that in institutional arbitration proceedings the disputing parties (and/or arbitral tribunal) might not refer to the national courts at the seat of arbitration for any assistance during the arbitral proceedings.¹⁴⁰ This does not mean that the disputing parties or the arbitral tribunal are precluded from referring certain issues to any relevant supervisory court during the arbitral proceedings. Examples of matters that may be referred are, assistance with gathering evidence,¹⁴¹ arbitrator challenge if a party is unsatisfied with the decision of the institution,¹⁴² assistance with the grant and enforcement of interim measures,¹⁴³ and assistance with enforcing procedural orders made by the arbitral tribunal.¹⁴⁴ Matters arising and

falling within the stage of the enforcement, setting aside or annulment of the final arbitral award are outside the remit of this book since by that time, the arbitration institution (and arbitrator) are already *functus officio*.¹⁴⁵

As already mentioned above, the provisions of the arbitration rules¹⁴⁶ of various institutions are automatically incorporated into the arbitration agreement concluded by the disputing parties. These arbitration rules stand as the rules of procedure agreed to be applied by the disputing parties in the arbitration proceedings.¹⁴⁷ This in effect means that the provisions of the arbitration rules take precedence over the non-mandatory provisions of the arbitration law of the relevant state.¹⁴⁸ While as provisions agreed upon by the disputing parties, they are interpreted to amount to provisions made 'otherwise by the parties'.¹⁴⁹ Mandatory provisions of the applicable national law also limit the sphere of application of institutional arbitration rules.¹⁵⁰ The relevant state is the seat of arbitration or the place of the proper law of the arbitration agreement.¹⁵¹ Another limitation on institutional arbitration rules is the effect of the public policy principles of either the seat of arbitration or the place(s) of likely enforcement of the award, if known, on these rules.¹⁵²

The procedure for arbitration adopted under institutional arbitration references lends full support to the proponents of both autonomous and delocalized theories of arbitration. These theories become very persuasive where the national laws (and possible interests) of the seat or place of arbitration are neutral (as it affects the dispute, parties or subject matter of the arbitration) without any connection to the dispute or even the disputing parties. This claim is further strengthened where the parties or arbitral tribunal do not invoke the assistance of the national courts during the arbitral proceedings. In this sense the arbitral proceeding literally floats. The award from such arbitration reference also floats. Where it is voluntarily performed it never crystallizes, however where it is not, it crystallizes in the jurisdiction where assets on which execution can be levied are found.¹⁵³ The arbitration proceeding itself remains autonomous or delocalized since the proceedings effectively terminate with the rendition of a valid final award.

However, it must be recognized that the arbitration proceeding becomes automatically linked to a state or jurisdiction once a seat is determined. This connection exists irrespective of the fact that the parties (and arbitral tribunal) may not have any recourse to the courts at the seat throughout the arbitral proceedings.¹⁵⁴ The disputing parties and especially the arbitral tribunal must take whatever procedural mandatory provisions of the law of the seat (along with any relevant public policy principles) into consideration during the arbitral hearings and in making the award. The same applies to the mandatory provisions of the law and public policy principles of the possible places where enforcement of the resultant award may be sought, if known. This is because there is no automatic guarantee that the losing party will voluntarily perform the arbitral award. Every final arbitral award may need to be recognized and enforced by the courts of a state either at the seat of arbitration¹⁵⁵ or the place(s) of enforcement.¹⁵⁶

7 Relationship between the arbitration agreement and the contracts

As has been mentioned above, the arbitration agreement is concluded between the disputing parties only. The arbitrators and the arbitration institution never become parties to it. The arbitrator's contract on the other hand is concluded between the arbitrators and the disputing parties (or arbitration institution) in furtherance of the purpose of the arbitration agreement. One of such purposes is the constitution of an arbitral tribunal to effectively manage and decide the disputes resulting from the underlying relationship between the disputing parties. This particular purpose is partially fulfilled on the constitution of the arbitral tribunal, and completely fulfilled when a valid final award is rendered by the arbitral tribunal. Thus, the conclusion of the arbitrator's contract constitutes one of the initial steps necessary in fulfilling the goals of the arbitration agreement.¹⁵⁷

Klaus Lionnet observes in this regard that

The arbitrator's contract is completed by the parties in compliance or in furtherance of their obligations under the arbitration agreement ... The arbitration agreement and the arbitrator's contract regulate different aspects of the parties' relationship.¹⁵⁸

The disputants conclude a contract with the arbitration institution to administer their dispute when a covered dispute arises. This contract, like the arbitrator's contract, is concluded to give effect to the promises the disputing parties have made in the arbitration agreement. Thus, the relationship between the contracts with the arbitrator and institution and the arbitration agreement is the partial fulfilment of one by the others.

Chapter summary

This chapter gives a general introduction on the arbitration agreement, which is the basis for the conclusion of the contracts with the arbitrator and institution. It sets the context for the discussions in the remaining chapters of this book. The arbitration agreement is the foundational contract in any consensual arbitration reference. The parties to the arbitration agreement (whether signatories to it or those adjudged to be bound by it) are those entities whose disputes arise under it. These parties to the arbitration agreement are also parties to the arbitrator's contract and the institution's contract. However the arbitrator and arbitration institution are not parties to the arbitration agreement and so are unable to enforce its terms. Being a bilateral contract, one party to the arbitration agreement makes an offer with legal intention to be bound (upon its acceptance) by the other party. Upon acceptance of this offer to arbitrate existing or future disputes, the agreement to arbitrate comes into existence between these parties. The

primary purpose of this agreement is to arbitrate covered disputes which have arisen or when they arise.

As a contract, the arbitration agreement has its own governing law independent of the law governing the substantive underlying contract or transaction. It is this law that governs matters affecting the existence, formation, validity, performance and termination of the arbitration agreement. International arbitration agreements by their nature may implicate the application of conflict of law rules to determine the governing law in the absence of an effective choice of law made by the parties. The decision maker applies several connectors of which the principal connecting factors are the law chosen to apply to the underlying transaction and the law of the seat of arbitration. The examination of the core subject matter of this book is divided on the basis of the two primary forms of arbitral reference: ad hoc reference, where the relevant parties are the disputing parties and the arbitrator; and institutional reference, where the arbitration institution takes on an active contractual role in the transaction.

2 Juridical and relationship theories

This chapter is divided into two sections in which the (1) juridical and (2) relationship theories are examined as they affect the formation and performance of the arbitrator's contract in the international arbitral reference. The juridical theories analyse and try to explain the legal nature of (international commercial) arbitration and to determine its connection with any given well-defined legal system or national legal order. The proponents of the various juridical theories seek to elucidate what (if any) legal regulatory regime (international commercial) arbitration is subject to, whether a national law, international law, both or none, in any defined legal system.¹ The relationship theories on the other hand analyse the legal nature of the relationships between the disputing parties and arbitrators, arbitrators and the arbitration institutions, and the disputing parties and arbitration institutions.² These theories are applied in examining these relationships as they exist to determine their effects on each of the parties involved in the various relationships.

1 Theories on the juridical nature of international commercial arbitration

According to Professor Julian Lew, the identification of the legal nature of arbitration 'allegedly holds the key to the identification of the legal and non-legal yardsticks available to arbitrators in international trade disputes'.³ Therefore each juridical theory affects the legal status of the international arbitrator and the exercise of his autonomy in any given national legal system in which the arbitrator operates. Five different juridical theories are examined in this section. These are the (1.1) jurisdictional, (1.2) contractual, (1.3) mixed or hybrid, (1.4) autonomous⁴ and the (1.5) concession theories. Each subsection gives a brief description of the main propositions of each theory with a brief commentary on its relevance or otherwise in current international arbitral practice.

1.1 The jurisdictional theory

The jurisdictional (or territoriality) theory⁵ highlights the dominance and control exercised by the sovereign state in regulating any arbitration proceeding conducted within its territorial jurisdiction through its national laws and courts.⁶ This theory highlights the supervisory power exercised by the sovereign state over the disputing parties' right to enter into an arbitration agreement, the arbitration proceedings, the powers exercised by the arbitrator in the arbitral reference and the eventual arbitral award.⁷ This theory gives significant importance to the law of the seat or place of arbitration, the *lex loci arbitri*.

The jurisdictional theory is based on the premise that the arbitrator performs judicial functions as an alternative (though private) judge as permitted under the national law (or international convention which the state has implemented) of the particular sovereign state. It thus emphasizes the fact that (international) arbitration references cannot take place in a territorial vacuum, without the permission of a state and must therefore be subject to the law of a particular state (which must be identified).⁸ This 'permission' of the sovereign state covers matters such as the disputing parties' right to opt for arbitration over an arbitrable subject matter and the procedural phase of the arbitral reference.

Hong-Lin Yu summarized the proposition of the jurisdictional theory as follows

Although the jurisdictional theory does not dispute the idea that an arbitration has its origin in the parties arbitration agreement, it maintains that the validity of arbitration agreements and arbitration procedures needs to be regulated by national laws and the validity of an arbitral award is decided by the laws of the seat and the country where the recognition and enforcement is sought.⁹

Dr Mann on his part argued strenuously on the pre-eminence of the state and its laws in the regulation of international commercial arbitration and completely rejected the arguments on the autonomy (or delocalization) of international arbitration from the law of the seat of arbitration. Dr Mann is of the view that

Whatever the intentions of the parties may be, the legislative and judicial authorities of the seat control the tribunal's existence, composition and activities ... The local sovereign does not yield to them except as a result of freedoms granted by himself.¹⁰

The law and practice of international arbitration in these modern times does not fit perfectly into the concept propounded under the jurisdictional theory. It is correct to state that parties opting to resolve their disputes

by arbitration must be permitted by their personal law to conclude an arbitration agreement over the defined legal relationship or underlying transaction. The relevant sovereign states here are those of the residence or nationality or domicile or registration of the disputing parties, whose laws will govern matters relevant to the capacity of the parties to conclude any form of contract (arbitration agreements included). Thus a party needs to satisfy the requirements for entering into a contract under its personal law to validly conclude an arbitration agreement. The argument in support of the jurisdictional theory is most obvious in the area of subject matter or objective arbitrability. Sovereign states control and so determine the subject matters from which disputes can be resolved by arbitration within its territorial jurisdiction.¹¹ A sovereign state will not uphold an arbitration agreement that is over a subject matter that is not arbitrable where the arbitration agreement is subject to its law.¹² In the same manner a sovereign state will not recognize and enforce an arbitral award over a dispute whose subject matter is not arbitrable under the law (or public policy) of such a state.¹³ In addition, an international arbitration reference can validly commence under authority conferred, not necessarily under a national law, but under an international convention, multilateral or bilateral treaty, albeit ratified and implemented by the relevant sovereign state.¹⁴

On powers to be exercised by the arbitrator and the arbitral proceedings, most modern arbitration laws give the disputing parties and arbitrators very wide discretion over the conduct and procedure of the arbitral reference.¹⁵ The provisions of most arbitration laws and judgments from national courts reveal that most states interfere in international arbitration connected to its territory primarily to render its assistance to the parties and arbitrators, and to protect mandatory provisions of its laws and rules of public policy.¹⁶ This is primarily to ensure that the arbitral proceedings comply with the state's minimal requirements of procedural due process, again evidencing the overarching or background presence of sovereign states in international arbitration

It is already noted above that the presence of sovereign states in international arbitration is most felt in matters relevant to the capacity of the disputing parties to contract and arbitrability under the relevant law.¹⁷ However some of the other premises or assumptions on which the propositions of the jurisdictional theory are based no longer exist. An example is the requirement of double *exequatur* of arbitral awards under the Geneva Protocol of 1923 and Geneva Convention of 1927 regimes before the adoption of the 1958 New York Convention.¹⁸ Niboyet argued that

An award is only a draft judgment, and it only becomes a final judgment when the judicial authorities of the country in which it was rendered have adopted it by means of the national *exequatur*. This *exequatur* gives the award of the arbitrators the seal of a judicial decision which the law accepts as final.¹⁹

The basis of this argument no longer exists since practically all national laws and jurisdictions recognize the final arbitral award as being on the same scale and of the same value as a judgment of the national courts, conferring on such awards the status of *res judicata*.

The argument that the importance given to the seat of arbitration is reflective of the continued relevance of the jurisdictional theory is persuasive, for example the New York Convention under its Articles V (1) (d) and (e) recognizes the importance of the law of the seat of arbitration. The final award may be set aside at the place of arbitration to preclude enforcement of the same award being sought in any other place.²⁰ This is so even where the judgment debtor does not have any assets in such jurisdiction (that is the seat of arbitration) on which execution could be levied. However, in recent years, some prominent decisions have been made which further erode the presumed importance of the law of the seat of arbitration as supportive of the continued relevance of the jurisdictional theory.

In *Hilmarton*²¹ the French courts enforced an award that had been set aside at the place of arbitration in disregard of the provisions of Article V (1) (e) of the New York Convention. This was possible because under the French law where enforcement was sought, there is no equivalent of Article V (1) (e) of the New York Convention. The French court applied Article VII of the New York Convention to enable it to apply its more favourable regime. This has been followed in other jurisdictions.²² It is now accepted that disputing parties do not choose a particular place as the seat of their arbitration simply because of the arbitration laws of such place²³ and that it may be the least considered point among several competing factors in choosing the place of arbitration.²⁴

However the practical effect of decisions of national courts at the seat of arbitration is to evidence the attitude of such courts to international arbitration references within their jurisdiction. So that entities concluding arbitration agreements and their advisors are now better informed in their choice of seat of arbitration, with the effect that jurisdictions whose courts are perceived to be 'arbitration friendly' enjoy a higher volume of arbitration references than those jurisdictions whose courts are perceived as unfriendly to arbitration.²⁵ This statement is not true as regards some jurisdictions especially in developing countries, which host very few international commercial arbitration references and with very limited access to decisions of their courts. The conundrum here is that if international arbitration references are not cited in these developing jurisdictions (even those that have modern arbitration laws) then the perception that their courts are not arbitration friendly become more difficult to justify since such allegations cannot be based on non-existent arbitration related judgments.

In addition to these, the juridical seat of the arbitration can be changed even after commencement of the arbitral proceedings.²⁶ Arbitral proceedings and arbitral hearings can be held at different locations or places or even held virtually,²⁷ all as agreed between the disputing parties and the arbitral

tribunal. This flexibility of location of the arbitral seat, the provisions of a direct conflict of laws choice in arbitration rules and laws, the continued increase in the use of institutional arbitration, technological advancement and the continued success of the New York Convention (which has now been implemented in 144 jurisdictions) imply the continued demise of the relevance of the seat of arbitration (its laws and courts) and its impact on the jurisdictional theory. This is not the full picture since as disputing parties and their advisors continue to use their knowledge of arbitration friendly and arbitration unfriendly jurisdictions, to choose the seat of arbitration, the jurisdictional or territoriality theory will remain relevant.

1.2 *The contractual theory*

The proponents of the contractual theory of the juridical nature of arbitration argue that party autonomy (evidenced in the arbitration agreement) is the essence of arbitration²⁸ and that arbitration is contractual in nature so that the law of the seat of arbitration has no relevance to the (international) arbitral reference. The proponents of this theory base their argument on the premise that (international) arbitration originates, commences, is conducted and terminates in accordance with the provisions of the arbitration agreement between the disputing parties.²⁹ Therefore since the source of the arbitral reference is contractual, its conduct and result (the arbitral award) is equally contractual. This theory however, recognizes that arbitration can and is *influenced* by national law, but denies that the state exercises a *controlling power* over arbitration.³⁰

The proponents of the contractual theory argue that the (international) arbitral process is rooted in the arbitration agreement between the disputing parties and that the arbitrator draws his power and authority from the same arbitration agreement and not from any public authority. Basically, their argument is that the state has nothing to do with any international arbitration proceeding conducted within its territory.³¹ The formation of the arbitral tribunal, arbitral hearings and arbitral procedure are all made in accordance with the arbitration agreement between the disputing parties. The arbitration reference terminates in a contract (that is the resultant award) and is complied with voluntarily by the disputing parties as a 'contract' between them. The award is therefore a contract since it emanates from the original arbitration agreement (which is also a contract) between the disputing parties.³²

Merlin and Foelix therefore assert that the arbitrator upon accepting appointment becomes an agent of the disputing parties. The disputing parties, as principal,³³ authorize the arbitrator to make an award in settlement of their dispute, on their behalf.³⁴ The award is therefore a contract that becomes enforceable in the courts, not as a *judgment* but as an *unexecuted contract* between the disputing parties.³⁵

On the role of national laws, with particular reference to the *lex loci*, the proponents of the contractual theory postulate that these have very little

influence on the arbitration agreement, the arbitral procedure and the resultant award. To contractual theorists, the law at the seat of arbitration (*lex loci*) does not act as a gap-filler, or regulate the conduct of the arbitral proceedings or stipulate the limits within which the disputing parties can exercise their powers. These limits or provisions in the *lex loci* are the mandatory procedural laws of the place of arbitration and its public policy principles, to which the disputing parties are nonetheless subject, since they cannot contract out of such provisions.

The basic premise of the contractual theory of the juridical nature of (international) arbitration is the supremacy of party autonomy evidenced in the arbitration agreement. This in itself is evident in almost all arbitration laws and rules. However, the conclusions drawn under the contractual theory are far fetched and do not adequately reflect the place of (international) arbitration as a dispute resolution mechanism in any legal system. It is true and accepted that all consensual arbitration references are rooted in the consent of the disputing parties evidenced in the conclusion of a valid (and effective) arbitration agreement.³⁶ International commercial arbitration is clearly a creature of contract. However, it is equally clear that it is not completely unregulated by national laws and courts. It has already been noted that the extent of judicial intervention of a state in international arbitration proceedings connected to it is directly related to the perception of the state's acceptance of international arbitration. Two well known examples which demonstrate this perception are the attitude of the courts in Pakistan³⁷ and England.³⁸ The courts in Pakistan are currently perceived to be very interventionist regarding international arbitration references connected to it while the English courts are perceived to be very supportive. Thus states are still very relevant in the scheme of things in international arbitration, particularly the *loci arbitri* (or the seat of arbitration) and the place of enforcement of the final award.³⁹

In addition to the above, it is practically an uncontested fact that the arbitrator (in international arbitral proceedings) does not at any point in time become the 'agent' of the disputing parties, even where he is a sole arbitrator jointly appointed by the disputing parties or a co-arbitrator appointed by one party. The functions and role of the international arbitrator upon acceptance of appointment differs considerably from that of an agent, even an agent of a disclosed principal. The arbitrator does not represent the disputing parties but contracts with the disputing parties in his own capacity to render a particular service to them severally and jointly. This is so even though some powers and obligations imposed on the arbitrator emanate partly from the arbitration agreement between the disputing parties and partly from the *lex loci arbitri*.⁴⁰

The contention that the arbitrator's powers are drawn partly from the arbitration law at the seat of arbitration is substantiated by the fact that the arbitrator must comply with any known mandatory provisions (and public policy principles) of the law of the seat of arbitration in order to comply with

his obligation to render an enforceable award.⁴¹ This also raises the fundamental question of the power/capacity of the disputing parties themselves to conclude an arbitration agreement in the first place as a question of subjective arbitrability. The disputing parties must be empowered under their personal law to enter into an arbitration agreement⁴² and over an arbitrable subject matter.⁴³ This does not have to be the law of the seat of arbitration but such empowerment must be granted by a state. In this sense the state still plays an important role in any international commercial arbitration reference relevant to it especially in support of party autonomy.

The arbitral award, though emanating from the arbitration agreement, does not have the status of a mere contract between the disputing parties. The arbitral award is enforced in theory and practice as a final judgment of a national court.⁴⁴ It is equally correct to state that the losing party may (and usually does) voluntarily comply with the resultant award. However, this voluntary compliance does not change the status, nature or value conferred by the state on the arbitral award as the equivalent of a final judgment of the court with the benefits of coercive enforcement and *res judicata*.⁴⁵ The relevant provisions of the New York Convention and national laws on enforcement and setting aside issues are addressed not to the disputing parties or the arbitral tribunal but to a national court,⁴⁶ in recognition of the relevance of states in international arbitration.

The contractual theory does not adequately explain the situation where the losing party fails to voluntarily comply with the resultant award and the winning party seeks recognition and enforcement of the arbitral award through a national court. It is known that in practice the party seeking enforcement is not required to assert the existence of a mere contract (referring to the arbitral award) but to seek the recognition and enforcement of a final award made by the tribunal by a national court. Article IV of the New York Convention⁴⁷ requires such a party to present an authenticated original or a duly certified copy of the award, original or certified copy of a valid arbitration agreement, a translation if necessary of these documents,⁴⁸ to a national court of a contracting state where recognition and enforcement is sought. These documents are primarily to identify and present as evidence the decision the court is requested to recognize and enforce. In practice, once the national court is satisfied with these documents and there are no grounds on which to otherwise attack the arbitral award, the court enforces the award as a final judgment and not as a contract.⁴⁹ Thus the contractual theory does not adequately explain the role of (international) arbitration in a defined legal system.

1.3 Mixed or hybrid theory

The proponents of the mixed or hybrid theory tried to reconcile the jurisdictional and contractual theories, recognizing that arbitration contains elements of both public and private law.⁵⁰ The theorists argued that

international arbitration cannot be completely detached from all legal systems.⁵¹ Professor Sauser-Hall argued that arbitration must be subject to some national law that determines the validity of the submission of the dispute to arbitration (this refers to both formal and substantive validity) and the enforceability of the resultant award, to ensure minimal compliance with due process. He defined arbitration as a mixed juridical institution that is both contractual and jurisdictional.

The hybrid theory acknowledges that arbitration is rooted in the arbitration agreement (contract) but must satisfy certain statutory requirements under public law (jurisdiction).⁵² Its proponents argue that the question of the validity of the arbitration agreement is determined by criteria applied to contracts in general while the arbitral procedure is subject to principles of national law, and that the enforcement of the award by national courts, though discretionary, is a mere formality. This creates a strong legal connection between (international) arbitration references and the juridical seat of arbitration (or place of enforcement as the case may be).

Redfern and Hunter have consistently supported this theory of the juridical nature of international commercial arbitration. According to the learned authors

International commercial arbitration is a hybrid. It begins as a private agreement between the parties. It continues by way of private proceedings, in which the wishes of the parties are of great importance. Yet it ends with an award that has binding legal force and effect and which, on appropriate conditions, the courts of most countries of the world will recognize and enforce. The private process has a public effect, implemented with the support of the public authorities of each state and expressed through its national laws.⁵³

The mixed theory's recognition of the law of the place of arbitration and the weight given to its influence has been affected by recent developments in international arbitration as discussed under section 1.1 above. The mixed theory recognizes and resolves the shortcomings of the propositions of the contractual theory. However its analysis does not examine the presence and role of arbitration institutions and their effect on the juridical nature of arbitration. The presence of an arbitration institution in the international arbitral terrain makes it quite possible for an international arbitral reference to be completely autonomous or at least semi-autonomous with little or no reference to the laws or courts of the seat. This phenomenon, though not a mere supposition but a factual occurrence, has not materially changed the arguments presented by the proponents of the mixed theory.

1.4 *The autonomous theory*

The autonomous or *sui juris* theory originally developed by Professor Rubellin-Devichi in 1965, takes a different approach from the earlier juridical theories which looked at the role of (international) arbitration within the existing structure of national legal systems and its relationship with the law of the seat. She examined international arbitration as a system on its own, detached from any particular national legal system on the presumption that arbitration evolves in an emancipated legal regime. She argued that the juridical character of arbitration is determinable by an examination of its use and purpose.⁵⁴ This means that the juridical nature of arbitration can neither be classified as jurisdictional or contractual or even mixed.⁵⁵

The autonomous theory postulates that commercial people (the users of the mechanism of arbitration) have led the development of the practice, procedure and law of arbitration (as a type of *lex mercatoria*). It suggests that states and arbitration institutions modify their laws and rules to meet the requirements of the international commercial community. This shows that party autonomy is supreme in international arbitration references. It is what the users of the mechanism (and not the sovereign state) want that drives its development. This therefore makes the provisions of the *lex loci arbitri* practically redundant, especially since parties can choose to subject their dispute to the procedural rules of an independent, non-national regime.⁵⁶ An example is the arbitration rules of institutions or the *lex mercatoria* (to govern the substantive dispute). These arbitration rules are not connected as it were to any national laws and are independent even of the laws of the state in which the arbitration institution is physically situated or registered. The effect of the autonomous theory therefore is the acknowledgement and recognition of the delocalization of arbitration, the complete detachment of international arbitration from the laws and courts of the seat of arbitration, and the supremacy of party autonomy as the controlling force in international commercial arbitration references.⁵⁷

In 1965 when Professor Rubellin-Devichi formulated her juridical theory, courts in most jurisdictions were still hostile to arbitration and fewer subject matters were held arbitrable while institutional arbitration was beginning to spread. There was no clear demarcation of jurisdiction between arbitral tribunals and national courts and most national courts were not supportive of international arbitration. However, in recent times, arbitration is recognized as the preferred method for the resolution of international commercial disputes. Most states have adopted or modified their national arbitration laws to be in sync with current modern trends in this area in recognition of the influence of such regimes on other sectors of their economies.⁵⁸

The perceived benefits of international arbitration in the resolution of commercial disputes have also informed the drive towards more research in the law and practice of arbitration, leading to the development and accessibility of arbitral principles, practices, judgments and jurisprudence.

The United Nations through UNCITRAL and its work in the area of international commercial arbitration produced the UNCITRAL Model Law which has been adopted in 66 jurisdictions.⁵⁹ These efforts amongst others have ensured a global increase in the support and assistance of national courts and state legislatures towards arbitration. With the old rivalry between national courts and the mechanism of arbitration now practically a thing of the past, arbitration has become more accepted with courts of most states willing to assist and support international commercial arbitration proceedings connected to their territory.⁶⁰ In addition to all these is the continued viability of the New York Convention (and its uniform enforcement regime), currently applicable in 144 signatory-states.

Though some of the premises on which the autonomous theory was formulated have altered, the theory is still of great relevance in the area of international commercial arbitration.⁶¹ Its adoption of a functional approach in determining the question of the juridical nature of international arbitration sets it apart from other theories. This theory has influenced the propositions on the delocalization of the seat of arbitration theory and the quest for the application of international public policy principles to international arbitration references. The delocalization theorists and advocates of the application of international public policy principles all seek to eliminate the relevance and dominance of the law (and courts) of the seat of arbitration, creating an international and truly autonomous regime for international arbitration references.⁶² The argument is that this internationalization of arbitration will ensure its complete removal from the reach of national law.

International arbitration (as currently practiced) is not completely autonomous from whatever national legal system may be relevant to the particular reference.⁶³ It is a fact that the law of the seat of arbitration and the place of enforcement still play significant roles in international arbitration references.⁶⁴ There are still states whose courts are hostile towards international arbitration.⁶⁵ There is hardly any known jurisdiction where international arbitration assumes a completely autonomous existence from its legal system.⁶⁶

1.5 The concession theory

The concession theory in its original form was advocated by Stokes to explain the emergence of the modern company as a legal entity with full legal personality in company law. Hong-Lin Yu and Eric Sauzier have adapted and applied this theory to explain the juridical nature of international arbitration.⁶⁷ The argument of the concession theorists is that historically, arbitration was a contractual relationship between the disputing parties and the arbitrators subjected to little or no legal regulation. The state then intervened to regulate the practice of arbitration by enacting various laws. These laws represent various ‘concessions’ made by the state to the disputing parties and arbitrators and the arbitration mechanism to allow for the development of arbitration.

The proponents of the concession theory differentiate it from the delegation theory where the state with a monopoly in administering justice delegates some of its powers to arbitrators.⁶⁸ It is also distinguished from the mixed theory by the fact that it claims that the involvement of the state is supportive and available to be invoked by the disputing parties (or arbitrators) at any time before, during and after the arbitral proceedings. This implies that the state's presence is in the background, it is supportive and not intrusive. On international arbitration, the concession theorists argue that it exists by the mutual concession of different states evidenced by their becoming signatories to various international conventions and treaties relevant to arbitration.⁶⁹ In this regard, Yu and Sauzier explain that, 'concession can be made to a number of entities and a state can concede some of its power to grant a prerogative (to) the parties, to the arbitrator, the arbitration or even to another State'.⁷⁰

In applying this theory to the question of arbitral immunity, Yu and Sauzier argued that arbitral immunity is a concession from the state to arbitrators for public policy reasons. This concession in most jurisdictions is conditional on the arbitrator acting in good faith. They explained arbitral immunity in international arbitration as, 'an exercise of concession. It is through the collective concession of the prerogative to the arbitrators by most states that international immunity arose.'⁷¹ Thus the fact that most states grant immunity (in one form or another) to arbitrators under their national laws, makes arbitral immunity a concession granted by the mutual concession of states.

The authors acknowledged that the theory maybe criticized for attaching too much importance to the intervention or concession from the state. However states still retain the last word especially through the enforcement of their rules of public policy and mandatory laws in international arbitration. In answer to the delocalization theory, the concession theorists declare that absolute concession by states will not be practicable, again because of the need of each state to protect its notions of public policy and the application of mandatory laws.

The proponents of the concession theory acknowledge the contractual foundation of (international) arbitration based on the arbitration agreement. They adopt a historical view of arbitration in which they takes account of the importance and continued relevance of states as territorial entities with supreme authority over what happens within (or in connection to) their territories. This basic fact and reality of international law cannot be wished away as suggested under the theory of delocalization. The departure point with the jurisdictional theory is the fact that it is not necessarily the law of the place or seat of arbitration that is relevant but the concept of statehood itself and the exercise of sovereign powers.

The applicability of the concession theory is most manifest in the area of arbitrability (just like the jurisdictional theory). It is those disputes, under a defined subject matter determined by each state in its sole discretion as being capable of settlement by arbitration, that can be arbitrated and none

other. A disregard of such provisions may render the resultant award unenforceable, for example under Article V (2) (a) of the New York Convention.⁷² Another area where regulation by the state is evident is in granting the disputing parties capacity to conclude an arbitration agreement in the first instance. As already mentioned above, since the arbitration agreement is a contract, parties to it must have legal capacity to conclude a contract, so that where a party to this arbitral contract lacks contractual capacity as determined by the state (in this case of his domicile or nationality or registration), then there cannot be an arbitral reference.

The concession theorist also examined the role of arbitration institutions in international arbitration references and concluded that even in such references, the courts and laws of a particular state (not necessarily one state) are still relevant, whether resorted to or not. The mere fact that the parties in a particular reference have not had recourse to the law or courts of any state in the course of their arbitration, does not by itself imply that such state institutions are of no relevance or are non-existent to that particular arbitral reference. This is a particularly important observation because the fact that the law and courts of any state have not been invoked does not mean they do not exist. Whether referred to or not, the arbitral tribunal would take notice (and comply) with any relevant procedural public policy requirements of the seat of arbitration. This is so since it may form a ground for the setting aside of the arbitral award and impacts on the legal obligation to render an enforceable award. From the analysis above, it is possible to describe the concession theory as a semi-autonomous theory of international arbitration, which stops short of removing international arbitration completely from the reach of states to which it may be connected while at the same time recognizing the effect of various limitations on party autonomy as it affects international arbitration.

The law and practice of international commercial arbitration is currently enjoying a good reputation with the international commercial community and it is fair to say that resolving international (or cross border) commercial disputes by the mechanism of arbitration is now the general rule, not the exception. Therefore the arguments advanced by the proponents of the jurisdictional and contractual theories no longer adequately explain this current state of affairs. The arguments of the proponents of the concession theory unfairly tip the scale of power over arbitration in favour of the sovereign state, while the propositions of the autonomous theory are yet to become reality in the practice of international commercial arbitration which still reflects the exposition of the mixed or hybrid juridical theory.

2 The relationship theories

It is generally acknowledged (and examined in Chapter One) that the relationship between the disputing parties *inter se* is contractual, based on the arbitration agreement as an independent and autonomous (from the

underlying transaction) contract.⁷³ On the legal nature of the relationship between the disputing parties and arbitrators, some legal commentators maintain the relationship is based on status or office,⁷⁴ some others maintain it is based on contract⁷⁵ and some that the relationship is part contract and part statute, making it a hybrid.⁷⁶

A few legal commentators have sought to explore the nature of the relationship between the disputing parties and the arbitration institution and between the arbitrator and the arbitration institution.⁷⁷ Legal commentators generally agree that the relationship between the arbitration institution and disputing parties is contractual. There is however no consensus on the legal nature of the relationship between the arbitrator and arbitration institution. To some commentators there is no legal relationship between the arbitrator and arbitration institution while to some other legal commentators there is a relationship and this relationship is also based on contract.⁷⁸

I agree (with other commentators) that the relationship between the disputing parties and the arbitrator is based on the principles of contract rather than on the status of the office of arbitrator. I also agree with other commentators that the legal nature of the relationship between the arbitrator and arbitration institution is based on the principles of contract law. An analysis of this contract evidences that, under institutional arbitral references, the arbitration institution will enter into this contract either as principal or agent of the disputing parties (but not of the arbitrator).

The effect of this analysis on the contractual matrix examined is that where the institution contracts as principal with the arbitrator, the arbitrator's contract will be between the arbitrator and institution, so that there is no contract between the disputing parties and the arbitrator. However some commentators argue that where the institution concludes this contract as agent, there will be one contract between the institution and disputing parties, and another contract between the arbitrator and the disputing parties. I argue against this last contract since if the institution contracts as agent, the disputing parties will still be liable on this contract as disclosed principal. In this sense it is not necessary to find a separate contract between the arbitrator and disputing party in this situation. To complete this analysis, an examination of the legal nature of the relationship between the arbitrators *inter se* (in a panel of more than one arbitrator) reveals that it lacks any obvious contractual basis, so that there is no contract between the arbitrators themselves.⁷⁹

A review of the commentaries on the legal nature of the relationship between the disputing parties and the arbitrator reveal a very broad distinction between two theories.⁸⁰ One theory is based on contract while the other explains this relationship on the basis of status or office of the arbitrator. The theory based on contract can be further divided into the agency and power of attorney propositions or sub-theories. These two variants have been applied by commentators to explain the situation where the disputing parties do not jointly appoint the arbitrators (Case Studies 2 and 6).⁸¹ The third

theory is that which is termed mixed or hybrid, which tries to reconcile the contract and status theories. This explains the relationships in the nature of contract and status or status and contract, depending on the starting point of the analysis. In this section, a review of the present literature and scholarly writings on each theory is briefly examined in three subsections dedicated to each theory: (2.1) the status or office theory, (2.2) contract theory and (2.3) the mixed or hybrid theory.

2.1 Status or office theory

The main proponents of this theory under the common law regime are Lord Michael Mustill and Stewart Boyd, QC. They argued this theory in their treatise titled, *The Law and Practice of Commercial Arbitration in England*, in which they examined the nature of the legal relationship between the arbitrator and the disputing parties under English law. According to Mustill and Boyd, the necessary question to ask was, 'whether the acceptance of an appointment as arbitrator gave rise to legally enforceable duties on either side'.⁸² To answer this question, they started from the historical position that

Traditionally, an appointment as arbitrator was regarded as having an honorary character: not so much that the arbitrator was expected to fulfil his duties without remuneration (although it was once the case) but that his appointment and agreement to act were at the same time a recognition of his standing and probity, and a recognition of the responsibilities owed by such persons to others engaged in the same trade.⁸³

In summary form, the argument in favour of the status theory is that the arbitrator's duty to act fairly is not a contractual obligation but evidences the interest of the sovereign state in arbitration.⁸⁴ It is true and thus accepted that the state is interested in arbitrators acting fairly just as much as the disputing parties are interested in getting a fair hearing.⁸⁵ However a breach of this obligation by the arbitrator, is a breach of its laws for the state (prohibiting such behaviour and possibly accompanied by a sanction), while for the disputing parties, it is a breach of the contract they have with the arbitrator (for which they may be able to claim damages). Therefore the interest of the state and the disputing parties, though similar, will lead to different enforcement regimes. The essence of the status or office theory therefore, is that the arbitrator's 'office' is a creature of statute. Hierarchically, this has the effect of elevating the arbitrator a few steps above the disputing parties, synonymous to a litigant and the national judge.

The driving force of the status theory is the comparison of the judicial function of the arbitrator to that of the state judge and in the light of this, the need to explain the limitation of the arbitrator's liability to the disputing parties, without distinguishing between the judicial function performed by the arbitrator (making him a private judge and so arguably entitled to

the legal protection of immunity from suit like the national judge) and the service he or she (or the institution) renders to the parties (which should be subjected to the law of contract just like any other contract for the provision of services). Thus the major difficulty with the status or office theory is its failure to distinguish the judicial role the arbitrator performs from his contractual role. This raises the further question of whether the arbitrator is an officer of the state like judges.⁸⁶

Klaus Lionnet sees this theory as being, 'contrary to the parties' freedom to determine the form of the arbitration procedure'.⁸⁷ He criticizes the status theory on two grounds: its starting point that the office of the arbitrator is created by statute and therefore above the disputing parties; and the fact that the theory fails to take into account the powers the disputing parties are conferred with over the arbitrator's office. He gives as an example the parties' power to terminate the arbitrator's mandate, which the parties would not possess if the arbitrator's office was a creature of statute. Again in comparison with the national court judge whose tenure and emoluments are determined by the state that he represents, and not by the disputing parties, the arbitrator on the other hand is appointed by the disputing parties (directly or indirectly) and remunerated by them.

The proponents of the status theory claim that this theory explains the arbitrator's power to make a decision which is legally binding on the disputing parties, the enforcement of his decision with the support of the state and its enforcement mechanisms (just like the judgment of a national court), and the fact that in some jurisdictions (like England) though the disputing parties have appointed the particular arbitrator for his perceived skill, the arbitrator is not liable to the parties in negligence where he performs his function in a negligent manner and causes the parties loss. This involvement and support of the state, it is asserted, is supportive of the proposition that the arbitrator does not act on the basis of a contract with the parties but in the discharge of the statutory duties imposed on him by the state. From arbitral law and practice, it is evident that the support given by the state is to the mechanism of arbitration itself and not to the arbitrator as an office holder in the process of arbitration. This state support is intended to make the process and outcome of arbitration more effective through the recognition and enforcement of the award which the state treats as equivalent to the judgment of a judge in its national court. This recognition is not given to the decision maker as much as to the decision itself.

There is no doubt the state judge is a creature of statute and an officer of the state since he is appointed by the state, swears allegiance to upholding the law of the state and is remunerated by the state. An arbitrator on the other hand is an individual, maybe a professional (though not necessarily so) appointed by the disputing parties (not the state) to perform a service for them (not the state) for a fee, and paid by the disputing parties (not the state). The arbitrator is not a creature of statute and does not swear

allegiance to the state neither is he remunerated for his service to the disputing parties by the state, and so definitely not an officer of the state.⁸⁸

I acknowledge that the arbitrator's role in the arbitral reference is also regulated by statute. However this is only to the extent that the disputing parties appointing him do not make contrary provisions⁸⁹ or such statutory provisions are mandatory. I must note that these statutory provisions primarily regulate the powers conferred on the disputing parties (which in default are exercised by the arbitrator). These statutory provisions (which act as gap fillers) are intended to assist the arbitral process and especially to act as a guide where the parties have made no provision.

On the question of immunity from suit granted to the arbitrator under some national laws, the policy considerations given by such states that grant judicial immunity (whether absolute or partial) to arbitrators is not based on the status or office or even the need to protect such status or office, but on the need to protect the judicial function arbitrators perform in the arbitral reference.⁹⁰ There is evidence from the majority of arbitration laws and relevant judgments from various jurisdictions to show that arbitrators do not enjoy any form of immunities from suit⁹¹ while in some states the immunity accorded arbitrators is qualified.⁹² This supports the view that most states do not perceive an arbitrator as a judicial officer whose function is so sacrosanct as to be granted legal protection from suit to enable him freely and more conscientiously to carry out his function in the arbitral reference.

An examination of the entity that chooses and remunerates the judge or arbitrator is very important in this analysis. The disputing parties choose and remunerate the arbitrator unlike the state judge who is chosen and remunerated by the state. When parties in dispute file an application to pursue a claim before a national court, the parties accept whichever judge is assigned to them. The disputing parties do not give an indication of what skills the judge assigned to hear their dispute should possess, as they could do with an institution who performs the function of appointing arbitrators on behalf of the parties. This again supports the view that there is a major difference both in theory and practice between the office of the national court judge and the office of the arbitrator.

On remuneration of the judge and arbitrator, it is the state that remunerates the national court judges (as its officers) and not the disputing parties. The arbitrator is remunerated for his services by the disputing parties and not the state. This clearly shows the relationships and allegiances in this comparison. The court fees paid when filing the application for the claim by the disputing parties in the national court can be equated to the administrative costs they pay in the arbitral reference. However recipients of this payment differ. In litigation, this fee is paid to the state (public entity) while the arbitral fee is paid to the institution or arbitral tribunal (private entity). Thus the fees paid by the disputing parties to the arbitrator accrue to him personally for the services he has rendered to them, while the fees they pay to the court accrues to the state and not to the judge personally. These are

some of the major differences between the office of the judge and the ‘office’ of the arbitrator in their relationship with the disputing parties, though they both perform judicial functions.

The office or status theory has no relevance or application to the relationship between the arbitrator and arbitration institution where such bodies appoint or confirm the appointment of the arbitrator nominated by the disputing parties since this particular relationship is not statutorily provided for in most national laws.⁹³ National laws recognize the power of the disputing parties to delegate their appointment powers to a third party.⁹⁴ However these laws do not regulate the rules of such arbitration institutions that equally affect the powers exercisable by the arbitrators. The arbitration institutions are not organs of the state, like courts, so that even where the arbitration institution appoints the arbitrator, the powers to make the appointment do not emanate from the state, neither does the power exercised by the arbitrators so appointed. These powers exercised by both the arbitration institution and appointed arbitrators emanate from the arbitration agreement between the disputing parties incorporating the relevant arbitration rules. In addition to the points raised by Klaus Lionnet above, this theory and its application are unsatisfactory primarily because of its presumption that the arbitrator can and should be treated like the national court judge, since they both perform the same judicial functions.

2.2 *The contract theory*

Klaus Lionnet discussed the legal nature of the relationship between the arbitrator and the disputing parties in terms of a contract.⁹⁵ He felt an examination of the question of whether there is a contract between the disputing parties and the arbitrator arises especially since the laws on arbitration do not say anything to that effect.⁹⁶ He notes that the arbitration agreement only creates a legal relationship between the disputing parties themselves and cannot govern the office of the arbitrator.⁹⁷ This is a different opinion from that expressed by the English Court of Appeal in *Hyundai* where the arbitrator was said to be a party to the arbitration agreement between the disputing parties.⁹⁸ In agreement with Klaus Lionnet, Murray Smith wrote, ‘the contract of appointment (of arbitrators) is a separate and distinct contract subject to its own terms and conditions’.⁹⁹

Klaus Lionnet in his analysis differentiates the arbitrator’s office from his decision-making powers, conferred on him by the disputing parties (through the arbitration agreement).¹⁰⁰ He explains that this is because the existence of the arbitrator’s office is unaffected in the face of a void arbitration agreement. In that situation, the arbitrator can still, under the doctrine of competence-competence, decide on the validity of the arbitration clause. Thus the rights and duties that flow (from the arbitrator’s acceptance of appointment) between the arbitrator and the disputing parties (institution) is unaffected by the fact that the arbitrator decides that he lacks jurisdiction

(for example over an objective arbitrability issue) or that the arbitration agreement is void. Such a decision by the arbitrator terminates the arbitration proceedings but any rights or duties that have already accrued by virtue of his entering into the contract with the disputing parties remain enforceable. By rendering the decision (for example that the arbitration agreement is void), the arbitrator has rendered service under the arbitrator's contract and is entitled to his remuneration.

In addition to the foregoing, the disputing parties in the exercise of their powers by virtue of the principle of party autonomy can regulate the arbitrator's conduct of the arbitral proceedings and jointly terminate his mandate.¹⁰¹ The exercise of such powers by the disputing parties is possible where there is a contract between the disputing parties (institution) and the arbitrators and not practicable where the relationship is a creature of statute.¹⁰² The contract theory thus recognizes that the arbitrator's contract is separate from the arbitration agreement. It therefore would not share the same fate as the arbitration agreement and (in most likelihood) will be governed by a different law from that governing the arbitration agreement. Indeed the arbitrator's contract emanates from the arbitration agreement but is separate from it.

In *Fouchard, Gaillard and Goldman on International Commercial Arbitration*, the authors analysed the legal nature of the relationship between arbitrators and the disputing parties in international commercial arbitration as a question of transnational law and not under any particular national law.¹⁰³ They explained that

The fact that international arbitrators have a 'status' simply means that the contract from which their powers are derived cannot exclude the application of the fundamental principles which govern the resolution of disputes before any forum.¹⁰⁴

The authors argue that the relationship between the disputing parties and arbitrator is based on contract. On the formation of this contract, they examined case-law relevant to the issue from various jurisdictions and concluded that

The contractual relationship is straightforward. First the parties appoint the arbitrators: whatever method is used to appoint them, there is no doubt as to the parties' intention to empower particular individuals to resolve their dispute. It is irrelevant that in some cases a predetermined third party or institution may ultimately be responsible for appointing the arbitrators or confirming that appointment. Such appointment is done on behalf of the parties, who will have agreed beforehand that the arbitrators may be chosen indirectly. Second, as nobody is ever under an obligation to assume the role of an arbitrator in a given dispute, the arbitrator's consent to act in that capacity is a prerequisite. They give

that consent by accepting their functions, thereby completing the constitution of the arbitral tribunal. [Footnote omitted]¹⁰⁵

And concluded

In both law and practice, in all legal systems and under all arbitration rules, the formation, performance and expiration of the contract between the parties and the arbitrators occur gradually and informally.¹⁰⁶

This analysis is applied in Chapter Four with diagrams to clearly show how and when the arbitrator's contract comes into existence.

Having concluded that there is in existence an arbitrator's contract, this raises the question of whether this contract is concluded with each arbitrator so that it is personal to each individual arbitrator, or if it is concluded with the arbitral tribunal regardless of the number of arbitrators. Klaus Lionnet examined this question and is of the opinion that

The arbitrator's contract is a separate contract between the appointing parties and the arbitrator, with the effect that where there are three arbitrators, three contracts are concluded.¹⁰⁷

He also contends that

Legal doctrine rarely tries to define the acts which constitute the contract and usually only states that the arbitrator's contract is concluded by both parties with each arbitrator, because each arbitrator works for both parties.¹⁰⁸

Thus the contractual theory more fully represents the legal nature of the relationship between the disputing parties and the arbitrators.¹⁰⁹ The obligations and rights of the disputing parties and the arbitrators arises out of the contract between them. It is argued in Chapter Five that where certain terms of this contract are provided under statute two situations arise. Provisions under national arbitration laws that are non-mandatory in nature supplement the terms of the arbitrator's contract, so that they are deemed to be agreed by parties to the contract. Those provisions under national arbitration laws that are of a mandatory nature apply by force of law, so that both the disputing parties (institution) and arbitrators cannot derogate from such provisions. The reference to this contract as the arbitrator's contract is to distinguish it from the arbitration agreement. Furthermore, it is agreed that the relationship between the disputing parties and the arbitration institution, and the relationship between the arbitrator and the arbitration institution, are both adequately explained in terms of contract.

Having identified and opted for the contractual theory as that which best describes and explains the legal nature of the relationships between the

various parties involved in international commercial arbitration, it is important to examine those arbitrator appointment methods which obviously do not perfectly fit into a straightforward contract formation analysis. The problem posed by such arbitrator appointment methods is the lack of participation of one of the disputing parties in the appointment of the arbitrator, so that the non-participating party may claim that it is not party to the arbitrator's contract. This possibility weakens the efficacy of the contract theory and its application to all forms of arbitrator appointment methods.¹¹⁰

The proponents of the contract theory have grappled with this apparent weakness and in answer, proposed the agency or power of attorney theories (2.2.1). Having analysed these agency and power of attorney theories, another theory, the partnership theory, is proposed below as another explanation for the proposition that the non-participating party should still be bound to the arbitrator on his contract from the period the arbitrator accepts appointment to act (2.2.2).

2.2.1 Agency and power of attorney theories

The agency and power of attorney theories attempt an explanation of arbitrator appointment methods under Case Studies 2 and 6, where in the appointment of arbitrators, the respondent fails or refuses to appoint or join the claimant in the appointment of either a sole arbitrator or to form the panel of arbitrators, and where the appointment of a sole arbitrator is made by an appointing authority or a national court on the application of the claimant only. Commentators argue that for the appointment of the arbitrator to be valid and binding on the respondent in contract, a notional agency or power of attorney has to be implied into the relationship between the disputing parties as it affects the appointment of the arbitrator.

The explanation and application of these theories is that at the time the disputing parties conclude the arbitration agreement, each party to the arbitration agreement gives to the other party a fictional power of attorney, or each party agrees to the other party acting as its agent, for purposes of appointing the arbitrator. The purpose of the grant of the power of attorney or imputation of a notional agency, is to enable either party to constitute the arbitral tribunal when the need arises. Thus in a three member arbitral tribunal, the non-participating party gives the complying party a notional power of attorney to appoint the arbitrator. Where an appointing authority is involved the presumption is that both parties give the notional power of attorney to the appointing authority, at the time of appointing it in the arbitration agreement to make the (default) arbitrator appointment on their behalf. The appointing authority therefore acts as the representative of both disputing parties in appointing the arbitrators. The same analysis is applied in declaring the complying party (or appointing authority) as the agent of the non-participating party (or both parties). Again, a notional agency appointment is implied into the arbitration agreement. This agency is to

enable either party (or the appointing authority) to appoint the arbitrator (for itself and on behalf of the non-participating party) and to ensure that such appointment binds both parties.¹¹¹

In agreement with this theory, Klaus Lionnet applied the power of attorney theory to the appointment of a sole arbitrator or the chairman of the tribunal by an appointing authority, and explained it as follows

The appointing authority acts as a representative of the parties, with two powers of attorney, one from the defaulting party and another from the other party, which were given implicitly by both parties when choosing the appointing authority.¹¹²

The proponents of the power of attorney and agency theories are constrained to imply such a notional state of affairs at the time of the conclusion of the arbitration agreement by the parties through hind sight. This construction appears to force the arbitrator appointment methods under Case Studies 2 and 6 into a preconceived model and not interpret the method in itself. This makes the arguments in support of these two sub-theories still inadequate.

A very recent decision of the Technology and Construction Court (England) on this point (though arising from the appointment of an adjudicator) leaves these theories open to doubt. In *Christopher Michael Linnett v Halliwells LLP*,¹¹³ Mr Linnett was appointed adjudicator in a dispute between ISG InteriorExterior Plc and Halliwells LLP over fit out works at Halliwells' new offices in Manchester. Halliwells LLP (the respondent in the adjudication) did not participate in the appointment of the adjudicator on the grounds that he lacked jurisdiction to hear the dispute. However, Halliwells participated in hearings in the adjudication but refused to contribute to the fees of the adjudicator who sued the firm of solicitors for his fees and expenses. Mr Justice Ramsey, after comparing this aspect of the adjudicator's involvement in the adjudication process to that of the arbitrator under the English Arbitration Act, said that, 'similarly the ability of an adjudicator to obtain fees depends on there being a contractual right to payment under the Adjudicator's Agreement with one or both of the parties'.¹¹⁴ After analysing the question of whether there was a contract between Mr Linnett and Halliwells, the judge came to the conclusion that on the facts of this case, 'there was no contract formed between Halliwells and the Adjudicator on the Adjudicator's Terms of Engagement'.¹¹⁵ The judge then observed that

Where one party agrees the adjudicator's terms but the other does not then, except for such terms as might require the agreement of the other party in order to become binding, the Adjudicator can enforce those terms against the party with whom he has a contract. There is nothing objectionable in an adjudicator being appointed unilaterally and, indeed, it is not uncommon for this to happen in arbitrations with three arbitrators.¹¹⁶

The judge continued:

I consider that if an adjudicator is appointed and neither party makes a contract with the adjudicator, the parties by participating in the adjudication and thereby requesting the adjudicator to act, enter into a contract with the adjudicator who acts in that capacity as a result of that request. Such a contract will be formed by conduct. There would, I consider be implied terms that the party would be liable to pay the reasonable fees and expenses of the adjudicator and would be jointly and severally liable with the other party to do so.¹¹⁷

Mr Justice Ramsey held that Halliwells were liable, on the facts, to pay the reasonable fees and expenses of the adjudicator. The judge did not imply a notional power of attorney or agency theory into the agreement between ISP and Halliwells to hold Halliwells liable to pay the adjudicator but applied normal contract principles to find an agreement between Halliwells and the adjudicator directly and determined the terms of this agreement as reasonable. There are no substantial differences between the appointment of adjudicators in statutory adjudication, as was the case in *Halliwells*, and appointment of arbitrators in international commercial arbitration since both are contractual in nature.¹¹⁸

2.2.2 *Partnership theory*

The partnership theory is proposed below as an alternative to the agency and power of attorney theories, to be applied to explain the formation of the arbitrator's contract in situations where one of the disputing parties fails or refuses to participate in the appointment of the arbitrator. Again this analysis is relevant to justify the presumption adopted in the analysis (in Chapter Four below) on the formation of the arbitrator's contract that the disputing parties contract jointly when concluding the arbitrator's contract upon the arbitrator's acceptance of appointment.¹¹⁹ The partnership theory seeks to answer the same question asked in *Halliwells* above whether, where one of the disputing parties was not party to the offer made to the arbitrator, such a party can be bound in contract to the arbitrator as posed in Case Studies 2 and 6.

The partnership theory argues that applying a functional interpretation of the relationship between the disputing parties themselves (which is evidenced in the arbitration agreement), leads to the proposition that the arbitration agreement by categorization is a partnership agreement between the parties to it since the arbitration venture is a joint one for the mutual benefit of the parties to it. In concluding the arbitration agreement, each party agrees to perform it in his own interest and in the interest of the other party to the agreement.¹²⁰ Applying the partnership law principles to this relationship, the actions of the claimant and/or the respondent in

performing the terms of the arbitration agreement (which principally entails asserting the arbitration agreement and constituting the arbitral tribunal) effectively binds both parties, severally and jointly to the same degree. This implies that where either party asserts the existence and efficacy of the arbitration agreement, it acts in the mutual interest of all the parties to the arbitration agreement. This assertion is supported by the requirement under most arbitration laws and rules, that the fees and expenses arising from the performance of the arbitration agreement is the liability (severally and jointly) of the parties thereto.¹²¹ This is not the position under the Housing Grants, Construction and Regeneration Act of 1996 (under which *Linnett v Halliwells* was decided) which does not contain any provisions on the rights of the adjudicator to be paid for his services.¹²²

One major point of departure from the power of attorney or agency theories is the premise on which the partnership theory is based. This premise is that the partnership principles apply as between the disputing parties (who are the parties to the arbitration agreement) and take effect before the offer is made to the arbitrator towards the formation of the arbitrator's contract. However, under the power of attorney and agency theories, the presumption is raised when the offer is made to the arbitrator by the complying party. For the partnership theory, the disputing parties implicitly agree with each other at the conclusion of the arbitration agreement to give effect to it when a dispute arises.

So when a dispute eventuates and the claimant notifies the respondent of its intention to assert the arbitration agreement and commence arbitral proceedings, if the respondent gives a positive response by participating in the formation of the arbitral tribunal, then both parties jointly make an offer to contract with the arbitrator. However, where the respondent refuses or fails to participate in constituting the arbitral tribunal, the claimant can still effectively act under the terms of the arbitration agreement to assert it and form the arbitral tribunal.¹²³ In constituting the arbitral tribunal, the claimant will simply be performing the terms of the arbitration agreement. This term is the performance of all that is necessary (within the limits of the law applicable to the arbitration agreement) to constitute the arbitral tribunal.

Testing the partnership theory on the formation of the arbitrator's contract, where the disputing parties appoint arbitrators directly and one disputing party contacts a prospective arbitrator to determine if he is willing to act as an arbitrator (Case Studies 3, 4, 5, 10, 11 and 12), this contact constitutes the offer. The party making this offer to the arbitrator acts for all parties to the arbitration agreement. Where the arbitrator is available and willing to so act, he accepts the offer directly to the disputing parties (represented by one of them but not as the agent of the other parties). The appointing party then notifies the other party of the arbitrator's appointment.¹²⁴ This requirement of notification has been said to be the authority for the proposition that, 'the appointing party does not only act on its own behalf but also for both parties', in support of the agency theory.¹²⁵ However,

under the partnership theory, it is argued that the appointing party notifies the other party on the basis of the requirement of full disclosure under partnership law. It is admitted that there is no noticeable difference in the resultant effect of the notification requirement between the theories.

Testing the partnership theory on situations where an appointing authority appoints the arbitrator on behalf of the disputing parties (Case Study 7), the party that requests the appointing authority to make the appointment acts in compliance with the terms of the arbitration agreement. The parties have already agreed in the arbitration agreement for recourse to the appointing authority under certain conditions. Once these conditions exist the applying party complies with the terms of the arbitration agreement by requesting the appointing authority to appoint the arbitrator. The appointing authority is designated by both parties in the arbitration agreement and so acts for both parties. By requesting the appointing authority to act, the applying party merely notifies the appointing authority of this designation or appointment by all the parties to the arbitration agreement, so that the appointing authority acts on the instruction of all parties to the arbitration agreement.

The parties to the arbitration agreement are involved in a joint enterprise of having their dispute resolved by arbitration. The applying party therefore, is here acting for all the parties to the arbitration agreement, not just as agent (so that its action may need to be ratified by the principal) but as principal in the name of all parties to the arbitration agreement. This action of the applying party is important since the constitution of the arbitral tribunal is in the joint interest of the parties and a necessary prerequisite to the realization of their joint enterprise.¹²⁶ Where there are fees to be paid for the services of the appointing authority, they will be paid by the applying party. This is all part of the cost of the arbitration, which the arbitral tribunal is liable to take into consideration when allocating the costs.¹²⁷ It is possible for one party (usually the claimant) to bear all the costs for which at the end of the arbitration, it can then be reimbursed by the respondent. This of course is dependent on the outcome of the claims.¹²⁸

A snapshot of the result of applying the partnership sub-theory to the various case studies is provided below

- Sole arbitrator jointly appointed by the disputing parties – in this scenario the parties jointly (both legally and physically) make the arbitrator the offer to act which he accepts to both parties.
- Where each party appoints one arbitrator and the two party appointed arbitrators appoint the presiding arbitrator – here, each party appoints one arbitrator both for itself and as representative of the other party to the arbitration agreement so that the parties jointly (here only legally but not physically) make an offer to the arbitrator which he accepts. In accordance with the terms of the arbitration, the disputing parties then jointly delegate to the two party arbitrators the power to appoint the third and presiding arbitrator.

- Where an appointing authority ‘appoints’ the arbitrator (sole, presiding or party appointed arbitrator) the appointing authority acts on behalf of both parties as argued above. The parties then jointly (again legally and possibly physically) make the arbitrator the offer to act. Thus the appointment made by the appointing authority is more akin to a nomination.
- Where one party refuses to join in the appointment of the arbitrator (whether sole, presiding or party appointed arbitrator) on the grounds that it is not party to the arbitration agreement – this is a question affecting the whole premise of this theory since the partnership principle will only apply to parties to the arbitration agreement. It is very obvious that, in this case, the non-participating party cannot be bound to the arbitrator’s contract where it is not party to the principal contract (the arbitration agreement). However, where the non-participating party raises objections affecting the jurisdiction of the arbitrator (for example, that the arbitration agreement is void, invalid, or the arbitrator lacks jurisdiction) as reasons for not joining in the appointment of the arbitrator and for the determination of the arbitrator, this theory will apply to bind it as party to the arbitrator’s contract.¹²⁹ The reasoning for this is that as a partner in the arbitration enterprise, the arbitrator rendering a decision on the objections raised by the party is rendering a service in the interest of the appointing party and non-participating party alike. This is unlike the situation where the contesting party is not party to the arbitration agreement and does not participate in the arbitral proceeding at all. This conclusion applies as long as the contesting party’s position is validated by the arbitrator or a national court.¹³⁰ However, where the arbitrator or judge decides that the contesting party is actually party to the arbitration agreement, then it will be bound as party to the arbitrator’s contract since it has always been party to the arbitration agreement.¹³¹ This is possible on the application of the partnership or agency or power of attorney theories to the non-participating party liable on the basis of being party to the arbitration agreement.

The application of the partnership theory does not affect the argument that appointing authorities may act as agents or representatives of the disputing parties, since it only applies as between the parties to the arbitration agreement. The appointing authority performs a distinct function to give effect to the arbitration agreement as agreed between the disputing parties. It does not enter into any form of contractual relationship with the arbitrator it appoints for the disputing parties. It is the disputing parties themselves that agree terms with the arbitrators appointed on their behalf pursuant to their arbitration agreement. Therefore in constituting the arbitral tribunal the disputing parties act as partners having a shared interest to comply with the provisions of their arbitration agreement.

2.3 Mixed or hybrid theory

The proponents of the mixed theory propose that the relationship between arbitrators and the disputing parties in arbitration reveals traits of both status and contract. Depending on what is taken as the starting point, the nature of the relationship could be 'Status-Contract' or 'Contract-Status'. The argument of the proponents of the mixed or hybrid theory is to the effect that arbitrators are creatures of statute (office) but the ability of these arbitrators to perform their function is dependent on the disputing parties' arbitration agreement (contract) and the parties appointing them. After appointment by the parties, the regulation of the arbitrators reverts back to statute. In other words, the office of the arbitrator is created by statute, but their appointment is based on contract while their performance of their function is also regulated by statute. The other variant of the argument is that the arbitrators come into existence when appointed by the disputing parties pursuant to an arbitration agreement (that is, they are created by contract) and their conduct is thereafter regulated by statute.¹³² The first scenario is the 'status-contract' position while the second is the 'contract-status' position. Julian Critchlow described the hybrid theory

The relationship maybe hybrid: primarily status based but subject to a consensual element ('status-with-contract') or primarily contractual but subject to a regulatory, status element ('contract-with-status').¹³³

The hybrid theory can be subsumed into the contract theory. The office of the arbitrator is regulated by statute to the extent that the disputing parties do not (or cannot) contract otherwise. The proponents of this theory accept that the relationship between the disputing parties and arbitrator emanate from the arbitration agreement between the disputing parties and the state makes statutory provisions permitting disputing parties to appoint arbitrators. However this does not import a statutory regime to this relationship. The relevant provisions in arbitration laws are powers granted to the disputing parties and not to the arbitrators (who are yet to be appointed). This is especially true under ad hoc arbitral references since in institutional references, the arbitration rules of the institution will fill the gaps and apply as the appointment method or procedure chosen by the disputing parties. Thus the mixed or hybrid theory does not fully reflect the practical realities of the nature of the relationship between the disputing parties and arbitrators.

It has been argued that the relationships between the disputing parties evidenced in the arbitration agreement, and between the disputing parties and the arbitrator, are adequately contractual in nature. However, it is also acknowledged that the terms of these contracts are affected by any mandatory laws of the seat of arbitration or law applicable to any of the contracts. It is further contended that in situations where the provisions of the arbitration law of the seat of arbitration apply by default or as a gap filler, such

provisions stand as the terms of the arbitrator's contract and this fact alone does not change the contractual nature of the relationships, so as to make the relationships a creature of statute.

Chapter summary

In this chapter, five major juridical theories of international arbitration are examined. It is agreed by all the various theories that consensual arbitration is based on the arbitration agreement. They all agree that the sovereign state plays some role in the arbitral process. They differ however as to the nature and extent of this role. International arbitration has developed over the years and the premises on which some of the juridical theories were based are no longer tenable.

As a consequence, the relevance of the law of the seat of arbitration has greatly diminished and this law basically serves a gap-filling position, especially in ad hoc arbitration references. International arbitration proceedings have become more regulated and formalized though still with very limited grounds of recourse against any resultant award. The arbitral award has never been and still is not a mere contract between the disputing parties. It is duly recognized and enforced as the equivalent of a final judgment of a national court in practically all jurisdictions. The increase in the number of institutions offering to administer arbitration references under their customized arbitration rules and the preference of institutional arbitration by parties support the adoption of the autonomous theory, however increased recourse to national courts, especially at the seat of arbitration during the arbitral proceeding also threaten this claim. The liberal attitude adopted by most states towards international arbitration generally supports the mixed or hybrid theory as the most reflective of the juridical nature of international commercial arbitration.

The theories on the legal nature of the relationship between the parties involved in international arbitration are also examined. These theories historically examined the relationship between the disputing parties and the arbitrator. The examination of these theories is expanded to include the relationships involving the arbitration institution, which is generally presumed to be contractual in nature. The office or status theory was examined and it was concluded that this theory is not reflective of the legal nature of the relationship between the arbitrator and disputing parties and is inapplicable to those relationships involving the arbitration institution. The contract theory was then analysed and tested against various arbitrator appointment methods, with a conclusion that this theory adequately reflects the legal nature of the relationship between the disputing parties and arbitrators and those involving the arbitration institution. This analysis of both the juridical and relationship theories reveals a possible connection between the notion of the juridical nature of international arbitration asserted and the explanation of the legal nature of the relationships between the parties

involved in international commercial arbitration. Accordingly, an inclination towards state dominance accords with the status or office theory while an inclination towards the dominance of party autonomy accords with the mixed or contract theories.¹³⁴

3 Parties to the arbitrator's contract

The contracting parties to the arbitrator's contract are the disputing parties and the arbitrator under ad hoc references while the arbitrator concludes his contract with the arbitration institution under institutional references. This chapter analyses: (1) the nature and role of the disputing parties; (2) the arbitrator and (3) the arbitration institution. It is these persons and entities that make promises under the arbitrator's contract and the contract between the disputing parties and the institution, perform obligations and enforce rights arising from the terms of these contracts. This chapter also examines the question of whether the arbitrator's contract is concluded with each arbitrator or the arbitral tribunal regardless of the number of arbitrators (4).

1 Disputing parties

It is reasonably certain and universally acknowledged that the parties to the main contract in which the arbitration clause is a part are also the parties to the arbitration clause (agreement) and usually this does not include the appointed arbitrator or institution.¹ So where the arbitrator is appointed and named in the submission agreement without more, it evidences the fact of the arbitrator's appointment.² Lew, Mistelis and Kröll write in this regard that, 'in a submission to arbitration it is normal to name the arbitrators directly and to confirm their acceptance before the submission is signed'.³ So where the arbitrator is appointed and named in the submission agreement without more, it evidences the fact of the arbitrator's appointment. Some arbitration laws that provide details of what should be contained in the submission agreement do not state that the arbitrator must sign the submission agreement. Article 10 of the Arbitration Law of Brazil, for example, requires the submission agreement to mandatorily indicate amongst other things

The name, profession and domicile of the arbitrator or arbitrators, or, if applicable, the identity of the institution to which parties have delegated the appointment of arbitrators.⁴

Another example is Article 1448 Arbitration Law France which applies to domestic arbitration. It requires a submission agreement, 'to appoint the arbitrator or arbitrators or provide their method of appointment', to be valid. So generally, arbitration laws do not require the signature of the arbitrator or institution named in the submission agreement.

The requirement to name the arbitrator or institution in the submission agreement does not make the arbitrator or institution party to the arbitration agreement evidenced in the submission.⁵ Under laws that do not require the arbitrator to be named in the submission agreement, or those that contain the arbitrator appointment method, the submission agreement will be just like an arbitration clause in a contract.⁶ Where however the law requires the arbitrator or institution to be named in the submission agreement, this raises the question of whether the submission agreement evidences two separate but related contracts or just one contract to which the arbitrator or institution is also a party. In Chapter One it was argued that the arbitrator is not party to the arbitration agreement, which is made between the disputing parties evidenced in the submission agreement. The terms of appointment of the arbitrator will still need to be separately agreed with the disputing parties.

If the submission agreement also contains terms of appointment, for example, terms relating to fees, extent of arbitral power, and time schedule of mandate (availability),⁷ then the submission agreement evidences two separate agreements. These are the arbitration agreement between the disputing parties only, and the arbitrator's contract (under which the arbitrator is appointed) between the arbitrator on the one hand, and the disputing parties (jointly) on the other hand. By analogy, the principle of autonomy of the arbitration clause contained in a main contract is applied to this type of submission agreement to make the arbitrator's agreement (and its terms) independent and autonomous from the arbitration (submission) agreement in which it is contained.

It is obvious that the subject matter of both agreements is different. The arbitration agreement concerns the resolution of the dispute between the disputing parties by arbitration⁸ while the arbitrator's agreement regulates the provision of services by the arbitrators to the disputing parties for a fee. Thus such detailed submission agreement reflects the existence of two separate contracts in one document. It would therefore only be necessary to conclude another contract between the arbitrator and the disputing parties evidencing details of this appointment where such details are not contained in the submission agreement itself. This is because this type of submission agreement only appoints and records the acceptance of the appointment by the arbitrator without giving details of the terms of such appointment.⁹

The same argument is made where the arbitration agreement contains the name of an institution instead of arbitrator, for example under the Arbitration Law of the People's Republic of China, the submission agreement is not required to contain the name of the arbitrator but the name

of the designated arbitration commission.¹⁰ This becomes an agreement that evidences the arbitration agreement and the contract to administer the arbitral reference between the disputing parties and the arbitration commission. Therefore the arbitration commission itself does not become party to the submission agreement by virtue of the fact that it is named in it.¹¹ In addition to this, the appointment of the commission in the arbitration agreement is a mandatory provision of the national arbitration law of China, so that in effect there is no provision for ad hoc references in international commercial arbitration.

Some arbitration laws also provide for the consequence of an arbitrator named in the submission agreement not accepting appointment. It is important to note that the same analysis will affect the situation where a named institution refuses to accept appointment and administer the arbitral reference. The French Law on Arbitration for example provides that

A submission agreement is null and void if an arbitrator appointed therein fails to accept his mission.¹²

This provision has the effect of voiding the arbitration agreement *ab initio* as though it never existed. This provision raises again the question of whether the arbitrator named in the submission agreement is party to it such that his failing to accept appointment vitiates the arbitration agreement, since the effect of this provision is that the arbitration agreement was never in existence.¹³ This provision in effect treats the acceptance of appointment by the arbitrator or institution named in the submission agreement as a fundamental term (or condition) of the contract to arbitrate.

This consequence and interpretation works a lot of hardship on the disputing parties themselves and not on the arbitrator (or institution) that has refused to accept appointment. It is clear that the arbitrator (or institution) is a third party to the arbitration agreement and not bound by the promise to arbitrate eventuating disputes as the disputing parties. As a matter of fact there will not be any substantive dispute covered by the arbitration agreement to which the arbitrator (or institution) is a party. Most legal commentators have treated the consequence of an arbitrator named in the arbitration agreement failing to accept appointment as resulting in the arbitration agreement becoming 'incapable of being performed' but not making it *void ab initio*.¹⁴

In support of this conclusion by commentators, it must be remembered that the primary purpose of the arbitration agreement is to evidence the parties consent to resolve their covered disputes through the mechanism of arbitration. The 'parties' here refers to the parties involved in the underlying transaction from which the dispute emanates, so in effect the disputing parties. The arbitrator named in the submission agreement is not a party to the underlying transaction and so not a party to the arbitration agreement. If the arbitrator is not a party to the arbitration agreement, he then is a non-party to that agreement. If this is the case, then it is difficult to sustain

an argument that this non-party to the arbitration agreement can by his action (non-acceptance of appointment) nullify the very existence of the arbitration agreement.

It is suggested here that the effect of the arbitrator's (or institution's) non-acceptance of appointment when named in the arbitration agreement, will be to make a term of the arbitration agreement incapable of being performed. This is particularly so since the performance of this term (acceptance of appointment by the arbitrator or institution) is outside the control of the parties to the arbitration agreement. The result of this non-acceptance of appointment practically, releases the disputing parties from appointing the named arbitrator or institution. It does not release the disputing parties from their promise to arbitrate covered disputes. Therefore the preferred remedy will be for the arbitration agreement to revert to a simple arbitration agreement without any provision as to how the arbitrator should be appointed.¹⁵ This suggestion preserves (instead of denies) and gives effect to the disputing parties' intention of arbitrating their dispute. This alternative interpretation is a mechanism to salvage the arbitration agreement between the disputing parties, which is otherwise valid, but contains a vitiating factor (in this instance the named arbitrator not taking up the appointment) external to it that hinders its performance.¹⁶

Thus the argument made here is that regardless of whether the arbitrator's appointment is contained in the submission agreement or not, the submission agreement never becomes a tripartite or trilateral contract between the disputing parties and the arbitrator. The arbitrator cannot sue on the terms of the submission agreement to enforce it.¹⁷ This does not affect the fact that his rights emanate from the arbitration agreement between the disputing parties. However these rights of the arbitrator are relevant to his role in the arbitral reference and become effective when he accepts appointment and enters into his mandate, and not before. It is only the disputing parties bound by the arbitration agreement that can act on it or sue.

In England the courts have also grappled with the question of whether the arbitrator becomes a party to the arbitration agreement. In *K/S Norjarl A/S v Hyundai Heavy Industries*,¹⁸ Justice Phillips of the Queens Bench Division (England) was of the view that the arbitration agreement is initially a bilateral contract between the parties to the main contract, but becomes a trilateral contract when the arbitrator is nominated. On appeal, the Court of Appeal held that the arbitrators contracted with the disputing parties (pursuant to the arbitration agreement) but not as third parties to the arbitration agreement. The court further held that the terms of this contract can be varied on normal contract principles. The court concluded that the arbitrator therefore becomes party to the arbitration agreement.

Klaus Lionnet commenting on the Court of Appeal decision in *Norjarl v Hyundai* argues

The main disadvantage of this view is that the contractual foundation

of the arbitrator's function automatically disappears if the arbitration agreement is declared null and void. In any event, arbitrators will in such a case no longer be able to continue the arbitration, because they have lost their jurisdiction, which is given to them by the arbitration agreement. However, if there is a separate arbitrator's contract which is independent of the arbitration agreement, arbitrators will maintain a contractual basis for their rights and obligations towards the parties and thus their claim for remuneration for work already done.¹⁹

2 Arbitrators

The arbitrator is the person who decides the underlying dispute covered by the arbitration agreement between the disputing parties. The whole essence of arbitral practice is private judging which, the disputing parties (and institution) appoint the arbitrator to perform. This section examines the nature and function of the international arbitrator in the arbitral reference.²⁰ This section examines: (2.1) the basic personal attributes to be possessed by an international arbitrator; (2.2) the appointment and acceptance by the arbitrator under the arbitrator's mandate; (2.3) the arbitrator's legal status in the arbitral process; and (2.4) the relationship between the members of the arbitral tribunal.

2.1 *Basic personal attributes required of an international arbitrator*

As masters of their dispute, the disputing parties are free to provide for whatever personal requirements or professional qualifications the arbitrator to be appointed should possess. Such requirements and qualifications would be conditions and terms of both the arbitrator's contract and the institution's contract and shall be binding on parties to these contracts.

2.2 *Physical person*

The provisions of some arbitration laws imply that the arbitrator must be a physical person, an individual, and not a legal entity.²¹ However, the relevant provision of the Model Law may be interpreted to include legal entities while those of most national laws clarify that the reference is to an individual.²² The Model Law provides

No person shall be precluded by reason of his nationality from acting as an arbitrator ... [Emphasis added]

In France

If the arbitration agreement appoints a legal person as arbitrator, its powers are limited to organising the arbitration.²³

While in Argentina

Only persons of full age and full legal capacity may be appointed.²⁴

The practice in international commercial arbitration is to appoint an individual as sole arbitrator or group of individuals as members of the arbitral tribunal.

2.3 Legal capacity

The international arbitrator concludes various contracts when he enters into an arbitral reference. He must therefore have legal capacity (under his personal law) to conclude such contracts. Some national laws contain provisions on the legal capacity of arbitrators. This is evident from the Arbitration Law of Argentina quoted above. French Law, on its part, requires the arbitrator to be in the, 'full enjoyment of (his) civil rights'.²⁵ And in Brazil, 'any legally capable individual trusted by the parties,' may be appointed an arbitrator.²⁶ Such an arbitrator must satisfy the 'legally capable' requirement under Brazilian law.²⁷ The arbitration commissions in China are mandated to appoint as arbitrators persons who are, 'righteous and upright'.²⁸ The authors of *Fouchard Gaillard and Goldman on International Commercial Arbitration* are of the view that the most important qualification for an international arbitrator is to be (and remain) impartial and independent.²⁹

2.4 Professional qualifications

An international arbitrator is not required to possess any special professional or technical qualifications³⁰ to accept appointment to act since the 'arbitrator-guild' does not qualify as a 'Profession' in most jurisdictions.³¹ However, the disputing parties are at liberty to indicate whatever professional or technical qualifications, expertise or experience the person to be appointed as arbitrator in their dispute should or must possess. This is in exercise of their powers of party autonomy and such requirements become contractual terms in the arbitrator's contract flowing from the arbitration agreement.³² Requirements to this effect are very common in arbitration agreements or are agreed between the disputing parties at the stage of appointing arbitrators.³³

One of the major perceived attractions of arbitration in the resolution of international commercial disputes is the fact that the disputing parties can appoint persons with expert, technical or professional knowledge and skills in the particular field or subject matter of the underlying transaction from which the dispute emanates.³⁴ Appointing an arbitrator-expert gives the disputing parties the added assurance that the arbitrator understands the technicalities involved in the particular transaction.³⁵ It is generally acknowledged by parties involved in international commercial arbitration

that arbitrator-experts add to the wealth of knowledge available to the arbitral tribunal.³⁶

Some arbitration laws require arbitrators to be lawyers.³⁷ The wisdom in such provisions may be gathered from the outcome of the Italian case of *Sacheri v Robotto*, where the arbitrators were all technical men.³⁸ They decided the dispute and contracted a lawyer to draft their decision into an award. The Italian *Corte de Cassation* held that the award was invalid for not being made by the arbitrators themselves. This decision highlights the importance of having at least one lawyer as a member of the arbitral tribunal. The lawyer (or a non-lawyer but with knowledge and experience in the law and practice of international arbitration) would ensure that the award is properly drafted and meets any formal validity requirements.³⁹

There are basic non-professional skills that are desirable for all international arbitrators to possess.⁴⁰ These include: trustworthiness, common sense,⁴¹ ability to make independent judgment, perception, ability to identify and isolate issues, self control, capacity for lateral thinking, responsiveness, flexibility, and exposure to a diversity of cultures.⁴² In addition to these are physical fitness, well-being and reasonable prospects of good health throughout the arbitral reference.⁴³ As a matter of fact, s 24 (1) (c) of the Arbitration Act England empowers the court to exercise its power to remove an arbitrator 'that is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so'.

Any appointing authority, arbitration institution or national court appointing arbitrators in international commercial arbitration references would take into consideration any special stipulations by the disputing parties on the qualification(s) of the arbitrator to be appointed.⁴⁴ Failure of an arbitrator to possess any such qualification(s) may⁴⁵ constitute a ground for disqualification under some national laws.⁴⁶ An example is Article 12 (2) of the Model Law.⁴⁷ The editors of *Russell on Arbitration* conclude that under English law

The effect of a successful challenge to an arbitrator on the ground that he does not have a special qualification required by the arbitration agreement is that the appointment and all proceedings which follow, including the award, are void because the arbitrator lacks jurisdiction.⁴⁸

The special qualification requirement for the appointment of the arbitrator is a fundamental term of the arbitrator's contract. An arbitrator appointed under such condition must ensure that he complies with it, as a contractual term between the arbitrator and disputing parties (or arbitration institution) since, 'a mistake as to his qualification may vitiate a party's consent to the appointment (subject to losing the right to object or waive)'.⁴⁹ A deliberate violation by the arbitrator himself of the term on qualification however, may affect the capacity of the arbitrator to act as arbitrator in the particular reference and amount to a breach of the arbitrator's contract.

The disputing parties may vary the professional or special requirements of the arbitrator before he accepts appointment. Such variation affects the arbitration agreement but not the arbitrator's contract, which as yet is not in existence. The variation of such terms of the arbitration agreement may be by conduct as happened in an arbitration dispute before the DIS. The arbitration agreement provided for the appointment of arbitrators who were members of the German Chamber of Industry and Trade. Both parties appointed non-members as arbitrators. The claimant sought to remove the respondent's arbitrator for lack of qualification. It was held that both parties had revised the arbitration agreement as regards the qualification of the arbitrators being members of the Chamber, since they both named and accepted non-members as arbitrators.⁵⁰

2.5 Arbitrator's role in the arbitral reference

The arbitrator's role in the arbitral reference is primarily to decide the dispute between the parties in accordance with the provisions of the arbitration agreement. The arbitrator has to accept appointment to act from the disputing parties (or arbitration institution) before he can enter into his mandate. The law and practice of international commercial arbitration empower the disputing parties to directly or indirectly appoint one or more arbitrators to decide their dispute.⁵¹ The disputing parties directly appoint an arbitrator when they contact, interview and select a particular person to act as arbitrator themselves.⁵² Indirect appointment occurs where the disputing parties appoint the person to act as arbitrator through a third party. This third party may be an appointing authority or a national court. In institutional references the third party will be the arbitration institution itself which the disputing parties agree (expressly or by default) to appoint to act as arbitrator.⁵³

Some national laws on arbitration expressly require the arbitrator to accept his mandate or appointment.⁵⁴ The French Law provides that, 'an arbitral tribunal is not constituted until the arbitrator or arbitrators accept their mission'.⁵⁵ In Argentina, the arbitrator has to accept appointment, 'before the clerk of the court under oath or promise of loyal and faithful fulfilment of (his) functions'.⁵⁶ However UNCITRAL, neither in the Model Law nor in its arbitration rules, requires arbitrators to evidence the acceptance of their appointment in any formal manner. Under regimes such as the Model Law therefore, an arbitrator is deemed to have accepted his appointment when he enters into his mandate. The peculiar regime in China requires that the arbitration commission notify the disputing parties in writing when the arbitral tribunal is formed.⁵⁷ This written notification from the commission is not an acceptance of appointment by the arbitrators (who would have accepted their appointment to the relevant commission) to the parties but a notification to the disputing parties by the commission in conformity to its obligations under its contract (to administer the arbitral reference)

with the disputing parties. Some national laws allude to this requirement by making the non-acceptance of the mandate by the arbitrator a ground for his replacement.⁵⁸

Article 2 of the IBA Rules of Ethics requires a prospective arbitrator to only accept appointment

If he is fully satisfied that he is able to discharge his duties without bias, competent to determine the issues in dispute, has adequate knowledge of the language of the arbitration, able to give the time and attention which the parties are reasonably entitled to expect.⁵⁹

It is equally recognized under case law that the appointment of the arbitrator becomes complete when the arbitrator has accepted his mandate or the appointment. The English Court of Appeal recognized this practice in *Robinson v Moody*⁶⁰ when it held that an arbitrator's appointment is complete when he accepts appointment. This would give effect to the parties' agreement to irrevocably appoint a sole arbitrator (as in this case).⁶¹ To become binding on the disputing parties, the acceptance by the arbitrators must be communicated to the parties.⁶² Lord Denning M.R. in *Tradax Export v Volkswagenwerk*⁶³ espoused the following three requirements for a valid appointment:

- a) Inform the other party
- b) Inform the nominee
- c) Secure the nominee's agreement to act.

In whatever manner this requirement is couched in national arbitration laws, it is certain that a prospective arbitrator must accept appointment before he can be bound by the terms of such appointment in contract. In the case of an arbitral tribunal with more than one arbitrator, it is when the very last arbitrator to be appointed (usually the presiding arbitrator) accepts appointment that the arbitral tribunal is constituted and the arbitrators can then collectively enter upon their individual mandate to resolve the issues in dispute between the parties.

2.6 Legal status of the arbitrator in the arbitral process

In some jurisdictions the international arbitrator is not treated as rendering professional services since he performs a *judicial* function upon accepting his mandate from the disputing parties (or the arbitration institution).⁶⁴ He is therefore not subject to the rules affecting professionals either in the performance of their professional duties or in the standard of skill and care required of them in the performance of such professional duties, and the attendant consequences of failure.⁶⁵ Some national laws statutorily grant arbitrators (full or partial) immunity from suit.⁶⁶ In some other jurisdictions,

arbitrators are generally recognized as practising a profession and therefore are required to exercise due skill and care in the performance of their duties failing which they may be liable in professional negligence.⁶⁷ However, there is no one single professional body or organization with disciplinary powers over international arbitrators. The Chartered Institute of Arbitrators' disciplinary mechanism applies only to its members.⁶⁸ The Rules of Ethics in force in various organizations (such as the IBA and ABA) and other recognized professions (such as those regulating lawyers, surveyors, and accountants for example) bind their members who practice as arbitrators as well. Under some national laws, the provisions on arbitral immunity are mandatory requirements of national laws, which are based on the public policy principles of such states. This by itself does not make the arbitrator a creature of statute as examined in Chapter Two above.⁶⁹ It is a mandatory provision from which disputing parties cannot derogate or contract out of but must comply with.⁷⁰

Arbitration rules of various institutions provide for the immunity of arbitrators as well. Such immunity provisions in arbitration rules are not statutory provisions and do not emanate from public law or from the sovereign state. They are contractual terms agreed upon by the parties to the arbitrator's contract. In 1995 Professor Philippe Fouchard, noting that it is for a national court to rule on the validity of such provisions when invited to do so, wrote

In most national laws, total exclusion of liability by such a contractual approach would be ineffective if the arbitrator was accused of certain particularly serious faults (deliberate or inexcusable wrongful acts or omissions). Indeed, they state that clauses restricting or excluding liability may not be invoked as a defence to such wrongful acts or omissions. Yet in the national laws which do not allow the arbitrator absolute immunity, the only wrongful acts or omissions for which the arbitrator is liable to incur liability are acts of this kind.⁷¹

In 2009 the Paris Court of Appeal ruled on this very issue while deciding on the validity of Article 34 (exclusion of liability) of the ICC Rules in *SNF v ICC*. The court held that the exclusion of liability clause was unenforceable under French law. The court reasoned

In order to require payment from the parties for the performance of its obligation, the ICC must [organise] and administrate arbitration proceedings and for that purpose it must provide the parties with a proper structure allowing for efficient arbitration proceedings, conducted according to the chosen rules and which [lead to the rendering of an award that is] enforceable.⁷²

The liability of the parties to the arbitrator's contract is further examined in Chapter Five below.

This section has argued the proposition that the arbitrator enters into a contract with the disputing parties (and arbitration institution) from which emanates rights and duties owed towards him and by him. His role in the arbitral process of deciding the dispute between the disputing parties is indispensable to the realization of the primary purpose of the arbitration agreement. Thus in furtherance of this role and to ensure he is remunerated, the arbitrator concludes the arbitrator's contract with the disputing parties (or arbitration institution). Even in an arbitral tribunal of more than one arbitrator, each arbitrator performs the judicial function of deciding the dispute between the parties, following which the decision of the majority (if there is no unanimity) becomes that of the arbitral tribunal. This clearly shows that each arbitrator individually performs his mandate, even where he is a member of a group of other arbitrators on the same dispute.

2.7 Relationship between members of the arbitral tribunal

In international commercial arbitration, all appointed arbitrators owe largely the same duties to (and are entitled to the same rights⁷³ from) the disputing parties and the arbitration institution. The arbitrators are all appointed, jointly and severally, to perform a judicial function. They all have accepted their mandates largely on the same terms though the provisions as to levels of remuneration may differ.⁷⁴ Any requirements as to availability, professional qualification, nationality, independence, impartiality, due process, confidentiality, limited party-communication, disclosure and ethical considerations are applicable to all members of the arbitral tribunal to the same degree. The question examined in this sub-section is whether each arbitrator owes a legal or contractual duty to the other arbitrators making up the arbitral tribunal.

As mentioned above the acceptance of the arbitrator's mandate is personal to the individual arbitrator. This fact is very evident when matters relevant to arbitrator challenge proceedings are analysed.⁷⁵ For example an arbitrator is challenged on grounds affecting him personally (and not another member of the arbitral tribunal). The grounds of challenge must be provable against each individual arbitrator whose conduct in the reference has allegedly fallen below the standard required under the relevant arbitration rule or law. Where a member of the arbitral tribunal is successfully challenged or resigns, the whole arbitral tribunal is not challenged and removed or resigns, but only the challenged member.

The relationship between the members of the arbitral tribunal raises at best, some ethical issues, for example, the need for each arbitrator not to do anything that would frustrate the effective and efficient performance of the mandates of other members of the arbitral tribunal. This is not a legal rule failing through which the particular arbitrator may incur liabilities to other members of the arbitral tribunal. The other members of the arbitral tribunal do not suffer any legal or pecuniary loss emanating from the dilatory action

(or inaction) of the offending arbitrator. It is the disputing parties that suffer any loss or damage resulting from such action or inaction. The disputing parties may not even have a remedial action against such an arbitrator except where his conduct or activities are of such a nature as to meet the very high standard required to successfully challenge an arbitrator or set aside the arbitral award. It is true that each arbitrator must personally accept and perform his mandate. He cannot delegate his mandate to someone else to perform on his behalf. Thus on accepting the mandate, the arbitrator becomes a member of a team or group of other arbitrators who have equally personally accepted the mandate to act over the same arbitral reference. These arbitrators are bound by a common goal for which they have both individual and collective responsibility, over the particular arbitral reference.

As to whether the arbitrators are bound to each other in contract, there is an obvious answer. Again by analysing arbitral practice, there is no evidence of any offers and acceptances flowing from any of the arbitrators to the others nor is there any evidence of any intention to be bound in contract as between the arbitrators. In addition the arbitrators are not rendering their service to each other but to the disputing parties (or arbitration institution) that also remunerate them. They are all appointed by a third party to work together as professionals for the benefit of the third party. They individually owe contractual obligations to the disputing parties (jointly) or institution that appointed them. Their association is limited to the particular arbitral reference and the arbitrators cannot therefore sue each other in contract over the arbitral reference since there is no contractual relationship in existence between them. They only owe each other whatever civil obligations (and courtesy) their loose association demands of them. Their relationship can be construed as a loose association without any legal obligations binding them in contract.

3 Arbitration institution

An arbitration institution is an organization or commercial entity which administers arbitration references for a fee but does not itself decide the dispute between the parties. Dr Werner Melis describes the function of an arbitration institution as one which

Guarantees stability and functioning for the foreseeable future ... The Institution should further offer clearly described services and indicate which rules and procedures it will apply. The Institution should offer more than merely to act as appointing authorities, either under their own rules or occasionally under other rules. Their services also must include some administrative activities, and they must have permanent staff which are professionally trained for this purpose.⁷⁶

Some arbitration institutions are attached to a chamber of commerce.

Examples include the ICC, CIETAC and the SCC,⁷⁷ while some others enjoy an independent existence.⁷⁸ Some exist as international organizations,⁷⁹ while some others are regionalized.⁸⁰ Some administer arbitration references over disputes emanating from specific trades,⁸¹ economic activities,⁸² or even nature of parties.⁸³ Most arbitration institutions have general jurisdiction regarding the nature of the disputes and parties that can make use of its arbitration rules.

The internal organization of these arbitration institutions generally follows the same format. The general format is for the institution to define its internal managerial system and structure of command, define its jurisdiction and its scope, and clarify its operation under its own specially formulated rules of arbitration⁸⁴ and any internal rules and codes of ethics in which the role of the institution, the tribunal and the disputing parties are clearly defined. The institution itself, either through its registrar, court, board, committee or administrator, makes all the important non-judicial (administrative) decisions as they affect the arbitration reference but does not itself (or any of its organs) decide the dispute between the disputing parties. Arbitration institutions (whether private or public entities) organize and assist international arbitration references by rendering professional, administrative and secretarial services to the disputing parties and arbitrators.⁸⁵

Under institutional references, arbitration institutions are much more involved in the arbitral reference than just as appointing authorities.⁸⁶ To clarify the type of arbitration institutions examined in this book, this section examines seven principal and generic functions that such institutions routinely perform.⁸⁷ Arbitration institutions (3.1) formulate their own arbitration rules, (3.2) *prima facie* determine the existence of the arbitration agreement, (3.3) appoint arbitrators, (3.4) act as appointing authority, (3.5) decide challenge of arbitrator applications, (3.6) determine the fees payable to arbitrators and (3.7) keep records. A further examination of the legal status of the institution shows that these functions are performed independently of whether the institution acts as principal or agent in concluding the arbitrator's contract (3.8).

3.1 Formulate their own arbitration rules

Arbitration institutions produce their own set of arbitration rules or may adopt other rules (an example is the UNCITRAL Arbitration Rules), which are then incorporated into and form part of the arbitration agreement between the disputing parties in institutional references.⁸⁸ These rules are the primary procedural rules applicable to the arbitration reference. In addition, some of its provisions are incorporated as terms of the arbitrator's contract between the institution and the arbitrator and the contract between the institution and disputing parties. Arbitration institutions regularly revise their rules as their practice develops.⁸⁹ This practice of revision of rules has raised the debate on the appropriate version of arbitration rules

that apply to any arbitral reference before the institution which is analysed in Chapter Four.⁹⁰

3.2 *Determine existence of arbitration agreement*

The arbitration institution may also be empowered by its rules to make a *prima facie* assessment and satisfy itself, of the existence, validity or scope of the arbitration agreement, and that the arbitration agreement refers to its rules when the request for arbitration is filed with it.⁹¹ Where this is not provided in the rules, arbitration institutions, in practice, routinely check the request for arbitration to be sure the disputing parties agreed to arbitrate under its rules. This provision or practice is aimed at satisfying the requirement for jurisdiction by the institution to set about organizing the arbitration and constituting the arbitral tribunal. Most arbitration institutions customarily satisfy themselves (before accepting a request for arbitration) that there exists a *prima facie* arbitration agreement referring to its arbitration rules. If the institution is not satisfied of this it may reject the request for arbitration.⁹² It must be mentioned here that the existence of a *prima facie* arbitration agreement also affects the jurisdiction of the arbitral tribunal and pursuant to the doctrine of competence-competence, will be decided by the arbitral tribunal. However where the arbitration institution rejects the request to administer the arbitration it will not constitute the arbitral tribunal for the parties to argue the issue.

3.3 *Appoint arbitrators*

The appointment of arbitrators is one of the most important and principal functions of any arbitration institution. However, arbitration rules of institutions do not generally detail all the criteria the institution's decision-making body applies in appointing arbitrators.⁹³ Some arbitration institutions maintain a list or panel of arbitrators from which they make appointments.⁹⁴ An example of the application of some generic standards used by the ICC Court as provided in the ICC Rules are the nationality, residence, availability and ability of the proposed individual to be appointed as arbitrator.⁹⁵

Arbitration institutions either directly appoint the arbitrators or confirm the arbitrators nominated for appointment by the disputing parties.⁹⁶ The various arbitrator appointment methods examined in Chapter Four ensure that an arbitral tribunal is constituted early in the process in furtherance of the contractual obligations of the arbitration institution to the disputing parties. In practice, disputing parties do not independently provide for arbitrator appointment procedures but rely on the procedure contained in the arbitration rules of the nominated institution.

3.4 Act as appointing authority

Generally, an appointing authority assists the parties with the appointment of the arbitrators.⁹⁷ When acting as appointing authority, arbitration institutions assist the arbitral process by appointing arbitrators either under ad hoc or institutional references. The disputing parties can leave the appointment of all or some of the arbitrators to the arbitration institution (as appointing authority). In this case, the arbitration institution directly appoints the arbitrator(s) when approached by the disputing parties. The arbitration institution in this capacity may be equally empowered to decide on arbitrator challenge applications,⁹⁸ and assist with the appointment of a replacement arbitrator.⁹⁹

Where an arbitration institution has been designated appointing authority, it is not bound to act as such by the designation. It can refuse to act in such capacity.¹⁰⁰ Where it refuses to act, the designating parties have no legal recourse (contractual or otherwise) against the arbitration institution. The arbitration institution (acting as appointing authority) is equally not contractually bound to the arbitrators it appoints. It may however be contractually bound to the disputing parties where it provides administrative support for the (usually ad hoc) arbitral reference but this contract does not incorporate the institution's obligations to the parties as an appointing authority. Where this is all an institution does in the arbitral reference, then it does not fall within the class of arbitration institutions examined in this book.

3.5 Decide arbitrator challenges and replacement

Arbitration institutions determine challenge applications emanating from arbitration proceedings conducted under their rules. Most arbitration rules provide that the decision of the institution is final.¹⁰¹ A disputing party can still challenge the decision of the arbitration institution while continuing with the arbitration proceeding under the provisions of the law of the seat of arbitration. Where the law of the seat of arbitration permits, the challenge can be brought before the relevant court during the arbitration proceeding.¹⁰² This may automatically stay the arbitral proceedings until judgment on the issue. In some jurisdictions (like the USA) an award can be set aside on the grounds that it would sustain a challenge of the resulting award.¹⁰³ Such laws do not allow a challenge application to interrupt the arbitral proceedings.

Where an arbitration institution decides the arbitrator challenge against the challenging party, the arbitral reference continues and if the challenging party is not satisfied with the decision of the institution, it cannot sue the arbitration institution for failing to uphold the arbitrator challenge application for the simple reason that this function of the institution is an administrative one. On the same reasoning the application by an arbitration institution to be joined in an appeal filed against its decision over an

arbitrator challenge would be dismissed. The Quebec Court of Appeal denied standing to the institution confirming that such decisions are administrative in nature and the institution need not defend its decision rejecting the challenge. However, the Quebec Court of Appeal acknowledged that such denial did not extend to the arbitration institution defending other issues on the services it rendered to the parties, alluding to the contract between the institution and the parties and its contract with the arbitrator.¹⁰⁴ The same conclusion was reached in *Raffineries de Petroles D'Homs et Bamas v ICC*, by the Tribunal of First Instance, Paris, which confirmed that in deciding on the challenge of an arbitrator, the ICC was acting in an administrative capacity within the provisions of its arbitration rules.¹⁰⁵

When the arbitration institution sustains a challenge of an arbitrator, it appoints a replacement arbitrator or repeats the prior appointment procedure.¹⁰⁶ The arbitration institution also appoints a replacement arbitrator when the arbitrator withdraws, becomes incapable of continuing with his mandate or dies. In some institutional arbitration rules, a truncated tribunal can continue with the proceeding in its truncated form and make a final award.¹⁰⁷ The 'new' arbitral tribunal may repeat the hearings or continue from where the 'old' arbitral tribunal stopped. These all depend on the agreement of the parties and as a practical issue, the stage of the arbitral hearing or reference at which the truncation occurred.¹⁰⁸

3.6 Charge fees

The fees charged by the institution include the fees paid to the arbitrators and for its own services. Arbitration institutions fix the rates of fees and reimbursable expenses arbitrators sitting under their rules are paid.¹⁰⁹ It is this ability of arbitration institutions to agree fees directly with the arbitrator that founded the proposition that the institution concludes the arbitrator's contract with the arbitrator. Subsumed into this sub-section is the ability of the institution itself to charge the disputing parties a fee for its services. An entity which is not paid a fee for rendering these services to the disputing parties is not an arbitration institution as defined and examined in this book. Institutions usually publish the cost of arbitrating under their rules on their website and as appendices to their arbitration rules. This scale is for the benefit of the parties and arbitrators and is part of the arbitration rules of the particular institution. Almost all arbitration institutions now maintain an electronic calculator on their websites which guides parties on the probable cost of their reference based on the amount of the claim among other indicators.¹¹⁰

3.7 Keep records

Most arbitration institutions allocate a case or file number to each arbitral reference filed before it and keep a file copy of the record of proceedings

and arbitral awards. Some institutions publish the arbitral awards with the consent of the disputing parties.¹¹¹ Where the law of the seat of arbitration or nationality of the award requires the final award to be registered with any national court or entity, the institution may also comply with this requirement. It is the arbitration institution that notifies the parties of the arbitral award when it is delivered to the institution by the arbitrator.¹¹² It is on the basis of this practice that the proposition that there is a separate but related contract between the arbitration institution and disputing parties is substantiated. The disputing parties obviously entrust the conduct and administration of the arbitration reference to the institution for a fee. The institution ensures that, as part of its contractual obligations to the disputing parties, they receive copies of the award(s) made by the arbitral tribunal in fulfilment of the contract between the disputing parties and arbitration institution.

3.8 Legal status of arbitration institutions in the arbitral process

The arbitration institution is endowed with legal personality and can sue and be sued in its own name. It employs staff and contracts with other persons through whom it performs its functions and role of administering the arbitration reference. The involvement of the institute in the arbitration starts when it contracts with the disputing parties to administer the arbitration reference under its arbitration rules for a fee. For the disputing parties, this is the second contract they conclude (after the arbitration agreement) under institutional references. One of the first functions the arbitration institution performs upon accepting to administer the arbitration, is to appoint arbitrators. It is in the performance of this function that it concludes the arbitrator's contract with the arbitrators it appoints. It therefore plays a pivotal and indispensable role in institutional arbitration references. It is demonstrated in Chapter Four that the arbitration institution concludes the arbitrator's contract with the arbitrator either as principal or agent to the disputing parties in performance of its contract with the parties. Where the institution acts as principal it becomes primarily liable to the arbitrators for their remuneration. Where it contracts as agent, the disputing parties themselves are liable to the arbitrator for his remuneration. The consequence of this analysis is that where the institution acts as principal, the arbitrator acquires a contractual right to sue the institution for his remuneration while where the institution acts as agent, the arbitrator's contractual right to sue for his fees will be against the disputing parties (as disclosed principals).

4 Single or multiple arbitrators contract

From the foregoing discussion, the proposition that the arbitration institution and arbitrators act for the benefit of all the parties to the arbitration agreement has been mapped out. One premise for the analysis made on the

formation of the arbitrator's contract is that the arbitrator does not act for the benefit of one party to the dispute only but for all parties to the arbitration agreement. The second premise is that each arbitrator concludes his own arbitrator's contract. This section examines the arguments which support and oppose this second premise.

Where a sole arbitrator is appointed, he alone forms the arbitral tribunal and is party to the arbitrator's contract. In this case it is obvious that the arbitrator's contract is concluded with the sole arbitrator. The analysis under this section is still relevant in the case of a sole arbitrator since we need to determine whether the arbitrator's contract is concluded with each arbitrator or with the arbitral tribunal. This is so even though in case of a sole arbitrator, either position will still lead to the existence of one arbitrator's contract. The relevance of the argument under this section is more obvious in a panel of three or more arbitrators. An analysis of arbitral practice leads to the conclusion that each arbitrator member of the arbitral tribunal has an individual responsibility under the arbitrator's contract. For example from arbitral practice, it is obvious that each arbitrator is personally bound to perform his obligations under the arbitrator's contract and is equally personally entitled to the benefits arising from the same contract. Professor Lew alluded to this when he said, 'In many cases there will be separate and different terms of appointment for different arbitrators.'¹¹³

There are two possible theories that can be applied in analysing this issue: (4.1) the single arbitrator's contract theory and (4.2) the multiple arbitrators' contracts theory. The proposition for a single arbitrator's contract theory is viable where the arbitral tribunal itself is seen as the party to the arbitrator's contract and not just the individual arbitrators constituting the arbitral tribunal. This premise and its resulting single arbitrator's contract align the formation of the arbitrator's contract under a panel of arbitrators with that of a sole arbitrator since the contract is concluded with the 'arbitral tribunal' itself. The multiple arbitrators' contracts theory takes a more functional view of what happens in practice. It recognizes and relies on the fact that each individual arbitrator is appointed independently, and each accepts his appointment independently and not collectively when all the members of the arbitral tribunal have been appointed.

4.1 Single arbitrator's contract theory

As already mentioned, the argument in favour of a single arbitrator's contract theory is based on the premise that the appointing parties conclude the arbitrator's contract with the *arbitral tribunal* and not with the individual arbitrators. This theory renders the number of arbitrators constituting the arbitral tribunal irrelevant in matters affecting the arbitrator's contract. The single arbitrator contract's theory may be persuasive as applicable, where each disputing party appoints one arbitrator and the two party appointed arbitrators appoint the third arbitrator who then agrees terms

of appointment with the disputing parties on behalf of all the arbitrators (Case Study 3).

For this theory to apply to the arbitrator appointment methods covered by Case Studies 4 and 5, one explanation is to argue that each party is presumed to enter into a pre-contractual agreement with its appointed or nominated arbitrator. If terms are agreed or negotiated with each arbitrator (party appointed and the third arbitrator), these terms will be agreed subject-to-contract so as to become contractually binding on the parties and arbitrators only when the arbitrator's contract is concluded with the arbitral tribunal after it has been fully constituted. So for example, issues on availability of the arbitrator and fees payable to him may be agreed separately by each party with the arbitrator he appoints.¹¹⁴ This implies that the authority of the party appointed arbitrators to appoint the third arbitrator emanates from their pre-contractual agreement with each of the disputing parties, and again it is this same pre-contractual agreement that empowers the party appointed arbitrators to agree to terms of appointment with the presiding arbitrator on behalf of their individual appointing party.

One side effect of this argument is that each party appointed arbitrator in nominating candidates for appointment as the third arbitrator, may (justifiably) be expected by his appointing party to act in the best interest of that appointing party alone and not in the interest of all the disputing parties. It is obvious from international arbitral practice that arbitrators who nominate a third arbitrator in this capacity do not generally consider themselves as acting in the best interest of their appointing party but of the arbitral reference.

Therefore, under the single arbitrator's contract theory, the party appointed arbitrators are presumed to have not yet entered into the arbitral reference or started rendering service under the arbitrator's contract (which is not yet in existence), when they perform this function. So that upon acceptance by the presiding arbitrator of his appointment, the arbitral tribunal is then fully constituted in accordance with the arbitration agreement and the arbitrator's contract is then concluded with all members of the arbitral tribunal as one contracting group and the disputing parties (or institution) as the other contracting group. The terms of the three pre-contractual agreements will then be incorporated as terms of the single arbitrator's contract.

This analysis does not satisfactorily answer the question of the capacity in which the party appointed arbitrator acts prior to the conclusion of the arbitrator's contract, in the appointment of the third arbitrator: does he act as the agent or advisor of the appointing party for example in nominating the individual to be appointed the third arbitrator? An analysis of international arbitral practice leads to an answer in the negative. In international arbitral practice it is acknowledged that the party appointed arbitrator does not owe any legal duties to the appointing party to act in his best interest and neither does he view himself as the agent or advisor of his appointing party. This is so in both the negotiation for a suitable individual as the third and

presiding arbitrator and in agreeing with such appointee's terms of appointment (which in most cases will mirror the terms of appointment of the party appointed arbitrators except possibly, the rate of the fees payable).

This dissatisfaction leads to the second possible explanation or justification for the single arbitrator's contract theory, which is that the power to appoint the third and presiding arbitrator emanates (or is implied) from the terms of the arbitration agreement as a condition precedent to concluding the arbitrator's contract with the arbitral tribunal. This condition precedent is the full constitution of the arbitral tribunal with whom the arbitrator's contract will be concluded. It is after the constitution of the arbitral tribunal that the disputing parties jointly enter into the arbitrator's contract with the members of the arbitral tribunal as one contracting group bound by one single arbitrator's contract. It is therefore this single arbitrator's contract that will contain the terms of appointment of the members of the arbitral tribunal. These terms may have already been negotiated at the time each arbitrator was appointed or will be agreed with all the members of the arbitral tribunal after its constitution. This form of conclusion of the arbitrator's contract will require disclosure of any terms agreed during negotiation between any disputing party and his arbitrator appointee.¹¹⁵ Such disclosed terms will then be subsumed as provisions of the arbitrator's contract, but be binding only on the particular arbitrator with whom they were agreed.¹¹⁶

One consequence of this alternative explanation of the single arbitrator's contract theory is the possibility that the disputing parties are bound to different provisions with different members of the tribunal in the same contract. Such an occurrence will foster confusion and uncertainty. This interpretation also implies that the disputing parties cannot possibly contract as one group with the arbitrators. Another difficulty posed by this explanation is that if for whatever reason the arbitral reference is terminated before the third arbitrator is appointed (so in effect before the arbitral tribunal is fully constituted) but after the two party appointed arbitrators have nominated possible appointees, the party appointed arbitrators would have rendered this service possibly *gratias* but not in contract.

It is obvious that the premise of the single arbitrator's contract theory is its primary weakness. The premise of the single arbitrator's contract theory is the existence of the arbitral tribunal *before* the formation of the arbitrator's contract. In Chapter Four the analysis of the formation of the arbitrator's contract establishes that the arbitrator's contract is concluded at the time each arbitrator accepts appointment and not necessarily when he agrees terms of appointment, since such terms can be fully agreed after the conclusion of the contract. The basic terms of fees, availability, impartiality and independence are usually discussed even before the arbitrator accepts to act, while other terms are contained in the arbitration rules (if any). The analysis of the single arbitrator's contract can be represented as follows (Figure 3.1).

Identifying the time of formation of the arbitrator's contract is very important in this analysis since it marks the time when the arbitrator embarks on his

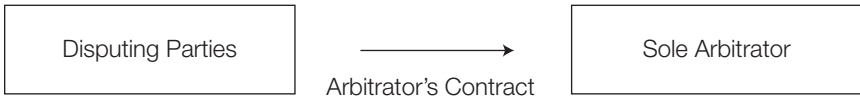


Figure 3.1 Single arbitrator's contract theory

service for which he will be entitled to be remunerated.¹¹⁷ From arbitral practice, it can be safely implied that in an arbitral tribunal consisting of more than one arbitrator, the arbitrator's contracts (for the two party appointed arbitrators) are already concluded before the full constitution of the arbitral tribunal. This implies that rights may become exercisable on the basis of the arbitrator's contract even before (or without) the full constitution of the arbitral tribunal.¹¹⁸ If the single arbitrator's contract theory is adopted then such rights cannot become exercisable or accrue in contract in the first place until after the constitution of the arbitral tribunal since there would be no arbitrator's contract in existence without a fully constituted tribunal.

4.2 *Multiple arbitrator's contracts theory*

The argument in favour of the multiple arbitrators' contracts theory generally examines the formation of the arbitrator's contract from a functional and practical perspective. The basis of the argument is that in practice, each arbitrator is appointed individually and each accepts appointment individually. The terms of appointment are agreed with each individual arbitrator. From arbitral practice, the appointor (whether disputing parties or arbitration institution) agrees terms directly with each arbitrator upon his acceptance of the mandate to act. Professor Lew is of the opinion that this analysis is relevant in the case of an arbitral tribunal constituted by three arbitrators where not all three arbitrators are appointed by an appointing authority or arbitration institution.¹¹⁹ However embarking on a detailed analysis of the two theories and the arbitrator appointment processes, it becomes evident that this analysis is relevant and applicable to all arbitrator appointment methods regardless of whether the arbitral tribunal is composed of a sole arbitrator or three or more arbitrators.

The premise of the multiple arbitrators' contracts theory is that the arbitrator's contract is concluded with the *individual arbitrator* and not the arbitral tribunal as a contracting unit. This implies that each arbitrator who is appointed and accepts appointment enters into a contract with the appointing party upon the conclusion of a valid agreement. This contract referred to as the arbitrator's contract contains terms agreed and binding on the individual arbitrator and the disputing parties (or arbitration institution) and regulates the performance of the individual arbitrator's mandate in the particular arbitral reference.

Testing this theory on the formation of the arbitrator's contract based on the different arbitrator appointment methods examined in Chapter Four and the various case studies further validates its application. In an arbitral reference with a sole arbitrator, the sole arbitrator concludes one arbitrator's contract with the disputing parties. In a panel of arbitrators (regardless of the number of arbitrators), each arbitrator concludes his own arbitrator's contract which is binding on him personally, but exercises his mandate as a member of a group of other arbitrators who have also concluded their own arbitrator's contracts. All the members of a panel of arbitrators are bound by a common goal in a loose association over the particular arbitral reference. The multiple arbitrator contracts in the arbitral reference bind the parties to each one with the result that it is the individual arbitrators that are parties to different contracts (and not the disputing parties as in the single arbitrator's contract theory).

This theory can also be tested on the effects of arbitrator challenge on the arbitrator's contract. An examination of arbitration laws, arbitration rules, and arbitral practice reveals that arbitrator challenge issues attach to each individual arbitrator. It is obvious that one way of terminating the arbitrator's contract is a successful challenge of the arbitrator, who is party to the contract.¹²⁰ It is the individual arbitrator that is challenged and not the whole arbitral tribunal, and even where the whole arbitral tribunal is sought to be removed, the arbitrators constituting the arbitral tribunal are challenged individually.¹²¹ This is a very clear recognition of the fact that each individual arbitrator is party to his own contract with the disputing parties or arbitration institution.

An examination of the practice among arbitration institutions also supports the proposition that a contract is concluded with each arbitrator who accepts appointment. On the appointment and acceptance of appointment by each arbitrator, the arbitration institution forwards a copy of its arbitration rules and declaration of independence statement to the individual arbitrator. The statement of independence contains the names of the disputing parties to enable the arbitrator to conduct conflict checks. The arbitrator signs the statement and returns it to the arbitration institution. The arbitration institution does not wait for the full constitution of the arbitral tribunal before dealing with the individual arbitrators¹²² and moreover, the institution does not require the arbitrators to make a collective declaration or acceptance of appointment.

It may appear difficult to apply the multiple arbitrators' contracts theory to situations where each disputing party appoints one of the two party appointed arbitrators, both of whom then appoint the presiding arbitrator, and each arbitrator accepts appointment and agrees to terms of appointment directly to the appointing party (Case Studies 4 and 5). However applying the premise adopted in Chapter Four that the arbitrator's contract is concluded when the arbitrator accepts appointment, this will result in the conclusion of three separate arbitrator's contracts between three separate

parties. That is, each disputing party and its own party appointed arbitrator, and then the two disputing parties jointly, and the presiding arbitrator.¹²³

This difficulty is settled by the presumption argued and adopted in this book that the disputing parties act jointly as one contracting group,¹²⁴ so that each appointing party acts for itself and the other disputing party when it appoints the arbitrator.¹²⁵ The result of this is that all the disputing parties appoint each arbitrator and each arbitrator accepts appointment to be bound to all the disputing parties from his appointor.¹²⁶ Thus the issue of different contracting parties does not arise since all disputing parties are contracting parties to each of the multiple arbitrator contracts.

One major weakness of this theory is the possibility that the individual arbitrator's contracts may be subject to different laws and contain different terms.¹²⁷ In practice the arbitrators may be entitled to different levels of remuneration but by necessity will be bound by the same terms on availability, neutrality, and compliance with relevant arbitration rules and national laws. However the possibility of different laws applying to the different contracts is very real with its attendant complications.¹²⁸ Thus in agreement with legal commentators, parties to the arbitrator's contract effectively conclude the arbitrator contracts with each arbitrator involved in each international commercial arbitration reference.¹²⁹

This can be represented as follows (Figure 3.2).

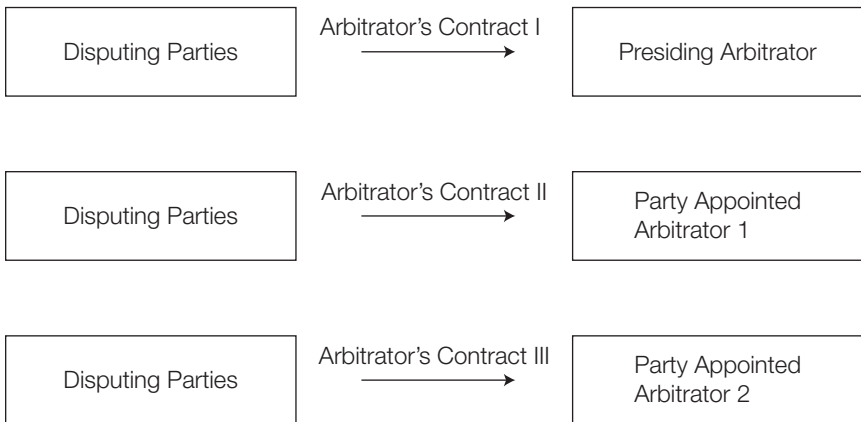


Figure 3.2 Multiple arbitrators contracts theory

Chapter summary

This chapter examined the nature of the individuals and entities that are parties to both the arbitrator and institution's contracts, the disputing parties, arbitrator and arbitration institution. Some conclusions drawn from the discussions in this chapter are that the arbitrator and institution never

become parties to the arbitration agreement even when they are named in the submission agreement and so in effect only the disputing parties are parties to the arbitration agreement; that each arbitrator concludes his own arbitrator's contract when he accepts appointment from the disputing parties or institution; and finally that the arbitration institution to fall within the discussion in this book must have legal personality so that it can sue and be sued in its name.

4 Formation of the arbitrator's contract

The case studies posed under section 4 of the Introduction detail the various methods by which arbitrators in international commercial arbitral references are appointed as provided for in various arbitration laws and rules. This chapter analyses the formation of the arbitrator's contract under (1) ad hoc and (2) institutional references, through an examination of these various arbitrator appointment methods. It then examines (3) the categorization of the arbitrator's contract and (4) formation of other collateral contracts in the arbitral reference. The arbitrator concludes the arbitrator's contract when he accepts appointment either from the disputing parties or arbitration institution.¹ Mauro Rubino-Sammartano in agreement with this proposition concludes that the arbitrator's contract is a contract, 'consisting on the one hand of the appointment of the arbitrator and on the other hand of the latter's acceptance'.² An analysis of the formation of the arbitrator's contract discloses the existence of two collateral contracts involving the arbitration institution.³

1 Formation of the arbitrator's contract under ad hoc reference

The various methods through which arbitrators are appointed in ad hoc references will be analysed to determine the process of the formation of the arbitrator's contract.⁴ Arbitrator appointment methods are typically: (1.1) a sole arbitrator jointly appointed by the disputing parties; (1.2) a sole arbitrator appointed by an independent third party; (1.3) in a tribunal of three arbitrators where two arbitrators are party appointed and the third arbitrator is appointed by a third party and (1.4) where a third party appoints all three arbitrators. The formation of the arbitrator's contract under ad hoc references therefore is tested against the following case studies:

- Case Study 1 where both parties jointly appoint the sole arbitrator.
- Case Study 2 where one party appoints the sole arbitrator upon the refusal of the other party to join in the appointment.
- Case Study 3 where the parties each appoint one arbitrator without

agreeing terms of appointment with each appointee and the two party appointed arbitrators thereafter appoint the third and presiding arbitrator, who then agrees terms of appointment for all the arbitrators with the disputing parties.

- Case Study 4 where the parties each appoint one arbitrator and individually agree on terms of appointment with each arbitrator at the time of the appointment, and the two party appointed arbitrators thereafter appoint the third and presiding arbitrator, and both parties (and not the party appointed arbitrators) agree the terms of appointment with them;
- Case Study 5 where the parties each appoint one arbitrator and individually agree terms of appointment with each arbitrator at the time of the appointment, and the two party appointed arbitrators appoint the third and presiding arbitrator and agree on his terms of appointment on behalf of the parties.
- Case Study 6 where an appointing authority or national court is requested by one party to appoint the arbitrator (whether a sole, co- or presiding arbitrator).
- Case Study 7 where both parties jointly request the appointing authority or national court to appoint the arbitrator (a sole or presiding arbitrator).

1.1 Sole arbitrator jointly appointed by the disputing parties

This is the simplest and least complicated arbitrator appointment method (Case Study 1) in which the sole arbitrator constitutes the arbitral tribunal. The disputing parties fully exercise their power of party autonomy when they opt for this method of appointing the arbitrator. The difficulty is in getting the parties to agree on the individual that will act as the sole arbitrator. This difficulty arises from the fact that once the dispute arises, the erstwhile business partners will hardly agree on anything. This fact is more complicated by the art of posturing embarked upon by the parties on the selection of the individual to be appointed as the sole arbitrator. In this appointment method, the parties involved are the claimant, the respondent, and the sole arbitrator who is jointly appointed by the disputing parties.

Various procedures have been developed over the years to assist the disputing parties with the joint appointment of a sole arbitrator. One very successful and frequently used method is the List procedure.⁵ This procedure assists the disputing parties by narrowing down possible candidates for appointment. Under the List procedure, disputing parties exchange lists containing names of possible individuals to be appointed as the sole arbitrator.⁶ These individuals are ranked by the parties in order of preference. The list of individuals is exchanged between the disputing parties and a process of elimination begins until one individual from the list is agreed upon. Once agreeing on the individual to be appointed, the parties jointly (and/or

their representatives) inform the individual who may then accept appointment immediately or meet with the parties (and or their representatives) to agree on terms of appointment before accepting. In this appointment method, the disputing parties jointly conclude the arbitrator's contract with the sole arbitrator when he accepts appointment.⁷

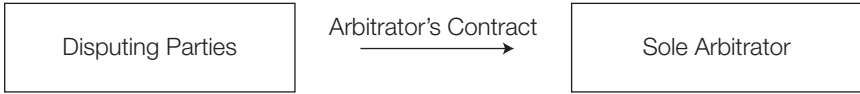


Figure 4.1 Sole arbitrator jointly appointed by the disputing parties

It is possible from this analysis that each party may have met with each individual whose name was mentioned on their relevant lists before the exchange began. This may be to ascertain that such individual was ready and willing to act if appointed. It is equally feasible that the parties had not contacted any of the individuals on the lists before one person is agreed, who is then approached jointly by the parties (or by one party acting for both parties) to agree on terms for his service. It should be preferable for parties to approach the individuals whose names are on their lists before the exchange to ascertain their availability and willingness to act in the reference. It must be quite time consuming and frustrating for the parties to go through the ping-pong stage of exchanging the list of names and agreeing on an individual, only to find out that the agreed person was not available or willing to act in the arbitral reference.

1.2 Sole arbitrator appointed by appointing authority or national court

Appointing authorities and national courts become involved where either the disputing parties did not make any arbitrator appointment provisions or they could not agree on the individual to be appointed as the sole arbitrator, so that in effect their appointing method failed.⁸ If the parties had nominated (or appointed) an appointing authority in their arbitration agreement, then they can have recourse to the nominee (or appointee) who would appoint the sole arbitrator in accordance with the terms of the arbitration agreement.

The arbitration law of the seat of arbitration may refer the parties to an appointing authority in the absence of an express appointment method in the arbitration agreement.⁹ Where the disputing parties have not nominated (or appointed) an appointing authority or where the nominated appointing authority fails or refuses to act, then the parties can apply to the relevant court with supervisory jurisdiction to appoint the sole arbitrator on their behalf (Case Studies 6 and 7).¹⁰ The appointment of a sole arbitrator by an appointing authority (1.2.1) and a national court (1.2.2) is analysed below.

1.2.1 Sole arbitrator appointed by appointing authority

The disputing parties may either nominate an appointing authority in their initial arbitration agreement or do so when the dispute eventuates.¹¹ The appointing authority may enter into a contract of service with the disputing parties.¹² It however does not enter into any contractual relationship with the arbitrators appointed by it for and on behalf of the disputing parties.¹³ This implies that the appointing authority acts as the agent of the disputing parties in appointing the sole arbitrator. Support for this assertion can be found in the second part of Article 6 (2) UNCITRAL Arbitration Rules, which provides, 'or if the appointing authority agreed refuses to act or fails to appoint the arbitrator'. This provision implies that a contract may be concluded between the disputing parties and the appointing authority. It also raises the presumption that the invoking party makes an offer (for itself and the other party) to the appointing authority to appoint the arbitrator in accordance with the arbitration agreement.¹⁴

The appointing authority upon receipt of the request exercises its discretion to accept or reject the request (and thereby its appointment by the disputing parties). The UNCITRAL Arbitration Rules do not contain any guidelines on how to proceed in the event of such refusal.¹⁵ Where the disputing parties ignore or fail to approach the agreed appointing authority to appoint the arbitrator, but approach a national court, the court will refer the parties back to the appointing authority.¹⁶ This again is in recognition of the principle of party autonomy and in compliance with the provisions of the arbitration agreement.

Where the appointing authority nominated in the arbitration agreement refuses to accept the offer when made to it by the disputing parties, this raises the same concerns as the position where an arbitrator named in a submission agreement refuses or is unable to act. This is examined in Chapter One.¹⁷ Applying the same arguments in this situation, such a refusal to accept the offer to act, will not vitiate the arbitration agreement, nor render it 'null and void, inoperative or incapable of being performed'. The terms of the arbitration agreement will revert to one where no appointing authority was nominated, so the disputing parties will fall back on the default arbitrator appointment method provisions under the *lex loci arbitri* or of the law or rules applicable to the arbitration procedure. Under those laws that require the appointment of the arbitrator by an appointing authority, the disputing parties will then have to nominate another appointing authority, failing which the relevant national court will then appoint an arbitrator in default or failure of the agreed arbitrator appointment method.

Where the appointing authority accepts its nomination and appoints the arbitrator, it is paid for making the appointment, which is a service it has rendered for the benefit of the disputing parties.¹⁸ If in the course of the arbitration, the disputing parties require the appointing authority to render further services (for example agree fees with the appointed arbitrator or

decide arbitrator challenge issues) then further payments for that service will be due from the parties. Therefore the disputing parties pay the appointing authority on the basis of services rendered. Such payments do not include provision of administrative facilities or assistance, which fall outside of the appointing authority's remit.¹⁹ Where the appointing authority renders such other services, it may conclude other contractual arrangements with the disputing parties.²⁰ Such contracts (if any) have no connection with the functions of the appointing authority under the arbitration agreement or the formation of the arbitrator's contract.²¹



Figure 4.2 Sole arbitrator appointed by the appointing authority

The invoking party (acting for itself and the other party) or both parties jointly requests the appointing authority to appoint a sole arbitrator on their behalf. The appointing authority may also apply the list procedure but with the appointing authority circulating identical lists with names of individuals to be appointed as arbitrator to the disputing parties. The disputing parties would either rank them or cross out unsatisfactory names and return the list to the appointing authority.²² The appointing authority, guided by such choices, chooses and appoints the sole arbitrator on behalf of the disputing parties. Under Case Study 6, one party invokes the appointing authority to appoint either the sole or co-arbitrator where the other party refuses or fails to participate in the arbitrator appointment. Under these circumstances, the invoking party again acts for itself and the other party to the arbitration agreement. Both parties will be bound to the appointed arbitrator as joint parties to the arbitrator's contract.

Once the selected individual accepts appointment to act as the sole arbitrator, the appointing authority notifies the disputing parties of the appointee and his contact details. The acceptance of appointment by the appointee is provisional (upon terms being satisfactorily agreed). The appointee accepts the offer to act as arbitrator made by the appointing authority as agent of the disputing parties who are the disclosed principals, so that in effect the arbitrator accepts appointment directly to the disputing parties. The arbitrator may as well accept appointment before agreeing terms with the disputing parties. This he does where his acceptance to the appointing authority is

not provisional or conditional on his agreeing terms of appointment with the disputing parties. The parties then contact the appointee, meet with him and agree terms for his service. The relevant point for purposes of this sub-section is that the terms of appointment are directly agreed between the disputing parties and arbitrator. A diagrammatic representation of this arbitrator appointment method will be similar to Figure 4.1 above since, the contract (if any) between the disputing parties and appointing authority is not relevant to the formation of the arbitrator's contract.

Therefore where in ad hoc arbitration references the disputing parties nominate an appointing authority in their arbitration agreement, two contracts may emanate from the arbitration agreement. There may in addition to the arbitrator's contract (between the disputing parties and sole arbitrator) be a contract for the provision of services between the disputing parties jointly and the appointing authority. This contract is independent of the arbitrator's contract not directly affecting the relationship between the disputing parties and the arbitrator. The appointing authority renders a service to the disputing parties and not to the arbitrator. It therefore does not enter into nor conclude any contract with the arbitrator it appoints on behalf of the disputing parties. This explains why there is no contractual link between the appointing authority and the appointed arbitrator.

1.2.2 Sole arbitrator appointed by a national court

As a last effort to give effect to the arbitration agreement, the disputing parties (or one of them) may apply to a relevant national court to appoint the sole arbitrator (Case Studies 6 and 7). Most national laws provide for appointment of arbitrators by a clearly identified court where the preferred arbitrator appointment method of the disputing parties had failed or none was agreed.²³ In this situation, the invoking party (or all the parties) applies to the relevant national court to appoint the sole arbitrator in accordance with the arbitration agreement for itself and all the parties to the arbitration agreement. The national court once satisfied that it can assume jurisdiction under the circumstance will appoint the sole arbitrator for the disputing parties. Upon appointment, the national court may directly notify the nominee who accepts appointment, or notify the disputing parties of the nominee's identity and his contact details.

Whatever the order of notification, the appointee must accept his appointment. Where the appointee is notified by the national court, then the 'acceptance' will be in the first instance to the national court. This acceptance to the national court is provisional because it comprises primarily a confirmation by the arbitrator of his availability and willingness to act. The appointee thereafter accepts appointment (expressly or by conduct) to act directly to the disputing parties at their very first meeting. The terms of appointment may be agreed at this meeting as well or thereafter but are agreed directly between the disputing parties and the appointed arbitrator.

The national court is not privy to the discussions on the terms of appointment between the disputing parties (and or their representatives) and appointed arbitrator. The role of the national court terminates (or is kept in abeyance) upon it appointing the arbitrator.²⁴

The most important issue in this appointment method is identifying which court to approach for assistance. This task is made easier where a seat of arbitration has been chosen so that the natural court will be the one at the seat of arbitration. Where however, the parties have not chosen a seat, then a situation such as that in *State of Israel v NIOC*, will arise.²⁵ The good news is that most national courts will assist an international commercial arbitral reference when requested to appoint an arbitrator even where the court is not the best forum for such application. However, it is important that the party requesting the national court to appoint the arbitrator has *locus* to stand before the particular court and move such an application and the national court has jurisdiction to entertain such application.²⁶ The jurisdiction of national courts is territorially based and so there may conceivably be a more convenient jurisdiction to assist the disputing parties with the appointment. In *Spiliada Maritime Corporation v Cansulex Ltd*, the House of Lords held that the natural forum for a dispute to be adjudicated was where the action had 'the most real and substantial connection' and 'the case may be tried more suitably for the interests of all the parties and the ends of justice'.²⁷ Some national courts without any connection with the dispute will readily assist parties in the appointment of arbitrators in an effort to give effect to the parties' intention to arbitrate their resulting dispute and in support of international commercial arbitration.²⁸ Where there is a *prima facie* valid arbitration agreement, the national courts act to give effect to the agreement between the disputing parties.²⁹

The party moving the court to exercise its discretion in its favour seeks specific performance of the terms of the arbitration agreement between it and the respondent. The application will be on the basis of the relevant national arbitration law empowering the court to appoint arbitrators in such circumstance. The court acts under its statutory power to appoint an arbitrator pursuant to the arbitration agreement between the disputing parties. The court therefore does not make the arbitrator appointment as agent either of the disputing parties or appointed arbitrator. In Figure 4.3 below, the supervisory national court 'stands' above the disputing parties and the arbitrator (arbitral tribunal). It enforces the terms of the contract reflected in the arbitration agreement between the parties just as it would enforce any other contract. Clearly, in appointing the arbitrator the court renders its support and assistance to the disputing parties in the performance of the terms of their arbitration agreement. Thus in this situation the arbitrator's contract is also concluded directly between the disputing parties and the arbitrator (arbitral tribunal) just as in Figure 4.1 above.

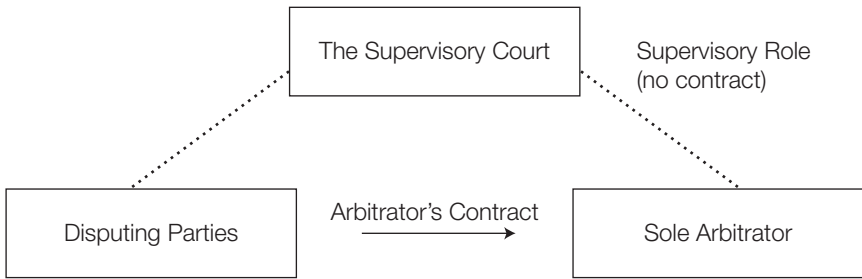


Figure 4.3 Arbitrator appointed by national court

1.3 Appointment of panel of arbitrators

In empowering the disputing parties to choose the number of arbitrators, some national laws attach a caveat that the number of arbitrators constituting the arbitral tribunal must be uneven.³⁰ Failing a provision by the parties, some national laws require the appointment of a sole arbitrator³¹ while others require the default appointment of three arbitrators.³² In this section the example of a panel of three arbitrators shall be used, however the number of arbitrators forming the arbitral tribunal does not affect the result of the analysis made here. The same conclusion will be reached as long as the arbitral tribunal is constituted by more than one arbitrator.

In constituting an arbitral tribunal with more than one arbitrator, most arbitration laws and rules provide for each party to appoint one arbitrator and the two party appointed arbitrators to appoint the third arbitrator referred to as the 'presiding arbitrator'.³³ The analysis in this section is tested against Case Studies 3, 4 and 5. Some laws provide that the presiding arbitrator should be appointed by a third party and not by the party appointed arbitrators. An example is the Arbitration Law of China which provides

The parties shall jointly select or jointly entrust the chairman of the arbitration commission to appoint the third arbitrator who shall be the presiding arbitrator.³⁴

Some other arbitration laws provide that where even-number arbitrators are to be appointed, an additional arbitrator should also be appointed. An example is the Arbitration Law of Brazil which provides

If the parties appoint an even number of arbitrators, the latter are authorized immediately to nominate another arbitrator.³⁵

The advantages of such a provision apart from certainty is to also ensure

that the arbitral tribunal can reach a decision by majority vote where they fail to reach a unanimous decision, and the arbitral tribunal can continue to function where it is truncated.³⁶

Under the provisions of some arbitration laws provision is also made for the appointment of an umpire.³⁷ An umpire is appointed in an arbitral reference by the two party appointed arbitrators when they are unable to reach a unanimous decision.³⁸ The two party appointed arbitrators then appoint a third arbitrator as umpire, change roles and become advocates of their appointing parties. Each party appointed arbitrator presents and argues his appointing party's case to the umpire who then makes a decision which is final and binding on the parties. This description of the roles of the party appointed arbitrators and the umpire in the arbitral reference does not mirror the role or function of the international arbitrator in international commercial arbitral practice. The prevalent position in international commercial arbitration is the appointment of neutral arbitrators and not umpires and the great majority of national laws and arbitration rules provide for the appointment of either a sole arbitrator or a panel of uneven number of arbitrators.³⁹ In addition to these reasons, the presumption adopted in this book that the disputing parties contract jointly, and on which the formation of the arbitrator's contract is based, will not fit into the umpire situation, which obviously shows that each party contracts with its appointed arbitrator who then contracts with the umpire as agent of his or her appointing party.

Some arbitration laws allude to the need to consult the disputing parties before the appointment of the presiding arbitrator⁴⁰ (Case Study 4) while others mandate the party appointed arbitrators to make the appointment independently of the parties,⁴¹ (Case Studies 3 and 5), while some other laws provide for the appointment to be made by an independent third party. It is acknowledged that in practice, the disputing parties (and their lawyers) are usually consulted before the appointment of the presiding arbitrator, whether made by the party appointed arbitrators or an independent third party.⁴²

Party-appointed arbitrators involved in international commercial arbitral references are not expected (at any point in the arbitration reference after accepting appointment) to act as agents or advocates of the appointing party, as is expected of party appointed arbitrators when an umpire is appointed. This sweeping statement is true in situations where the disputing parties themselves, appointing authority or national courts appoint the third and presiding arbitrator (in which case the party appointed arbitrators do not make any contributions neither are they involved in the appointment process). A grey area manifests itself where it is the party appointed arbitrators that appoint the third and presiding arbitrator. This practice raises the question of whether the party appointed arbitrators (in appointing the presiding arbitrator) act as agents of their appointing parties, or act in fulfilment of the terms of their arbitrator's contract.

Two arguments can be made in this regard. One is that each party appointee acts on behalf of the appointing party in negotiating the appointment of the

third arbitrator, as 'agent' of his appointor.⁴³ It is arguable that this service is rendered to constitute the arbitral tribunal, which becomes fully constituted when the last arbitrator appointee accepts his appointment.⁴⁴ The second argument is that each party appointed arbitrator acts in performance of his arbitrator's contract (which already exists⁴⁵) in appointing the presiding arbitrator, to properly compose the arbitral tribunal.⁴⁶ Under this second proposition, the party appointee does not act as agent of his appointing party but independently in fulfilment of a term (express or implied) of the arbitrator's contract applicable to him. This term is to fulfil the requirements of the arbitration agreement that the arbitral tribunal shall be composed of three arbitrators. In a nutshell, he is performing part of the function he contracted to perform under his arbitrator's contract. In light of international arbitral practice which clearly shows that the party appointed arbitrator never acts as agent of his appointing party, the second proposition better represents this state of arbitral practice.

All arbitrators appointed in any international commercial arbitral reference upon acceptance of appointment, must be and remain independent of his appointing party, its lawyers and witnesses throughout the arbitral reference. Thus, in acting on behalf of the appointing party and negotiating the selection of the third arbitrator, the party appointee must act in good faith and in furtherance of the purpose of the arbitration agreement, and not just in the best interest of the party that appointed him.⁴⁷

1.4 Arbitrator appointment under multiparty arbitration references

Multiparty arbitral references refer to arbitral disputes where there are more than two disputing parties involved. One peculiarity of arbitrator appointment methods under multiparty arbitration references is the fact that it may be possible to group the parties (howsoever many) by interests for convenience.⁴⁸ The arbitral tribunal in multiparty disputes can be composed of a sole arbitrator. The arbitrator appointment method and the formation of the arbitrator's contract in diagrammatic form will reflect Figures 4.1 and 4.2 above.⁴⁹ Where the disputing parties' interests are capable of being grouped into categories of claimants and respondents then the arbitrator appointment methods for a panel of arbitrators examined above will apply.⁵⁰ In this case the formation of the arbitrator's contract in diagrammatic form is reflected in Figure 4.3 above.

2 Formation of the arbitrator's contract under institutional reference

Under institutional arbitral references, there is a new entrant that plays an active role in the appointment of arbitrators, this is the institution itself.⁵¹ Under the arbitration rules and practice of most institutions, the disputing parties nominate arbitrators for appointment by the arbitration institution

itself. The propositions made on the formation of the arbitrator's contract in this section are tested against the following case studies:

- Case Study 8 where the arbitration institution appoints the arbitrator(s) without any input from the disputing parties.
- Case Study 9 where the disputing parties jointly nominate the sole arbitrator who is then appointed by the arbitration institution.
- Case Study 10 where the disputing parties nominate the two co-arbitrators and the presiding arbitrator all for appointment by the arbitration institution.
- Case Study 11 where the disputing parties appoint the two co-arbitrators and the arbitration institution appoints the presiding arbitrator.
- Case Study 12 where the disputing parties appoint the two co-arbitrators who then nominate the presiding arbitrator all for appointment by the arbitration institution.

In Chapter Three above it was clarified that the arbitration institution acts in its own name and for itself as a legal entity.⁵² The disputing parties (again jointly) enter into a contractual relationship with the arbitration institution. The arbitrator on his part concludes his contract for service with the arbitration institution.⁵³ In this capacity the arbitration institution contracts either as agent or principal. The institution's capacity to contract as principal is the point of departure with arbitrator appointment methods by appointing authorities or national courts (this is examined above). In Chapter Three above, the question of whether the institution concludes the arbitrator's contract with each arbitrator or with the arbitral tribunal as a contracting unit was answered.⁵⁴ This section analyses the various methods of appointing arbitrators under the arbitration rules of various institutions, to determine the formation of the arbitrator's contract. There are two propositions on the legal status of the arbitration institution in concluding the arbitrator's contract based on whether the institution confirms the appointment of arbitrators or not (2.1). The effect of arbitration institutions maintaining a list of arbitrators on the appointment mechanism is examined (2.2) and the conclusion from this discussion is applied to the appointment of the sole arbitrator (2.3), panel of arbitrators (2.4) and appointment of arbitrators in multiparty disputes (2.5).

2.1 Institution confirming appointment of the arbitrator

Under the arbitration rules of some institutions, arbitrators nominated by the disputing parties are 'appointed' subject to confirmation by the institution.⁵⁵ For example the LCIA Rules expressly provide

If the parties have agreed that an arbitrator is to be appointed by one or more of them or by any third person, that agreement shall be treated as

an agreement to nominate an arbitrator for all purposes. Such nominee may only be appointed by the LCIA Court as arbitrator ... The LCIA Court may refuse to appoint any such nominee if it determines that he is not suitable or independent or impartial.⁵⁶

The SIAC Rules on its part provides, 'In all cases, an arbitrator shall not be deemed appointed until confirmed by the Chairman.'⁵⁷ Under these rules, the disputing parties therefore nominate the arbitrators for appointment by the arbitration institution itself.⁵⁸ This applies irrespective of whether the arbitrator is chosen from a list maintained by the arbitration institution or not.⁵⁹ On the basis of such requirements, it is obvious the arbitration institution takes full responsibility on the appointment of the arbitrator and by extension concluding the arbitrator's contract directly with the appointed arbitrator. The relevant question here relates to the capacity in which the arbitration institution concludes the arbitrator's contract, whether as principal or as agent, of the disputing parties. On the terms of appointment, these are the provisions of the arbitration rules of the institution, which it agrees with the appointed arbitrator. As principal, it does not act as a representative of the disputing parties to the arbitrators but makes its own representations directly to the arbitrators, albeit in favour of and for the benefit of the disputing parties.

It is important to describe the role of the institution in the arbitral reference to better clarify its relevance. The disputing parties in agreeing upon the arbitration institution, contract with it to organize and administer their arbitration reference 'in accordance with its arbitration rules'. The arbitration institution performs the function ascribed to it under its arbitration rules subject to any amendments (of its rules) contained in the arbitration agreement.⁶⁰ Some arbitration rules expressly state this. Using the International Arbitration Rules of the AAA as an example, it provides

Where parties have agreed in writing to arbitrate disputes under these International Arbitration rules ... the arbitration shall take place in accordance with these Rules, as in effect at the date of commencement of the arbitration, subject to whatever modifications the parties may adopt in writing.

These Rules specify the duties and responsibilities of the administrator, the International Centre for Dispute Resolution ...⁶¹

The arbitration institution can decline to confirm or appoint an arbitrator nominated by the disputing parties.⁶² In practice, the arbitrator accepts appointment directly to the arbitration institution. He also completes and returns any declaration forms to the arbitration institution and not the disputing parties.⁶³ The arbitration institution thus contracts in its own name with the appointed arbitrator.⁶⁴ Dr Melis describes this process, using the procedure under the Arbitral Centre of the Federal Economic Chamber in Vienna as an example:

[The Rules] made it a condition for *a person* who acts as arbitrator to conclude an arbitrator's agreement with the institution in which he expressly accepts the rules and the decisions of the organs of the institution as binding. Together with the copy of this agreement, the Centre transmits 'guidelines for arbitrators' which are a summary of its administrative practice concerning matters which are of relevance to the mutual relationship including the way of calculating fees and expenses.⁶⁵ [Emphasis added]⁶⁶

To this end, upon confirmation of the nominated arbitrator, the arbitration institution forwards its arbitration rules (and any other relevant document) to the appointed arbitrator in preparation for his service under the arbitral reference. The arbitration rules form part of the terms of appointment of the arbitrator (contained in the arbitrator's contract) by the arbitration institution. Where the arbitration institution contracts as principal on the basis of the description of arbitrator appointment described above, then the institution itself concludes the arbitrator's contract with no collateral contract existing directly between the disputing parties and the arbitrator. Where the institution contracts as agent of the disputing parties, then a contract will exist between the arbitrator and the disputing parties just as exists under ad hoc arbitral references. This proposition is reflective of Case Study 8 and for the presiding arbitrator in Case Study 11 and is represented as follows (Figure 4.4).



Figure 4.4 Arbitrator appointment subject to institution's confirmation

In Figure 4.4 below the arbitration institution concludes and is bound by two distinct but collateral contracts. *Contract 1* is between the arbitration institution and the disputing parties. This is concluded at the point the institution accepts to administer the arbitration reference. Pursuant to and in performance of *Contract 1*, the arbitration institution appoints the arbitrator and concludes the arbitrator's contract (*Contract 2*) with each appointed arbitrator.

For arbitrator appointment methods under Case Studies 9, 10, 12, and the co-arbitrators under Case Study 11, since the disputing parties nominate

the arbitrators for appointment by the arbitration institution, the arbitration institution in those situations contracts as agent of the appointing parties, in accordance with the provisions of its arbitration rules as reflected in its contract with the disputing parties. This implies the existence of another contract directly between the disputing parties and arbitrators (*Contract 3*) in which the parties are the principals and the institution their agent. This proposition reflects that of commentators who have argued that the arbitrator's contract, by necessary implication, gives rise to *Contract 3* in Figure 4.4 above which binds the arbitrators and the disputing parties directly and to the exclusion of the arbitration institution. Dr Melis, after describing the control exercised by arbitration institutions over the work of the arbitrators (specifically the ICC Court), concludes:

These are, however, also in this arbitration what I would call 'ad hoc phases', where the arbitrators determine the proceedings in direct contact with the parties: ... The only control exercised by the Court here is in respect of the time limits in the ICC Rules for the duration of the proceedings.⁶⁷

The diagram in Figure 4.4 above shows the two possible contractual capacities of an arbitration institution which confirms the appointment of arbitrators under its arbitration rules, either as principal or as agent of the disputing parties.

2.2 Institution appointing arbitrators from a list

Some arbitration institutions are mandated by their arbitration (or internal) rules to maintain a list or pool of arbitrators from which the disputing parties may choose and appoint arbitrators to arbitral tribunals sitting under such rules.⁶⁸ The relevant question that arises under this section is whether a contract is concluded between the arbitration institution and the listed arbitrators when they are listed on the institution's list of arbitrators. A general analysis of arbitrator enlistment procedures with arbitration institutions will assist in answering this question. Where the arbitration institution informs (by whatever means) the arbitration community of vacancies for enlistment, this at best is a tender made to the international arbitration community. Each arbitrator considers such tender and makes an offer for enlistment to the arbitration institution by completing certain forms in which they provide personal details and information on matters such as their areas of subject matter expertise, language skills, and eligibility to act, amongst others.⁶⁹ The institution lists those whose offers it accepts and informs the successful applicants. Another interpretation of this practice is that the distribution of the arbitration rules by the institution is an advertisement so that an offer for a unilateral contract, which does not require notification for the acceptance to be valid, is created.

All that this achieves is getting the particular prospective arbitrator listed by the arbitration institution. It does not guarantee the listed individual any appointments. If a contract can be conceived from such transactions, then such 'contract' is fully performed upon the enlistment of the arbitrator by the arbitration institution. This 'contract' does not affect or influence any of the contractual relationships between the disputing parties, institution and arbitrators in the arbitration reference neither does it affect the formation of the arbitrator's contract. In enlisting the arbitrator, the arbitration institution does not promise to act as his agent in obtaining work.

Another arbitrator enlistment method arises in situations where prospective arbitrators take the initiative and contact various arbitration institutions with their details for inclusion on such lists when there is a vacancy. Applying the offer and acceptance model, the applying arbitrator can be said to make an offer for enlistment to a particular arbitration institution. Where the arbitration institution accepts the offer it enlists such arbitrator. The enlistment still does not amount to the institution taking on a legal obligation to ensure the listed arbitrator is appointed to sit. Such contract (if any) is fully performed upon enlistment of the arbitrator by the arbitration institution. Under arbitration rules where the disputing parties must appoint arbitrators from the list maintained by the arbitration institution, the institution does not need to confirm such arbitrator appointments. Thus, regardless of the enlistment procedure adopted, any resultant contract between the arbitration institution and the enlisted arbitrator is fully performed on the arbitrator's enlistment. It is not usually a term of such arrangements that the arbitration institution would guarantee the arbitrator will secure appointments. It therefore does not affect the formation of the arbitrator's contract under institutional arbitration references. The view taken in this book is that there is no contract (unilateral or bilateral) formed between the institution and prospective arbitrator by these means of enlistment.

2.3 Appointment of sole arbitrator

The formation of the arbitrator's contract in situations where the sole arbitrator is jointly appointed by the disputing parties (Case Study 9) is reflected in the same diagram as Figure 4.4 above. This is the case where the sole arbitrator jointly appointed by the disputing parties in accordance with the arbitration rules of the institution is accepted by the arbitration institution.⁷⁰ As mentioned above, the arbitrator's contract here is concluded between the arbitration institution (as agent) and arbitrator with a separate contract binding the sole arbitrator and disputing parties. Where the disputing parties agree on fees and terms (as provided in their arbitration agreement) with the sole arbitrator, the fees and terms are the same as those published by the arbitration institution in its arbitration rules and form part of the arbitration agreement.⁷¹ The mandate of the institution to administer the

arbitrator's contract is founded on the arbitration agreement containing its arbitration rules.⁷²

Under situations where a sole arbitrator is appointed by the arbitration institution without any input from the parties in accordance with its arbitration rules (Case Study 8), the arbitrator's contract is concluded directly between the arbitrator and the arbitration institution (as principal) reflected as follows (Figure 4.5).

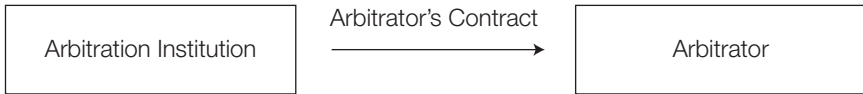


Figure 4.5 Institution acting as principal

2.4 Appointment of panel of arbitrators

Where the arbitral tribunal is to be constituted by three arbitrators, some institutional arbitration rules provide for the disputing parties to each nominate one arbitrator for appointment by the arbitration institution while the two party appointed arbitrators nominate the third and presiding arbitrator also for appointment by the arbitration institution (Case Study 12).⁷³ The disputing parties may also nominate all three arbitrators (forming the arbitral tribunal) with the arbitration institution confirming their nominations and also appointing the arbitrators (Case Study 10).⁷⁴

Some other institutional arbitration rules provide for arbitrators to be appointed by the arbitration institution itself (whether sole arbitrator or all the members of the panel of arbitrators as in Case Study 8). In such cases the formation of the arbitrator's contract is shown as the same diagram evidenced in Figure 4.4, with the institution acting as principal so that no contract comes into existence between the arbitrator and disputing parties. This structure does not change under the arbitration rules of those arbitration institutions that permit an appointing authority to nominate arbitrators (on behalf of the parties).⁷⁵

Where the applicable arbitration rules provide for an appointing authority to nominate or directly appoint the arbitrators, the relevant question that arises is whether the presence of the appointing authority affects the formation of the arbitrator's contract as described above. Two scenarios are examined in answering this question. The *first scenario* is where the institutional arbitration rules provide (for example LCIA Rules) that all arbitrator appointments by *whomsoever* are subject to confirmation by the institution. Then, the presence of an appointing authority does not affect the formation of the arbitrator's contract as shown in Figure 4.4 above. This is because the contract between the disputing parties and the appointing authority is independent of the contracts in Figure 4.4. The function performed by the

appointing authority amounts to a mere nomination of possible appointees to be confirmed and appointed by the arbitration institution itself.

In the *second scenario*, where under institutional arbitration rules (for example SIAC Rules⁷⁶) providing for direct party appointment of arbitrators, the presence of an appointing authority still does not change the effect of such arbitrator appointments on the formation of the arbitrator's contract. The appointing authority performs a function attributed to the disputing parties. The authority of the appointing authority to act is founded on the arbitration agreement incorporating these institutional arbitration rules. The performance of such a role does not make the appointing authority party to the ensuing contracts. The role of the appointing authority in these instances falls outside the ensuing contractual relationships between the arbitrator, institution and disputing parties. This is so even where the appointing authority is another arbitration institution.

Where there is no requirement for confirmation of the appointment of the arbitrator by the institution, then the disputing parties themselves make all the arbitrator appointments. This proposition is anchored on the ground that the arbitration rules bind the disputing parties, institution and the arbitrators, with the institution only administering the arbitrator's contract already agreed between the disputing parties and the arbitrator.⁷⁷ This proposition is based on the argument made above that the arbitration institution acts as agent of the disputing parties and so does not enter into any contract with the arbitrators. This proposition is represented as follows (Figure 4.6).

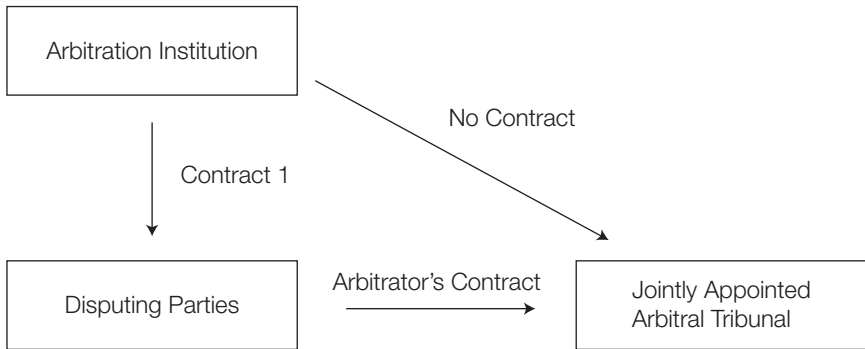


Figure 4.6 Institution acting as agent of disputing parties

Thus in Figure 4.6 the arbitrator's contract will be concluded directly between the disputing parties and arbitrators just like in ad hoc arbitral references. The conclusion drawn from the above diagram is that in this scenario Contract 2 is non-existent, so that (just as under ad hoc references) the arbitrator's contract is concluded strictly between the disputing parties and arbitrators.

2.5 Multiparty cases

Arbitration institutions have had to deal with the complexities of constituting arbitral tribunals in multiparty arbitration references.⁷⁸ This is especially true after the decision of the *Cour de Cassation* of France in the *Dutco* ICC arbitration in 1992.⁷⁹ An examination of arbitrator appointment methods in arbitral references involving multiple parties under institutional arbitration rules reveals four different methods.

- 1 The first arbitrator appointment method common to all institutional arbitration rules that deal with this issue, is compliance with any prior agreement of the disputing parties.⁸⁰ The parties can thus determine how the arbitrators would be appointed. Such provision is an express term of the arbitration agreement and where exercised, overrides the default provisions in the institutional arbitration rules. It also binds the arbitration institution as a term of its contract with the disputing parties. The three other arbitrator appointment methods provide for situations where the disputing parties have not agreed on an appointment procedure or their agreed procedure fails.
- 2 The second appointment method empowers the arbitration institution to appoint a sole arbitrator or three arbitrators for the disputing parties at its absolute discretion.⁸¹ Here Figures 4.4 or 4.5 reflect the formation of the arbitrator's contract in such scenario.
- 3 The third appointment method mirrors provisions that require the disputing parties' interests to be grouped on the basis of 'claimants' and 'respondents' to enable each group to nominate one arbitrator for appointment.⁸² The two nominated arbitrators then act as party appointed arbitrators to nominate the third and presiding arbitrator for appointment.
- 4 In the fourth appointment method, the arbitration institution appoints the presiding arbitrator.⁸³

It is obvious that in these appointment methods,⁸⁴ arbitration rules make the same provisions as in the formation of a panel of three arbitrators examined above. It is equally conceivable under some institutional arbitration rules that a panel of more than three arbitrators can be constituted.⁸⁵ This is where the interests of the individual disputing parties cannot be conveniently grouped into batches of 'claimant' and 'respondent'. This appointment method is still reflected by Figure 4.3 but with many more disputing parties and more arbitrators' contracts. This is so as long as the appointment of each nominee is subject to confirmation and appointment by the arbitration institution itself, which then contracts either as principal or agent.

This section concludes an analysis of the various arbitrator appointment methods adopted in institutional arbitration references. It has shown that arbitration institutions can be grouped into two sets. One set comprises

those institutions that exercise control over the appointment of arbitrators,⁸⁶ and the second set comprises those that administer the terms of the arbitrator's contract made between the disputing parties and the arbitrators.⁸⁷ The degree of involvement of each arbitration institution has implications for the formation of the arbitrator's contract, in the sense that the arbitration institution contracts either as principal or agent with effects on the obligations and rights arising under the respective arbitrator's contracts.

3 Categorization of the arbitrator's contract

This section examines: (3.1) the relevance of categorizing the arbitrator's contract and (3.2) the different categorizations already proffered by legal commentators. Some legal commentators categorize the arbitrator's contract as an agency others see it as a contract for the provision of services while a third group of commentators view it as an autonomous or independent contract.

3.1 Relevance of categorization of the arbitrator's contract

Categorization of legal relations is predominantly a phenomenon of the civil law tradition but has both theoretical and practical relevance.⁸⁸ *Fouchard Gaillard and Goldman* give two reasons for the necessity of characterizing the arbitrator's contract

[First] it clarifies the arbitrator's status [and second] as the contract is concluded progressively, with no single legal document setting forth the rights and obligations of the parties, it is helpful to liken it to an existing category of contracts, so that if need be it can be subjected to the legal regime governing such contracts.⁸⁹ [Footnote omitted]

And to Mauro Rubino-Sammartano

The consequence of the classification is that the supplementary statutory provisions, which deal with that specific contract, will apply, some of which may be mandatory.⁹⁰

3.2 Classification of the arbitrator's contract

The classification of the arbitrator's contract has posed a challenge to legal commentators with views varying as to (3.2.1) agency, (3.2.2) service and (3.2.3) an autonomous or independent contract.

3.2.1 Arbitrator's contract as an agency

The agency theorists postulate that the appointed arbitrator acts as an agent of the disputing parties. The argument is that the arbitrator is appointed to act on behalf of the disputing parties in making a decision over their dispute pursuant to the arbitration agreement.⁹¹ This categorization has been criticized by some commentators. *Fouchard Gaillard and Goldman* for example reject the agency classification for not taking account of the fact that the source of the arbitrator's contract is contractual while its object is judicial.⁹² While an agent complies with the principal's instructions and acts in his principal's best interest and is fully accountable to him, the arbitrator is appointed to comply with the arbitration agreement of the parties.⁹³ The arbitrator can be said to act in the best interest of all the parties to the arbitration agreement since generally speaking, the arbitrator is appointed to make a decision over the parties' dispute in compliance with their arbitration agreement. *Fouchard Gaillard and Goldman* examined the argument of the proponents of this theory (under Swiss Law) against the operation of the law of agency under French Law and conclusively rejected it because

The specific object of a contract of agency is to confer a power of representation on the agent. The arbitrator does not 'represent' the parties, and certainly not the party which appointed him.⁹⁴ [Footnotes omitted]

In agreement with the views expressed by *Fouchard Gaillard and Goldman*, the discussions in previous chapters of this book clearly show that arbitrators are not appointed as representatives or agents of the disputing parties.⁹⁵ This is so even where there are party appointed arbitrators as members of the arbitral tribunal, so that the arbitrator is not an agent of either his appointing party or all the disputing parties involved in the arbitral reference.

3.2.2 Arbitrator's contract as a contract for service

Lew, Mistelis and Kroll described the arbitrator's contract as a contract of service.⁹⁶ To *Fouchard Gaillard and Goldman* arbitrators render intellectual services to the disputing parties for a fee so that

The arbitrators, in common with other professionals, undertake to give the parties the benefit of their experience and knowledge, and to accomplish tasks such as investigating the case and hearing the parties within a certain period of time. The arbitrators thus agree to provide services which constitute either best efforts undertakings or undertakings to achieve a particular result.⁹⁷ [Footnote omitted]

The difficulty with this categorization (as contract of service) for the authors of *Fouchard Gaillard and Goldman* is the fact that judging under the civil law is

not strictly speaking, rendering a service. However to Philippe Fouchard the arbitrator acts just like other professionals, for example legal practitioners and so he viewed the arbitrator's contract as

The *contract for hire of services* ... is certainly closer to the contract binding the arbitrator to the parties, because its aim is wider than that of agency. In fact it is possible to analyse the arbitrator's task as the provision of a whole set of services of an intellectual nature, that he carries out in the interest of the parties, independently, in consideration of a fee.⁹⁸

This description better represents the role the arbitrator plays in any standard international commercial arbitral reference. The arbitrator accepts appointment to render a number of services which include, administering the hearing and making a binding decision on the merits of the dispute before him in the particular reference. Clearly these are services that the arbitrator renders for payment.

3.2.3 *Arbitrator's contract as an autonomous contract*

Klaus Lionnet on his part did not place the arbitrator's contract into any particular category of contracts. He simply saw it as an independent (autonomous) contract.⁹⁹ The authors of *Fouchard Gaillard and Goldman* also declare that the arbitrator's contract shares the hybrid nature of arbitration because, 'its source is contractual, but its object is judicial'.¹⁰⁰ In examining the various legal commentators quoted above on the categorization of the arbitrator's contract, the notion of the contract being one for service as proposed by Lew, Mistellis and Kroll and Philippe Fouchard is preferred.

4 Other collateral contracts

The existence of some collateral contracts in institutional arbitral references have been referred to in the various analyses of the formation of the arbitrator's contract made above. This section briefly examines the formation of two other contracts concluded in institutional references that affect the formation of the arbitrator's contract: (4.1) The contract between the disputing parties and arbitration institution shown in Figure 4.4 (Contract 1) and (4.2) the contract between the arbitrator and disputing parties in Figure 4.4 (Contract 3).

4.1 *Contract between the disputing parties and arbitration institution*

The existence of a contract between the disputing parties and arbitration institution is not disputed.¹⁰¹ Dr Melis examined the relationship between the disputing parties and arbitration institution and said it contains two distinct elements

(1) The transfer of power to the institution to perform those services contained in its rules ... and the mandate to perform these services in accordance with its rules; and (2) the performance of other services ... of an administrative nature, which the institution may render on its own against payment or provide on behalf of the arbitrators or parties according to their instructions.¹⁰²

This description clearly refers to a contractual relationship where the institution acts as principal or agent of the disputing parties or arbitrators. The only point of departure with Dr Melis's position as mentioned above is the argument maintained here that the institution does not act as the arbitrator's agent.¹⁰³ The formation of the contract between the disputing parties and arbitration institution is examined through an analysis of the concept of offer and acceptance in contract formation (4.1.1) and the nature of the contract is determined through an examination of the nature of the contractual obligations undertaken by the parties to the contract (4.1.2).

4.1.1 Formation of the contract

In examining the formation of this contract, the question of which version of the arbitration rules the institution applies will also be answered. The authors of *Fouchard Gaillard and Goldman*, explained the coming into existence of this contract as follows

By drafting and publishing its arbitration rules, the arbitral institution effectively puts out a permanent offer to contract, aimed at an indeterminate group of persons ... but made under fixed conditions. By concluding their arbitration agreement, the parties accept that offer and agree to empower their chosen institution to organize and oversee the arbitration in the event that a dispute arises between them ... When the request for arbitration is submitted to the institution and it begins to organize the proceedings, the contract is perfected.¹⁰⁴

Dr Melis on his part explains the formation of this contract thus

The arbitral institution, by publishing its rules and by recommending an arbitration clause, offers its services under its rules to a public which is only identified by categories, such as participants in international trade. [The contract between the institution and the parties] is deemed concluded on the date of the conclusion of the arbitration agreement between the parties and not the date of the request for arbitration ... These considerations lead to the conclusion that the contractual relationship is already existent, even if the arbitral institution will normally not be aware of its existence.¹⁰⁵

Thus to the authors of *Fouchard Gaillard and Goldman* and Dr Melis, an institution's publication of its arbitration rules constitutes an offer, even though not made to an identifiable individual but to an 'indeterminate group', quoting *Fouchard Gaillard and Goldman*. The result of this analysis is that the disputing parties accept the offer made by the arbitration institution when they opt for arbitration under the rules of a particular institution in their arbitration agreement. Therefore, 'this would imply liability for damages if an institution would refuse to perform services which it has offered under its rules'.¹⁰⁶

There is another proposition of the formation of this contract proposed here on the basis that the arbitration institution does not make the disputing parties an offer. It is here argued that on the contrary, it is the disputing parties who make the institution an offer when they file a request or notice for arbitration with the institution. This proposition presupposes that nominating the institution in the arbitration agreement is simply a term of the arbitration agreement binding on the disputing parties only. The arbitration institution then accepts the offer when it is notified of its appointment and accepts the appointment. It then forwards its arbitration rules (which are analogous to a standard form contract) to the disputing parties.

The position advanced by Dr Melis and the authors of *Fouchard Gaillard and Goldman*, raises some unanswered questions:

- i on the application of 'offer' and 'tender' or 'invitation to treat' to the formation of the contract between the arbitration institution and disputing parties. If it is agreed (as canvassed in this book) that the arbitration institution (or arbitrator) is not party to the arbitration agreement, how then can the institution be bound by an agreement to which not only is it not a party, but whose existence, terms (in the arbitration agreement) and its own involvement it is not even aware of?
- ii On the time of conclusion of the contract, which both commentators quoted above agree comes into existence when the disputing parties conclude the arbitration agreement. The position argued here is that this contract is concluded when the institution accepts a request filed by the disputing parties, so that it is concluded well after the arbitration agreement.
- iii On the version of the institution's arbitration rules applicable to the arbitral reference. It is argued here that it is the version of the arbitration rules currently in use at the time when the request for arbitration is filed with the institution that applies to the arbitral reference.¹⁰⁷

Regarding the version of the arbitration rules that would apply to the dispute, there are two possibilities: the rules in force at the time the disputing parties concluded their arbitration agreement or the version in force at the time the request for arbitration was filed and the arbitration institution became aware of the dispute and its nomination.¹⁰⁸ The Paris Court

of Appeal very recently ruled on this issue in *SNF v ICC*.¹⁰⁹ The court held in determining the version of the ICC Arbitration Rules applicable to an arbitration reference, that the 1988 version of the ICC Rules which was in force when the parties concluded their arbitration agreement applied to the reference instead of the current 1998 version of the ICC Rules. The agreement between SNF SAS (SNF) and Cytec Industries BV (Cytec) was for the purchase and supply of certain raw materials, and was concluded in 1993. In 2000, disputes relevant to EU competition law issues arose between the parties. As at this time a new version of the ICC Rules was in force.¹¹⁰ The parties commenced ICC arbitration with seat in Belgium wherein two awards were issued in 2002 and 2004 in favour of Cytec. Following subsequent proceedings (for clarifications and error in the award) before the arbitral tribunal, Cytec obtained leave to enforce the awards in both Belgium and France. The relevant proceedings for our purposes here is the one instituted by SNF against the ICC for alleged breaches of its arbitration rules which resulted in lengthy proceedings and excessive costs.¹¹¹

The *SNF v ICC* litigation turned on the version of the ICC Arbitration Rules that applied to the *SNF v Cytec* arbitration.¹¹² If the 1988 Rules applied, then the ICC could be held liable if it was found to have been in breach of its rules, since this version of the rules did not contain any exclusion of liability provisions unlike the present 1998 Rules. The Court of First Instance found in favour of the ICC and determined that the 1998 Rules applied being the rules in force when the request for arbitration was filed with the ICC. On appeal by SNF, the Paris Court of Appeal held that it is the 1988 version that applied because the arbitration rules were a 'permanent offer' made by the ICC and this offer was accepted by the parties in 1993 when they concluded their arbitration agreement.¹¹³ This argument by the court implies the formation of a unilateral contract. However the court held that on the facts of the case, the 1998 version of the ICC Rules applied because SNF had conducted itself in the arbitral proceedings on the basis of the 1998 version of the ICC Rules.

The arguments made below are supportive of the view taken by the Court of First Instance in *SNF v ICC* and with respect disagree with the reasoning of the Paris Court of Appeal and its conclusion on the applicable version of the rules. An examination of institutional rules shows that some institutions in their arbitration rules provide that a reference in the arbitration agreement to arbitrate under their rules includes an express agreement by the disputing parties to incorporate the institution's arbitration rules *in effect at the date the arbitration commences* into the arbitration agreement. As example, the AAA International Arbitration Rules provide

Where parties have agreed in writing to arbitrate disputes under these International Arbitration Rules or have provided for arbitration of an international dispute by the International Centre for Dispute Resolution or the American Arbitration Association without designating particular

Rules, the arbitration shall take place in accordance with these Rules, as in effect at the date of commencement of the arbitration, subject to whatever modifications the parties may adopt in writing.¹¹⁴

The Introduction to the LCIA Rules on its part provides

Where any agreement, submission or reference provides in writing and in whatsoever manner for arbitration under the rules of the LCIA ... the parties shall be taken to have agreed in writing that the arbitration shall be conducted in accordance with the following rules ('the Rules') or such amended rules as the LCIA may have adopted hereafter to take effect before the commencement of the arbitration.

These rules expressly provide its applicable version so that by filing a notice for arbitration under such rules, the parties are deemed to have expressly consented to arbitrate under the current version of the rules. This position was recognized by the Paris Court of Appeal decision in *SNF v ICC* as well so that according to the court, under such rules, the current version will be the applicable version. By adopting the rules, the disputing parties can be said to have consented to the current version applying to their dispute whenever they file a request or notice of arbitration with the institution.

Some other arbitration rules leave the question open by providing that the disputing parties can choose otherwise. An example is the ICC Rules which provide

Where the parties have agreed to submit to arbitration under the Rules, [that is the ICC Rules] they shall be deemed to have submitted *ipso facto* to the Rules in effect on the date of commencement of the arbitration proceedings, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.¹¹⁵

This provision implies that the arbitration rules applicable to the dispute when it arises may be different from the rules that were in existence at the time the arbitration agreement was concluded. It is obvious that this type of provision leaves open the possibility for the interpretation given by the Paris Court of Appeal.¹¹⁶ The current predominant practice is that arbitration institutions apply the current version of their rules to disputes filed before them.¹¹⁷

A description of arbitral practice in this regard supports an alternative analysis, so that it can be argued that the arbitration institution makes a tender through the publication of its arbitration rules to the international arbitration community. The disputing parties (by themselves or through their lawyers) consider various institutions' arbitration rules and choose one (that meets their perceived needs) to incorporate into their arbitration agreement. This the parties do by either adopting or adapting the arbitration

institution's published and suggested standard arbitration agreements (and rules).¹¹⁸

The institution publishes its arbitration rules to the world with distribution tailored towards possible users including commercial entities. This act of distribution at best amounts to a tender or 'invitation to make offers' because of the nature of its general distribution which is not personalised or sent to any specific person (legal or otherwise) with the necessary legal intention of entering into a contract if accepted. The tender is open and valid but with respect to the institution's arbitration rules applicable at the time when an offer based on the tender is made.¹¹⁹ The tender contains detailed provisions on various aspects of the arbitral procedure, some of which the disputing parties can modify and adapt.¹²⁰

The disputing parties conclude an arbitration agreement opting for institutional arbitration. If the parties wish, they make modifications to the chosen institution's arbitration rules by making express provisions in the arbitration agreement.¹²¹ The parties at this stage do not notify the particular institution of their arbitration agreement or their choice. The institution therefore is not aware of its nomination (and the adoption of its arbitration rules) by the parties. When a dispute eventuates, the parties in performance of the arbitration agreement then make an offer to the chosen arbitration institution. This offer becomes effective when the arbitration institution receives a notification by the parties filing a Notice or Request for Arbitration with the institution pursuant to the provisions of the arbitration agreement.

When the disputing parties make the offer, the arbitration institution must accept the offer for a valid agreement to exist between it and the parties. If the institution rejects or fails to accept the offer made by the disputing parties, it cannot take up the administration of the arbitration reference. It must accept appointment expressly or by necessary implication. Most arbitration institutions upon receipt of the Notice or Request for Arbitration and accompanying documents (including payment of any required sums), expressly acknowledge receipt to the disputing parties before entering into the mandate. This receipt amounts to a formal acceptance of the offer made by the disputing parties. Where the arbitration institution does not issue a receipt but enters into its mandate by administering the arbitral reference, this amounts to an implied acceptance (by conduct) of the offer made by the disputing parties. Thus the institution accepts the offer by accepting the Notice or Request for Arbitration (expressly or impliedly) and processing it.

Where the arbitration institution accepts appointment and (before constituting the arbitral tribunal) declines to act after determining that there is no *prima facie* arbitration agreement providing for arbitration under its arbitration rules, it acts under the terms of this contract existing between it and the disputing parties. This is in compliance with the provisions of most arbitration rules, being the standard form contract on which the parties' agreement is based. Such arbitration rules empower the institution to ascertain the existence of a *prima facie* arbitration agreement before constituting

the arbitral tribunal,¹²² (the arbitral tribunal will also make a decision on its jurisdiction¹²³). The arbitration institution in performing this function will be acting within its mandate and in furtherance of its contractual obligations to the disputing parties.¹²⁴ This may terminate the relationship between it and the disputing parties, except where the parties take steps to remedy (where possible) the default in the arbitral reference. This might entail the disputing parties terminating the existing arbitration agreement and concluding a submission agreement to arbitrate before the particular arbitration institution.¹²⁵

From this analysis, it is obvious that the arbitration institution is aware of its nomination by the disputing parties *before* it accepts its appointment. The institution is also afforded the opportunity of ensuring it has *prima facie* jurisdiction over the dispute and to decline the offer made by the disputing parties. Acceptance by the institution is equally relevant for practical issues such as amount of fees, payment of fees and deposits.¹²⁶ Where the institution rejects its nomination to administer the parties' arbitration, it would not be in breach of any contractual obligations because there is no contract in existence between it and the disputing parties at this time.

As the Paris Court of Appeal reasoned, if it is accepted that the contract between the arbitration institution and the disputing parties comes into existence when the arbitration agreement is concluded, then the arbitration institution in effect, will be bound to apply the version of its arbitration rules in existence at the time of the conclusion of the arbitration agreement. This will require the institution to apply an outdated version of its arbitration rules to the dispute, as in *SNF v ICC* it would have required the ICC to apply its 1988 Rules. Arbitration institutions can get round this result by encouraging the parties to expressly or by conduct (as in *SNF v ICC*) agree to the application of its current rules. It is perfectly foreseeable that some parties may insist on arbitrating under the old rules of the institution that was in existence when they concluded their arbitration agreement. This is especially feasible since it is acknowledged that most arbitration agreements are pre-dispute clauses inserted into commercial contracts.¹²⁷ This possibility makes it even more urgent that those institutions whose arbitration rules contain permissive wording on what version of their rules apply to requests or notice of arbitration filed with them, should replace such clauses with very clear and unambiguous wording.

On the question of the disputing parties' power to modify the non-mandatory provisions of the institution's arbitration rules, where the parties are deemed to make the offer, they can modify any relevant provisions of the arbitration rules in their arbitration agreement before the arbitration institution accepts such offer. In this manner, the agreed terms supersede the provisions in the arbitration rules (as the contract terms). Where the arbitration rules empower the disputing parties and arbitrators to agree otherwise on any provision, the question of the parties' awareness of the applicable version of the arbitration rules before or after concluding their

contract with the arbitration institution has no practical impact on these propositions.¹²⁸ However, if the disputing parties are deemed to make the arbitration institution an offer, then the disputing parties will be bound to the general contract terms (referred to as 'fixed condition' by the authors of *Fouchard Gaillard and Goldman*¹²⁹) contained in the institution's arbitration rules without any powers of unilateral modification.

In summary, the argument canvassed here is that the arbitration institution makes a tender by distributing its arbitration rules to the commercial community at large. It is then for any interested party to make the institution an offer based on its tender or a modified version of it (in this case its arbitration rules). The party to whom the tender is made by the institution is not sufficiently specific as to satisfy the relevant standard applied in the definition of a valid offer (for a bilateral contract). However the 'offer' made by the disputing parties satisfies this standard. The disputing parties' offer is made to a specific and identifiable arbitration institution out of the hundreds of institutions offering comparable services. From arbitral practice recounted above, it is equally possible to interpret the events as the conclusion of a unilateral contract with the arbitration institution making a unilateral offer to the whole commercial world on the basis of the advertisement of its arbitration rules. Whoever accepts this unilateral offer will base its acceptance on the version of the arbitration rules in force on the date of this acceptance.

The critical question then becomes ascertaining the date of acceptance. If the time of acceptance of this offer is regarded as being when the parties concluded their arbitration agreement and opted to arbitrate under the rules of the institution, then the version of the rules applicable will be those at the date of conclusion of the arbitration agreement by the parties jointly. If however the time of acceptance of this unilateral offer is regarded as the date when a request for arbitration was filed with the institution then it will be the version of the arbitration rules in force on the date the request was filed with the institution.

4.1.2 *Categorization of the contract*

The contract concluded between the disputing parties and the arbitration institution can be categorized as an agency or a contract for the provision of service.¹³⁰ The contract is described as an agency on the analysis that the arbitration institution acts for and on behalf of the disputing parties in relation to third parties while as a contract for service on the analysis that the arbitration institution renders certain services to the disputing parties as mandated or instructed by the arbitration agreement. It is not the disputing parties' agent but an independent service provider. There appears to be a direct correlation between the categorization of the contract between the disputing parties and institution and the description of the function performed by the arbitration institution. The less involved the institution is in the arbitral reference the more likely it is that it acts as an agent of the

disputing parties while the more involved the institution, the more likely it is that it acts as principal.¹³¹

In the categorization of the contract between the arbitration institution and disputing parties as an agency, it is argued that the institution organizes and administers the arbitral reference on behalf of the parties acting as their agent. In performance of this function, the arbitration institution acts as the representative of the disputing parties to the arbitrators it appoints to decide their dispute. For performing the agreed functions, the disputing parties remunerate the arbitration institution. The effect of this argument on the arbitrator's contract is that the disputing parties conclude Contract 3 in Figure 4.4 above with the arbitrators in institutional arbitral references.

An examination of arbitral practice again shows that the institution in drafting its arbitration rules publishes certain services it wishes to render to the international arbitration community. The disputing parties accept these terms and incorporate them into their arbitration agreement. So that effectively, the institution determines what services it would render to the disputing parties. The disputing parties are aware of such services (contained in the institution's arbitration rules) and nominate the particular arbitration institution to render those services to them. The service the arbitration institution renders is not in favour of third parties but in favour of the disputing parties themselves. This service to the disputing parties includes functions which the institution itself cannot render (for example deciding the dispute) but for which it will contract third parties (in this case the arbitrators). The arbitration institution therefore acts pursuant to terms it has proposed (and agreed to by the disputing parties) in its arbitration rules. This description of the arbitral practice better represents the institution acting as principal.

As principal, the arbitration institution as an independent contractor or service provider, contracts in its own name and on its own behalf with the disputing parties and third parties. It renders services for which the disputing parties remunerate it.¹³² In the performance of its contract with the disputing parties, it enters into and concludes other contracts with other providers of certain other relevant services. This includes the arbitrators appointed by it in accordance with its arbitration rules to adjudicate the dispute. In performance of its contractual obligations to the disputing parties, the arbitration institution can incur liabilities where it breaches the contractual terms as contained in its arbitration rules. In anticipation of this eventuality some institutional arbitration rules contain an exclusion of liability clause as a contractual term.¹³³ Thus, the arbitration institution can also contract as principal though possibly with greater legal burdens for which in practice, arbitration institutions may not intend to be so bound.

An examination of the relationship as it exists in practice between arbitrators and disputing parties in institutional references supports the proposition of the existence of Contract 3 (in Figure 4.4) between the disputing parties and arbitrator while the institution enters into the arbitrator's contract directly with the arbitrators. The arbitration institution agrees on fees and terms of

appointment directly with the appointed arbitrators. The institution provides the arbitrators with the procedural rules applicable to the resolution of the dispute. The arbitrators render their service to the arbitration institution and not to the disputing parties, albeit, for the benefit of the disputing parties. The arbitration institution remunerates the arbitrators. The arbitrators on their part, accept appointment to the institution, comply with the institution's arbitration rules and deliver their final award to the institution. In all of these the institution acts either as agent of the disputing parties or principal so that the arbitrators are answerable to the institution and disputing parties.

Where the arbitration institution acts as principal, the nature of the relationship between the employer/main contractor/sub-contractor can be applied as an analogy with the disputing parties as employer, the arbitration institution as main-contractor and the arbitrators as sub-contractors. The arbitration institution as the main-contractor contracts with the disputing parties as employers to administer the arbitration in accordance with its arbitration rules. The main contract is between the disputing parties, as 'employer' and the arbitration institution as 'main-contractor'. In furtherance of its obligations under the main contract, the main-contractor (arbitration institution) contracts with the arbitrator as a 'sub-contractor' (arbitrator's contract) to perform the judicial function of the main contract for the benefit of the disputing parties. In this hypothesis, there is no privity of contract between the disputing parties (employer) and arbitrators (sub-contractor) despite the fact that the functions performed by the arbitrators directly affect the disputing parties and are for their benefit. Any complaints from either party (i.e. the arbitrators or disputing parties) would have to be routed through the arbitration institution as the main-contractor with whom they both have contractual relationships.

This analysis is tested against arbitrator challenge procedures under institutional arbitration rules. Generally, institutional arbitration rules empower an aggrieved party to challenge an arbitrator it alleges lacks independence and/or impartiality.¹³⁴ The aggrieved party complains to the arbitration institution. The institution decides the question in the exercise of an administrative power. In applying the employer/main-contractor/sub-contractor concept to such arbitrator challenge procedures, the contract between the disputing parties and institution provides for the institution to decide such matters. The arbitrators accept appointment agreeing to such terms under the arbitrator's contract as well. The disputing parties complain directly to the arbitration institution on the basis of their contract with the institution. The arbitration institution acts as an impartial arbiter in deciding the challenge issues arising between the challenging party and the challenged arbitrator as a contractual obligation, though emanating from two separate contracts. Therefore the need for a contract (to found an action) between the challenging party and the challenged arbitrator does not arise. A disputing party can sustain a challenge on the basis of its contract with the arbitration institution for a breach of the arbitration rules.¹³⁵

Where a party is dissatisfied with the decision of the arbitration institution, it does not seek redress against the institution in a national court on the basis of a breach of their contract. It instead seeks the removal of the challenged arbitrator by a national court. It does not sue the arbitrator directly but files an action against the other party to the dispute seeking to remove the arbitrator. The arbitrator may not even be heard directly in the court proceedings. The other party to the dispute, as it were, defends the challenge application. This is because such an action is not founded on the arbitrator's contract between the arbitrator and arbitration institution neither is it founded on the contract between the disputing parties and the institution, but on the *lex loci arbitri*.

It has been argued above that the cause of action before the national court is not based on contract but on the applicable national law.¹³⁶ The terms of the various contracts between the disputing parties, institution and arbitrator, are subject to mandatory provisions of the law of the seat of arbitration. Thus where the applicable national law empowers a party dissatisfied with the arbitration institution's decision on arbitrator challenge, to appeal the decision before its national courts, such appeal falls outside these contracts though recognized in them.¹³⁷

Thus the authority of the arbitration institution to decide arbitrator challenge issues has been conferred by the principal contract, being the arbitration agreement between the disputing parties. This authority is again confirmed in the contract between the disputing parties and the institution, incorporating the arbitration rules of the institution. In accepting appointment under the arbitration agreement between the disputing parties (incorporating the arbitration rules, which confer such authority on the institution) the arbitrator also gives his consent to the arbitration institution's right to decide any challenge issues that may arise in the course of the arbitration reference. Where the institution acts as agent, the disputing parties and arbitrators also agree to this procedure under Contract 3 (in Figure 4.4). All parties to the various connected contracts thereby consent to this mandate of the arbitration institution and are bound by it. It therefore is a contractual term in the various related contracts.

The conclusion on the formation of this contract is again tested against the procedure for the remuneration of arbitrators. The parties pay the arbitration institution on the basis of their contract with the institution. The institution pays the arbitrator on the basis of the arbitrator's contract. In this regard under the arbitration rules of some institutions, there is a stronger interaction between the disputing parties and arbitrators. An example would be that under arbitration rules disputing parties are permitted to agree on fees directly with the arbitrators or permit the arbitrator to fix his fees,¹³⁸ while disputing parties remunerate the arbitration institution separately for the service it provided in conducting the arbitral reference.¹³⁹ In practice the disputing parties still make all payments directly to the institution even where the amount to be paid is fixed by the arbitrators in the final award. As already

mentioned above the provisions of such arbitration rules are terms of the arbitrator's contract (which is concluded between the arbitration institution and arbitrators), the contract between the disputing parties and arbitrators and the contract between the disputing parties and arbitration institution. Thus on the basis of these analyses and tests, there is a contract between the disputing parties and arbitrators in institutional arbitral references where the institution acts as agent to the disputing parties and not as principal.

4.2 Contract between the arbitrators and disputing parties

The issue examined under this section is whether there is a contract existing between the arbitrators and disputing parties under institutional arbitration references, pursuant to Contract 1 (Figure 4.4). Some commentators have posited that the arbitrator concludes the arbitrator's contract with the disputing parties under institutional references.¹⁴⁰ An analysis of this issue through arbitral practice agrees with this proposition and suggests that in certain situations a contract exists between the arbitrators and disputing parties under institutional arbitral references.

It has been shown that the arbitration institution contracts with the arbitrator (the arbitrator's contract) to perform the adjudicatory obligation requirement in its contract with the disputing parties. The performance of this obligation by the arbitrator includes the rendering of both judicial and non-judicial services to the arbitration institution in favour of the disputing parties. Dr Melis has described some of these functions as, 'ad hoc phases' of the institutional arbitral reference, which include where 'the arbitrators determine the proceedings in direct contact with the parties'.¹⁴¹ This by necessary implication raises the question of the existence of a possible contract directly between the disputing parties and the arbitrators (just like in ad hoc arbitration references).

From the formation of the arbitrator's contract above under institutional arbitration references, the relationship between the disputing parties and arbitrators is not as direct as it is in ad hoc arbitration. Here there is the active involvement of the arbitration institution,¹⁴² which undertakes to perform some of the promises undertaken by the disputing parties (and arbitrators) in ad hoc arbitration references.¹⁴³ Thus the disputing parties contract out, as it were, some of these obligations to the arbitration institution. The institution performs these functions as part of its obligations to the disputing parties under its contract with them.

However, there are obligations that the disputing parties and arbitrators must perform towards each other directly as a result of their interaction in the arbitral reference. There are two propositions that can be canvassed to explain the nature of this interaction. The first is the existence of another contract directly between the arbitrators and disputing parties. This mirrors the effect of the arbitrator's contract under ad hoc arbitral references. The second proposition hinges on the institution contracting as principal and

thus asserts that in that situation, there is no contract existing between the disputing parties and arbitrators. Their interaction is based on the performance of two different but related or collateral contracts, which they both have concluded with the institution over the particular arbitral reference.

The arbitrator performs various obligations directly affecting the disputing parties in the arbitral reference. Such obligations include the arbitrator performing his mandate independently and impartially, granting the parties a fair hearing, and personally making the award.¹⁴⁴ The disputing parties on their part contract to comply with the orders and decisions of the arbitral tribunal and render it all necessary assistance in the discharge of its obligations in accordance with the institution's arbitration rules. These obligations are part of the terms contained in both the arbitrator's contract and the contract between the disputing parties and arbitration institution.

It is here acknowledged that the finding of a contract regulating these 'ad hoc phases' between the disputing parties and arbitrators may act as the basis of legal recourse against an arbitrator who fails to perform these functions by the disputing parties. On the basis of the assertion that the institution contracts as principal, a defaulting arbitrator can only be contractually liable to the arbitration institution on the arbitrator's contract even where the disputing parties (and not the institution who is the party to the contract) suffer damage resulting from his default. This outcome (of the disputing parties suffering loss and liability resting on the institution, which does not suffer loss) can be argued as the major shortcoming of this argument. However, it is suggested that the disputing parties will not be left without remedy since they can seek redress directly from the arbitration institution on the basis of their contract with the institution. The terms of the arbitrator's contract with the disputing parties are a mirror image of relevant provisions of the arbitrator's contract under ad hoc arbitration references, emanating from the arbitration agreement between the disputing parties,¹⁴⁵ and the relevant provisions of the arbitration rules of the institution. In summary therefore, there is no contract between the disputing parties and arbitrator in institutional references.

Chapter summary

This chapter examined various methods of appointing arbitrators to determine the process for the formation of the arbitrator's contract in both ad hoc and institutional references. It established that under ad hoc arbitral references, only the disputing parties and arbitrator conclude the arbitrator's contract when the arbitrator accepts appointment. Where an appointing authority is nominated to perform assigned functions, a contract (not relevant to the arbitrator's contract) may be concluded between the appointing authority and disputing parties. Such contract affects neither the relationship between the disputing parties and arbitrator nor the formation of the arbitrator's contract. In situations where national courts become involved

in constituting the arbitral tribunal, its role does not affect the contractual nature of the relationship between the disputing parties and arbitrators nor the formation of the arbitrator's contract.

In institutional references, the presence of the arbitration institution alters the matrix of these relationships and the parties to the arbitrator's contract. Again, through the analysis of various arbitrator appointment methods in institutional arbitration references, the existence of two contracts was established. These are (i) the contract between the disputing parties and arbitration institution and (ii) the arbitrator's contract between the arbitration institution and the arbitrator. These contracts all contain practically the same terms (being back-to-back contracts) and all emanate from the arbitration agreement. The following four contracts¹⁴⁶ have been identified

- The arbitration agreement between the disputing parties.
- The contract between the arbitration institution and the disputing parties.
- The contract between the arbitration institution and the arbitrator when the institution acts as principal.
- A possible contract between the arbitrator and the disputing parties when the institution acts as agent of the disputing parties.

5 Terms of the contracts

In the preceding chapters it was shown that the fundamental and enabling contract is the arbitration agreement between the disputing parties in which they opt for arbitration either ad hoc or under the arbitration rules of a particular institution. Pursuant to the performance of the arbitration agreement, the disputing parties conclude the arbitrator's contract with the appointed arbitrator in ad hoc arbitral references. Under institutional references, the arbitration institution itself concludes the arbitrator's contract with the arbitrator either as principal or as agent of the disputing parties. The institution also concludes another contract with the disputing parties, which represents the arbitration institution's mandate to act pursuant to the arbitration agreement. This chapter examines the terms in these contracts which may be either expressly agreed between the parties to the contracts or implied by law, arbitral practice or fact.¹ This chapter examines thirteen of such terms which may be contained in these contracts. The term on limitation of liability is examined in Chapter Six under remedies. These contractual terms are taken from the provisions of arbitration rules and laws, and decisions of various national courts.²

The terms of a contract describe what obligations the parties to the contract have agreed to perform. Such terms may be express or implied (by custom, usage or statute).³ Identifying the terms upon which the parties contracted is important since these terms are the obligations that will be interpreted and enforced as reflecting the agreement of the parties to the arbitrator's contract. In addition, contractual terms do not all have the same value to parties to the particular contract. Some contractual terms are of a fundamental nature so that a breach of such terms will bequeath a right of termination or repudiation on the party who suffered the consequence of the breach. This right to terminate or repudiate the contract is in addition to the right to claim damages for such breach. These terms are referred to as conditions or fundamental terms. There are other terms which can be described as ancillary to the main purpose of the contract. These terms are not fundamental or indispensable to the performance of the contract so that a breach of such terms will not grant a right of repudiation or termination of the contract. Upon the breach of such terms the parties will continue to perform their obligations

under the contract but the party not in breach will acquire a right to claim damages for the breach. These terms are referred to as warranties.⁴

The breach of a term of the arbitrator's contract which is of a fundamental nature (in the sense of the term being categorized as a condition) by the arbitrator, will result in the disputing parties or institution acquiring the right in contract to terminate his contract through the removal of the arbitrator. Where the arbitrator is in breach of a non-fundamental term (in the sense of the term being a warranty), the disputing parties or institution will acquire a right to sue the arbitrator for damages but not to terminate the arbitrator's contract. A disparity between arbitral practice and these statements is immediately apparent. In arbitral practice, even where one party to the arbitrator's contract is in breach of a warranty, neither party pursues an action to claim damages for such a breach. The fact that the parties do not pursue such a claim does not imply that they do not have a right to pursue such a claim in contract. This is one of the interesting things about analysing the arbitrator's contract in this way.

In addition is the interplay of the peculiar nature of the primary purpose of the arbitrator's contract, which is the rendering of a judicial service, and the consequent immunities imposed in one form or the other on this contract. From case law, it appears that national courts are willing to accept a claim for damages where there has been a fundamental breach of the arbitrator's contract. It is acknowledged that the breach of a fundamental term of the arbitrator's contract may also result in the setting aside of the final award. However, issues on the award are not covered in this book since matters of annulment or setting aside of the arbitral award are outside the purview of the arbitrator's contract.⁵ Examples of fundamental obligations of the arbitrator are qualifications of the arbitrator, disclosure, impartiality and independence by the arbitrator and granting the parties fair hearing (observance of due process). All other obligations of the arbitrator under the arbitrator's contract are warranties. Examples of fundamental obligations of the disputing parties are payment of the fees of the arbitrator and institution and possibly to diligently pursue the arbitral reference. All other obligations of the disputing parties under the arbitrator's contract or its contract with the institution are warranties. On the part of the institution, its fundamental obligation is to diligently perform the role it has undertaken under its arbitration rules. Any other obligation is incidental to this and so will be regarded as a warranty.

It must be remembered that just because a contracting party has a right, it does not mean that such a party must enforce the right so that even where a fundamental term of these contracts may have been breached, the non-breaching party may decide not to pursue the right under the arbitrator's contract or the contract with the institution. An example is where the arbitrator or institution is in breach of a fundamental term which could also be the basis for a setting aside application, the disputing parties may choose (having reserved their position) not to terminate the arbitrator's contract (in other

words not to sue the arbitrator or arbitration institution) but instead to attack the resultant award on the same grounds. This is a choice to pursue the claim under another contract (in this case the arbitration agreement) or statute (for example national arbitration law or New York Convention). The exercise of such right will therefore reside in the domain of the arbitration agreement since the contractual life of the arbitrator's contract would have expired at the stage of filing the application to set aside the arbitral award.

The rights and duties examined in this chapter arise under the arbitrator's contract and/or the contract between the institution and the disputing parties. Where there is a contract between the disputing parties and arbitrator, then such rights and duties are owed as between them and enforceable as such. The direct consequence of this is that where the arbitration institution contracts as principal so that it concludes the arbitrator's contract with the arbitrator, the institution itself will owe duties and be entitled to corresponding rights under the contract. It is obvious that the terms of the arbitrator's contract will differ depending on the parties to it.

The essence of the arbitrator's contract is to empower the arbitrator, disputing parties and arbitration institutions to give effect to the purpose of the arbitration agreement. Whereas the arbitration agreement empowers the arbitrator to make a decision on the dispute between the disputing parties, the arbitrator's contract empowers him to go about doing this. This chapter examines: (1) the source of these rights and obligations and (2) thirteen of such rights and duties decipherable from these sources.

1 Sources of the terms in the arbitrator's contract

The terms in the arbitrator's contract reveal the powers, rights and duties the parties to the various contracts exercise in the arbitral reference, and all these powers, rights and duties emanate from the same sources.⁶ These sources are: (1.1) national laws and international conventions, (1.2) the arbitration agreement, and (1.3) arbitration rules incorporated into the arbitration agreement.⁷

1.1 National laws and international conventions

The source of the primary power to enter into an arbitration agreement (conferred on the disputing parties) is national laws or international conventions. This refers back to the analysis of the juridical nature of arbitration in Chapter Two where it was stated that consensual arbitration can only take place when the relevant state permits the disputing parties to opt out of litigation, within certain parameters, into arbitration over the particular subject matter of their dispute. The disputing parties are empowered under various national laws to agree on certain procedural rules themselves and to empower the arbitrator to make decisions on various aspects of the arbitration reference. These very broad powers granted to the disputing parties are

subject to any mandatory provisions of the *lex loci arbitri*. The procedural powers, rights and duties granted under national laws are predominantly default provisions that apply where the disputing parties have not made contrary provisions in the arbitration agreement. Therefore the provisions agreed by the parties in the arbitration agreement take precedence over these statutory default provisions subject to any applicable mandatory provisions.

1.2 Arbitration agreement

National arbitration laws grant disputing parties great powers over the determination of the scope of their arbitration agreement and the arbitral procedure in recognition of the principle of party autonomy. The disputing parties exercise these powers either expressly by making provisions in the arbitration agreement or impliedly by adopting arbitration rules⁸ (institutional or ad hoc). Where the disputing parties fail to exercise these powers, national arbitration laws make default provisions to apply as such or to fill in gaps in existence. Professor Lew in agreement with this assessment is of the view that

The first issue is the extent of the arbitrators' power and authority. The overriding determining factor is party autonomy. Hence the starting place to look is the arbitration agreement. It is ... the source of the power and authority of the arbitral tribunal.⁹

1.3 Arbitration rules

The disputing parties may incorporate a defined set of arbitration rules as the applicable procedural rules into the arbitration agreement.¹⁰ This set of rules grants certain rights to the arbitral tribunal (and arbitration institution).¹¹ The incorporation of the provisions of these arbitration rules into the arbitration agreement also amounts to an indirect grant of the powers contained in them by the disputing parties on the arbitrator (and arbitration institution). The version of the arbitration rules that would be relevant to these contracts may differ. From the analysis of this issue in Chapter Four, the version of the arbitration rules that applies to the contract between the disputing parties and institution is the version the parties agree to either expressly or by implication. This may be the arbitration rules in force at the time the arbitration agreement was concluded or the version in force at the time the request or notice of arbitration was filed with the institution.¹² To identify the version of the arbitration rules that will apply to the arbitrator's contract under institutional references, a different analysis may be applied since this contract is obviously a bilateral one.

According to the analysis of the formation of the arbitrator's contract made in Chapter Four, the institution makes the arbitrator an offer which the arbitrator accepts. This offer is made to the arbitrator after the conclusion of the contract between the institution and the disputing parties, so that

the arbitrator's contract is made after the request or notice of arbitration has been filed with the institution. From arbitral practice, the institution usually sends to the arbitrator the version of its arbitration rules in force as at the date of communicating with the arbitrator. This may simply be because institutions take it for granted that it is that version of their arbitration rules that will govern the reference and their expectations of the arbitrator. However with the decision of the Paris Court of Appeal in *SNF v ICC*³ in February 2009 and the analysis of those arbitration rules that contain permissive wording on the applicable version of their arbitration rules, institutions will now be minded to clarify this issue to arbitrators they make offers to. Where an arbitrator has been made an offer to render service on the terms of a version of the arbitration rules different from the version of the rules applicable to the contract between the institution and the disputing parties, this may create difficulties. An example can be taken from the *SNF v ICC* dispute where, under the 1988 ICC Rules there was no provision for exemption of liability while such a provision is contained in the 1998 Rules. Since the argument made in this book is that the two contracts contain mirror image terms, there is a temptation to argue that whatever version of the rules applies to the contract between the institution and the parties, the same version should apply to the arbitrator's contract. The important thing is to note that the older version cannot be imputed on the arbitrator and they must agree to the version which applies.

Four distinct sources have been identified as conferring the various powers and rights exercised by disputing parties, arbitrators and arbitration institutions in international commercial arbitral references, from which the terms of the arbitrator's contract are derived. The question that arises then is whether these sources are complimentary or whether there is any hierarchy amongst them. There appears to be a clear hierarchy of these sources. As regards non-mandatory provisions of the national law or international convention, any express agreement of the disputing parties prevails. However the mandatory provisions of the national law or international convention take precedence over the express or implied agreement of the disputing parties. The provisions of arbitration rules supplement the arbitration agreement and so apply to the extent that the disputing parties have not expressly provided otherwise while its mandatory provisions supersede any contrary express provisions in the arbitration agreement. There is almost uniformity in the provisions of these sources on the matters examined below, most of which are of a non-mandatory nature.

2 Terms of the arbitrator's contract

The terms contained in the arbitrator's contract examined below are not exhaustive. The parties to the arbitrator's contract can add to the terms in the exercise of their power of party autonomy. However the terms examined below are considered to be important and are also predominantly

discernible from every arbitrator's contract. These terms are: (2.1) availability of the parties, (2.2) any special qualifications of the arbitrator, (2.3) scope of the arbitrator's powers, (2.4) compliance with the arbitration agreement and chosen procedural rules, (2.5) compliance with decisions of the arbitral tribunal, (2.6) remuneration of the arbitrator and institution, (2.7) confidentiality, (2.8) equality of treatment and fair hearing, (2.9) disclosure, independence and impartiality of the arbitrator, (2.10) arbitrator challenge and replacement, (2.11) arbitrator to decide the dispute, (2.12) choice of law, (2.13) and dispute resolution mechanisms. These terms are examined under both the arbitrator's contract and the contract between the institution and the disputing parties.

2.1 Availability of the parties

This is a duty mutually undertaken by the arbitrator and the disputing parties and so will arise under both contracts. In ad hoc references, the arbitrator and disputing parties owe each other this duty directly. Under institutional references, the arbitrator owes this duty to the institution on the arbitrator's contract while the disputing parties owe this duty to the institution on their contract with it. The arbitrator contracts to personally attend the arbitral proceedings and hearings and render an award within any time limits provided under the arbitration agreement (and arbitration rules) or within a reasonable time if no time is agreed or provided under the arbitration law or rules. The disputing parties on their part promise to also attend any scheduled hearing, file documents within time and diligently pursue the arbitral reference. This term ensures the arbitrator is contractually committed to the disputing parties or arbitration institution for the duration of the arbitration proceedings. Therefore on the basis of this term, the arbitrator must be available at all relevant times for the business of the arbitral reference and will be in breach of the arbitrator's contract where he causes undue delay due to any unscheduled absences.

In some jurisdictions, such undue delay is also a breach of the relevant statutory law.¹⁴ So even where the arbitrator's contract does not expressly require the arbitrator to conduct the arbitral reference without undue delay, and the arbitral reference is subject to a law that so requires, the arbitrator, parties and institution must all diligently pursue the arbitral reference. In jurisdictions where this is a mandatory provision, then the pursuit of the arbitral reference without undue delay becomes a term implied into the two contracts which are binding on all parties.¹⁵ For example, where the seat of arbitration is in London, s 33 of the English Arbitration Act (by virtue of s 4 (1) and Sch 1) requires the tribunal to

Adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.¹⁶

This contractual term extends to situations where the arbitrator (or disputing parties) perceives that the award will not be rendered within any applicable time limits. The arbitrator (or the disputing parties) must raise this possibility and seek extension of such time limit before it lapses or expires, either from the arbitration institution, the disputing parties or any relevant national court.¹⁷ This makes time of the essence under such circumstances and under such laws or rules. Where the time limit is not extended and it lapses, any award rendered thereafter will be rendered outside the applicable time limit and may be of no legal effect. In such a situation, the arbitrator by not complying with the term on time limit, causes the disputing parties damage, making the award of no practical use to them. The loss suffered by the disputing parties is in wasted costs and time expended in pursuing the arbitral reference.

Since the observance of the applicable time limit is a term under the arbitrator's contract and the arbitrator's failure is a breach of this term, the question that arises of whether the disputing parties can recover any ensuing damages (above nominal damages) from the arbitrator himself or the institution.¹⁸ The answer to this question (applicable to breaches of other terms of the arbitrator's contract as well) is dependent on the law applicable to the arbitrator's contract and may be subject to any applicable legal protections or limitations of liability in favour of the arbitrator and institution.¹⁹

The disputing parties on their part also contract to abide by the timetable agreed with the arbitrators and diligently pursue the arbitration without undue delay. This implies that a dilatory party, whose conduct in the arbitral proceedings causes delay, is in breach of this term of the two contracts. An example is a respondent who seeks unreasonable extensions of time and fails to attend arbitral hearings without prior notification, or fails to file documents within agreed times. If the delay was caused by the disputing parties, as long as the arbitrator and institution are paid their fees, it is difficult to see what other loss they would have suffered. There is an obvious case for a claim for damages for delay against the disputing parties on the basis of the contracts, but this will amount to a claim for nominal damages only.

In practice there is an obvious tension between this obligation of the parties and that of the arbitrator to avoid unnecessary delay in the arbitral reference. Where the two terms are both contractual, and the disputing parties (usually one of them) breach this duty by delaying the proceedings, the arbitrator (or institution) shall not be liable to the disputing parties or more appropriately, to the disputing party who suffers loss as a result of the delay of the other disputing party. This is one of the consequences of adopting the presumption that the disputing parties contract jointly. However the diligent member of the disputing parties' group is not left without remedy since this breach will fall under the terms of the arbitration agreement (but not under the contracts examined in this chapter) so that it can pursue a claim for this delay on the basis of the arbitration agreement. However where, as under s 33 (1) (b) of the English Arbitration Act, the arbitrator's duty is a mandatory provision of

the law of the seat of arbitration, and so an implied term of the arbitrator's contract, this implied term will take precedence over the contractual duty (to diligently pursue the arbitration) owed by the disputing parties.

Where the institution contracts as principal and the arbitrator breaches this term, the arbitration institution will also suffer loss where the disputing parties have successfully sued it (for the same breach of the arbitrator) under the terms of the contract between them and the institution, so that the loss suffered by the arbitration institution will be the damages awarded against it in favour of the disputing parties. The institution can then effectively claim this same amount from the arbitrator for breach of this term. Of course if the institution also contributed to the delay, then it may be required to bear some of the burden of the claim by the disputing parties. This process looks circuitous and it is very likely that this process is not within the contemplation of the individuals and entities involved in international commercial arbitration as they conclude these various connected contracts.

2.2 Special qualifications of arbitrators

Where the disputing parties have indicated or expressly provided in the arbitration agreement (or subsequently but before the appointment of the arbitrator) any special technical or specialist qualifications that the appointed arbitrator should possess, such requirement becomes a term of the arbitrator's contract and the contract between the disputing parties and institution. It is one of the fundamental terms of the arbitrator's contract such that, by accepting appointment, the arbitrator represents to the appointing parties (or arbitration institution) that he is possessed of the relevant special qualifications.²⁰

A breach of this term is also a disqualifying factor for which the other party to the arbitrator's contract acquires a right to remove the arbitrator, making the term a fundamental one or a condition. Where the other party to the arbitrator's contract decides not to remove the arbitrator, then that party has elected to treat the breach of this condition as the breach of a warranty.²¹ Examples of such special qualifications include the requirement that the arbitrator must be a surveyor, architect, 'commercial man' or lawyer. These requirements are said to be special because generally speaking an individual does not require any such special qualifications to be appointed an arbitrator. In commodity trade arbitration references, an arbitrator may be required to be a 'commercial man',²² a person engaged in the trade²³ or who belongs to the particular trade association.²⁴ The Court of Appeal (England) has held that the retirement of an arbitrator as an 'executive' from his company during the arbitral process but who was an 'executive' at the time he was appointed (in satisfaction of the requirements of the arbitration agreement and the two contracts) was not a disqualifying factor.²⁵

The disputing parties (or arbitration institution with the consent of the disputing parties) may waive such a breach so as to remove its disqualifying

element by ratifying the appointment of the arbitrator lacking such pre-condition. Such waiver may be express or implied. Where the arbitrator does not possess a special qualification required under the arbitration agreement, but the disputing parties consent to his appointment without such qualification, the parties' consent is a waiver of the earlier requirement so as to vary this term of the arbitration agreement and their contract with the institution but not the arbitrator's contract.²⁶ The key issue here is that the arbitrator needs to disclose this deficiency immediately he becomes aware of it. The disputing parties may then raise objections in accordance with the relevant challenge procedures, or expressly waive the requirement. Where the disputing parties fail to challenge the arbitrator after disclosure, and continue with the arbitral proceedings without any complaints, they are deemed to have waived the pre-condition or ratified the appointment as is. The result of such waiver or ratification is to bar the disputing parties from challenging the resultant award on the basis of this breach. Where however, the arbitrator knowingly withholds such information from the disputing parties (or arbitration institution), he may not only be in breach of the arbitrator's contract but may also incur liability for fraudulent misrepresentation. This assertion is supported for example by the Model Law under which an arbitrator may be removed for not possessing any required qualification.²⁷

It is self evident that to be liable on this term, the arbitrator must be aware of the special qualification or pre-condition at the time he is approached to act as an arbitrator in the particular arbitral reference whether as party appointed arbitrator or presiding arbitrator.²⁸ This point was applied in *Continental Grain Co v China Petroleum Technology & Development Corporation*, where the applicants were mistaken as to the arbitrator being legally qualified and sought to remove him when it turned out otherwise. The English High Court held that there was no contractual basis for the applicant's belief which was a unilateral mistake and that a mistake of such a nature was inadequate to vitiate the arbitrator's appointment.²⁹

In the same manner, the arbitrator cannot be in breach of this term (whether as an express or implied term) where the disputing parties agree on the special qualification after he has accepted appointment. Such change is a unilateral amendment of a fundamental term of the arbitrator's contract (or the disputing parties' contract with the institution).³⁰ In such situations, the disputing parties (or arbitration institution) will be in repudiatory breach of the arbitrator's contract and will be liable to the appointed arbitrator in damages if his mandate is terminated on this ground.

Where an arbitration institution appoints an arbitrator lacking any specialist qualifications notified by the parties in their arbitration agreement and their contract with the institution, the liability of the institution will depend on the capacity in which it concluded the arbitrator's contract. The breach by the institution is a breach of its contract with the disputing parties. Where the institution contracts with the arbitrator as agent, the disputing parties may be bound by the appointment of such arbitrator, especially where the

arbitrator was not aware of any such requirement before he accepted the appointment. The institution will be liable to the disputing parties under the principles of agency for this breach. Where the institution contracts with the arbitrator as principal, it will then be in breach of its contract with the disputing parties under which its liability will arise. This term of the arbitrator's contract is therefore a fundamental one or a condition so that its breach will entitle the other party to the arbitrator's contract to terminate the contract and seek damages against the arbitrator who had knowledge that he lacked some required expertise and still accepted appointment without making relevant disclosure of his lack of qualification.

2.3 Scope of the arbitrator's powers

The scope of the issues the arbitrator is contracted to decide will be contained in the arbitration agreement.³¹ This will also include the scope of the powers exercisable by the arbitrator. It is important that the issues to be decided and the powers exercisable by the arbitrator are clearly identified. The scope of the powers exercisable by the arbitrator are usually supplemented by those provided in the arbitration rules and the arbitration law of the seat of arbitration.³² The parties to the arbitrator's contract can opt out of some powers or agree to confer some powers not provided for in the applicable arbitration rules. Any limitation on the powers exercisable by the arbitrator is an express term of the arbitrator's contract.

As a contractual term, the arbitrator will be in breach of contract where he exceeds the powers conferred on him in the arbitrator's contract.³³ The fact that excess of power is a ground on which the final award may be set aside,³⁴ may elevate such a term to a condition or a fundamental term.³⁵ An example of acts constituting an excess of power is a failure to receive the evidence of a material witness or receipt of inadmissible evidence.³⁶ This implies that the disputing parties may be entitled to recover money damages from the arbitrator, or the award may be remitted back to the arbitrator, a form of specific performance of the arbitrator's contract, so that the arbitrator can decide in accordance with the powers conferred upon him.

Most arbitration laws³⁷ and rules³⁸ grant various powers to the arbitrator for the effective and efficient conduct of the arbitral proceeding. The arbitrator is also empowered to decide certain matters that the disputing parties are empowered to decide but fail to agree on,³⁹ and to exercise powers incidental to his or her compliance with his or her mandate.⁴⁰ The exercise by the arbitrator of these powers is in fulfilment of the purpose of the arbitration agreement. This implies compliance with the provisions of institutional arbitration rules (in institutional arbitration) since these rules form part of the arbitration agreement. Article 29 (1) LCIA Rules codifies the practice of arbitration institutions and their decision-making powers. It states

The decision of the LCIA Court with respect to all matters relating to

the arbitration shall be conclusive and binding upon the parties and the Arbitral Tribunal. Such decisions are to be treated as administrative in nature and the LCIA Court shall not be required to give any reasons.

2.4 Compliance with the arbitration agreement

All parties to the arbitrator's contract and the institution's contract owe a duty to comply with the arbitration agreement.⁴¹ Where the institution contracts as principal or agent, this duty is owed by both the arbitrator and the institution to each other, while in ad hoc references the duty is owed by the disputing parties and arbitrator to each other. The institution also owes this duty to the disputing parties under its contract with them. As already mentioned, the arbitration agreement includes any adopted arbitration rules. In the decision of the US District Court for the Southern District of New York in *York Hannover Holding A.G. (Switzerland) v American Arbitration Association (USA)*⁴² the Court held that the petitioner by pursuing arbitration before the American Arbitration Association (AAA) had agreed to incorporate the arbitration rules of the AAA by reference, into the purchase agreement between the petitioner before the court and the claimant in the arbitration (McDermott) and the court must defer to the decision of the AAA on the challenge by the petitioner of the arbitrator appointed by the AAA. Furthermore, the petitioner was bound by the appointment of a substitute arbitrator to replace the resigned arbitrator appointed by the petitioner made by the AAA in accordance with its arbitration rules.

The arbitration process is controlled by the disputing parties and the arbitrator to the extent that the disputing parties delegate their powers to him. The terms of the arbitration agreement are agreed between the disputing parties and cannot be derogated from by the arbitral tribunal without the consent of the disputing parties.⁴³ Any variation will be made with the agreement of the disputing parties. The variation of the arbitration agreement (to which the arbitrator is not party and so cannot vary) can only be made by the disputing parties. Such variation will also affect the arbitrator's contract and the institution's contract.⁴⁴ This duty encompasses various procedural issues such as, arbitrator disclosure, impartiality and independence, observance of due process,⁴⁵ applicable time limits and powers of the arbitrator, applicable law,⁴⁶ and the various procedural steps to be taken by the disputing parties including the functions ascribed to the arbitration institution, all to be complied with in a timely manner and in good faith.⁴⁷ The ICC Rules in this regard provide, 'By accepting to serve, every arbitrator undertakes to carry out his responsibilities in accordance with these Rules.'⁴⁸

Choosing the seat of arbitration is one of those decisions the disputing parties can and do make. Where the disputing parties exercise this power and make a choice but the arbitral tribunal relocates the seat of arbitration chosen by the disputing parties without the consent of the parties, the question that arises is whether this change is a unilateral variation of

the contracts examined. This is a question that deals with the power of the arbitrator. Where the applicable arbitration rule allows the relocation of the juridical seat at the sole discretion of the arbitral tribunal, the arbitrator will not be in breach when it relocates the arbitral seat. If such relocation is dependent on certain conditions, on meeting those conditions, the arbitral tribunal will not be in breach. However, if the relocation is unauthorized or conditions for such relocation are not met, then the arbitral tribunal will be in breach of this term of the arbitration agreement, and the arbitrator and institution's contracts. An example of the former situation is the notorious arbitration of *Himpurna California Energy v The Republic of Indonesia*⁴⁹ under UNCITRAL Rules with Jakarta as the juridical seat. The facts of the arbitral proceeding relevant to this issue are briefly that a third non-party to the arbitration agreement obtained an injunction against the arbitral tribunal from continuing with the arbitral proceedings. Thereafter, the arbitral tribunal relocated the arbitral proceedings to The Hague (from Jakarta) to hear witnesses (which is permitted under Article 16 (2) UNCITRAL Rules) without changing the juridical seat of the arbitration. In this arbitration, the arbitral tribunal acted within the terms of the arbitration rules as contained in the arbitration agreement applicable to the dispute and was therefore not in breach of the arbitrator's contract. This is despite the fact that one party to the dispute did not consent to the relocation.

In another case, *ICC Case No 10623*, an arbitration between a European construction company and an Ethiopian Municipal Authority under the FIDIC Terms of Contract over an infrastructure project in Addis Ababa, where the juridical seat of the arbitration was Addis Ababa.⁵⁰ There was a dispute as to jurisdiction because the General Conditions referred to 'ICC arbitration in Addis Ababa' while under the Special Conditions in the contract of one of the parties, it referred to 'arbitration in Addis Ababa under the Civil Code of Ethiopia'. The arbitral tribunal held hearings on the jurisdictional issue in Paris pursuant to Article 14 (2) ICC Rules (though most witnesses were resident in Ethiopia, the tribunal had powers under the ICC Rules to do this). Following this, the Ethiopian party challenged the arbitrators for lack of impartiality/independence. This challenge was rejected by the ICC court upon which the challenging party applied to the Ethiopian courts for the removal of the arbitrators. The Ethiopian Supreme Court issued an injunction pending its decision on the challenge issue which the arbitral tribunal disregarded, continuing the hearing and issuing an interim award confirming its jurisdiction. In relocating the hearings the arbitrators were not in breach of the arbitrator's contract since the applicable arbitration rules permitted them to do so.

2.5 Compliance with decisions of the arbitral tribunal

The disputing parties owe the arbitrator a duty to comply with his decisions. For example the CIETAC Rules provides in summary, 'The disputing parties

shall proceed with the arbitration in *bona fide* cooperation.⁵¹ This requirement is not just a duty imposed on the disputing parties in the arbitral reference but also a term of the arbitrator's contract. This duty involves an undertaking by the disputing parties not to disrupt, delay or in any other way frustrate the conduct of the arbitral proceedings, and is similar to the term examined above of diligently pursuing the arbitral reference.⁵² The consequences of such failures was summarized by Colman J in the *MV Pamphilos*

If parties will not cooperate on such matters as inspection, the taking of samples, and disclosure of documents, the resolution of their dispute by arbitrators becomes far more difficult and far more expensive.⁵³

Where a disputing party deliberately causes delay, for example by incessant applications for adjournments and extensions of time or frivolous arbitrator challenges, such actions are in breach of the terms of the arbitrator's contract. This is therefore not just a requirement to act in good faith but imposes a positive duty on the disputing parties individually and collectively. Where there is a breach of this duty, it would usually be by one of the disputing parties, so that any consequence will be against that particular party. But it is not just one of the disputing parties that is a contracting party to the arbitrator's contract but all the disputing parties, so that again the question that arises where one of the parties is in breach of this term in the arbitrator's contract, is whether this breach is to be attributed to all the disputing parties as members of a contracting group. It appears that since the parties to the arbitration agreement jointly and severally appoint the arbitrator (and so conclude the arbitrator's contract with him), technically they shall equally be jointly and severally liable for the duties they owe under the arbitrator's contract. However, where this term is also implied into the arbitration agreement as discussed above then, its breach is also a breach of the arbitration agreement so that the delaying party can be sued by the other party on the arbitration agreement.

Where the institution contracts as principal or agent, it gives an undertaking that the disputing parties will comply with the decisions of the arbitrator on the basis of its contract with the disputing parties.⁵⁴ Where one of the disputing parties is in breach of this promise the question that arises is whether the arbitrator will have recourse against the institution (as the contracting party on the arbitrator's contract). Technically, the arbitrator will have such recourse if the institution contracts as principal. The arbitrator will definitely have a right of suit against the disputing parties as principals where the institution contracts as agent.

However, in arbitral practice under institutional references, the arbitrator will notify the institution of the disputing parties' breach and the institution will then take action against the disputing party in default.⁵⁵ The institution will be acting on the basis of its contract with the disputing parties (in which the defaulting party had contracted to comply with the arbitration

rules, which it has now breached). In such situations, all that the arbitrator does is to draw an adverse inference from the actions of the defaulting party. It is suggested that the arbitrator can rightly do this on the basis of the arbitrator's contract as provided for in the arbitration rule, irrespective of whether the institution contracts as principal or agent. Such inference is not treated as a remedy for the breach by the defaulting party but in exercise of the powers of the arbitrator incidental to his judicial function. The effect of this arbitral practice is that the arbitrator does not take any action on the basis of his contract (especially since he has suffered no damage or loss by the dilatory action of the disputing party) since he has a more potent weapon at his disposal, which is the exercise of his power to draw adverse inferences by the action or inaction of the defaulting party.

This term can be categorized as an innominate term. Its breach may lead to a delay of the arbitral proceedings or to its termination, so that the gravity of the breach and its effect on the arbitral reference and the contracts of the arbitrator and institution, will determine whether it will be treated as a condition or a warranty. So for example, if the effect of its breach is to delay the arbitral reference, this will be a breach of a warranty, which will not entitle either party to the arbitrator's contract to terminate it. However if the effect of the breach leads to the termination of the reference, for example where the claimant party does not pursue the arbitral reference, then the term will be a condition, the breach of which not only leads to the termination of the arbitral reference but also the arbitrator's contract and the contract with the institution.

2.6 Remuneration of the arbitrator and institution

This term of the arbitrator's contract regulates issues relevant to the fees payable to the arbitrator for completing the task or his mandate.⁵⁶ A similar term exists in the institution's contract, which regulates the fees payable to the arbitration institution for the service it renders in administering the arbitral reference. There are a few preliminary points to note at the outset of the examination of this term. In ad hoc arbitral references the arbitrator agrees fees directly with the disputing parties. Under institutional references the practice differs. In some institutions, the arbitrator also fixes his fees, which is not determined by the institution itself. However in most institutions, the arbitration institution itself fixes the fees payable to the arbitrator. From arbitral practice, under ad hoc references, the arbitrator's fee is agreed with the arbitrator while in some institutions, the fees are fixed unilaterally by the institution. In the same manner, most institutions unilaterally fix the fees they charge for their service and this is usually published on their website and in their arbitration rules. It does not appear that these published scales of fees chargeable by institutions are subject to negotiation by disputing parties. Another point to note is that institutions characteristically change their scale of fees so that the scale that was published when the disputing

parties nominated the institution in their arbitration agreement may be substantially different from the scale chargeable when their dispute eventuates and they file a notice or request for arbitration before the institution. The last preliminary point is that in an arbitral tribunal of three members, the arbitrators are not usually paid the same sums or rates of fees for services rendered over the same reference.

This section examines the remuneration of the arbitrator, which covers the arbitrator's fees and his reimbursable expenses (2.6.1). The arbitrator may be entitled to remuneration even in the event of non-completion of his mandate and such payment may be in the form of cancellation fees. As a contractual term, the parties to the contract may agree to the variation or amendment of the fees payable to the arbitrator, and disputes may arise as to the fees payable to the arbitrator (2.6.2).

2.6.1 Fees and reimbursable expenses of the arbitrator

The issue of the fees payable to the arbitrator is of such importance that it has been held that it should be agreed *before or at the time* the arbitrator is appointed.⁵⁷ The fees payable to the arbitrator is the only tangible benefit he gets from his appointment and involvement in the arbitration process.⁵⁸ In one case it was held that the arbitrator is entitled to his remuneration even when the award is worthless to the parties, as long as he was not negligent.⁵⁹ The term on remuneration of the arbitrator can be express or implied.⁶⁰

In most arbitral references, the remuneration payable to the arbitrator is agreed as an express term between the parties to the arbitrator's contract. According to Robert Merkin

In the vast majority of cases, the amount to be paid to the arbitrators, or at least the machinery for establishing this amount, will be agreed in advance between the parties and the arbitrators.⁶¹

While Professor Lew confirms that, 'an arbitrator is providing a service for which he expects payment. There are few voluntary arbitrators, especially not in international commercial arbitration'.⁶² So where the arbitrator's fees are not expressly agreed such fee become payable by implication of law, so as to entitle the arbitrator who has rendered the service to be paid a reasonable fee for such service under relevant statute or on the basis of restitution. Therefore the arbitrator and the state expect him to be paid for rendering service to the disputing parties.

The next point is to determine the party with liability to remunerate the arbitrator. In *ad hoc* references, it is the disputing parties who are jointly and severally liable to the arbitrator for his fees as the contracting parties to the arbitrator's contract.⁶³ Where the institution contracts as principal, it will be primarily liable to the arbitrator for his fees on the arbitrator's contract. A non-party to the arbitrator's contract cannot be liable to him for his

remuneration in contract. Thus where one party contests the jurisdiction of the tribunal on the grounds that it was never a party to the arbitration agreement, but requests the arbitrator to make this determination, if the arbitrator determines that the non-appointing party was not party to the arbitration agreement, the non-appointing party shall be bound to remunerate the arbitrator in contract. This is because though not a party to the arbitration agreement, by requesting the arbitrator to render this service, the non-appointing party becomes party to the arbitrator's contract on the basis of which the decision was made. Where however, the non-appointing party itself did not seek such determination from the arbitrator, it shall not be bound to remunerate the arbitrator, even though his decision (that the party is not bound by the arbitration agreement) benefits the non-appointing party. The arbitrator will in this case be remunerated by the appointing party who requested the service from the arbitrator. These issues were recently examined in the context of adjudication by the Technology and Construction Court (England) in *Linnett v Halliwells LLP*.⁶⁴ This section examines arbitrator's remuneration under ad hoc (2.6.1.1) and institutional references (2.6.1.2).

2.6.1.1 ARBITRATOR REMUNERATION UNDER AD HOC REFERENCES

Under ad hoc arbitration references the disputing parties negotiate (either by themselves or through their lawyers) with the arbitrators the basis of calculating their remuneration.⁶⁵ The scale or rate of arbitrator's fees agreed as applicable may be influenced by those fixed by some arbitration institutions or the primary profession of the arbitrator and used as a guide.⁶⁶ The arbitrator therefore agrees his remuneration directly with the disputing parties who appoint him and with whom he concludes his arbitrator's contract. This follows that at the agreed times for payment or deposits to be made, the arbitrators look to the disputing parties to make such payments. In practice, upon entering into the mandate, the arbitrator may open a bank account in the name of the arbitral tribunal where the disputing parties make deposits and from which the arbitrator withdraws funds.⁶⁷ At the termination or completion of the mandate, the arbitral tribunal produces an account of its expenditure and refunds whatever sums are left to the disputing parties.⁶⁸ Where the arbitral tribunal account becomes deficient at any time during the arbitral reference, the disputing parties replenish it with whatever funds are required until the arbitral proceedings are concluded. Any matters on fees are usually settled before the award is released to the disputing parties. The reason is quite obvious since once the award is delivered to the disputing parties, any enthusiasm to settle the arbitrator's fees may have withered away.

In a panel of arbitrators, the right to remuneration of members of the arbitral tribunal is rooted in the provisions of the arbitrator's contract between the disputing parties and each member of the arbitral tribunal.⁶⁹ However, the disputing parties do not make payments directly to each individual

arbitrator. The parties usually make payments to the arbitral tribunal and the presiding arbitrator disburses the funds from the bank account in the name of the arbitral tribunal. Where the arbitral tribunal has appointed an expert witness, a tribunal secretary or other persons to perform any administrative or secretarial function for the purposes of the arbitration, the arbitral tribunal remunerates such persons with funds from its account.⁷⁰

In arbitral practice, it is usual to agree the particulars of arbitrators' fees and reimbursable expenses at the time the arbitrator accepts his appointment.⁷¹ At this stage (before entry into the mandate and the arbitrator's contract) the arbitrator can decline to act if the rate of fees payable (or time of payment) is unacceptable to him or the disputing parties. In the case of the disputing parties, they can jointly withdraw the offer from the arbitrator, with the effect that no arbitrator's contract will then be concluded.

This matter becomes a little complicated if fees are agreed after the conclusion of the arbitrator's contract but before the arbitrator fully enters into his mandate. Where at this early stage the parties cannot agree on the fee, the arbitrator can withdraw or the disputing parties can terminate his mandate, both of which will effectively terminate the arbitrator's contract.⁷² At this stage the conceivable harm to the arbitral reference will be very minimal. This is because it is at the very early stages of the dispute resolution process, the substantive dispute has not been entered into, and the fees (if any) payable to the withdrawing arbitrator may be insignificant.⁷³

The provisions of various laws on termination and/or withdrawal of the arbitrators' mandate *after* acceptance lend great support to the need to agree terms when each arbitrator (in a panel of arbitrators) accepts appointment, effectively before the constitution of the arbitral tribunal.⁷⁴ The fees offered to an arbitrator must be acceptable to him before he accepts to act. Being his principal benefit from the process, it is therefore only prudent that fees should be agreed *before* he accepts appointment. In situations where an appointing authority fixes the fees of the arbitrator, it acts for and on behalf of the disputing parties. The appointing authority can only so act where the disputing parties have requested it to agree fees with the arbitrator. Fixing the fees of arbitrators is not part of the standard or general function of appointing arbitrators. Where the appointing authority agrees fees with the arbitrator, it does this for the disputing parties whose sole responsibility it is to remunerate the arbitrator. The appointing authority is never responsible for the fees of the arbitrator, whether in contract or otherwise.

The arbitrator's contract may include an express provision that the disputing parties are jointly and severally liable for the remuneration of the arbitrator. This grants the arbitrator a right to claim remuneration from either or both parties in contract. Where there is no express term to this effect, it may be implied into the arbitrator's contract by the proper law of the arbitrator's contract. The parties may agree on how the arbitrator's fees will be divided up amongst themselves in the submission agreement. However, it has been held that an arbitrator is not bound by such agreements. The

Privy Council in *Carter v Harold Simpson Associates* held that the arbitrator had powers to order one party to pay the whole of the arbitrator's costs and charges, and that the submission agreement, which required the costs to be borne equally by the parties, was not concerned with allocation of the costs of arbitration. The Privy Council said

It (the allocation) was intended to create contractual relations with the arbitrator and to make the parties each liable to him for an equal share of his costs and charges. Liability in equal shares to the arbitrator was not inconsistent with his having the statutory power to order that, as between the parties, the costs should be borne differently.⁷⁵

Where the disputing parties in agreeing fees with the arbitrator make reference to the scale of fees applied by any arbitration institution such institution itself plays no part in remunerating the arbitrator directly. Under some arbitration laws, the arbitrator is empowered to fix his fees in the final award.⁷⁶ Whether the disputing parties discuss and agree fees directly with the arbitrator or indirectly through the appointing authority, the disputing parties are deemed to have agreed such terms and so directly bear the responsibility of paying the arbitrator. It is clear that the arbitrator can sue the disputing parties in contract, jointly and severally, for recovery of his fees and reimbursable expenses.

2.6.1.2 ARBITRATOR REMUNERATION UNDER INSTITUTIONAL REFERENCES

Most institutions fix the remuneration payable to an arbitrator sitting under their arbitration rules. The arbitration institution itself agrees the remuneration payable with the arbitrator. The arbitrator does not discuss, negotiate or agree fees with the disputing parties. Professor Lew in confirmation of this practice notes

In institutional arbitration, it is generally not necessary for the parties to engage in any direct negotiations with the arbitrator or arbitrators as to the amount of his or her fees. The institution sometimes acting independently, sometimes after consultation with the sole or presiding arbitrator, generally fixes these. The parties have no say in the matter.⁷⁷

Arbitration institutions agree on the arbitrator's remuneration as part of the terms of the arbitrator's contract and its undertaking under the contract between the institution and the disputing parties.⁷⁸ In support of this assertion is the decision of a sole arbitrator in one ICC arbitration reference, where the claimant requested the sole arbitrator to issue an interim award directing the respondent to pay back to it one half of the advance on the costs of arbitration in accordance with Article 30 (3) ICC Rules. The arbitrator

decided that this article of the ICC Rules does not constitute a contractual obligation on the parties to each pay one half of the deposit on costs, but evidences a *contractual debt owed the ICC Court*.⁷⁹ It is asserted that this 'debt' accrues under the contract between the ICC (as arbitration institution) and the disputing parties.

The institution's obligation to remunerate the arbitrator arises from its conclusion of the arbitrator's contract in performance of its contract with the disputing parties, in which it promises to manage the arbitration process in accordance with the arbitration agreement and its arbitration rules. Where the institution concludes the arbitrator's contract as principal, then the arbitrator does not have direct recourse (in contract) against the disputing parties either severally or jointly for his remuneration. The arbitrator's contractual right to remuneration is contained in the arbitrator's contract he concluded with the institution on which will be founded any cause of action to recover such monies. However where the institution contracts as agent, then the arbitrator can recover his fees and reimbursable expenses directly from the disputing parties (as disclosed principals).

On the basis of these analyses, it follows that where the disputing parties do not keep the arbitration institution funded so that the institution lacks funds with which to remunerate the arbitrator, then where the institution contracts as agent, the arbitrator can proceed directly against the disputing parties to recover his fees on the basis of Contract 3 (in Figure 4.4). However, where the institution contracts as principal, it will have to remunerate the arbitrator from its own funds or resources under this circumstance to service its obligation to the arbitrator under the arbitrator's contract. The institution will then have a right of recourse to claim the disbursed sum back from the disputing parties on the basis of its contract with them in which the disputing parties have contracted to pay the institution for the remuneration it agreed with the arbitrator and its own fees. If the institution becomes insolvent (and it contracted as principal) the arbitrator can still claim against the disputing parties in restitution or under statute for remuneration for services he has already rendered to them and against the benefit they have received.

There are two methods of assessing the fees payable to the arbitrator. These are the '*ad valorem*' and 'time spent' methods. Under the *ad valorem* method, the arbitrator's fee is calculated as a proportion of the amount in dispute.⁸⁰ Under the *time-spent* method,⁸¹ the arbitrator is paid an hourly or daily rate agreed with the disputing parties or fixed by the arbitration institution itself.⁸²

2.6.2 *Variation of the arbitrator's fees*

As a term of the arbitrator's contract, either party to the contract may seek a variation of the fees payable to the arbitrator where there is a change in circumstance or in accordance with the provisions of the contract (if any).

Such variation may be an increase or decrease in the agreed fees. Where the complex nature of the dispute was not clear at the time fees were agreed but became apparent after the arbitrator started rendering service under the contract, he can raise the issue of variation of agreed fees with the disputing parties and their lawyers. This is relevant where the fees are calculated *ad valorem*.⁸³ Where all parties to the arbitrator's contract agree to the variation, the new term operates as a variation of the arbitrator's contract and takes precedence over the earlier agreed scale of fees. Difficulties arise where one party to the arbitrator's contract disagrees with the variation.

In *Norjarl v Hyundai*, Hyundai contracted to build a drilling rig for Norjarl. A dispute arose between the parties when Norjarl refused to take delivery of the rig. The agreement between the parties provided for arbitration, 'in London according to the English Arbitration Act, 1950 to 1979 (as amended), by reference to three arbitrators ...'⁸⁴ An ad hoc tribunal of three arbitrators was constituted. Each party appointed one arbitrator and the two party appointed arbitrators appointed the presiding arbitrator.⁸⁵ The three arbitrators accepted their appointments without qualification or reference to fees. The chairman's acceptance was subject to time availability. The arbitrator appointed by Hyundai (Mr Cedric Barclay) died in 1989 and a replacement arbitrator was appointed. In 1990 the parties requested the arbitral tribunal to reserve a period of twelve weeks for the hearing. The arbitral tribunal agreed to this on condition that a commitment fee was paid. This was to be a proportion of their fees to be paid in advance. Hyundai contended that this amounted to technical misconduct and sought the removal of the arbitrators for alleged misconduct under s 23 (1) Arbitration Act 1950 England. Norjarl contended that the arbitrators' proposal was reasonable and the arbitral tribunal could agree fees with it alone since the agreement is not acceptable to Hyundai, without any impropriety or imputation of bias.

In the High Court Phillips J observed that

As this case demonstrates, it is highly desirable that any negotiations between the arbitrators and the parties as to the services that the arbitrators are to render and the terms upon which they are to render them should take place *at the time* of appointment of arbitrators.⁸⁶

The Court of Appeal affirmed the lower court's decision on the right time to agree fees. Leggat L.J. said

It seems to me that if arbitrators wish to insist on the payment of a commitment fee, the proper time to do so is *before* appointment. They can then decline the appointment if acceptance terms are not forthcoming. There is no reason why the appointing party should be regarded as exposing his arbitrator to imputations of bias merely by undertaking to be responsible for his fees, since they are merely a concomitant of the arbitrator's acceptance of the appointment.⁸⁷

Lord Justice Stuart-Smith on his part said

But once appointed an arbitrator cannot unilaterally change the terms of his appointment and demand a commitment fee any more than any other party to a contract can change the terms of the contract, unless there is a significant and substantial change in the commitment required of him such as to justify the payment of further consideration.⁸⁸

Sir Nicolas Browne-Wilkinson, VC, on his part said

An agreement to pay remuneration can properly be made by the arbitrator with one party *before* he accepts appointment: before appointment, the arbitrator has not assumed the status which gives rise to his disability to deal with one party only. After he has accepted appointment, the arbitrator cannot by reason of his status, deal unilaterally with one only of the parties.⁸⁹ [Emphasis added]

Thus, the Court of Appeal was of the opinion that an arbitrator should agree terms of appointment with the parties *before* or at the time of accepting appointment (LLJ, Leggat and Nicolas Browne Wilkinson) which his status will prevent him from doing once he accepts appointment. For L.J. Smith, this is because once appointed, he enters into a contract with the parties whose terms he cannot unilaterally change.

In *Town Centre Securities Plc v Leeds City Council*, the High Court (England) held that where the parties have agreed a fixed fee, and there is changed circumstance, the arbitrator could not insist on a new fixed fee.⁹⁰ This decision does not affect situations where the parties to the arbitrator's contract all agree on the fee variation.⁹¹ Under the arbitration rules of some institutions, the institution in fixing the fees payable to the arbitrator takes into account the diligence with which the arbitrator performed his mandate. An example is the ICC Court of Arbitration, which is permitted by its arbitration rules to

Fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case.⁹²

In the same manner, where the dispute between the parties is prematurely terminated, possibly as a result of settlement of the dispute by the disputing parties, such that the arbitrator does not spend the time and effort anticipated at the time of the conclusion of the arbitrator's contract, a change in circumstance equally occurs. In such event, there arises the need for a variation of the terms on arbitrator's fees in the form of a decrease in the amount payable. Again the disputing parties (or arbitration institution) and the arbitrator will agree on the necessary changes.

The disputing parties or institution can also proactively seek to reduce the amount payable to the arbitrator as fees.⁹³ If the need for this arises under ad hoc arbitral references, the disputing parties will raise the issue directly with the arbitrators at the earliest opportunity. The timing of this discussion is crucial as it would amount to misrepresentation if the arbitrators were allowed to proceed with the reference on the understanding that the parties have agreed to one rate of fees only to be offered a different rate when payment becomes due. The disputing parties will under such situation be estopped from unilaterally varying the fees payable and be deemed to have acquiesced to pay the rate originally agreed.

However, under institutional references, the disputing parties will complain to the institution about the rate fixed or chargeable by the arbitrator, again immediately they become aware of this. This complaint will fall under the provisions of the contract between the arbitration institution and disputing parties. Again, the timing of this request is crucial. If it is after the arbitrator has accepted appointment so that the arbitrator's contract is concluded, the institution must obtain the consent of the arbitrator to the proposed variation. If the issue arises before the arbitrator accepts appointment, then it remains one of the terms the parties to the arbitrator's contract will negotiate and agree on when concluding the contract. The institution will be acting under the provisions of the arbitrator's contract on its power to fix the remuneration of the arbitrators in accordance with its arbitration rules.

In a case before the Zurich Chamber of Commerce (ZCC) in 2002, arbitrators sitting under the auspices of the ZCC (before the Swiss Chambers merged) informed the parties that their fees will be charged at an hourly rate of 2,500 Swiss Francs each. The claimant complained to the arbitration institution that this rate was high and the ZCC reduced the fees to 900 Swiss Francs. The claimant subsequently challenged the arbitrators before the arbitration institution. The arbitral tribunal issued its final award while the challenge was pending, against the claimant. The claimant then challenged the award before the Swiss Courts on the grounds that the arbitrators issued the final award without jurisdiction since they had been challenged. The Swiss Federal Court rejected the challenge of the award, ruling that the arbitrators had powers to render the award since the challenge did not amount to a stay of the arbitral proceedings.⁹⁴ For purposes of this section, the issue of fees payable was treated as contractual in the case.

In recent years one major issue on which there has been some high profile disputes concerning the variation of arbitrator's remuneration, is the payment of cancellation fees or commitment fees. From the discussions above it is obvious that as an express term of the arbitrator's contract, provisions on cancellation or commitment fees will be complied with. However, where it has not been agreed and the arbitrator seeks a variation of his payment terms, to provide for cancellation fees, a problem arises. In *Norjarl v Hyundai*, Phillips, J of the Commercial Court (England) observed that

The acceptance of appointment as arbitrator did not carry with it any right to a commitment fee which was payable regardless of whether or not loss was suffered by the arbitrator as a consequence of the withdrawal of the demand for his service.⁹⁵

And on Appeal, the Court of Appeal (England) in agreement said

If arbitrators wished to insist on a commitment fee the proper time to do so was before appointment had been accepted.⁹⁶

In the Australian case of *Sea Containers Ltd v ICT Pty Ltd*,⁹⁷ the Court of Appeal (New South Wales) upheld the decision of Gzell J in the first instance, to remove the arbitrators for misconduct. The dispute arose out of an ad hoc arbitration proceeding under the Commercial Arbitration Act of 1984 (NSW) over alleged defects in the construction of four catamaran ferries built by ICT Pty, under four separate contracts that were consolidated for purposes of the arbitration. The disputing parties each appointed one arbitrator and the two party appointed arbitrators appointed the third as presiding arbitrator. The arbitrators each agreed to the payment of a daily rate of 3,000 Australian dollars. Nothing was agreed about the payment of cancellation fees. After two months, the arbitrators sought variation of the payment terms to include entitlement to cancellation fees if the hearing dates were vacated. The disputing parties made various proposals but could not arrive at an agreement with the arbitrators. The arbitrators all applied the cancellation fees without the agreement of the parties, who did not make such payments. The arbitrators responded with a threat not to make further orders in the proceeding until the disputing parties accepted their obligation to pay the arbitrators cancellation fees. They also threatened to take legal action against the disputing parties over the non-payment of the portion of the cancellation fees already invoiced. The arbitrators further proposed new hearing dates to which ICT did not respond. The arbitrators wrote the parties to the effect that ICT's lack of response indicated they had abandoned the arbitration, after which they set new dates and dismissed ICT's objections to the new dates.

Both the court of first instance and the Court of Appeal held that the arbitrators' behaviour amounted to misconduct, which gave rise to reasonable apprehension of bias. The Court of Appeal (NSW) held that a mere request for cancellation fees was not misconduct. However, the arbitrators had pressured the parties into agreeing to a cancellation fee. Meagher, J.A, used phrases such as 'disgraceful' and 'passed beyond the realms of unseemliness into misconduct' to describe the behaviour of the arbitrators.⁹⁸

From these decisions, it is clear that fees payable to arbitrators can be varied as long as all parties to the arbitrator's contract consent to such variation. However, one party to the arbitrator's contract cannot unilaterally vary the fee payable to the arbitrator or through applying duress get the consent of

the other party to the variation in contract. In *Hyundai*, one party was willing to pay the additional fees while in *Sea Containers* both disputing parties refused to consent to the commitment fee. From our discussions so far, the *Sea Containers* scenario fits perfectly into the analysis of the arbitrator's contract under ad hoc references and its effects since the disputing parties maintained the same position and so effectively acted as one contracting group. In *Hyundai*, it is submitted that the same conclusion will still be reached even though one party was willing to comply with the fee variation. On the presumptions made in this book, the disputing parties contract as a group with the arbitrators so that if Norjarl had made the additional payments, then the disputing parties, on the analysis in this book, will be held to have consented to the variation. In this way the action of one of the parties will be attributed to the contracting group.

This term on the remuneration of the arbitrator is a condition or fundamental term of the arbitrator's contract, since the fees are the primary benefit the arbitrator derives from concluding the contract.⁹⁹ A breach of this term should therefore entitle the arbitrator to repudiate or terminate the arbitrator's contract and seek damages. Such damages may include payment for any work already performed on the reference and possibly consequential losses for time which would otherwise have been spent on other instructions.

Where in the event of a variation in the fees payable to the arbitrator, the parties to the arbitrator's contract fail to agree on new payment terms, a dispute arises. This dispute arises under the arbitrator's contract, so where there is a dispute resolution clause, it will be resolved in accordance with the clause. Where there is no dispute resolution clause, and the parties do not wish to arbitrate the dispute, then either the disputing parties or arbitrator may apply to a relevant national court for taxation of the fees.¹⁰⁰ The arbitrator's application before the appropriate court will be for the enforcement of the terms of the arbitrator's contract with regards to the agreed fees.

Where the parties to the arbitrator's contract have not made any express provisions on the remuneration of the arbitrator in the arbitrator's contract, then a gap occurs. The remuneration of the arbitrator therefore will be regulated by a term implied by the relevant law.¹⁰¹ Some national laws make provisions to fill such gaps by requiring the arbitrator to be awarded a 'reasonable' fee or on a *quantum meruit* basis that is subjectively calculated or taxed and awarded by an officer of the relevant court independent of the parties to the arbitrator's contract.¹⁰² As already mentioned, the basis for the arbitrator's entitlement to fees can also lie in restitution, since he has rendered service to the disputing parties.

2.7 Confidentiality

It is now acknowledged that the international commercial arbitral process is private but not necessarily confidential. Most national laws are silent on this

issue. Some arbitration rules make express provisions on the confidentiality of the arbitral process, the documents generated from the process including the pleadings, witness statements, expert reports, documentary evidence, communications between parties and arbitral tribunal and those between the arbitrators themselves on the arbitration reference. Some arbitration rules are however silent on this requirement and case law differs depending on the jurisdiction. Including an express term on confidentiality in the arbitrator's contract ensures the confidentiality requirement applies irrespective of the provisions of the applicable procedural law (which are usually not of a mandatory nature) on the point. A breach of the term on confidentiality will therefore be a breach of the arbitrator's contract and the defaulting party may be contractually liable to the other party who suffers damage as a result of the breach.

Identifying the party that suffers loss as a result of this breach is fundamental to its application. The arbitrator's contract is between the disputing parties or arbitration institution and the arbitrator. Thus to amount to a contractual breach under the arbitrator's contract, the breach will be committed either by the disputing parties (or one of them) or the arbitration institution against the arbitrator or vice versa. Where the breach of confidentiality is committed by one disputing party against the other disputing party, (as is the normal situation) then such action is not a breach that falls under the arbitrator's contract but possibly under the terms of the arbitration agreement. On the same analysis where the breach is by the disputing parties against the arbitration institution or vice versa, then the breach falls under the terms of the contract between the institution and the disputing parties, and not the arbitrator's contract. This term is not fundamental to the purpose of the arbitrator's contract and so is not categorized as a condition. Thus its breach will give rise to a right to damages but not to termination of the arbitrator or institution's contract.

As between the members of the arbitral tribunal, various arbitration rules provide that their deliberations are confidential. An example of such a provision is the LCIA Rules, which provide that, 'the deliberations of the Arbitral Tribunal are likewise confidential to its members'.¹⁰³ This provision reflects the practice of most arbitration institutions. In support the IBA Rules of Ethics provides

The deliberations of the arbitral tribunal, and the contents of the award itself, remain confidential in perpetuity unless the parties release the arbitrators from this obligation.¹⁰⁴

Various rules of ethics and codes of conduct for arbitrators place a further caveat on the use to which arbitrators can make of their involvement in the arbitration reference. For example Canon VI of the AAA/ABA Code of Ethics states

The arbitrator is in a relationship of trust to the parties and should not, at any time, use confidential information acquired during the arbitration proceeding to gain personal advantage or advantage for others, or to affect adversely the interest of another.¹⁰⁵

These rules of ethics and codes of conduct are binding on the arbitrator himself where he is subject to the rules or codes but do not constitute terms of the arbitrator's contract. However, as requirements of arbitration rules, the terms bind each arbitrator under the provisions of his arbitrator's contract, so that the duty of confidentiality is owed not to his fellow arbitrators (in a panel of arbitrators) but to the institution or disputing parties, as the other party to the arbitrator's contract.

Decisions on confidentiality in arbitration from various national courts have raised serious doubts as to the assumed confidentiality of the documents and awards from arbitration proceedings.¹⁰⁶ The Privy Council has held that the arbitration award is not confidential (even when the parties took the extra precaution of entering into a separate Confidentiality Agreement).¹⁰⁷ In *Ali Shipping Corporation v Shipyard Trogir*¹⁰⁸ the Court of Appeal (England) held that the parties are under an implied duty of confidentiality affecting the documents used in the arbitration and the arbitration itself. This duty is however limited by consent, court order or where the interest of justice so requires.¹⁰⁹ This decision was again confirmed in the *Banker's Trust* case.¹¹⁰ The Australian High Court in the *Esso Australia* decision held that the documents generated from arbitration proceedings are not confidential.¹¹¹ In *Aita v Ojeh*, A sought nullification of a London award in France. The Court of Appeal dismissed the challenge and imposed penalties against A. The court held that the proceedings violated the principle of confidentiality, noting that, 'the action caused a public debate of facts which should remain confidential', and that, it is 'the very nature of arbitral proceedings that they ensure the highest degree of discretion in the resolution of private disputes, as the two parties had agreed'.¹¹² In Sweden, there is no explicit duty of confidentiality. However the courts have held that a disclosure could be viewed as a breach of the duty of good faith imposed on the parties in relation to each other, and can be compensated where loss is proved.¹¹³

Thus most jurisdictions recognize the privacy of the arbitration process but place limitations on the confidentiality of documents and the awards from the arbitration proceedings while arbitration awards are published with the consent of the disputing parties. The arbitral proceedings and awards of the Iran–US Claims tribunal are published. The ICC publishes awards with the permission of the disputing parties, and without disclosing their identities. Other arbitration institutions or organizations also publish arbitral awards.¹¹⁴ The disputing parties can consent to the publication of some relevant documents or be compelled by a national court. It is recognized that the issues in dispute can enter into the public domain through a court hearing. These decisions and the publication of awards do not affect any

confidentiality obligations binding on parties to the arbitrator's contract but do affect the parties to the arbitration agreement.

2.8 Equality of treatment and fair hearing

This term embodies an obligation imposed on the arbitrator to treat the disputing parties equally and fairly. The obligation may be express or implied by law. The obligation is contained in practically all arbitration rules and in most arbitration laws, is a mandatory requirement.¹¹⁵ As a fundamental provision impacting on the principles of procedural public policy of states, national courts enforce compliance not just to give effect to the arbitration agreement or assist the arbitral process but to protect its own fundamental principles and notions of justice. For purposes of the arbitrator's contract, where this obligation is a mandatory requirement under the proper law of the arbitrator's contract then it will apply regardless of any express provision in the contract that seeks to limit or exclude this obligation.

This term may be couched in the form of an obligation of the arbitrator or right of the disputing parties under various arbitration laws, but the purpose of the term is to ensure that each disputing party is given an opportunity to put forward its case and answer to that of its opponent. The Model law provides succinctly in Article 18

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.¹¹⁶

The English Arbitration Act on its part provides

The tribunal shall act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent.¹¹⁷

The practical application of the requirement for equal treatment means the arbitral tribunal applies the same standards of treatment to both disputing parties. It does not require the arbitral tribunal to ensure that the parties are legally represented by the same calibre or quality of lawyers. For the arbitrator to comply with this obligation, he cannot be required to default in complying with other terms of his contract, for example obligation to pursue the arbitration diligently and without undue delay. This term on fair hearing does not entitle a party to indiscriminate adjournments or irrelevant requests for disclosure (or discovery). The opportunity to present its case (whether full, reasonable or fair) entails giving a party the opportunity to put forward its case and to answer to the case of its opponent. So, all that this obligation entitles a party to is not to be treated more or less favourably than the other party involved in the dispute.

This term of the arbitrator's contract can be categorized as a condition or

a fundamental term, so that its breach will give the disputing parties a right to terminate the arbitrator's contract without prejudice to the disputing parties' right to also claim damages against the arbitrator.

Some examples of decisions of national courts on matters relevant to this term show that an arbitral award will be set aside if a party can show that it was not given a fair hearing or treated equally by the arbitrator.¹¹⁸ The Court of Appeals, Second Circuit (USA) set aside the award rendered in *Parsons & Whittemore Overseas Co Inc v Societe Generale de l'Industrie de Papier (RAKTA)*¹¹⁹ for failure to grant the parties oral hearing. In *Goldtron Ltd (Singapore) v Media Most BV (Netherlands)* the Court of First Instance Amsterdam refused enforcement of the award on the ground that by refusing to examine an arbitrator challenge on the merits, the arbitration institution deprived Media Most of its right to present its case against an arbitrator whom it believed was partial, thereby violating due process.¹²⁰ In *Iran Aircraft Industry v Avco Corporation*, the US Court of Appeals (Second Circuit) held that Avco was denied the opportunity to present its case when it was misled by the arbitral tribunal, which disregarded an order it had made on the manner of production of invoices, by Avco Corporation.¹²¹

However, where a disputing party deliberately fails to answer to the case of its opponent, it cannot rely on lack of fair hearing as a ground to set aside the award. The Ontario Superior Court held in, *Corporation Transnationale de Inversiones, SA de CV v STET International SpA & STET International Nederlands, NV*, that the Mexican parties by boycotting the arbitral proceedings deliberately forfeited their right to be heard.¹²² The English Courts on their part in, *Minmetals (Germany) v Fero Steel* rejected the losing party's argument that it was denied a fair hearing by the arbitral tribunal relying on evidence obtained through its own investigation. This decision was on the basis that the losing party had been given an opportunity to request for disclosure of the evidence in issue and comment on it but declined.¹²³ However the Hong Kong courts have held that a party wishing to rely on procedural irregularity to set aside an award must raise it promptly or be deemed to have waived its right.¹²⁴ These decisions of national courts evidence the importance of this right or obligation in the arbitral process. Its exercise affects the performance of the arbitrator's contract and is an obligation that the arbitrator directly performs in favour of the disputing parties.

Where the arbitrator breaches this term of the arbitrator's contract, this is a breach of a condition and the disputing party exercises its right to terminate the contract through an application to challenge the arbitrator. This procedure is necessary because the breach of the term is one of the grounds on which an arbitrator can be determined to be biased or dependent on the other party and so substantiate a challenge application. A successful challenge will terminate the arbitrator's contract.¹²⁵

2.9 *Disclosure, independence and impartiality*

These are obligations imposed on arbitrators and corresponding rights of the disputing parties. This is a condition or fundamental term of the arbitrator's contract.¹²⁶ These obligations are expressed in requirements contained in both the arbitration rules and arbitration laws so that the terms may be expressly agreed by virtue of the arbitration rules or implied by virtue of the proper law of the arbitrator's contract. It must be noted that these terms are also contained in the arbitration law at the seat of arbitration and will apply to the arbitrator's contract if it is a mandatory requirement. The law of the seat will apply as the law of the place of performance of the arbitrator's contract.¹²⁷

As terms of the arbitrator's contract, these terms affect the performance by the arbitrator of his mandate as it directly affects the disputing parties, so that in the event of a breach it is the disputing parties that suffer damage and not the arbitration institution. Practically all arbitration laws make provisions on impartiality and or independence of the arbitrator but do not define these terms.¹²⁸ The French Courts have defined independence as constituting

Through the existence of material or intellectual links, a situation which is liable to affect the judgment of the arbitrator by creating a definitive risk of bias in favour of a party to the arbitration.¹²⁹

The US Court on its part, in *York Hannover Holding AG v AAA*,¹³⁰ said

Impartiality amounts to the absence of risks of bias on the part of the arbitrator towards one of the parties.

While the IBA Rules of Ethics defines these terms as

Partiality arises when an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties.¹³¹

Arbitration Law China lists situations which will cause the arbitrator to withdraw. This same list also forms a basis on which disputing parties can challenge the arbitrator to withdraw, which are¹³²

- i The arbitrator is a party in the case or a close relative of a party or of an agent in the case;
- ii The arbitrator has a personal interest in the case;
- iii The arbitrator has another relationship with a party or his agent in the case which may affect the impartiality of the arbitrator; or

- iv The arbitrator has privately met with a party or agent or accepted an invitation to entertainment or a gift from a party or agent.

This obligation is balanced by another obligation requiring the arbitrator to conduct a conflicts check and make adequate disclosures, before accepting appointment or thereafter, when the need arises.¹³³ This requirement of disclosure is also couched as a duty and relates directly to the arbitrator's duty to remain impartial and independent throughout the arbitration mandate. Legal commentators¹³⁴ have discussed these issues in great detail with a collective agreement that international arbitrators ought to make full disclosures and maintain a high degree of impartiality and independence.¹³⁵ Arthur Marriott noted that the controversy surrounding the question of conflict of interest in international arbitration is the varying criteria applied in different jurisdictions to decide whether an arbitrator should accept appointment or having accepted it, should excuse himself or be removed.¹³⁶ In 2004, the International Bar Association (IBA) adopted a Guideline on Conflicts to help foster uniformity in this area.¹³⁷ The IBA Guidelines provide colour coded indicators of matters to disclose by international arbitrators.¹³⁸

All arbitration laws and arbitration rules (and codes of ethics) make provisions requiring a prospective arbitrator to make any known disqualifying disclosures before accepting the arbitral mandate.¹³⁹ Some arbitration laws and arbitration rules expressly require the arbitrator to be and remain impartial,¹⁴⁰ others require him to be independent,¹⁴¹ most however, require the arbitrator to be and remain both impartial and independent, throughout the arbitral reference. For example, the Model Law provides in Article 12 (1)

When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.¹⁴²

Thus the obligation required of the arbitrator under various national laws is to disclose as soon as the disqualifying event is known. In most cases this will be before the arbitrator accepts to act in the arbitral reference and so before the conclusion of the arbitrator's contract.¹⁴³ The arbitrator cannot be in breach of this term of his contract where the disputing parties do not raise any objections to his acting as arbitrator after necessary disclosures have been made. This is supported by the fact that the arbitral award cannot be set aside on the basis of such disclosed but unchallenged issues. This is treated as a matter of waiver by the disputing parties, and so implicating consent to the otherwise disqualifying breach.¹⁴⁴ In *The State of Israel v Desert Exploration 1976 Incident*, one of the party appointed arbitrators agreed on a cancellation fee towards his fees. This arrangement was not disclosed to the other party or members of the arbitral tribunal until two years later. The State of Israel sued in Tel Aviv for rescission of the arbitration agreement on this ground. The court held that the arbitrator acted improperly by not disclosing the

existence and details of the arrangement, at the latest time, when he received the first payment. According to Justice Shilo (on the importance of arbitrator disclosure)

The duty of loyalty is subject to each party knowing the nature of the relations that exist between the party and his chosen arbitrator. The three arbitrators were under an obligation to be independent of each of the parties and owed a duty of full loyalty towards both parties even if he was chosen by only one of them. It is incumbent upon every party appointing an arbitrator to disclose any fact or circumstance which is likely to preclude the arbitrator appointed by him from full discharge of the loyalty duty.¹⁴⁵

This term is a fundamental one and so a condition of the arbitrator's contract. Its breach will result in the successful challenge of the arbitrator during the arbitral reference and termination of the arbitrator's contract. Where an award has been rendered, its breach may result in the setting aside or annulment of the resultant arbitral award, and possible claim against the arbitrator for damages. This claim will arise after the termination of the arbitrator's contract (by the publication of the final award) but will still be based on the arbitrator's contract for a breach of its term when it was in operation. In *Commonwealth Coatings*, the third arbitrator failed to disclose that he had performed occasional consulting construction work for the respondent until after the award had been rendered. However, the petitioner failed to adduce proof of actual fraud or bias. The United States Supreme Court observed that, to vacate an award where nothing more than an appearance of bias is alleged would be automatically to disqualify the best-informed and most capable potential arbitrators. The court then established a standard for determining the extent to which s 10 of the Federal Arbitration Act, United States, requires disclosure of the arbitrators' prior business relationships with either party to the arbitration agreement. The Supreme Court held that evidence of the slightest pecuniary interest is sufficient to void an award under subs 10 (a) and (b) of the Federal Arbitration Act.¹⁴⁶

In the French case of *Annahold BV v L'Oreal*,¹⁴⁷ the arbitrator failed to disclose his close connection with the chairman of the defendant company. The Court of Appeal, Paris held that the victim of such a fraudulent manoeuvre could sue the person who committed them (in this case the arbitrator) so as to be reimbursed for the loss suffered. Again, in *Raoul Duval's* case,¹⁴⁸ the arbitrator failed to disclose his relationship and connections with one of the parties. The party employed him the day after he rendered his arbitral award in the party's favour. The arbitrator was held to be liable in misconduct. He was ordered to make reparations caused by his misconduct.

However, in *AT&T v Saudi Cable Company*,¹⁴⁹ the English Court of Appeal refused to accept AT&T's contention that the chairman of the arbitral tribunal who was a stockholder in a rival company (over the same tender)

was biased. This is despite the fact that the arbitrator forwarded to the ICC court two different curricula vitae, one showing his stockholding in the rival company and the other (forwarded to AT&T) not disclosing this information. It appears the Court of Appeal was swayed by the personality of the particular arbitrator involved in reaching its decision. Hong-Lin Yu and Laurence Shore have criticized this decision.¹⁵⁰ Mr Shore in another article concludes

In short, *AT&T* should give little solace to the international arbitration community, rather, the case, taken as a whole, should provide a caution to the community to see the process from the eyes of the parties who have agreed to arbitrate their disputes.¹⁵¹

This decision is also contrary to the standard required of arbitrators under the IBA Rules of Ethics, which states that

Failure to make such disclosure creates an appearance of bias, and may of its (own) be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification.¹⁵²

It is appropriate to conclude that the importance of the observance of these terms to the arbitral reference practically makes the terms principles of international public policy, which neither the disputing parties nor the arbitrators can disregard whether by agreement or otherwise. Every litigant is entitled to the fundamental right to be heard by an impartial and independent tribunal, whether appearing before a public or private tribunal.¹⁵³ Most (if not all) states recognize this as a fundamental right of their citizens. These cases¹⁵⁴ give the general trend in common law and civil law jurisdictions on this issue. Though the threshold in most jurisdictions for successfully challenging an arbitrator on grounds of lack of impartiality and independence is very high, international arbitrators err on the side of caution by making full disclosures.¹⁵⁵

An examination of the effect of this term on the performance of the arbitrator's contract raises the question of who decides what to disclose, which is provided for under arbitration rules, guidelines and codes of ethics.¹⁵⁶ An example of one standard is the ICC Arbitration Rules,¹⁵⁷ which requires disclosure of issues, which 'in the eyes of the parties' might raise questions of lack of independence.¹⁵⁸ The AAA/ABA Code puts the burden on the arbitrator to conduct the check with 'reasonable effort'.¹⁵⁹ The answer to this question depends on the applicable legal regime. As a practical matter, the arbitrator owes the duty and so should make diligent efforts to check and disclose. The disputing parties both suffer the consequences of a breach and so should also both make diligent efforts to search for any possible disqualifying matter and inform the arbitrator in accordance with the arbitration rules or arbitration law.

One more question in this regard is whether where the institution contracts as principal, it is under a requirement to conduct any checks on the arbitrator it has appointed. It is very difficult to see how the institution can be said to assume such an obligation whether under the arbitrator's contract or under its contract with the disputing parties. An analysis of arbitration rules shows that institutions do not undertake to conduct such a check and so do not undertake this obligation. However arbitration rules expressly place the burden on the arbitrator and the disputing parties. Moreover, the institution itself does not directly suffer any loss from any breaches of these terms so that allocating risks according to interest, it is the disputing parties, and the arbitrator that suffers loss and so should bear the burden of protecting against the risks in the contracts.

2.10 Arbitrator challenge and replacement

The analysis of the term on lack of independence and impartiality leads to the next term which is closely related to it, that is the term on the right of the disputing parties to challenge an arbitrator. An arbitrator can be challenged by one of the disputing parties in certain situations, which are usually expressly contained in the arbitration rules and arbitration laws. The grounds, procedure for the challenge and the person or entity who will decide the challenge, are also provided in arbitration rules and arbitration laws. The express term on arbitrator challenge is a provision of the arbitrator's contract.¹⁶⁰ The grounds, procedure, and person or entity who decides the challenge, are also terms of the arbitrator's contract.¹⁶¹ This section: (2.10.1) identifies the person or entity who decides the arbitrator challenge, (2.10.2) the grounds of such challenge, and (2.10.3) the procedure of challenging an arbitrator.

2.10.1 Person or entity who decides arbitrator challenge

The person or entity that decides challenges to arbitrators differs in ad hoc and institutional references, and so this will also differ in the arbitrator's contract depending on whether the contract is concluded pursuant to an ad hoc or institutional reference. In Chapter Four it was clarified that where in ad hoc references, an appointing authority is appointed to assist with the appointment of arbitrators, it does not conclude the arbitrator's contract either as principal or agent of the parties. It is the disputing parties themselves who conclude the arbitrator's contract with the arbitrator.¹⁶² However, such appointing authority may be empowered by the applicable arbitration rule to decide arbitrator challenge issues. In this case, since the agreed arbitration rule contains the promises the parties to the arbitrator's contract have made to each other, it follows that the appointing authority will decide arbitrator challenge issues as agreed to by the disputing parties and arbitrator under the arbitrator's contract.¹⁶³ In the absence of an appointing

authority and where the disputing parties have not made alternative provisions in the arbitrator's contract, then under the terms of the contract, there is no agreed decision maker on arbitrator challenge issues, thereby creating a gap. The parties will then resort to the applicable national law (of the seat) for directions.

Some national laws especially those influenced by the Model Law require the decision to be made by an appointment authority. This will therefore apply as a term implied by law into the arbitrator's contract. Some national laws provide that the decision will be made by the arbitral tribunal itself.¹⁶⁴ As a practical matter this will be the case where the arbitral tribunal is composed of more than one arbitrator, so that the challenged arbitrator will not find himself deciding his own challenge.¹⁶⁵ This same regime applies in arbitration proceedings under the ICSID Convention. In an annulment proceeding between *Compania de Aguas del Aconquija SA & Vivendi Universal v Argentine Republic*,¹⁶⁶ the state party to the proceedings reserved its right to challenge the chairman of the Arbitral Committee, which it subsequently did. The two party appointed arbitrators decided the challenge. This procedure again underscores the fact that each individual arbitrator is obligated to the disputing parties under the provisions of the arbitrator's contract. It is this fact that makes it legally feasible for the remaining members of the arbitral tribunal to decide the challenge application that affects another member of the tribunal.¹⁶⁷ Most national laws empower the court with supervisory jurisdiction over international arbitration references connected to it to make the final decision on arbitrator challenge matters. This reference to a national court is also a term of the arbitrator's contract, whether express or implied into the contract, by virtue of the application of the law of the seat of arbitration.

In practice and also recognized under arbitration laws and rules, where an arbitrator is successfully challenged it may be necessary to appoint another arbitrator to take the place (but not his mandate) of the challenged arbitrator. To meet this need, arbitration laws and rules also usually make provisions on the method of appointing a replacement arbitrator. The provision on arbitrator replacement is not a term of the arbitrator's contract, but a term under the contract between the disputing parties and the institution. This is because when an arbitrator is successfully challenged, his mandate comes to an end, and upon settlement of any outstanding fee, the arbitrator's contract terminates.¹⁶⁸

Arbitrator replacement issues will by necessity be a term of the arbitrator's contract under the single arbitrator's contract theory, because the arbitral tribunal may not be able to perform its function in a truncated form. It would therefore be in the interest of the arbitral tribunal to ensure the appointment of a replacement arbitrator, so as not to jeopardize their award, for example under the requirements of Article V (1) (d) of the New York Convention. As mentioned above the term on the appointment of a replacement arbitrator is a term of the institution's contract so where the applicable

arbitration rules provide for the method of making the replacement appointment, the appointor must comply with such method. In the event of a breach of such agreed appointment method, the defaulting party (disputing parties or arbitration institution) will be in breach of the contractual term.

Under ad hoc references, the provision in arbitration laws and rules on arbitrator replacement falls under the arbitration agreement between the disputing parties only. Under some arbitration laws, where the arbitrator is successfully challenged, the original appointment procedure would be repeated to appoint a replacement arbitrator. Some national arbitration laws provide for the appointment of a substitute arbitrator, who does not enter into the mandate until a replacement arbitrator is needed.¹⁶⁹ Once a replacement arbitrator is appointed, whether under the arbitration agreement or the contract between the disputing parties and arbitration institution, he does not take over the contract of the challenged arbitrator but enters into a fresh mandate and concludes a new arbitrator's contract in his name and for his own benefit.

If the single arbitrator's contract theory is adopted then the replacement arbitrator will have to continue with the existing arbitrator's contract concluded by the arbitral tribunal which he now joins as a member. The terms of the arbitrator's contract concluded with the arbitral tribunal (to which he becomes a member) will then remain effective and binding on him. The assent of the replacement arbitrator will not therefore affect or change the parties to the arbitrator's contract. However this effect of the single arbitrator contract theory is not reflective of arbitral practice or the intention of the parties involved in the international arbitral reference, and so not adopted. The preferred interpretation of this situation is that each arbitrator agrees terms with his appointor (disputing parties or arbitration institution) whether his appointment is as one of the original arbitrators or as a replacement arbitrator. His mandate starts to run when he accepts appointment, is binding on him personally and terminates when he is successfully challenged.

Under institutional references, it is the arbitration institution itself that investigates and decides whatever complaints the disputing parties make to it against the arbitrator pursuant to the arbitrator challenge provisions in its arbitration rules, incorporated into the arbitrator's contract.¹⁷⁰ The authority of the arbitration institution to act is also founded on the contract between the disputing parties and the institution in which the institution is contracted to administer the arbitration reference in accordance with the provisions of the arbitration agreement and its arbitration rules. All parties to the various related contracts therefore agree to the arbitration institution making the decision on arbitrator challenge.

One question that arises where the institution acts as agent of the disputing parties in concluding the arbitrator's contract with the arbitrator, is whether the institution acts as an independent third party in making the challenge decision. It is suggested here that if account is taken of the few arbitrator challenges institutions uphold, then even through an agent,

arbitration institutions act independently in making arbitrator challenge decisions.¹⁷¹ Moreover, such empowerment is not novel in contracts examined in this book. An example where there is a parallel is in construction contracts where the engineer, appointed by the employer, decides disputes between the same employer (who remunerates him) and the contractor.

2.10.2 Grounds for arbitrator challenge

The grounds on which an arbitrator can be challenged is a term of the arbitrator's contract and where the contract makes no provision to this effect, the relevant provisions under the arbitration law of the seat will be implied into the arbitrator's contract. The UNCITRAL Arbitration Rules provide

An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.¹⁷²

While under the ICC Rules, the parties can challenge an arbitrator for

An alleged lack of independence or otherwise.¹⁷³

Examples of grounds on which arbitrators have been successfully challenged include lack of required qualifications, pecuniary interests, and personal knowledge. Arbitrator challenges have been refused on various grounds including where the arbitrator participated in the drafting of a country's laws,¹⁷⁴ where allegations were 'remote, uncertain or speculative'¹⁷⁵ and where a mere lack of confidence which would not be shared by any reasonable person was alleged.¹⁷⁶ The IBA Conflict Guidelines give international arbitrators (and challenge decision makers) a guide on what issues are challengeable by providing a section on 'Practical Application of the General Standards'. The IBA Guidelines are merely a guide; so a party that wishes to challenge an arbitrator must ensure that the grounds on which his challenge is based is provided for under the relevant arbitration rules and or laws.

2.10.3 Procedure for arbitrator challenge

The arbitrator's contract also provides the method or procedure for raising and pursuing arbitrator challenge claims. Where the provisions of the UNCITRAL Arbitration Rules apply as terms of the arbitrator's contract (under ad hoc references), the challenging party will be required to notify the challenged arbitrator, the other disputing party and other members of the arbitral tribunal, in writing and within fifteen days of his appointment or of becoming aware of the relevant facts that substantiate the challenge. Where the challenged arbitrator does not resign and the other disputing party does not join in the challenge, then the appointing authority will be notified to decide the challenge.¹⁷⁷

Where the arbitrator's contract incorporates provisions of the arbitration rules of a particular institution, then the provisions on arbitrator challenge will apply. Generally, under most institutional rules, the aggrieved party presents its complaint to the arbitration institution in accordance with the provisions of its arbitration rules incorporated into the contract between the disputing parties and arbitration institution. The arbitration institution in performance of its contractual obligation under its contract with the disputing parties and the arbitrator's contract decides the challenge.¹⁷⁸ By concluding the arbitrator's contract the arbitrators also agree to the arbitration institution making such decisions on the basis of its arbitration rules. Thus all parties to the arbitrator's contract and institution's contract, that is the disputing parties, arbitrators and arbitration institution, in implementing the arbitration agreement, comply with the provisions of the incorporated arbitration rules.

However, such decisions, though administrative in nature, do not oust the supervisory jurisdiction of the relevant national court. To this effect, in the *AT&T v SCC* arbitration, AT&T could still apply to the English High Court, being the court of the forum, after the ICC Court decided against its challenge of one of the arbitrators in its dispute with Saudi Cable Company.¹⁷⁹ This ability for further recourse to national courts even where the parties (disputing parties and arbitration institution) have agreed otherwise, is not a breach of the contract between the arbitration institution and disputing parties or of the arbitrator's contract. The authority for further recourse to a supervisory national court is anchored on the mandatory provisions of the law of the seat of arbitration which parties cannot exclude by a contractual provision or term.¹⁸⁰ This is supported by the recent decision of the Rotterdam Court of First Instance in *Exel v Logitech* where the court held that a challenging party can bring its challenge application before the courts, even while the institution is yet to make a decision on the same challenge.¹⁸¹

The terms determining who decides on an arbitrator challenge and the procedure for making such a challenge in the arbitrator's contract can be categorized as warranties. Its breach will not terminate the arbitrator's contract (or the contract between the institution and disputing parties). In most jurisdictions where a party to the arbitrator's contract breaches this provision of the contract by failing to comply with the agreed challenge procedure in the applicable arbitration rules the party will be compelled to comply with the relevant rules. For example a party may apply directly to the national courts at the seat of arbitration instead of the arbitration institution (or appointing authority) in the first instance. The national courts may then refer such a party back to first comply with the provisions of the applicable arbitration rules and in effect the agreed terms of the arbitrator's contract and its contract with the arbitration institution. This action of national courts can be said to amount to the remedy of specific performance of this term of the arbitrator's contract. The decision of the Rotterdam Court of First

Instance in *Exel v Logitech* was based on the grounds that Article 1035 of the Netherlands CCP is a mandatory provision.

2.11 Decide the dispute

The arbitrator makes various decisions both procedural and substantive, on the dispute between the parties to the arbitration agreement.¹⁸² The final ‘product’ of any international commercial arbitral reference is an enforceable final award. This final award is also the end product of the arbitration agreement and its collateral contracts and the ‘commodity’ for which the disputing parties remunerate the arbitrator and the arbitration institution. Making various procedural and substantive decisions and the final award is the primary obligation of the arbitrator in the arbitrator’s contract just as the remuneration of the arbitrator is the primary obligation of the disputing parties under the arbitrator’s contract.¹⁸³

This obligation on the arbitrator to make relevant decisions in the arbitral reference is either an express or implied term of the arbitrator’s contract. This term is categorized as a fundamental one or a condition of the arbitrator’s contract so that its breach will result in the termination of the contract and possible liability for damages may be incurred by the arbitrator. There are various ways this obligation can be breached by the arbitrator including where he fails to make the decisions and arbitral award himself or makes the award outside the time agreed for it to be made.

In a panel of arbitrators the award represents the individual and collective decision of the members of the arbitral tribunal. It is arguable that the arbitral award has a dual nature, comprising of each individual arbitrator’s decision on the one hand and the arbitral tribunal’s decision on the other. So, where there is a dissenting opinion/award, this represents the individual decision of the dissenting arbitrator while the majority award represents the award of the arbitral tribunal, which takes precedence over and above the dissenting opinion and individual award.¹⁸⁴ However it can also be argued that the arbitral award is the decision of each arbitrator that signs it so that ultimately the majority or unanimous decision evidences the decision of each arbitrator, and then the decision of the majority of arbitrators will be adopted. This analysis recognizes the fact that each arbitrator makes his own decision¹⁸⁵ on the issues in dispute and supports the multiple arbitrator contracts theory, and is the preferred interpretation.

The breach of this term by the arbitrator amounts to a fundamental breach as the parties would have been deprived of the very reason they concluded the arbitrator’s contract in the first place. The gravity of the breach of this obligation is not dependent on whether the arbitral award was set aside, since there would be no award to set aside. This is because this breach would only occur in situations where a sole arbitrator is appointed since in a panel of three or more arbitrators the other arbitrators will render a majority award.¹⁸⁶

The failure to render an arbitral award requires a determination of the party who suffers loss and under which contract. It is clear that it is the disputing parties who suffer loss and so can recover damages under the arbitrator's contract where the disputing parties contract as principal (ad hoc references) or the institution contracts as agent. This analysis does not apply where the institution contracts as principal. In situations where the institution contracts as principal, where the arbitrator fails to render an award, the disputing parties will have a cause of action against the arbitration institution on the basis of the contract they have with the institution, for a breach of the term requiring the institution to deliver the arbitral award to the disputing parties. This is because the delivery of the arbitral award is the primary service of this contract as well, for which the disputing parties remunerate the arbitration institution. Therefore, in failing to deliver the award to the disputing parties, the institution has failed to comply with its fundamental obligation under this contract. By analogy with other contracts of service, the delivery of the award is the primary service for which the disputing parties remunerate the institution. This primary service has not been performed amounting to a fundamental breach of the contract.

The question that naturally follows this analysis is whether the institution can plead frustration as a defence since it is the arbitrator it appointed that had failed to make the decision and so produce an award for the institution to deliver to the disputing parties. The institution itself cannot make the decision so as to have a commodity (the arbitral award) to deliver to the disputing parties under their contract. Such a defence will depend on the law applicable to the contract between the disputing parties and arbitration institution, under which the court or tribunal will have to decide whether this is an event of a frustrating nature and consequence.¹⁸⁷ It is suggested that the institution may successfully plead frustration of its contract with the disputing parties in this situation.

However, where in such circumstances the disputing parties successively make a claim against the institution, then applying basic contract law principles, the institution will have a right of recourse against the arbitrator and can claim back the monies it has had to pay out to the disputing parties for this breach. Where in such circumstances the disputing parties do not make a claim on their contract with the institution, the institution can still make a claim against the arbitrator for breaching this term of the arbitrator's contract though it would only be entitled to nominal damages while the disputing parties who have suffered huge losses will be left without a remedy. This analysis again highlights the possible complications that arise when the institution contracts as principal under the arbitrator's contract.

All national arbitration laws regard arbitral awards that comply with its formal validity requirements as a final judgment of a court of law within its jurisdiction. The recognition or value a sovereign state gives to an arbitral award is not a question of contract either under the arbitration agreement or under the arbitrator's contract.¹⁸⁸ It is a question of the law and public

policy of each state. It represents the weight or value which any given state has decided in its own discretion (including compliance with international conventions) to attach to an arbitration award. The final award therefore enjoys the force of *res judicata* as do final court judgments in practically all jurisdictions. Thus the value attached to the final award made by the arbitrator is not determined by the arbitrator's contract but by statute, that is, the relevant national law or international convention.¹⁸⁹

The arbitral award is addressed to the disputing parties pursuant to the provisions of the arbitration rule or law in fulfilment of the arbitrator's contract and arbitration agreement. This connects the final award to the arbitration agreement.¹⁹⁰ The award evidences the performance by the arbitrator of the promise he made in the arbitrator's contract. In a panel of arbitrators the final award¹⁹¹ is made in the name of the arbitral tribunal as a requirement of the arbitration rule or law applicable to the award. Where the institution contracts as principal, the arbitral award is still addressed to the disputing parties as required under the applicable arbitration rules. This is so because the arbitrator is aware that he is contracted by the institution to make this decision for the disputing parties and not for the institution itself, and in compliance with the requirements of the proper law of the arbitral award. Under most arbitration laws, the award is required to expressly contain the names of the disputing parties.¹⁹² Addressing the arbitral award to the disputing parties also is a requirement under most arbitration rules.¹⁹³ So, in so addressing the award, the arbitrator complies with the requirements of the terms of his contract with the institution, whether the institution contracts as principal or as agent.

The arbitral tribunal (usually represented by the presiding arbitrator) deposits or files the award with the appropriate body or organ in jurisdictions where such measures are required.¹⁹⁴ Under ad hoc references the arbitrator notifies the disputing parties of his decision and delivers the final award to them. Such notification is made directly to the disputing parties with whom the arbitrator has contracted. This also signifies the perfection and fulfilment of the arbitrator's mandate.¹⁹⁵ However, the arbitrator's contract is fully performed once the disputing parties or institution have duly remunerated the arbitrators and accounts have been reconciled and closed. The rendering by the arbitrators of a decision and delivery of the award marks the fulfilment of one phase of the arbitrator's contract (that of deciding the dispute between the disputing parties).

As in ad hoc references, it is the arbitrator who makes the decision and produces the final award in institutional references. The arbitrator makes the award and deposits it with the arbitration institution, which then notifies the disputing parties and delivers the final award to them. This arbitral practice supports the proposition that it is the institution that concludes the arbitrator's contract with the arbitrator under institutional references. Where the arbitration institution allocates to itself the responsibility of 'scrutinising' the award,¹⁹⁶ such scrutiny goes to the form and possibly points of

substance of the award but not the substantive decision of the arbitrator.¹⁹⁷ To this effect CIETAC Rules provide

The CIETAC may remind the arbitral tribunal of issues in the award on condition that the arbitral tribunal's independence in rendering the award is not affected.¹⁹⁸

This preserves the award as the product of the arbitrators themselves. The authority of the arbitration institution to scrutinize the award is a term of both the arbitrator's contract (ensuring the consent of the arbitrator) and the agreement between the disputing parties and arbitration institution (ensuring the consent of the disputing parties) since it is provided for in the applicable arbitration rules.

The obligation of the arbitrator to make and deposit the award with the arbitration institution is part of the promises made by the arbitrator in the arbitrator's contract. This enables the institution to fully perform its own contract with the disputing parties. The notification and delivery of the award by the arbitration institution to the disputing parties must necessarily fall under the contract between the institution and disputing parties. The arbitrator contracts to deliver the award in accordance with the applicable arbitration rules to the institution. Therefore when the arbitrator makes his decision and embodies it in an award, he delivers the award to the institution in full satisfaction of his obligation under his contract. Thereafter the obligation to notify and deliver the award to the disputing parties arises under the contract between the institution and the disputing parties and falls on the institution.¹⁹⁹

Every other act relevant to the award then reverts to the contract concluded between the disputing parties and the arbitration institution. This includes full payment of all outstanding sums by the disputing parties to the arbitration institution (including the institution's remuneration for its services). Where the need for corrections as to calculations, typographical errors, interpretation or additional awards arises, the disputing parties notify the arbitration institution directly. In such situations the arbitration institution may possibly reconvene the same arbitral tribunal to effect such corrections. Every arbitral award made under the auspices of an arbitration institution contains the name and file number given to it by the institution.²⁰⁰ This identifies the award as a 'product' of the relevant arbitration institution and as emanating from it. This practice also reflects the fact that the institution was contracted by the disputing parties to administer the arbitration reference, where the institution in turn contracted the arbitrators named on the award to perform the judicial functions relevant to the arbitration reference.

The issue of time limit is also relevant under this term of the arbitrator's contract. This affects the time when the award should be rendered especially where time is of the essence.²⁰¹ In such a situation any applicable time limit is a contractual term, a breach of which will render the award invalid as having

been made out of time and therefore without jurisdiction. Such time limits may be contained in the arbitration agreement or applicable arbitration rule. An example is the ICC Rules in Article 24 (1), which provides

The time limit within which the Arbitral Tribunal must render its final Award is six months. Such time limit shall start to run from the date of the last signature by the Arbitral Tribunal or of the parties of the Terms of Reference ...²⁰²

The arbitrator can always seek extension of the time limit before it expires.²⁰³ This is important as the grant of such an extension ensures that the contractual term on time limit is not breached.²⁰⁴ The consent of the disputing parties is not required by the institution (or national court) for the grant of such extension. However, on application to the arbitration institution, the time may be extended where there is justifiable reason to do so. The arbitrator can always get the disputing parties to jointly agree to an extension of the time which will then operate as an amendment of the arbitration agreement and to all other collateral contracts.

2.12 Choice of law applicable to the arbitrator's contract

The arbitrator's contract, as with any other contract, must have its basis in a proper law. This will determine its terms and the obligations and rights of the parties signed to it. From arbitral practice, it is evident that the arbitrator's contract may not necessarily be contained in a single document neatly packaged like most written contracts. However, its terms are clearly defined and agreed by parties to it, as evidenced in applicable arbitration rules and arbitration laws. The analysis in Chapter Four of the formation of the arbitrator's contract clearly shows that parties to the arbitrator's contract may not even be conscious of the fact that they are involved in a contractual relationship.²⁰⁵ This being the case, they definitely may not have averted their minds to the issue of the law that applies to this contract.

The necessity of determining the law applicable to the arbitrator's contract affects various aspects of the contractual relationships and where a dispute arises on any aspect of the contract, the substantive law would be applicable to the resolution or adjudication of such a dispute. This section briefly examines various criteria applied in determining the law applicable to the arbitrator's contract in three sub-sections. The criteria examined are: (2.12.1) express choice of parties, (2.12.2) the Rome Convention regime, (2.12.3) the place with the closest connection, and (2.12.4) application of trans-national rules of law.

2.12.1 *Express choice by the parties*

The means of determining the law applicable to international contracts is settled and appears to have a universal acceptance.²⁰⁶ In furtherance of the principle of party autonomy, the parties to the arbitrator's contract may freely choose a set of non-national standards or rules, or a national law to apply as the substantive law of the arbitrator's contract. For reasons already mentioned above, this hardly happens in the arbitrator's contract. Where the parties to the arbitrator's contract have not expressly chosen the applicable law, then various tests may be applied to find out if they made an implied choice. The relevant conflict of law rules are then applied.

2.12.2 *The Rome 1 regime*

The EC Regulation on the Law Applicable to Contractual Obligations 2008 (Rome 1) regulates, 'the rules applicable in the member States concerning the conflict of laws and of jurisdiction'.²⁰⁷ It must be noted that the conflict of laws test adopted under this Regulation may lead to the application of the national law of any state, whether or not it is a member state of the European Communities.²⁰⁸ The rules of this regulation apply, 'in situations involving a conflict of laws, to contractual obligations in civil and commercial matters'²⁰⁹ but does not apply to arbitration agreements.²¹⁰ The arbitrator and the institution's contracts, not being an arbitration agreement but contracts under which the arbitrator and institution provide services, will both be subject to the regime of the Regulation.

Rome 1 retains the freedom of choice of the parties as a paramount consideration in accordance with the principles of party autonomy.²¹¹ Article 3 Rome 1 states that, 'A contract shall be governed by the law chosen by the parties.' The parties' choice can be expressly stated in the contract or 'clearly demonstrated by the terms of the contract or the circumstances of the case'.²¹² Where no express choice can be deciphered from the contract or the parties have made no choice, the regulation lays down rules that would be applied to determine the law to apply to the contract. In Article 4, the regulation gives guidance on the default position in various categories of contracts. The contracts examined in this section are both contracts for the provision of services, so under Article 4.1 (b)

A contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence'.

Therefore under this provision and where Rome 1 applies to determine the question, the arbitrator's contract will be governed by the law of the habitual residence or domicile of the arbitrator, and the institution's contract will be governed by the law of the place of incorporation or registration of the institution.

The first thing to note is that the application of these criteria to the arbitrator's contract in a tribunal of more than one arbitrator, means that each arbitrator's contract will be subject to different laws. This is especially relevant in arbitral tribunals over international commercial arbitration references, where the arbitrators are usually 'habitually resident' in different countries. Klaus Lionnet examined this proposition in the contest of the closest connection test, and rejected it on the grounds that in a panel of arbitrators, with arbitrators of different domiciles, the arbitrator's contracts will be subjected to different laws and this result is undesirable. One of the practical effects of the objection by Klaus Lionnet is that in a panel of arbitrators, one or more arbitrators may be subject to a law under which he enjoys some limitation to his liability while other arbitrators in the same reference will be subject to a law under which they do not enjoy such limitation. A simple example can be taken from a tribunal of three arbitrators where two of the arbitrators are habitually resident in England and the presiding arbitrator is habitually resident in Switzerland. The two arbitrators whose contracts will be subject to English law will enjoy partial immunity while the Swiss arbitrator will not under Swiss Federal law. This result will be unacceptable to arbitrators and so highly undesirable. The arbitrators are all involved in the same arbitral reference and even though each has a separate contract binding him to the disputing parties (or arbitration institution) it would be desirable that all the arbitrator's contracts are subjected to the same law.

The requirement under Rome I that needs to be fulfilled so that recourse can be made to the 'law of the country where the party required to effect the characteristic performance of the contract has his habitual residence' is that 'the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1', which these contracts do not fall under since they fall within only paragraph 1 (b).²¹³ Even if these contracts fell within this paragraph, characteristic performance under a contract of service for money payment is the performance of the service. Thus under the arbitrator's contract, it is the arbitrator that effects the characteristic performance of the contract by making the arbitral award. Therefore the relevant law will be that of the habitual place of residence of the arbitrator (i.e. his or her place of residence at the time of accepting the appointment). The law of the place of incorporation or registration of the institution will still apply to the institution's contract, effectively resulting in the same position as the default requirement under Article 4.1 (b) Rome I.

According to commentators there are other laws which may be 'manifestly more closely connected with a country'²¹⁴ other than those of the domicile of the arbitrator. These other connectors are also applied as standards or tests for determining the applicable law under conflict of law rules applying the closest connection test.²¹⁵ Three of these connectors will be examined below: (2.12.3.1) seat of arbitration, (2.12.3.2) place of formation, and (2.12.3.3) place of performance of the arbitrator's contract.

2.12.2.1 SEAT OF ARBITRATION

Klaus Lionnet adopted the seat of arbitration as having the closest connection to the arbitrator's contract, being the place of performance of the arbitral reference and the arbitrator's contract. He further argues that the choice of this connector is also supported by the provisions of Article V (1) (a) of the New York Convention on the law applicable to the arbitration agreement.²¹⁶ It may be argued that the adoption of the law of the seat of arbitration as the closest connector to be applied to the determination of the proper law of the arbitrator's contract may become uncertain where a juridical seat has not been agreed. It is suggested that the various established methods of identifying the seat of arbitration will be applied to establish the seat of arbitration and then the law of the seat will be applied as the law applicable to the arbitrator's contract. Where this connector is applied to the example of the three arbitrators above, then if the seat of arbitration is in New York, regardless of the three arbitrators being habitually resident in England and Switzerland, the contract law of New York will apply as the proper law to their individual arbitrator's contracts. Evidently, the application of this connector ensures all the contracts of all the arbitrators involved in the same arbitral reference will be subject to the same law. This in effect cures the defect of adopting the habitual residence of the arbitrator as the connector.

The decision of the Austrian Supreme Court in 1998 over a dispute between the chairman of an arbitral tribunal and the company that lost the arbitration is supportive of the application of this connector. The dispute arose out of institutional arbitration proceedings in Austria between two German companies. The parties appointed two arbitrators while the arbitration institution appointed the chairman of the arbitral tribunal. The award was against company X, who sued the chairman of the arbitral tribunal before the Austrian courts, claiming damages and interests, on the grounds of lack of impartiality and independence. On the question of the law applicable to the arbitrator's contract, the Austrian Supreme Court ruled that this is the same law applicable to the arbitration agreement and arbitration proceedings, in this case, German law. The Court of First Instance was therefore directed to apply German contract law to the question of the liability of the arbitrator.²¹⁷ The arbitrator's contract in this decision was between the arbitrator and arbitration institution acting as agent, so the disputing party could sue the arbitrator on the arbitrator's contract (as a disclosed principal). German law was agreed between the parties as the law applicable to the arbitration agreement and arbitral proceedings though the hearings took place in a law office in Vienna.²¹⁸

One issue that arises in this regard is where the parties change the seat of arbitration for example from a jurisdiction where arbitrators enjoy some immunity to one in which they do not, the effect of this change on the proper law of the arbitrator's contract. This is relevant since it is within the

powers of the disputing parties to change the juridical seat of the arbitration. Would the arbitrator then be bound by the application of the new law to his contract? On the basis of the judgment from the Austrian case mentioned above and jurisprudence from German scholars referred to in the judgment, the answer to this question would be in the affirmative. However, the original seat 'at the time the arbitrator's contract was concluded' should be the relevant seat of arbitration for purposes of applying the seat of arbitration connector in determining the law applicable to the arbitrator's contract, and not the new seat agreed by the disputing parties. One of the reasons for this assertion is that the arbitrator contracted on specific terms, the applicable law (as the law of the seat of arbitration) being one of those terms. If the seat is changed by the disputing parties that will amount to a unilateral change of this term of the contract by the disputing parties only. Such unilateral change is a breach of the terms of the arbitrator's contract. So that except where in such circumstances the arbitrator also agrees to the change of seat as it affects his contract, then a change of the juridical seat after the arbitrator has accepted appointment should not affect the law applicable to the arbitrator's contract where this connecting factor is adopted. If the arbitrator will be bound by such unilateral changes (without his consent), then this connector may for this reason, be unsatisfactory to arbitrators. The possibility of changing the juridical seat of the arbitration also erodes certainty regarding the law applicable to the arbitrator's contract. This uncertainty is an undesirable possible outcome of the adoption of this connector.

2.12.2.2 PLACE OF FORMATION OF ARBITRATOR'S CONTRACT

Another possible connecting factor is the place of the formation of the arbitrator's contract. This implies that the law of the place where the arbitrator accepted appointment will govern the arbitrator's contract. This may not necessarily be the law of the juridical seat of the arbitration. It may be the law of a neutral place but most likely will be the law of the habitual residence or domicile of the arbitrator. This is because the disputing parties make the offer of appointment to the arbitrator by contacting him usually at his place of residence or domicile and he accepts the offer at the same place. The result will therefore be the same as under the Rome 1 discussion above. The shortcomings mentioned above will affect this connector where each arbitrator accepts appointment at his domicile or place of habitual residence, or even a different place. This may differ under institutional arbitral references where the arbitrator may be required to attend the premises of the arbitration institution to accept appointment, so that for example if the arbitral reference in the example given above is under the auspices of the LCIA rules, all three arbitrator's contracts will be subject to English law since the LCIA maintains its offices in London. In practice however, the arbitration institution sends necessary documents to the arbitrator who accepts appointment at his domicile or place of habitual residence and sends the documents

back to the institution, so that the arbitrator's contract will be concluded again at his place of habitual residence or domicile.

2.12.2.3 PLACE OF PERFORMANCE OF THE ARBITRATOR'S CONTRACT

The arbitrator's contract is performed by the arbitrator conducting the arbitral hearings and evidencing this in a decision over the disputes between the parties in an arbitral award, in accordance with the arbitration agreement. The place of performance will therefore be the same place as the origin or nationality of the arbitral award. This is usually where the arbitrator wrote the award and generally would be at the seat of arbitration or his place of habitual residence (if different from the seat of arbitration). Determination of the place of performance is usually not problematic since one of the formal requirements of the award is to state the name of the place where the award was made, known as place of origin of the award²¹⁹ or the award will be deemed as made at the place of arbitration.

This connector therefore will require that the law of the place of origin of the award apply as the proper law of the arbitrator's contract. This again links the award (final product of the arbitral reference) to the arbitrator's contract. As mentioned above the place of origin of the award is generally taken to be the same as the seat of arbitration. This implies that where the seat of arbitration is changed during the reference, the award would bear the name of the last seat of arbitration before it was made. This still retains the uncertainty affecting the law applicable to the arbitrator's contract where the disputing parties change the law of the juridical seat of arbitration, which then has a negative impact on the rights of the arbitrator as mentioned above. Under institutional references, the same law (origin of the award) will apply as the applicable law of the arbitrator's contract whether the institution contracts as principal or agent.

2.12.3 *Trans-national rules of law*

Another proposition is the application of trans-national rules of law to the arbitrator's contract because of its independent nature and the deficiencies in the application of the connecting factors examined above. Transnational rules of law include the application of suitable rules of *lex mercatoria* and other non-legal standards or principles applicable to international commercial contracts, but not any particular national law. The inspiration for this proposition emanates from provisions of arbitration rules. The trend in modern arbitration rules on identifying the substantive applicable law (for the main dispute between the parties to the arbitration agreement) mandates arbitrators to apply, 'the rules of law which it (the arbitral tribunal) determines to be appropriate'.²²⁰ This requirement can be applied to identify the law applicable to the arbitrator's contract.²²¹ This question will be left to the tribunal or court seised of the dispute to determine what law

or rules of law it considers appropriate to apply to the arbitrator's contracts. In so determining, the tribunal will take all or some of the above mentioned connecting factors into account and this may lead to the application of the same law or rules of law to the three arbitrator's contracts, which is the desired effect of this exercise.

It may be difficult for some national courts that are not empowered by their internal conflict of laws rules to apply non-national laws or rules of law as the substantive law of a contract to adopt this conflict rule. Another difficulty is identifying what these transnational rules of law are and those that are relevant to the arbitrator's contract. However, determining the applicable law is very relevant to issues of remedy, limitation and exclusion of liability, and termination of the arbitrator's contract. Thus the preferred position is an express or implied choice by the parties and in its absence, in ranking the connectors discussed above, the law of the juridical seat of arbitration should be ranked highest and where feasible applied as the proper law of the international arbitrator's contract.

On the proper law of the institution's contract, the law of the service provider, which is the law of the place of incorporation or registration of the institution, as a connector will suffice in the absence of any express or implied law by the parties. This connector will be reassuring for arbitration institutions, since this implies that whatever the seat of arbitration, as long as the arbitral reference is administered by the institution under its arbitration rules, regardless of venue, the institution's contract with the disputing parties will be subjected to the same law. In recent years prominent arbitration institutions have been extending their administrative reach, and so no longer satisfied with administering arbitral references under their rules in any city in the world, they have now opted to establish offices in certain geographical regions of the world. An example is the LCIA which now has an independent branch office in New Delhi, India.²²² The impact of this expansionist movement (on the proper law of the institution's contract) is that where the arbitral reference is registered in the India offices of the LCIA, for example, then the proper law of the contract between the LCIA (India) and the disputing parties will be Indian contract law and not English contract law which will apply where the reference is registered with LCIA London.

2.13 Dispute resolution

The parties to the arbitrator's contract may provide for the means of resolving any disputes arising from the arbitrator's contract in exercise of the principle of party autonomy. The choices open to the parties include agreeing to a jurisdiction clause identifying the court/jurisdiction where their dispute should be resolved. The parties may also agree to proceed by way of arbitration or a non-binding dispute resolution mechanism or an escalating dispute resolution clause. The relevant question here is what happens where the parties to the arbitrator's contract are silent as to what dispute resolution

mechanism will apply. This is especially possible since, as has been noted above, the parties to the arbitrator's contract do not overtly conclude the contract and consciously agree on its terms.

This question will be determined by an examination of the law applicable to the arbitrator's contract. It is likely to culminate in litigation since other processes will require the consent of both parties. It is not clear how many arbitrator appointment agreements have dispute resolution clauses or whether parties to the arbitrator's contract avert their minds to the need for such a clause. It appears arbitrators are generally reliant on arbitrator immunity provisions under national laws. It is recognized that one of the results of this analysis of the arbitrator's contract is the proof that such reliance may be unfounded and there exists a need to agree to these terms with the disputing parties or arbitration institution before they conclude their service contract. The same situation applies in the contract between the institution and disputing parties, especially since there is nothing to this effect in the arbitration rules of institutions.

Chapter summary

Having established the formation of the arbitrator's contract in Chapter Four, this chapter examined some important terms of the arbitrator and institution's contracts, the categorization of these terms as conditions or fundamental terms, and warranties, and the effect on these contracts of the breach of any of these terms by the parties to the contracts. The remedies available to the parties for such breaches are examined in Chapter Six. Thirteen general terms that are contained in each arbitrator's contract are examined ranging from the qualifications and remit of the arbitrators to a dispute resolution clause.

6 Remedies

This chapter examines the remedies that are available for breach of the terms of the arbitrator's contract and the contract between the institution and disputing parties.¹ From the discussions in Chapter Five, it is obvious that the remedies that are available under the arbitrator's contract do not exactly accord with traditional contract remedies. The very consequence of the analysis made in previous chapters of this book is highlighted in this chapter. This consequence is the fact that the arbitrator's contract is a contract for the provision of services by the arbitrator who should be held liable on the basis of this contract at least, (if not under the general law of professional negligence) for breaches of this contract. The primary purpose of this book is to alert the users of international commercial arbitration to this contractual aspect of the mechanism of arbitration, so that the parties concluding these contracts (disputants, arbitrators and institutions) can be minded of these contractual aspects when entering into any international arbitral reference. This awareness, it can be argued, will ensure the continued professional development of the practice of international commercial arbitration by these participants.

This chapter examines: (1) the remedies that are available for breach of the arbitrator's contract; (2) those remedies that are available for breaches of the institutions contract; and (3) the effect of the term on limitation of liability on these contracts.

1 Remedies for breach of the arbitrator's contract

Having identified and categorized some general terms usually contained in the arbitrator's contract, the question examined in this section is whether there are any consequences for breaches of the arbitrator's contract by parties to it, and if there are, what remedies are available to the parties. As already mentioned in Chapter Five, the breach of a term classified as a condition or a fundamental term will give the other party to the contract a right to terminate the arbitrator's contract along with the right to claim damages. The right to terminate the arbitrator's contract is exercised through another right, that of challenging the arbitrator. A successful challenge will

terminate the arbitrator's contract. It is obvious that the same ground or breach that grounded the termination of the arbitrator's contract may also substantiate a challenge of the arbitral award.² Thus, the authors of *Fouchard Gaillard and Goldman*, have argued that in the event of a breach, 'in principle it is the award, and not the arbitrator that will be under attack'.³ However, matters affecting the challenge of the arbitral award are outside the remit of the discussion on the arbitrator's contract, since the parties involved are different and, on a time grid, they fall outside the period when the arbitrators' contract is in existence.

From arbitral practice, it appears that if the breach by the arbitrator is not of a fundamental nature, there may be no remedy available to the disputing parties, principally because of the peculiar nature of the service rendered by the arbitrator under this contract. This service is judicial and is usually accompanied by some degree of immunity, since the service is not strictly classified as a professional service. Another reason for this lack of remedy against the arbitrator may be that the breach of such non-fundamental terms may not cause the disputing parties or institution to suffer any substantial loss, so that a claim may result in nominal damages being awarded. The effort expended on such a claim will not be worth the benefit (if any) especially as such a claim may derail the arbitral proceeding, in both time and cost.

Another difficulty encountered in pursuing a remedy for the breach of the arbitrator's contract, is identifying the party that has suffered loss as a consequence of the breach. It is usually the disputing parties who suffer any resultant loss from the breach of the terms of the arbitrator's contract. The arbitrator will only suffer loss where the disputing parties (or arbitration institution) fail or refuse to remunerate him for his service. In such situations, the arbitrator will sue either the disputing parties or institution on the basis of his contract for his fees under the arbitrator's contract. As already mentioned in Chapter Five, the failure or refusal to remunerate the arbitrator for his fees is a fundamental breach which ideally will entitle the arbitrator to terminate his contract with the institution or disputing parties. Some arbitration laws and rules expressly codify this right of arbitrators. An example is the Arbitration Act India which provides

further that where the other party also does not pay the aforesaid share in respect of the claim or the counter claim, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of such claim or counter claim, as the case may be.⁴

Generally where a party is in breach of a contractual term, the party who has suffered damage as a result of such breach is entitled to a remedy. Under general contract law there are various remedies available against the party in breach including specific performance and award of damages. The autonomy or independent nature of the arbitrator's contract is again evident in the analysis of the types of remedies available for the breach of its terms by

its contracting parties. This section examines: (1.1) the availability of the remedies of specific performance; and (1.2) the award of damages, which may be available to parties under the arbitrator's contract.

1.1 Remedy of specific performance

The remedy of specific performance will be the preferred remedy depending on the nature of the term breached. This remedy requires the restoration of the contracting parties to *status quo ante*. The major prerequisite to the grant of the remedy of specific performance is that the service to be performed can still be performed. So, for example, where a disputing party fails or refuses to comply with a decision of the arbitrator in breach of the arbitrator's contract, such a party can only be required to comply with the decision where the relevance of the order has not been defeated. An example is where the arbitrator orders one party to produce documents, which the party fails or refuses to produce. The defaulting party is in breach of its undertaking under the arbitrator's contract (and/or its contract with the institution) to comply with the orders of the arbitrator. It would be unfruitful to require specific performance of compliance with this order of the arbitrator where the relevant documents have been destroyed. Moreover, drawing from arbitral practice, in such circumstances the arbitrator only draws an adverse inference from the defaulting party's failure to produce the document and continue with the arbitral proceedings.⁵ Another example is where the disputing parties fail to comply with the arbitrator challenge procedure they have agreed on with the arbitrators (or institution), and directly apply to a national court for redress. Most courts will require the disputing parties to first comply with their challenge procedure before applying to the court. In making such an order the national court recognizes the terms of the arbitrator's contract and requires the parties to adhere to it.

1.2 Award of damages

Where the award of specific performance is no longer practicable, an award of money damages may be pursued. Where the disputing parties are in breach, for example failure to pay the arbitrator's fees, the arbitrator can sue in a relevant court for his fees and interest on the amount. Some arbitration laws also make express provisions in this regard.⁶ There is no known case dealing with a dispute between an arbitrator and arbitration institution over non payment of fees, however the same general contract principles will apply to any such dispute emanating from the arbitrator's contract where the institution contracts as principal.

The more familiar scenario is where the disputing parties have suffered loss on account of the breach of a contractual term by the arbitrator, for example the final award being set aside because of a default committed by the arbitrator, so that in effect the parties have wasted their time and

resources in prosecuting the arbitral reference. Where such a claim arises, there can be a wide difference in remedies depending on whether arbitrators enjoy any applicable immunity from or limitation of liability under the applicable law. In a 2005 dispute before the Supreme Court of Finland, an arbitrator was ordered to pay a substantial sum on the basis of contract in *Roulas v Professor J Tepora*,⁷ arising out of an ad hoc arbitral reference under the Finnish Arbitration Act 1992.⁸ The arbitration reference was over a dispute concerning a share purchase agreement between three private sellers and a company owned by a Finnish bank. The parties appointed two party appointed arbitrators who appointed Professor Tepora the third and presiding arbitrator. The arbitral tribunal rendered its award in 1995 against the sellers. In 1997, the Helsinki Court of Appeal nullified the arbitral award on the grounds of the disqualification of Professor Tepora, who had given expert legal opinion (on different issues) to the respondent company, banks and other members of the group, before and during the arbitral proceedings without disclosing this to the parties in the arbitration. The sellers thereafter recommenced arbitral proceedings and filed a claim for the loss suffered and interest on the claim, directly against the arbitrator, Professor Tepora.

The District Court and Helsinki Court of Appeal agreed on the basis of the breach being the non-disclosure by the presiding arbitrator. Both courts determined that the arbitrator's liability should be based on tort,⁹ and in categorizing the arbitrator's conduct as 'slight negligence', dismissed the claim. On further appeal to the Supreme Court, the court analysed the relationship between the parties and arbitrators and determined that it is comparable to a contract (as did the Court of Appeal). It then found that the nullity of the award was based on the fault of the arbitrator, and held that the compensation payable is based on contract and not tort (point of departure with the Court of Appeal).¹⁰ The arbitrator was eventually ordered to pay almost 81,000 Euros in damages to the sellers. This decision fully supports the proposition that the relationship between the disputing parties and arbitrator in ad hoc references is contractual. This decision also supports the view that where any applicable immunity protection laws do not cover the consequence of the breach by the arbitrator, the disputing parties will be able to recover money damages from the arbitrator.

2 Remedies for breach of institution's contract

The parties to the institution's contract as identified in Chapter Four, are the disputing parties and the arbitration institution. The terms of this contract were identified in Chapter Five. This implies that the terms of this contract can only be breached by the institution and disputing parties and not the arbitrator who is not party to it. However it is obvious that even where the institution contracts with the arbitrator as principal, certain actions of the arbitrator will affect the disputing parties directly. To ensure that the contractual link and divides are maintained, it has been argued that even

in such situations, the disputing parties will have a right of recourse directly against the institution who can then claim back its loss from the arbitrator it appointed. This clarification is important in identifying what remedies are available, who can claim and against whom under this contract. Again the same remedies of specific performance and award of damages will be available as remedies for breaches of the terms of this contract. An example of a breach by the disputing parties against the arbitration institution is where the disputing parties fail or refuse to remunerate the institution for its services. It has already been clarified that the provisions on cost under institutional rules form part of the arbitration rules of the institution which is the standard form contract on which the institution contracts with the disputing parties. So where the institution's fees are not paid, the disputing parties are in breach and the institution can claim this fee from the disputing parties through a court action where it has rendered services to the disputing parties. Disputing parties can sue institutions for any breaches of the terms of this contract as well. Disputing parties (usually one of the parties) have sued institutions for not complying with their arbitration rules, for appointing arbitrators who have not performed their task satisfactorily and even for the arbitrator rendering an unenforceable award.¹¹

3 Effect of exclusion or limitation of liability clauses

An examination of various arbitration laws shows a range of treatment of the question of liability of arbitrators for negligence in the performance of their service under the arbitrator's contract.¹² Some laws are completely silent on the issue leaving it to the national courts to deal with,¹³ while some laws make express provisions for partial immunity from liability,¹⁴ and yet some other arbitration laws provide for arbitrator liability for professional negligence.¹⁵ Such liability is not for 'judging poorly' but for 'duties and obligations he owes in his ruling capacity'.¹⁶ The liability discussed here is both the liability of the institution itself and arbitrators, whether sitting under institutional rules or ad hoc. The discussion below reveals that in jurisdictions where the arbitrator or institution does not enjoy any exclusion or limitation of liability, the disputing parties can seek a remedy against the arbitrator or institution for acts or omissions amounting to breaches of the arbitrator and institution's contracts; while in jurisdictions where the arbitrator or institution enjoys full, partial or limited immunity from suit, the scope to sue the arbitrator or institution is limited to the extent of the protection provided to him by such laws.¹⁷

The arbitrator's liability would therefore be to the other parties to the arbitrator's contract on which any possible cause of action arises. This section only examines the effect of the clause on the exclusion or limitation of liability on the arbitrator's contract. Arbitrators enjoy statutory immunity (full or partial) under the provisions of some national laws. Various reasons have been proffered for such exemptions.¹⁸ Such immunities are questions

of public policy and/or mandatory provisions of the relevant law from which the disputing parties and arbitrators cannot derogate in the arbitrator's contract.¹⁹ It therefore is not a term that mandatorily binds the parties to the arbitrator's contract.

It is acknowledged that some arbitration institutions exclude themselves and their servants from liability to the disputing parties in their contract. An example of such provision is contained in Article 34 ICC Rules which provides

Neither the arbitrators, nor the Court and its members, nor the ICC and its employees, nor the ICC National Committees shall be liable to any person for any act or omission in connection with the arbitration.²⁰

This clause of the ICC Rules is very widely drawn to ensure that the acts or omissions of the staff of the institution (for which as employer, the institution would be vicariously liable) that breach the promises of the institution to the disputing parties or arbitrator are exempt from liability, so that the disputing parties cannot claim against the institution for such breaches. Thus parties cannot seek redress from the employee involved since this would amount to indirectly obtaining redress from the arbitration institution itself.²¹

The Paris Court of Appeal in January 2009 decided that this clause is unenforceable as a matter of French law.²² The court reasoned that such a clause allowed the ICC to avoid performance of its role as service provider.²³ This is especially important since it is not the institution but the arbitrator that renders a judicial service to the disputing parties.²⁴ This judgment must also be read in light of the fact that French law does not make any statutory provisions on the limitation or exclusion of liability for arbitration institutions, unlike English law.

An analysis of international conventions and national laws reveals a lack of uniformity on this issue. For example the ICSID Centre enjoys immunity from all legal processes except when it waives its immunity.²⁵ Section 74 Arbitration Act England provides

An arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith.²⁶

This section confers on arbitration institutions and appointing authorities, including their employee and agents, immunity subject to acts or omissions done in bad faith.²⁷ In Hong Kong, arbitration institutions, appointing authorities and their employees and agents, are liable for dishonest acts or omissions.²⁸ In England, the rationale appears to be that the immunity of arbitration institutions emanates from that of the arbitrators who sit under their rules. This ensures the effectiveness of the immunity granted

to arbitrators, since a party who cannot sue the arbitrator might sue the appointing institution. The judge in *Road Rejuvenating & Repair Services v Mitchell*²⁹ had said that since the arbitrator was appointed by the Chartered Institute of Arbitrators who were not before him, he expects that they would stand by their appointee and pay the costs of the parties. This decision predates the 1996 Act as the judges' comments are in clear breach of the protection granted by s 74.

Therefore under statutory regimes such as this, Article 34 of the ICC Rules (and all other institutions with exclusion or limitation of liability clauses in their arbitration rules) will be enforceable. In support of the view taken by the Paris Court of Appeal in *SNF v ICC*, it is obvious that arbitration institutions do not perform any judicial roles or functions for which they require protection, even on public policy grounds. From the discussions and analysis in previous chapters of this book, arbitration institutions clearly enter into a contractual relationship with the disputing parties to provide certain services for a fee. Where the institution fails to perform its advertised tasks or functions, then it has not provided the service for which it should be paid.³⁰

Chapter summary

This chapter examined the contractual remedies of specific performance and award of damages, which are available to parties for the breach of terms of the arbitrator's and institution's contracts. It also examined the term on the exclusion or limitation of the liability of the arbitrator and institution on the contracts and the influence of this term on the contracts.

7 Termination of the contracts

The arbitrator and institution's contracts can be discharged or terminated through one of four methods.¹ These are where: (1) all parties have fully performed their obligations under the contracts; or (2) all agree to terminate the contracts; or (3) where there is a fundamental breach of the terms of the contracts; or (4) the contracts are frustrated, so as to bring the contract to an end. Where any of these contracts is terminated because of the breach of a fundamental term, this may also implicate issues of limitation or exclusion of liability of the arbitrator or institution. Such issues do not affect the termination of the contract but the claim for a remedy for the breach.²

1 Full performance

The arbitrator's contract is fully performed when the arbitrator has delivered the final award in accordance with the arbitration agreement and he has been fully remunerated by the disputing parties or arbitration institution. The vast majority of arbitrator's contracts terminate in this way. This does not include proceedings before national courts to set aside or recognize and enforce the final arbitral award since this stage of the arbitral reference falls outside the remit of the arbitrator's contract. Statistics from various arbitration institutions show a very healthy completion rate and since there are very few recorded proceedings before national courts by arbitrators seeking enforcement of their remuneration clauses, then it can be safely concluded that the performance of the obligations in the arbitrator's contract is the usual way of terminating the arbitrator's contract.

Some arbitration laws make provisions on when the arbitral proceedings or the arbitrator's mandate terminate, this is when the final award is made.³ From the discussion above, it is clear these provisions refer to the performance by the arbitrator of one part of the arbitrator's contract. The other part that needs to be performed is by the disputing parties or institution, and this is the payment to the arbitrator in full for the services he has rendered in the arbitral reference. It is after this payment that his contract will be fully performed.

The institution's contract with the disputing parties is fully performed

when the institution has delivered the arbitral award to the disputing parties and the disputing parties have fully paid the institution's fees. Since the arbitrator is not party to this contract, matters on the payment of his fees by the institution do not fall within this contract and so are not relevant to the performance of this contract. In practice, the institution will have to be in funds to pay the arbitrator but this is not a contractual requirement except of course where the arbitrator's contract makes the payment of the arbitrator's fees by the institution conditional on the institution itself receiving payment from the disputing parties.

Once the institution is paid, its contract with the disputing parties is fully performed and so stands terminated. A relevant question is, where the disputing parties require the arbitrator to interpret, correct or make an additional award, will the institution be required to perform the relevant service to effect this interpretation, correction or additional award under the same contract it originally concluded with the disputing parties, or will it draft a new contract with them to perform these services?

It can be argued that where the disputing parties require these additional services from the institution (to be performed by the arbitrator) *after* the original contract for service has been terminated, the parties will have to draft a fresh contract. It is also arguable that these additional tasks are not fresh instructions or services (as can be seen from the provisions of arbitration laws relevant to these matters) but can be interpreted as an extension of the original instruction and service. This argument is very persuasive since any service of interpretation, correction or additional award, emanates from the original service rendered by the arbitrator through the institution. The provisions of arbitration laws on interpretation, correction and additional awards clearly refer back to the award from the original arbitrator's contract, so it appears that these additional services will fall within the arbitrator's original contract.⁴

A suggestion to reconcile these two opposing arguments and based on the practicality of the services to be rendered, may be to interpret each case as it arises, so that where the same arbitrator renders the interpretations, correction or additional award, then the service will be rendered under the original contracts. However, where a new arbitrator is appointed to render these services then a new contract will be drafted with the new arbitrator but the institution will be acting under its original contract with the disputing parties. This compromise suggestion appears to be supported by the provisions of arbitration rules in which the institution represents that the arbitrator it appoints will perform these functions.⁵

2 Agreement of the parties

Generally the parties to any contract can agree to terminate the contract at any time during its existence. Such agreement and termination will not affect any accrued rights of the parties including those for breaches of the terms

of the contract. The parties to the arbitrator's contract may equally agree on situations or events the occurrence of which will terminate the contract. However the parties to the arbitrator's contract hardly agree on such events or situations, again because of the nature of the formation of the contract. Such situations or events are indirectly agreed under arbitration rules and laws, which contain provisions on matters or events the occurrence of which will terminate the arbitral reference. This is because the termination of the arbitral reference in turn triggers the event leading to the termination of the arbitrator's contract since once the reference is terminated, the obligation to fully pay the arbitrator arises and once this obligation is fulfilled the arbitrator's contract comes to an end. An example of such event is where the disputing parties settle their dispute. The arbitrator can then issue a consent award which will terminate the arbitral reference and trigger the termination of the arbitrator's contract.⁶ It is generally accepted that the disputing parties have the right to settle or resolve their dispute before the arbitral tribunal makes a final award. Some national laws provide for the arbitral tribunal to make an award on agreed terms, if requested by the disputing parties and not objected to by the arbitral tribunal.⁷ In other national laws, the consent of the arbitral tribunal is not required.⁸ The award on agreed terms has, 'the same status and effect as any other award on the merits of the case'.⁹ This right of the parties is also a term of the arbitrator's contract rooted in the arbitration rules or law incorporated into the arbitration agreement. Thus as mentioned above, the exercise by the disputing parties of this right of settlement effectively terminates the mandate of the arbitrator and upon full remuneration of the arbitrator terminates the arbitrator's contract.

Where the disputing parties agree to terminate the arbitrator's mandate (and by extension the arbitrator's contract) the arbitrator will have to agree to this termination either expressly or by conduct, otherwise, the disputing parties' action will amount to a unilateral termination of the contract, which is not binding on the arbitrator. Arbitration rules and laws empower disputing parties to terminate the arbitral reference at any time before a final award is made. This right of the disputing parties emanates from the arbitration agreement but is also incorporated into the arbitrator's contract. It is the effect of the exercise of this power by the disputing parties that imparts on the arbitrator's contract. The exercise of this power is conferred by agreement of all the parties to the arbitrator's and institution's contracts (through the incorporation of the arbitration rules) and so is valid. However as already mentioned above, this only terminates one part of the arbitrator's contract.

Where an arbitration institution contracts as principal under the arbitrator's contract, the agreement of the disputing parties to terminate the arbitral reference falls under the contract between the institution and the disputing parties. Under this contract, the arbitration rules permit the disputing parties to take this course of action. Since the arbitration rules also form the basis of the arbitrator's contract with the institution, then by

accepting to contract on these rules, the arbitrator already consented to the termination of his mandate in this manner. Again this situation is a partial termination of the arbitrator's contract which will be fully terminated once the institution pays the arbitrator his fees.

On the effect of such events on the institution's contract, the same analysis applies. Under this contract, the institution will still deliver the award by consent (if required) to the disputing parties and receive payment from them for the full performance of this contract.

3 Fundamental breach

From the analysis on breaches of the terms of the arbitrator and institution's contracts, it is evident that where one party provides a performance that is different from the one agreed or does not perform at all then that party is in actual breach of the contracts. Where one party gives an advance indication that he will not perform his obligations under any of the contracts as agreed, then that party is in anticipatory breach of the relevant contract. In Chapter Five, various terms of the arbitrator's contract which are of a fundamental nature were identified so that a breach of any of those terms will result in the other party to the arbitrator's contract having the right to terminate the arbitrator's mandate and his contract. It is arguable that in the face of such a serious default, the arbitrator is dismissed by the disputing parties or institution. This argument is flawed since the arbitrator is not employed by either the disputing parties or institution. On this point the authors of *Fouchard Gaillard and Goldman*, drew a distinction between termination and dismissal. The learned authors argued that termination is a joint decision of the parties, arbitration institution, or national court while dismissal is sought by one party and decided by the arbitration institution, appointing institution or national court.¹⁰

Upon the arbitrator's loss of his mandate, the arbitrator's contract terminates subject to the payment (or refund) of any outstanding remuneration by the disputing parties or arbitration institution. The authors of *Fouchard Gaillard and Goldman*, are of the view that

In the event of negligence or misconduct on the part of arbitrators, it is universally recognised that the contract between them and the parties, as well as the contract between them and any arbitral institution, can be terminated.¹¹

4 Frustration

Applying the basic principle on frustration to the arbitrator's contract, where after the conclusion of the contract, an unforeseen event happens through no fault of any of the parties to the contract so as to make its performance impossible, the arbitrator's contract will then stand frustrated and this will

terminate the contract from the time the frustrating event happened. This in effect discharges the parties from continuing to perform under the contract. The fact the arbitrator's contract is discharged by the occurrence of a frustrating event does not make it void *ab initio* so that liabilities that may have been incurred before the occurrence of the frustrating event will still need to be remedied.

There are three categories of events which can frustrate a contract.

- 1 Those events which make performance or continuing performance of the contract impossible. An example of such an event is where after concluding the contract and at any time before its completion a sole arbitrator suddenly falls terminally ill or dies. This event which is (most likely) unforeseeable, will terminate the arbitrator's contract since where he falls terminally ill or is suddenly diagnosed with an illness of a chronic nature (and the parties to the contract therefore cannot determine how long the arbitrator will be ill for), or where he dies, his mandate dies with him. So effectively this service provider (of a personal nature) can no longer provide the service for which he is contracted.¹²
- 2 A second category is those events that make continued performance of the contract illegal. An example of this is where one of the disputing parties successfully challenges the jurisdiction of the arbitrator especially on grounds of lack of arbitrability or where there is no arbitration agreement. This effectively terminates the arbitral reference and so by implication the mandate of the arbitrator and his contract upon payment of any outstanding remuneration. Where any of the parties loses its legal capacity to contract as examined in Chapters One and Three, then that party may no longer be able to continue rendering service or performing any obligations under the contract. So, for example where the arbitrator loses his legal capacity or civil liberty, then he can no longer continue with the arbitral reference and so is no longer able to continue to render service under his contract. Another example of this is 'upon the expiration of the time limit for the arbitral procedure'.¹³ The consequences of not observing any agreed time limits by the arbitrator or disputing parties has been discussed in Chapter Five. The effect of this breach is to render the final arbitral award of no value having been issued without jurisdiction. This occurrence is also a matter of the fundamental breach of a term of the arbitrator and institution's contracts.
- 3 The third category is those events whose existence make the continued performance of the contract pointless. An example of this situation is where both disputing parties do not pursue the arbitral reference. Arbitration rules and laws recognize the possible occurrence of this situation and so make relevant provisions. Generally these rules and laws provide that where the respondent party fails to participate in the reference, the arbitral tribunal can proceed with the reference and render an arbitral award. Such an award will be enforced as any

other arbitral award. However where it is the claimant party that fails to pursue the arbitral reference, the arbitral tribunal may terminate the proceedings.¹⁴

Chapter summary

This chapter examined the situations under which the arbitrator and institution's contracts will come to an end or be terminated. This analysis shows clearly that the same principles that apply to the termination of any ordinary contract will terminate the arbitrator and institution's contracts. Therefore, each of these contracts can be terminated by its complete performance, by agreement of the parties to it, through the breach of one of its fundamental terms, or as a consequence of the occurrence of a frustrating event.

Notes

Introduction

- 1 Arbitration becomes relevant when a dispute arises as confirmed in *Arenson v Casson Beckman Rutley & Co* [1977] AC 405 at 424, [1975] 3 All ER 901, [1976] Lloyd's Rep 179, [1975] 3 WLR 815, decision of the House of Lords (England) on appeal from *Arenson v Arenson* [1973] Ch 346, [1973] 2 WLR 553, [1973] 2 All ER 235). Lord Simon of Glaisdale said, 'The essential prerequisite for a valuer to claim immunity as an arbitrator is that, by the time the matter is submitted to him for decision, there should be a formulated dispute between at least two parties which his decision is required to resolve'. This confirmed the position in *Sutcliffe v Thackrah and Others* [1973] 2 Lloyd's Rep 115 at 120 where architects were granted the same immunity enjoyed by arbitrators when acting as such in issuing interim certificates. Also reported in [1973] 2 All ER 1047 and [1973] 1 WLR 888. In *Lobb Partnership Ltd v Aintree Racecourse Co Ltd* [2000] BLR 65, [2000] CLC 431 it was held that when a dispute arises either party is entitled to make a reference to arbitration.
- 2 Disputing parties can opt for non-binding private processes of dispute resolution (for example, mediation and mini-trials) or binding private dispute resolution processes (for example, expert determination or adjudication).
- 3 M. Mustill, 'Arbitration: History and Background', *JIA*, 1989, Vol 6, p. 43; D. Roebuck, 'Sources for the History of Arbitration, a Bibliographic Introduction', *Arb Int*, 1998, Vol 14, p. 235.
- 4 Examples of such trade associations are the Grain and Feed Trade Association at <http://www.gafta.com/New/NewArbitration.htm>; London Metal Exchange at <http://www.lme.co.uk/who.asp>; The Federation of Oils, Feeds & Fats Associations at http://www.fosfa.org/contracts/cont_arb_intro.htm; and The London Maritime Arbitrators Association at <http://www.lmaa.org.uk/intro.asp>.
- 5 An example is the 'look, sniff arbitration' common in resolving disputes related to the grains and feeds trade associations.
- 6 This is a consequence to be avoided since the result is commercial suicide. There is however no published empirical data of the compliance rate of such awards.
- 7 This is taken to be the time before the adoption of the UNCITRAL Model Law in International Commercial Arbitration in 1985, which ushered in a modern regime for international commercial arbitration.
- 8 M. Mustill and S.C. Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd edn., London: Butterworths, 1989. A very brief but comparative historical review collaborating this view is given by A. Redfern and M. Hunter with N. Blackaby and C. Partasides, *Law and Practice of International Commercial Arbitration*, 4th edn., London: Thomson, Sweet & Maxwell, 2004, paras. 1.03–1.06.

- 9 L. Mistelis, 'International arbitration – corporate attitudes and practices, 12 perceptions tested: myths, data and analysis: research report', *Am. Rev. Int. Arb.*, 2004, Vol 15, p. 525.
- 10 L. Mistelis, 'Corporate attitudes', at p. 541 concludes that corporations will continue to use arbitration in resolving their international disputes.
- 11 A. Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*, Cambridge: CUP, 2001, claims that a good number of African states have modernized their arbitration laws following the Model Law, to attract foreign investment and international arbitration business.
- 12 Fifty four arbitration institutions were registered as members of the International Federation of Commercial Arbitration Institutions (IFCAI) at its 8th biennial conference in Washington DC on 3 June 2005. Available online at http://institutionalarbitration.org/index.asp?spg_id=6 (last accessed 18 June 2009).
- 13 There were 144 ratifications of the New York Convention. Available online at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NY_Convention_status.html (last accessed 18 June 2009).
- 14 Examples of institutions that have recently reviewed their arbitration rules are the newly merged Swiss Chambers in 2004 and CIETAC in 2005. The rules of the UNCITRAL, ICC and LCIA are currently under review. Jean-Louis Delvolve, 'The fundamental right to arbitrate' in M. Hunter, A. Marriott and V.V. Veedeer, eds., *The Internationalisation of International Arbitration: the LCIA Centenary Conference*, Graham & Trotman, 1995, at p. 141 is of the view that such reviews are beneficial to the continued growth of arbitration.
- 15 J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *Comparative International Commercial Arbitration*, The Hague: Kluwer Law International, 2003, paras. 4.27–4.39.
- 16 Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, at para. 1.1.
- 17 Article 1 (3) & (4) Model Law give a broad definition of 'international'.
- 18 Footnotes to Art. 1 Model Law, Art. 1 Model Law on E-Commerce, 2000 give a description of the word 'commercial' which according to *The Mexican States v Metalclad Corporation* (2001) 89 BCLR (3d) 359 includes investment disputes. It is acknowledged that the determination of the commercial nature of a transaction varies. As examples, the Supreme Court of India in 1994 ruled that a contract for technical know how was non-commercial in *RM Investment Trading Co. Pvt Ltd (India) v Boeing Company & Another (US)* (1997) XXII YBCA 710, while the *Cour de Cassation* of Tunisia decided that a contract for a town planning programme drawn by architects was not commercial in *Taieb Haddad & Hans Barrett v Societe d'Investissement Kal* (1998) XXIII YBCA 770.
- 19 This does not make the analyses in this book comparative. It is just one of the peculiarities of international commercial arbitration that a matrix of national laws and arbitration rules are always at play.
- 20 See L. Mistelis, 'Corporate attitudes', pp. 562–3 on the reasons corporations have a preference for these arbitration institutions.
- 21 Examples include, NAFTA, Organisation for the Harmonization of Business Law in Africa (OHADA), European Convention on International Commercial Arbitration 1961, Inter-American Convention on International Commercial Arbitration 1975, and the Inter-Arab Convention on Commercial Arbitration 1987.
- 22 An example is the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958 (NYC) and ICSID Convention.
- 23 The Model Law has been adopted in 60 sovereign states and 10 administrative parts of three other states all over the world and is cited as representative of the national laws of all those states. The particular provision of a Model Law

- jurisdiction is cited where it differs in a significant manner from the Model Law provisions. For commentary on the Model Law see, Holtzmann & Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, The Hague: Kluwer Law International, 1989.
- 24 See Horacio Grigera Naon, 'Argentina' in Jan Paulsson (ed.) *International Handbook on Commercial Arbitration*, Supp. 28 January 1999, and the text of the law is reproduced in J. Kleinheisterkamp, *International Commercial Arbitration in Latin America*, New York: Oceana, 2005, pp. 471–81.
 - 25 The text is reproduced in J. Kleinheisterkamp, *International Commercial Arbitration in Latin America*, New York: Oceana, 2005, pp. 513–25.
 - 26 See, Houzhi Tang and Sheng Chang Wang, 'PR China' in Jan Paulsson (ed.) *International Handbook on Commercial Arbitration*, Supp. 25 January 1998.
 - 27 Based on the Model Law with some modifications, and text translated into English by the German Institute of Arbitration (DIS) and the German Federal Ministry of Justice.
 - 28 Based on the Model Law with some modifications.
 - 29 Part II which applies to international commercial arbitration (in addition to Part I) is based on the Model Law.
 - 30 The UNCITRAL Rules serve as an industry benchmark and standard, and are commonly adopted in ad hoc arbitral proceedings. See D. Caron, L. Caplan and M. Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary*, Oxford: OUP, 2006. The Rules are currently under review by UNCITRAL.
 - 31 Modelled after the UNCITRAL Rules 1976 with some modifications.
 - 32 Modelled after the UNCITRAL Rules 1976 with some modifications.
 - 33 The CIETAC Rules are available online at <http://www.cietac.org/cn/english/rules.htm> (last accessed 18 June 2009). Since being founded in 1956, CIETAC has administered more than 10,000 international arbitration cases. More than 700 cases are filed with CIETAC each year and most of these are international. Available online at http://www.cietac.org/cn/english/introduction/intro_1.htm (last accessed 18 June 2009). See also Wang Sheng Chang & Lijun Cao, 'Towards a higher degree of party autonomy and transparency: The CIETAC introduces its 2005 New Rules', *Int ALR*, 2005, Vol 8(4), p. 117.
 - 34 The ICC Rules were tried and tested with a case load of 2,155 between 2002/2005 and now have an administrative branch in Hong Kong. See Jennifer Kirby, 'The ICC Court: a behind-the-scenes look', *ICC Bull*, Vol. 16 (2), 2005, p. 9.
 - 35 Modelled after the UNCITRAL Rules 1976 with some modifications.
 - 36 The LCIA is the foremost international arbitration institution in England with a total of 397 cases between 2002/2005 and now has administrative branches in Dubai and India.
 - 37 The Swiss Rules are now applicable to the six Chambers of Commerce of Basel, Bern, Geneva, Ticino, Vaud, and Zurich in Switzerland and are a modern implementation of the UNCITRAL Rules 1976.
 - 38 Examples include, IBA Rules on Taking Evidence in International Commercial Arbitration 1999, IBA Rules of Ethics for International Arbitrators (as amended) 1964, IBA Guidelines on Conflicts of Interest in International Arbitration 2004, AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes 2004, SIAC Code of Ethics for Arbitrators (available online at <http://www.siac.org.sg/cop-ethics.htm> – last accessed 19 June 2009), CIARB Code of Ethics 2004, and UNCITRAL Notes on Organizing Arbitral Proceedings 1996.
 - 39 Clay Thomas, *L'arbitre*, Paris: Dalloz, 2001.
 - 40 Patrik Schöldstrom, *The Arbitrators Mandate: A Comparative Study*, Stockholm: Elanders Gotab, 1998.

1 Arbitration agreement

- 1 The consent of the parties is not required as a pre-condition in statutory or mandatory arbitration.
- 2 This underlies the importance of the arbitration agreement to the arbitral reference.
- 3 On arbitration agreements see, A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Law and Practice of International Commercial Arbitration*, 4th ed., London: Thomson, Sweet & Maxwell, 2004, pp. 78–93, 131–232; A. Singh, *Law of Arbitration and Conciliation*, 8th ed., New Delhi: Eastern Book Company, 2007, pp. 35–114; A. Tweeddale and K. Tweeddale, *Arbitration of Commercial Disputes*, Oxford: OUP, 2007, pp. 97–138, 215–53; D.J. Sutton, J. Gill and M. Gearing, *Russell on Arbitration* 23rd ed., London: Sweet & Maxwell, 2007, pp. 28–91; E. Gaillard and D. Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice*, London: Cameron, May 2008, pp. 189–594; E. Gaillard and J. Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, The Hague: Kluwer Law International, 1999, pp. 198–446; G.B. Born, *International Commercial Arbitration*, The Netherlands: Kluwer Law International, 2009, pp. 197–1226; J. Collier and V. Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures*, Oxford: OUP, 1999, pp. 198–217; J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *Comparative International Commercial Arbitration*, The Hague: Kluwer Law International, 2003, pp. 31–41, 99–164, 187–221; J. Kleinheisterkamp, *International Commercial Arbitration in Latin America*, New York: Oceana, 2005, pp. 51–158; J.O. Orojo and M.A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*, Lagos: Mbeyi & Associates, 1999, pp. 98–119; M.J. Mustill and S.C. Boyd, *Commercial Arbitration*, 2nd ed., London: Butterworths, Companion Volume 2001, pp. 133–57, 158–65; M.L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge: CUP, 2008, pp. 17–38; R. Merkin, *Arbitration Law*, London: LLP, 2004, pp. 69–97; W.W. Park, *Arbitration of International Business Disputes: Studies in Law and Practice*, 2006, Oxford: OUP, 2006, pp. 377–88.
- 4 The contract evidencing the underlying transaction may be made orally or contained in a written document. Most international commercial contracts are contained in written documents.
- 5 The term ‘arbitration agreement’ is used to refer to both arbitration clauses and submission agreements except where otherwise stated.
- 6 See E. Robine, ‘What Companies Expect of International Commercial Arbitration’, *JIA*, 1992, Vol 9(2), p. 31 is of the opinion that firms expect speed, simplicity, lowest costs, justice and confidentiality from international commercial arbitration.
- 7 Article II (1) of the New York Convention, which includes matters arising from contract, and tort or delict.
- 8 M.J. Mustill and S.C. Boyd, *Commercial Arbitration*, 2nd ed., London: Butterworths, Companion Volume 2001, pp. 151–3. Thus even where the underlying transaction is not contractual, the parties must have capacity to conclude the arbitration agreement which is a contract.
- 9 This is on the basis of the doctrine of privity of contract. Third non-signatory parties may be held bound by an arbitration agreement as examined below.
- 10 *Fiona Trust & Holding Corporation and Others v Privalov and Others* [2007] UKHL 40, [2008] 1 Lloyd’s Rep 254 at 255 reproduced from the Opinion of Lord Hoffman in the House of Lords.
- 11 Final Award in *Ronald S. Lauder v The Czech Republic*, WTAM, 2002, Vol 14(3), p. 35, and in *The American Lawyer*, March 2002, and available online at

- <<http://ita.law.uvic.ca/documents/LauderAward.pdf>> (accessed 19 June 2009). The outcome of the case is examined in B. Bezdek, 'Lauder v Czech Republic: Panel in London and Stockholm reach opposite results in treaty arbitration on media investment', *ASA Bull*, 2002, Vol 20(2), p. 249.
- 12 *French Manufacturer v German Distributor*, final award in ICC Case No 6850 of 1992, YBCA, 1998, Vol XXIII, p. 37.
 - 13 Examples of these arrangements include: trans-national corporations, joint venture vehicles, publicly quoted companies, privately owned companies, companies limited by guarantee, partnerships and limited liability partnerships.
 - 14 This is because the arbitration agreement is a contract enforceable at law just like any other contract.
 - 15 In *A v B*, ICC Case No 5065 of 1986, Clunet, 1987, 1039, the award dealt with the question of arbitrating with a company intended to be formed but not eventually formed.
 - 16 In the sense that, the new company takes over the assets, liabilities and commitments of the old subsumed company.
 - 17 See the decision in *Eurosteel Ltd v Stinnes AG* [2000] 1 All ER (Comm) 964, that all issues on the status of the company will be governed by the law of the place of its formation.
 - 18 *Dentirol AB v SwissCo Services AG*, Case No T 4805–3 decision of the Court of Appeal of Western Sweden of 30 September 2005.
 - 19 The word 'company' or 'corporation' in its generic form shall henceforth be used to refer to the various forms of legal entities involved in international commercial arbitration mentioned above.
 - 20 *Himpurna California Energy Ltd (Bermuda) v PT (Persero) Perushahaan Listrik Negara (Indonesia)*, Final Award of 4 May 1999, YBCA, 2000, Vol XXV, 13; *Mealey's IAR*, 1999, Vol 14(12), A1–A58.
 - 21 See S.M. Schwebel, 'Injunction of Arbitral Proceedings and Truncation of the Tribunal', *Mealey's IAR*, 2003, Vol 18(4), p. 33 where he discussed the four final awards and two interim awards from this dispute and concluded that the awards confirmed the position that a truncated tribunal in international arbitration can proceed and render a valid award. The arbitral award supports the view that a state denies a foreign national justice where it refuses or fails to arbitrate with the foreign national when it is legally bound to do so, or when it, whether by executive, legislative or judicial action, frustrates or endeavours to frustrate international arbitral processes in which it is bound to participate.
 - 22 See S.P. Woolhouse, 'Group of Companies Doctrine and English Arbitration Law', *Arb Int*, 2004, Vol 20, pp. 435–43; L. Flannery, 'Jurisdiction of Arbitrators: The Parties to an Arbitration', *ALM*, 2004, April, pp. 1–5; For the position under US law see Jack Berg, 'The Right of Non-signatories to Arbitrate', *Maritime Advocate*, 2004, Vol 26, pp. 9–11.
 - 23 The analysis of the group of companies' doctrine is very relevant in investment arbitration references where the vehicle for the investment is registered as a company in the host state as part of the requirements of entry, and a dispute arises, and the discussion on whether this company has locus to benefit from the dispute resolution processes under the applicable treaty, bilateral or multilateral. See, M. Henry, 'The Group of Companies Doctrine Applied to Arbitrations Involving a State', *Int'l Business LJ*, 2006, Vol 3, pp. 297–317.
 - 24 Complex corporate structures can be horizontal or vertical depending on whether decision-making is centralized or not.
 - 25 The parent company still retains managerial and financial control over the subsidiary companies.
 - 26 *Dow Chemical v Isover Saint Gobain*, Paris, 21 October 1983, *Rev Arb*, 1984, p. 691.

- 27 *Dow Chemicals v Isover Saint Gobain*, ICC Partial Award in Case No 4131 of 1982, YBCA, 1984, Vol IX, p. 131. In *Ernesto Francisco (Philippines) v Stolt-Nielson SA, Stolt Tankers Joint Services, Steamship Mutual Underwriting Association Ltd*, YBCA, 2003, Vol XXVIII, p. 1112, a US District Court held that a non-signatory to an arbitration agreement can compel arbitration against a signatory in certain circumstances. See also *Oriental Commercial and Shipping Co Ltd (Saudi Arabia) & Oriental Commercial Shipping Co Ltd (UK) v Rousseel NV (Belgium)*, YBCA, 1987, Vol XI, p. 532, decision of Southern District of New York of 4 March 1985.
- 28 *Peterson Farms Inc v C & M Farming Ltd* [2004] EWHC 121 (Comm), [2004] 1 Lloyd's Rep 603.
- 29 The part of the award made to C&M Farming Ltd was not challenged before the commercial court.
- 30 *Peterson Farms v C&M Farming Ltd* [2004] 1 Lloyd's Rep 603 at 610, paras 43–4. See B. Hanotiau, 'Groups of Companies in International Arbitration', in L.A. Mistelis and J.D.M. Lew (eds), *Pervasive Problems in International Arbitration*, The Hague: Kluwer Law International, 2006, pp. 279–90.
- 31 In England, the Contracts (Rights of Third Parties) Act 1999 will apply by virtue of s 1, where English law is the proper law of the arbitration agreement.
- 32 See S. Jagusch and A. Sinclair, 'The Impact of Third Parties in International Arbitration – Issues of Assignment' in L.A. Mistelis and J.D.M. Lew (eds), *Pervasive Problems in International Arbitration*, The Hague: Kluwer Law International, 2006, pp. 291–319.
- 33 See G.B. Born, *International Commercial Arbitration*, pp. 1137–212 for a review of the authorities on the various doctrines employed in determining whether a non-signatory is bound by the arbitration agreement or not.
- 34 See Daniel Busse, 'Privity to an Arbitration Agreement', *IALR*, 2005, Vol 8, pp. 95–102, where he examined relevant decisions from courts in Germany, England, United States, France, Spain and Italy and arbitral awards on the group of companies doctrine.
- 35 Some examples of such decisions are, *Arhontisa Maritime Ltd (Liberia) v Twinbrook Corporation (Panama) & Constantine D Nicopoulos (US)*, YBCA, 2002, Vol XXVII, p. 752; *Deutz AG (Germany) v General Electric Co (US)*, YBCA, 2002, Vol XXVII, p. 795; *Rhone Poulenc Fiber & Resin Intermediates SaS, Rhodia SA (France) & Others v El Du Pont de Nemours & Co (US)*, YBCA, 2002, Vol XXVII, p. 779; *Caparo Group Ltd v Fagor Arrasate Sociedad Cooperativa*, decision of English Commercial Court (Mr Justice Clarke), 1998, WL 35176261.
- 36 In *Intertec Contracting A/S (Denmark), Intertec (Gibraltar) Ltd, (Gibraltar), Intertec Overseas Ltd, (Gibraltar) v Turner Steiner Int'l, SA (USA), Turner Steiner East Asia Ltd, (Hong Kong) and Turner Corporation (USA)*, YBCA, 2001, Vol XXVI, p. 949, the United States District Court for the Southern District of New York, held that a subcontract between the parties was not subject to the arbitration agreement in the main contract since there was no evidence to show that the subcontract was governed by the main contract between Turner and Overseas Realty which contained an arbitration agreement. Intertec was not a signatory to that contract. This was despite the fact that Intertec had an interest in the main contract. The US Court of Appeals for the Second Circuit confirmed this judgment.
- 37 B. Hanotiau, *Complex Arbitrations – Multiparty, Multicontract, Multi-Issue and Class Actions*, The Hague: Kluwer Law International, 2006; B. Hanotiau, 'A New Development in Complex Multiparty, Multicontract Proceedings: Classwide Arbitration', *Arb Int*, 2004, Vol 20, p. 39.
- 38 An example can be found in *Thixomat Inc (USA) v Takata Physics International Co Ltd (Japan)*, YBCA, 2002, Vol XXVII, p. 685.
- 39 See for example Art. II (1) European Convention on International Commercial Arbitration.

- 40 Article 738 (1) Arbitration Law Argentina provides that ‘persons that cannot conclude a settlement agreement cannot submit to arbitration’. See also, Mustill and Boyd, *Commercial Arbitration*, pp. 151–3; *Fouchard Gaillard and Goldman*, paras 453–60.
- 41 The capacity of the disputing parties to contract is a question of subjective arbitrability under Art V (1) (a) of the New York Convention determinable by reference to the, ‘law applicable to them (here referring to the parties)’.
- 42 This applies to the age of maturity which varies in different jurisdictions from 14 years (American Samoa) to 25 years (El Salvador males) but 18 years in most jurisdictions. This variance means it is important to check the applicable personal law of the individual to determine the question of when it arises. This issue hardly arises in international arbitral references because of the nature of disputants and those appointed as arbitrators.
- 43 Examples of such legal impediment include mental incapacity and bankruptcy.
- 44 Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 3rd ed., London: Sweet & Maxwell, 1999, paras 3.25–3.29; *Fouchard Gaillard and Goldman*, pp. 453–60; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, pp. 140–7; Rubino-Sammartano, *International Arbitration Law and Practice*, 2nd ed., The Hague: Kluwer Law International, 2001, pp. 269–302.
- 45 See *Russell on Arbitration*, para. 3–002.
- 46 Article V (1) (a) of the New York Convention states in part, ‘The parties to the (arbitration agreement) were, under the law applicable to them, under some incapacity.’
- 47 Article 1 (4) (b) of the Model Law.
- 48 Article 1 (4) of the Model Law.
- 49 Article 1 (4) (a) of the Model Law.
- 50 This may be determined by the applicable conflict of law rules.
- 51 Edwin Peel (ed.), *Treitel The Law of Contract*, 12th ed., London: Sweet & Maxwell, 2007, para. 2–002
- 52 *Treitel on Contract*, para. 2–015. The discussion in this area of the law also implicates issues of apparent authority, ratification and agency.
- 53 A party that initiates proceedings before a national court in the face of an offer to conclude an arbitration agreement categorically rejects such an offer by his conduct.
- 54 The terms of the arbitration agreement can be as simple as the consent to initiate arbitration proceedings in a particular seat when a covered dispute arises, to a complex and detailed agreement of how the arbitral procedure will be conducted.
- 55 On battle of forms and the resolution of which terms prevail in English law, see the decision of the English Court of Appeal in *Butler Machine Tools Co Ltd v Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401, followed in *A E Yates Trenchless Solutions Ltd v Black and Veatch Ltd* [2008] EWHC 3183 (TCC).
- 56 When faced with such an application, New York Convention contracting states will at the request of one of the parties refer the parties to arbitration on the basis of Art. II (3). See E. Gaillard, ‘Reflections on the Use of Anti-suit Injunctions in International Arbitration’, in *Pervasive Problems in International Arbitration*, pp. 201–13.
- 57 *Fiona Trust & Holding Corporation and Others v Privalov and Others* [2008] 1 Lloyd Rep 254 at 256.
- 58 This partnership theory is argued in more detail in s 2.2 of Chapter Two.
- 59 Legal commentators that imply a notional agency to this relationship will interpret this as the claimant party acting without or outside the authority given to it by the respondent party in the arbitration agreement.

- 60 In accordance with Art. V (1) (a) of the New York Convention. See also Art. VII of the European Convention and s 48 Arbitration Act Sweden.
- 61 See Art. 178 (2) Federal Arbitration Law Switzerland.
- 62 See Art. 1494 Arbitration Law France.
- 63 In addition to the references in Footnote 3, see also E. Onyema, 'Drafting an Effective Arbitration Agreement in International Commercial Contracts', *VJ*, 2003, Vol 7, pp. 277–86.
- 64 Option II of the 2006 version of the Model Law dispenses with the writing requirement altogether. The article only defines an arbitration agreement as 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not'.
- 65 Article 7 (2) of the original version of the Model Law (1985) defines an agreement in writing as one, 'contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another'.
- 66 For arbitration laws see Art. 4 Arbitration Law Brazil and Art. 16 Arbitration Law China, which require an arbitration agreement to be in writing but do not define writing; s 5 Arbitration Act England and Art 178 Federal Arbitration Law Switzerland define writing but do not require the document to be signed; Arts 1443 and 1449 Arbitration Law France and s 2 Federal Arbitration Act US require the arbitration agreement to be in writing but do not define writing and do not require signature; s 7 Arbitration Act India and s 1 Arbitration Act Nigeria define writing and require signature. For arbitration rules see Art. 1 AAA Rules, Art. 1 Cairo Regional Centre Rules, Art. 1.1 (a) Lagos Regional Centre Rules, Art. 1.1 (a) LCIA Rules and Art. 1 UNCITRAL Rules require the arbitration agreement to be in writing. Article 5 (3) CIETAC Rules and the Preamble to DIS Rules require the arbitration agreement to be in writing and defined writing. Article 3.1(c) SIAC Rules, Art. 3 (c) Swiss Rules and by virtue of Art. 18 ICC Rules (on terms of Reference) imply the arbitration agreement should be in writing.
- 67 Therefore the parties do not need to separately sign the arbitration clause but are required to sign the submission agreement.
- 68 Article 7(2) of the original version of the Model Law (1985) provides 'An agreement is in writing if it is contained in a document signed by the parties ...'
- 69 Examples are Art. 7 (1) of the Model Law, Art. 2 Arbitration Law China (disputes over rights and interests in property), s 6 (1) Arbitration Act England, Art. 1442 Arbitration Law France, s 1029 (1) Arbitration Law Germany, s 2 (f) and s 7 (1) Arbitration Act India (restricted to commercial disputes), s 1 Arbitration Act Sweden, Art. 177 Federal Arbitration Law, Switzerland (any dispute of financial interest), s 2 Federal Arbitration Act US. Some other national laws restrict the arbitration agreement to contractual dispute, such as Art. 4 Arbitration Law Brazil.
- 70 Examples are Art. 1 Cairo Regional Centre Rules, Art. 1 (1) ICC Rules (business disputes of an international character), and Art. 1 (1) UNCITRAL Rules. Most arbitration rules just refer to the settlement of disputes, examples are Art. 1 AAA rules, Art. 1 (1) DIS Rules, Art. 1 (1) (a) Lagos Regional Centre Rules, Art. 1 (1) SIAC Rules, Art. 1 (1) Swiss Rules.
- 71 See in addition to the references in Footnote 3 above, S. Kröll, 'Arbitration and Insolvency Proceedings – Selected Problems', in *Pervasive Problems in International Arbitration*, pp. 357–76.
- 72 For the same requirement under national laws see Art. 38 (1) Arbitration Law

- Brazil, s 103 (3) Arbitration Act England, s 48 (2) (a) Arbitration Act India, s 52 (2) (b) (i) Arbitration Act Nigeria.
- 73 *Maternaco SA v PPM Cranes Inc and Others*, decision of the Tribunal de Commerce, Brussels of 20 September 1999, YBCA, 2000, Vol XXV, p. 673.
- 74 On arbitrability see references in Footnote 3 in particular: *Enforcement of Arbitration Agreements and International Awards*, pp. 503–94; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, pp. 187–221; *Fouchard Gaillard and Goldman*, pp. 330–59.
- 75 For a debate on the proper nomenclature see G. Born, *International Commercial Arbitration*, pp. 312–15, 348–53 and *Fouchard Gaillard and Goldman*, pp. 47–52, 389–419, 420–51.
- 76 Gary B. Born, *International Commercial Arbitration*, 2nd ed., The Hague: Kluwer Law International, 2001, p. 313 and for a historical account see pp. 316–44.
- 77 See *Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909 (Comm), [2005] 1 Lloyd's Rep 192, *LG Caltex Gas Co Ltd v China National Petroleum Corporation* [2001] EWCA Civ, 788, [2001] 4 All ER 875.
- 78 For national laws see Art. 7 (1) of the Model Law, Art. 8 Arbitration Law Brazil, Art. 19 Arbitration Law China, s 7 Arbitration Act England, Art. 1442, Arbitration Law France, s 1040 (1) Arbitration Law Germany, s 16 (1) (a) Arbitration Act India, s 12 (2) Arbitration Act Nigeria, s 3 Arbitration Act Sweden and Art. 178 (3) Federal Arbitration Law Switzerland.
- 79 *Fiona Trust & Holding Corporation and Others v Privalov and Others* [2007] UKHL 40, [2008] 1 Lloyd's Rep 254. See also the Court of Appeal decision in *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] 3 All ER 897.
- 80 *Fiona Trust v Privalov* [2008] 1 Lloyd's Rep 254.
- 81 *Fiona Trust v Privalov* [2008] 1 Lloyd's Rep 254 at 257.
- 82 *Prima Paint Corp v Flood & Conklin Mfg Co*, 388 US 395 (US S Ct 1967).
- 83 *Buckeye Check Cashing Inc v Cadegna*, 546 US 440 (US S Ct 2006) where the main contract was a loan agreement which violated the usury laws of the state of Florida.
- 84 *Fiona Trust v Privalov* [2008] 1 Lloyd's Rep 254 at 257.
- 85 See the decisions cited above in Footnotes 83 and 84 (*Fiona Trust*, *Buckeye Check Cashing*).
- 86 For dicta to this effect see *Prima Paint Corp, Republic of Nicaragua v Standard Fruit Co*, 937 F 2d 469 (9th Cir 1991).
- 87 See Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, The Hague: Kluwer Law International, 2003, para. 6.23.
- 88 In support of this assertion, s 2 (2) Arbitration Act Sweden expressly provides, 'Notwithstanding that the arbitrators have, in a decision during the proceedings, determined that they possess jurisdiction to resolve the dispute, such a decision is not binding'.
- 89 Section 48 Arbitration Act Sweden using words to the same effect provides, 'Where an arbitration agreement has an international connection, the agreement shall be governed by the law agreed upon by the parties'.
- 90 As discussed in section 1 above (1. Legal Nature of the Arbitration Agreement), the submission agreement is concluded after the dispute has arisen and contains only the agreement to arbitrate and so is usually more detailed and the need for a law governing this particular contract is more acute and obvious than when the agreement is contained as a clause in another contract.
- 91 Article 178 (2) Federal Arbitration Law Switzerland while s 48 Arbitration Act, Sweden on its part provides for the arbitration agreement in default to, 'be governed by the law of the country in which, by virtue of the agreement, the proceedings have taken place or shall take place', so in effect the law of the seat of arbitration.

- 92 See J.D.M. Lew, 'The Law Applicable to the Form and Substance of the Arbitration Clause', *ICCA Congress Series*, 1998, No 14, para. 136.
- 93 Redfern and Hunter, *The Law and Practice of International Commercial Arbitration*, 3rd ed., Sweet & Maxwell, 1999, para. 2–86, *Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd's Rep 48, and *Sonatrach Petroleum Corporation (BVI) v Ferrell Int'l Ltd* [2002] 1 All ER (Comm) 627 in support of the application of the same law as the proper law of the main contract.
- 94 See for example, Art. 34 of the Model Law, s 53 Arbitration Act England, s 1054 (3) Arbitration Law Germany, s 26 (3) (c) Arbitration Act Nigeria.
- 95 Article VI European Convention.
- 96 Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, The Hague: Kluwer Law International, 2003, para. 6–23.
- 97 See R.D. Bishop, W.M. Coriell and M.M. Campos, 'The "Null and Void" Provision of the New York Convention', in *Enforcement of Arbitration Agreements and International Arbitral Awards*, pp. 275–98 where the authors analysed vitiating factors of misrepresentation, fraud, incapacity, duress and undue influence in procuring the arbitration agreement and judgments of courts from different jurisdictions.
- 98 See C.B. Lamm and J.K. Sharpe, 'Inoperative Arbitration Agreements under the New York Convention', in *Enforcement of Arbitration Agreements and International Arbitral Awards*, pp. 297–322 where the authors examined examples of situations that will make an arbitration agreement inoperable with the general conclusion (from judgments of courts of various jurisdiction) that most courts will try to give effect to the parties' intention to arbitrate their dispute and give directions to realize this intention in the face of vague, ambiguous or pathological clauses.
- 99 See S. Kröll, 'The Incapable of being Performed Exception in Article II(3) of the New York Convention', in *Enforcement of Arbitration Agreements and International Arbitral Awards*, pp. 323–53.
- 100 See the discussion under the doctrine of separability above.
- 101 See s 9 (3) Arbitration Act England, s 8 (1) Arbitration Act India, s 5 (1) Arbitration Act Nigeria, s 4 Arbitration Act Sweden.
- 102 See *Downing v Al Tameer Establishment* [2002] EWCA Civ 721, [2002] 2 All ER (Comm) 545 where one party denied the existence of a contract between the parties only to turn around and request a stay of proceedings when the other party took out a writ before the courts. The Court of Appeal decided that normal contractual principles applied so that the issue and service of the writ amounted to an acceptance of the act of repudiation, making the arbitration agreement inoperative. This was applied in *Delta Reclamation Ltd v Premier Waste Management Ltd* [2008] EWHC 2579 (Comm).
- 103 *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA, The Leonidas D*, [1983] 3 All ER 737.
- 104 *The Leonidas D*, [1983] 3 All ER 737 at 738.
- 105 *The Leonidas D*, [1983] 3 All ER 737 at 745.
- 106 See *Fouchard Gaillard and Goldman on International Commercial Arbitration*, pp. 437–46.
- 107 *Bovis Land Lease Pty Ltd v Jay-Tech Marine & Projects Pte Ltd*, Case No O/S 77/2005, 166/2005, decision of The High Court (Singapore) of 6 May 2005.
- 108 The UNCITRAL Rules are currently undergoing review. Other sets of arbitration rules adopted in ad hoc proceedings are the Centre for Public Resources (CPR) Rules 2005 and any appropriate Optional Rules under the PCA regime.
- 109 This is in the arbitrator's exercise of his autonomy.
- 110 It is internationally recognized and accepted that the arbitration proceedings can hold in several places, for the convenience of the parties and their witnesses, amongst other reasons. However, every arbitration proceeding has a place

appointed either by the parties or in default by the arbitral tribunal in agreement with the parties or the arbitration institution or a national court as the seat of arbitration. The identification of this place is also important for purposes of recognition and enforcement or setting aside of an award under Art. V (I) (a), (d), (e) of the New York Convention. See, W.W. Park, 'The Lex Loci Arbitri and International Commercial Arbitration', *ICLQ*, 1983, Vol 32, p. 21 where he discussed the legal relevance of the place or seat of arbitration.

- 111 The two primary regimes evident in various jurisdictions are those whose national laws on arbitration automatically apply by virtue of its choice as seat. This is the purport of s 2 Arbitration Act England as applied in the following cases: *Ecuador v Occidental* [2007] 2 Lloyd's Rep 252, EWCA Civ 656, *Union of India v McDonnell Douglas Corporation* [1993] 2 Lloyd's Rep 48; *DST v RAKOIL & Another* [1987] 2 Lloyd's Rep 246. The other regime is more liberal empowering the parties arbitrating within its jurisdiction to apply whatever rules or law they wish to their procedure and subjecting the reference to minimal mandatory requirements. An example of this regime is evidenced in Art. 1494 Arbitration Law France.
- 112 Most arbitration institutions provide this service; examples are the LCIA, Cairo and Lagos Regional Centres, SIAC, HKIAC, and SCC.
- 113 Most arbitration institutions also act as the appointing authority. The ICC applies its *Rules of ICC as Appointing Authority in UNCITRAL or Other Ad Hoc Arbitration Proceedings* effective 1 January 2004 and charges a fee of \$2,500 to provide this service.
- 114 This is clearly evidenced in the analysis of the formation of the arbitrator's contract in both ad hoc and institutional references in Chapter Four.
- 115 See E. Onyema, 'The Role of the International Arbitral Tribunal Secretary', *VJ*, 2005, Vol 9, pp. 99–110, and C. Partasides, 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration', *Arb Int*, 2002, Vol 18(2), p. 147.
- 116 This state of affairs means more recourse by the parties to the law and courts at the seat of arbitration with the resultant uncertainty as a result of the different attitudes of national courts to international commercial arbitration.
- 117 An example is Schedule 1 Arbitration Act England. This legislation lists 26 of its 110 sections as being of a mandatory nature. See M. Blessing, 'Mandatory Rules of Law versus Party Autonomy in International Arbitration', *JIA*, 1997, Vol 14 (4), p. 23 on the effect of mandatory rules on arbitration and its limiting effect on party autonomy.
- 118 In *Marriot Int'l Inc v Ansal Hotels Ltd*, YBCA, 2001, Vol XXVI, 788 the parties subjected the arbitration to Indian law in proceedings before the Kuala Lumpur Regional Centre in Malaysia. The courts in neither jurisdiction could assist the parties with obtaining interim measures, since the Malaysian courts could not apply Indian law to proceedings before it and the Indian courts could not grant an order in arbitration outside its shores.
- 119 An example is ss 2 (2) and (3) which refers to ss 43 and 44 Arbitration Act England.
- 120 An example is Art. 1117 of NAFTA where disputes can be resolved under ICSID Arbitration Rules, ICSID Additional Facility Rules or UNCITRAL Rules.
- 121 Dr Mann argued against delocalization of international arbitration and in favour of the dominance of the law of the place of arbitration and its courts in his treatise *Lex Facit Arbitrium* reproduced in, *Arb Int*, 1986, Vol 2, p. 241.
- 122 For example under Art. 1494 Arbitration Law France it is possible for the procedural rules of an international arbitration with its seat in France to be the national law of another state. The same is true in England but the national law will still be subject to the mandatory provisions of the Arbitration Act England. See *Union of India v McDonnell Douglas Corporation* [1993] 2 Lloyd's Rep 48.

- 123 For example s 4 (1) Arbitration Act England provides, ‘The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary.’
- 124 The arbitral proceeding will be subjected to such law where it is the law of the seat of the arbitration.
- 125 See for example the Preamble to the LCIA Rules.
- 126 The choice or reference to a wrongly described or non-existent arbitration institution can make the arbitration agreement inoperative though case law shows that most courts give such clauses a purposive interpretation as evidenced in the celebrated decision of Judge Kaplan (as he then was) in *Lucky Goldstar Int’l (HK) Ltd v Ng Moo Kee Eng Ltd*, YBCA, 1995, Vol XX, p. 280 where he referred the parties to ad hoc arbitration.
- 127 See for example Art. 6 (3) AAA Rules, Art. 8 (bis) Cairo Regional Centre Rules, Art. 24 (4) CIETAC Rules, Art. 9 (4) ICC Rules, Art. 9 (1) (d) Lagos Regional Centre Rules, Art. 5 (5) LCIA Rules, Arts 6 (2) and 7 (2) SIAC Rules, and Arts 7 (3) and 8 (5) Swiss Rules.
- 128 See for example Art. 9 AAA Rules, Art. 26 (6) CIETAC Rules, s 12 (2) and s 14 DIS Rules, Art. 11 (3) ICC Rules, Art. 15 (1) Lagos Regional Centre Rules, Art. 10 (4) LCIA Rules, Art. 12 (1) SIAC Rules, and Art. 11 (1) Swiss Rules.
- 129 See for example the Rules for the Pre-Arbitral Referee Procedure 1990 of the ICC, A.A. De Fina, ‘Different Strokes for Different Folks: Institutional Appointment of Arbitrators’, *ADRLJ*, 2000, Vol 9, p. 35. This author is of the opinion that the obligation of the arbitral tribunal rendering a final and enforceable award, will in part be satisfied when the jurisdictional issue of ensuring a properly constituted arbitral tribunal is appointed, is performed by the arbitral institution in accordance with the agreement of the parties. This will ensure that the final award may not be set aside under Art. V (1) (d) of the New York Convention.
- 130 According to the 2008 ICC Statistics, ICC Bull (forthcoming June/July 2009) ICC arbitrations were held in 50 countries with parties from 120 countries and independent territories.
- 131 See E. Onyema, ‘Tribunal Secretary’, at p. 102.
- 132 See Art. 18 ICC Rules on terms of reference, and S. Lazareff, ‘Terms of Reference’, *ICC Bull*, 2006, Vol 17, pp. 21–32.
- 133 See Art. 27 ICC Rules and Art. 45 CIETAC Rules on scrutiny of awards, SCC Rules, and Art. 40 (4) Swiss Rules to consult with the Chambers on the assessment and apportionment of fees.
- 134 According to the 2007 ICC Statistics at p. 13, the ICC court exercised this Art. 27 power in 317 awards and referred 35 awards back for resubmission.
- 135 The same regime applies under CIETAC Rules and Swiss Rules. This can be contrasted with the LCIA whose fees are charged as per the time invested by the arbitrator and the institution into the particular dispute.
- 136 An examination of the institutional rules examined in this book shows that all but CIETAC have exclusion of liability provisions.
- 137 See *SNF SAS v ICC*, Paris Court of Appeal, First Section C, decision of 22 January 2009, 07–19492 confirming the decision of the Paris First Instance Court, *Rev Arb* 2007, 851 with Note by C. Jarrosson, discussed in s 4.1 of Chapter Four.
- 138 An example is s 74 Arbitration Act England.
- 139 For example Art. 14 ICC Rules, and Art. 16 LCIA Rules. Such proceedings can be said to be delocalized and supportive of the autonomous nature of international arbitration as expounded by Prof. Devellin in Chapter Two.
- 140 This is the ultimate goal of institutional arbitration proceedings.
- 141 See for example ss 43 and 44 Arbitration Act England.
- 142 See Arts 13 (3) and 14 of the Model Law, Art. 747 (2) Arbitration Law Argentina,

- s 24 (2) Arbitration Act England, and Art. 1457 Arbitration Law France. In *Exel v Logitech*, decision of Rotterdam District Court of 8 June 2006, the court held that a party in an institutional reference need not wait for the outcome of its challenge application before applying to the courts for assistance. An abstract of the decision is available online at <http://www.internationallawoffice.com/Newsletters>.
- 143 See for example s 42 and s 44 Arbitration Law England, Art. 753 Arbitration Law Argentina, Art. 46 Arbitration Law China.
- 144 See for example s 42 Arbitration Law England, s 1041 Arbitration Law Germany, s 2GB Arbitration Ordinance Hong Kong.
- 145 See E. Onyema, 'Power Shift in International Commercial Arbitration', *Carrib. LR*, 2004, Vol 14, p. 62.
- 146 It is acknowledged that most institutions also publish other rules, for example rules for conciliation proceedings. All references to rules in this book (unless otherwise indicated) are to arbitration rules.
- 147 Pursuant to Art. 19 (1) of the Model Law, Art. 751 Arbitration Law Argentina, s 34 (1) Arbitration Act England, Art. 1494 Arbitration Law France, s 19 (2) Arbitration Act India, parties can agree on the procedure to be followed by the arbitral tribunal.
- 148 Since the arbitration rules are incorporated into and form part of the arbitration agreement between the parties. This is a feature of party autonomy.
- 149 This statutory provision gives the arbitration rules the status of provisions expressly agreed and made by the parties as contractual provisions.
- 150 See for example Art. 4 (2) CIETAC Rules, Art. 1 (2) Cairo Regional Centre Rules and Art. 16.3 LCIA Rules.
- 151 This is because institutional rules make provisions for procedural matters. Thus the applicable mandatory rules would be those affecting the procedure of the arbitration and not those relevant to the substantive dispute. See P. Fouchard, 'Final Report on the Status of the Arbitrator', *ICC Bull*, Vol 7, No 1, May 1996, p. 29. This author listed possible laws applicable to the arbitrator's contract where an institution is involved as those with the following connectors: express choice made by the parties, the seat of arbitration, the headquarters of arbitration institution, and domicile of each arbitrator which are considered in detail in Chapter Five.
- 152 These two important places are relevant pursuant to the provisions of Art. V (1) (e) and Art. V (2) (b) of the New York Convention.
- 153 This in effect implies that where the final award is voluntarily performed, the whole process was a floating one. However, hearings would have been in a physical place attached to a particular state's territory, so that irrespective of whether or not recourse was made to the law or courts of the seat of arbitration, no arbitration reference is 'delocalized'.
- 154 See chapter two for the discussions on the autonomous theory of the juridical nature of arbitration.
- 155 Article V (1) (e) of the New York Convention provides, 'Recognition and enforcement of the award may be refused ... (where) 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'.
- 156 In accordance with Art. V (2) of the New York Convention.
- 157 The first step in this process is the commencement of the arbitral process.
- 158 K. Lionnet, 'The Arbitrator's Contract', *Arb Int*, Vol 15, 1999 161 at p. 164.

2 Juridical and relationship theories

- 1 For a general reference on the juridical theories see, A. Redfern, M. Hunter, N. Blackaby, C. Partasides, 4th ed., *Law and Practice of International Commercial Arbitration*, London: Sweet & Maxwell, 2004, pp. 62–6; A. Rau, 'The Culture of American Arbitration and the Lessons of ADR', *Tex IJL*, Vol 40, 2005, p. 451; A. Samuel, *Jurisdictional Problems in International Commercial Arbitration: Study of Belgian, Dutch, English, French, Swedish, Swiss, U.S. and West German Law*, Zürich: Schulthess, 1989, pp. 32–74; A. Tweeddale and K. Tweeddale, *Arbitration of Commercial Disputes*, Oxford: OUP, pp. 34–40; E. Gaillard and J. Savage (eds), *Fouchard Gaillard and Goldman on International Commercial Arbitration*, The Hague: Kluwer Law International, 1999, pp. 29–35; F.A. Mann, *Lex Facit Arbitrum*, in Pieter Sanders, et al. (eds) *International Arbitration, Liber Amicorum for Martin Domke* and reproduced in *Arb Int*, 1986, Vol 2, p. 241; G. Born, *International Commercial Arbitration*, Vol I, p. 1131–232, 1349–592, The Hague: Kluwer Law International, 2009, pp. 184–9; G. Petrochilos, 'Procedural Law in International Arbitration', Oxford: OUP, 2004, p. 25; Hong-Lin Yu, 'Explore the Void – An Evaluation of Arbitration Theories: Part 1', *Int ALR*, 2004, Vol 7(6), p. 180; Hong-Lin Yu and E. Sauzier, 'From Arbitrator's Immunity to the Fifth Theory of International Commercial Arbitration', *Int ALR*, 2000, Vol 3, p. 115; J.D.M. Lew, *Applicable Law in International Commercial Arbitration*, New York: Oceana, 1978; F.A. Mann, 'State Contracts and International Arbitration', *Brit YBIL*, Vol 42, 1967, p. 10; J.D.M. Lew, L.A. Mistelis, S.M. Kröll, *Comparative International Commercial Arbitration*, The Hague: Kluwer Law International, 2003, pp. 71–95; K. Lionnett, 'The Arbitrator's Contract', *Arb Int*, 1999, Vol 15, p. 161; K.S. Carlston, 'Theory of the Arbitration Process – Part 2', *Law & Contemporary Problems*, Vol 17, 1952, p. 631; M. Rubino-Sammartano, *International Arbitration Law and Practice*, The Hague: Kluwer Law International 2001, pp. 133–4; P. Schöldstrom, *The Arbitrator's Mandate: A Comparative Study*, Stockholm: Elanders Gotab, 1998; T. Carbonneau, *Cases and Materials on the Law and Practice of Arbitration*, 2nd ed., Juris Publishing Inc, 2000, p. 624.
- 2 For a general reference on the relationship theories see, *Fouchard Gaillard and Goldman on International Commercial Arbitration*, pp. 560–608; Julian D.M. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, New York: Oceana, 1978, para. 63–81; J.G.H. Critchlow, 'The Source of Power: A Critical Appreciation of the Relationship of the Arbitrator and the Parties', *Arb*, 1997, Vol 63, p. 1; J.G.H. Critchlow, 'The Relationship between the Arbitrator and the Parties', in G. Beresford-Hartwell (ed.) *The Commercial Way to Justice*, The Hague: Kluwer Law International, 1997, p. 187; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, pp. 275–9; M.L. Smith, 'Contractual Obligations Owed By and To Arbitrators: Model Terms of Appointment', *Arb Int*, Vol.8, 1992, p. 17; P. Fouchard, 'Relationships between the Arbitrator and the Parties and the Arbitral Institution', *ICC Bull Special Supp*, 1995, pp. 12.
- 3 See, Lew, *Applicable Law*, at para. 63 quoting other commentators on the need to identify the legal nature of arbitration on which depends the attitude of national legal systems to arbitration proceedings and the award.
- 4 The arguments made under the autonomous theory in substance mirror those made under the theory of the delocalization of the seat of arbitration.
- 5 Lew, *Applicable Law*, contains a list of the proponents of this theory in Footnote 65.1.
- 6 Lew, *Applicable Law*, para. 65.
- 7 Lew, *Applicable Law*, para. 66.
- 8 This is the antithesis of the delocalization theory.

- 9 Yu, 'Explore the Void', at p. 180 and see Lew, *Applicable Law*, para. 68.
- 10 See A. Mann, 'Lex Facit Arbitrium', *Arbitration International*, Vol. 2 (3), 1986, p. 246.
- 11 This will include the validity of the arbitration agreement and the validity of the resulting arbitral award.
- 12 For New York Convention states, Art. II (1) and Art. V (1) (a).
- 13 For New York Convention states, Art. V (2) (a). See also the decision of the English courts in *Soleimany v Soleimany* [1999] QB 785, [1998] 3 WLR 811.
- 14 Some examples are, Art. 25 ICSID Convention, Chapter 11 NAFTA, Art. 26 Energy Charter Treaty, various BITs available online at <<http://icsid.worldbank.org/ICSID/FrontServlet>> (accessed 20 June 2009).
- 15 See Art. 5 of the Model Law, Art. 736 Arbitration Law Argentina, Art. 8 Arbitration Law China, s 1 Arbitration Act England, Art. 1494 Arbitration Law France.
- 16 An example is s 2 and s 4 Arbitration Act England.
- 17 Arbitrability is relevant under the proper law of the main contract, personal law of the parties, law of the seat of arbitration and law of the place of enforcement.
- 18 Under the Geneva Protocol and Geneva Convention regimes, an award had to be declared final and binding by the courts at the place of arbitration before being recognized and enforced by the courts at the place of enforcement. This required obtaining prior recognition before the courts at the place of arbitration and subsequently again before the courts at any place of enforcement.
- 19 Quoted in Lew, *Applicable Law*, at para. 67.
- 20 Article 34 of the Model Law reserves the setting aside of the award to the courts at the seat of arbitration.
- 21 *Hilmarton v Omnium de Traitement et de Valorisation (OTV)*, YBCA, 1995, Vol XX, p. 663.
- 22 *Kajo-Erzeugnisse Essenzen GmbH (Austria) v DO Zdravilisce Radenski (Slovenia)*, YBCA, 1999, Vol XXIVa, p. 919 (this decision was made under Art. IX of the European Convention on International Commercial Arbitration); *Chromalloy Aeroservices Inc (USA) v The Arab Republic of Egypt*, 939 F Supp 907, YBCA, 1997, Vol XXII, p. 1001, this decision has not been followed in subsequent cases. An example is *Baker Marine (Nigeria) Ltd v Chevron (Nigeria) Ltd*, 191 F 3d 194 (CA 2nd Cir 1999); *Martin Spier v Calzaturificio Technica SpA*, 71 F 2d 279 (SDNY 1999), *Mealey's IAR*, 1999, Vol 14, E1. Both cases were discussed in E. Gaillard and J. Edelman, 'Baker Marine and Spier Strike a Blow to the Enforceability in the United States of Awards Set Aside at the Seat', *Int ALR*, 2000, Vol 3, p. 37.
- 23 In addition to the disputing parties, the arbitration institution and the arbitral tribunal may choose the seat of arbitration. Such seats are usually chosen because of their neutrality and convenience of the parties and possibly the arbitral tribunal. According to the ICC 2005 Statistics, the parties chose the place of arbitration in 87.4% of the cases introduced in 2005 while the ICC court fixed the place in 12.6% of the cases.
- 24 See L. Mistelis, 'International Arbitration: Corporate Attitudes and Practices, 12 Perceptions Tested: Myths, Data and Analysis', *Am Rev Int Arb*, 2004, Vol 15, p. 525 at 568, where convenience of the parties ranked second after legal considerations.
- 25 This is a perception though, since there is not yet any empirical study in support of this assertion, and the presence of many other competing reasons (e.g. nationality of the disputing parties) for these arbitration references.
- 26 An example is the *Himpurna* tribunal sitting under the UNCITRAL Rules which changed the juridical seat of the arbitration from Jakarta to Geneva. See S. Schwebel, 'Injunction of Arbitral Proceedings and Truncation of the Tribunal', *Mealey's IAR*, 2003, Vol 18, p. 33.

- 27 This refers to online arbitrations, where the parties are not physically in a particular place but interact through their computers and internet from various locations and even different states. See, J Hornle, *Cross-border Internet Dispute Resolution*, Cambridge, Cambridge University Press, 2009; G Kaufmann-Kohler and T. Schultz, *Online Dispute Resolution: Challenges for Contemporary Justice*, The Hague: Kluwer Law International, 2004; and Katsh and Rifkin, *Online Dispute Resolution: Resolving Disputes in Cyberspace*, San Francisco: Jossey Bass, 2001; C. Rule, *Online Dispute Resolution for Business*, San Francisco: Jossey Bass, 2002.
- 28 Lew, *Applicable Law*, gives a list of proponents of the contractual theory in Footnote 69.1.
- 29 Lew, *Applicable Law*, para. 69 quoting Klein in Footnote 69.2.
- 30 Thus the extent of state influence marks the line of departure between the jurisdictional and contractual theories. For the jurisdictional theorist, the state controls arbitration by virtue of its sovereignty while for the contractual theorist the parties control arbitration by virtue of the doctrine of party autonomy.
- 31 Lew, *Applicable Law*, paras 70–71 and quoting various commentators in Footnotes 70.2–71.5.
- 32 Lew, *Applicable Law*, para. 69 and quoting Niboyet in Footnote 69.3.
- 33 Implying an agency relationship between the parties (as principal) and the arbitrator (as agent), which is not followed in Chapter Four below.
- 34 Merlin and Foelix, quoted in Lew, *Applicable Law*, at para. 71, and Yu and Sauzier, 'Fifth Theory of International Commercial Arbitration', *Int ALR*, Vol 3(4), 2000, p. 115.
- 35 Lew, *Applicable Law*, at para. 71.
- 36 Cases on the validity of arbitration agreement include, *Owerri Commercial Inc (Panama) v Dielle Srl (Italy)* (decision of the Gerechtshof of 4 August 1993), YBCA, 1994, Vol XIX, p. 703; *Dalimpex Ltd v Janicki* (unpublished) [2000] OJ No 2927, decision of Ontario Superior Court of Justice, Divisional Court cited in Henri Alvarez, Neil Kaplan & David Rivkin, *Model Law Decisions: Cases Applying the UNCITRAL Model Law on International Commercial Arbitration 1985–1991*, The Hague: Kluwer Law International, 2003, p. 65 where the court held that where an arbitration clause is capable of bearing two interpretations, one of which fairly provides for arbitration, the courts should lean towards that interpretation; *Lucky-Goldstar Int'l (Hong Kong) Ltd v Ng Moo Kee Engineering Ltd* [1993] 2 HKLR 73.
- 37 An example is the *Hubco v WAPDA* saga where the Supreme Court in Pakistan granted an anti-arbitration injunction. *Hubco v Water and Power Development Authority (WAPDA)*, PLD (2000) SC 841, *Arb Int*, 2000, Vol 16, p. 439. See, K.N. Kabraji, 'Allegations of Corruption Vitiates International Commercial Arbitration: The Pakistan Experience', and his discussion of the judgment in his paper delivered at the 17th LawAsia Biennial Conference, New Zealand, October 2001 and available online at <<http://www.lawyers.org.nz/conference/pdf%20files/KabrijSa17and25.pdf> (last accessed 20 June 2009)>, and N.B. Majeed, 'Commentary on the Hubco Judgement', *Arb Int*, 2000, Vol 16, p. 431. The Indonesian courts are also perceived as interventionist as evidenced in the *Himpurna* saga and *Kerahas* cases where the courts granted an anti-arbitration injunction against the arbitral tribunal.
- 38 An example is the Court of Appeal's decision in *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd & Others* [2000] QB 288, [1999] 2 Lloyd's Rep 65, where it confirmed the public policy in support of arbitration proceedings and enforcing resultant awards.
- 39 This view is supported by Art. V (2) of the New York Convention as it relates to mandatory provisions of such laws and the state's rules of public policy.
- 40 This assertion is fully argued in Chapter Five below.

- 41 This assertion is supported by the decision of the European Court of Justice in *Eco Swiss China Time Ltd v Benetton Int'l NV* [2000] 5 CMLR 816.
- 42 See for example Art. V (1) (a) of the New York Convention.
- 43 This is supported by Art. V (1) (e) and V (2) of the New York Convention.
- 44 See Art. 31 Arbitration Law Brazil, s 66 (1) Arbitration Act England, Art. 1476 Arbitration Law France, and s 1055 Arbitration Law Germany.
- 45 See A. van den Berg, 'Commentary on the New York Convention', YBCA, 2004, Vol XXIX, p. 502.
- 46 See Arts III and V of the New York Convention, Art. IX (1) European Convention, Arts 34 and 36 of the Model Law, Art. 763 Arbitration Law Argentina, Art. 33 Arbitration Law Brazil, Art. 58 Arbitration Law China, ss 67 and 68 Arbitration Act England, Arts 1486 and 1501 Arbitration Law France, s 1059 Arbitration Law Germany, s 34 Arbitration Act India, s 29 Arbitration Act Nigeria, s 56 Arbitration Act Sweden, Art. 191 Arbitration Law Switzerland, and s 12 Federal Arbitration Act United States.
- 47 Read with Arts II and III of the New York Convention.
- 48 Including the necessary court fees, though not mentioned in the New York Convention.
- 49 See E. Onyema, 'Formalities of the Enforcement Procedure' in E. Gaillard and D. Di Pietro (eds) *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, London: Cameron, May 2008, pp. 597–612.
- 50 The mixed theory was developed by Professor Sauser-Hall in his Report to the Institut de Droit International, 44-I Ann IDI 469 (1952) and 47-II Ann IDI 394 (1957), as stated in Lew, *Applicable Law*, para. 75.
- 51 Yu and Sauzier, 'Fifth Theory of International Commercial Arbitration', at p. 119, and Lew, *Applicable Law*, at para. 74.
- 52 Lew, *Applicable Law*, at paras 76–7 quoting Jean Robert and Sauser-Hall in Footnotes 76.2 and 76.3 respectively.
- 53 Redfern and Hunter, *The Law and Practice of International Commercial Arbitration*, 3rd ed., London: Sweet & Maxwell, 1999, para. 1–16, and 4th ed., para. 1–16.
- 54 Lew, *Applicable Law*, at para. 78.
- 55 Lew, *Applicable Law*, at para. 79.
- 56 Lew, *Applicable Law*, at para. 80.
- 57 Lew, *Applicable Law*, at para. 81.
- 58 An example of this is foreign direct investment and see Y. Dezalay & B.G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, Chicago: Univ. of Chicago Press, 1996.
- 59 The Model Law was amended in 2006 and the amended version has been implemented in Mauritius (2008), New Zealand (2007), Peru (2008) and Slovenia (2008). Other successful and influential initiatives are the UNCITRAL Arbitration Rules (currently under review) and ICSID Convention sponsored by the World Bank and currently ratified by over 155 States.
- 60 Most states in promoting arbitration (and alternative dispute resolution processes) cite court decongestion as one of the major reasons for this.
- 61 The European Court of Justice in support of the autonomous theory held in *Nordsee Deutsche Hochseefischerei GmbH Bremerhaven, FR Germany v Reederei Mond Hochseefischerei Nordstern AG & Co, KG Bremerhaven, FR Germany, and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co KG Bremerhaven, FR Germany*, YBCA, 1983, Vol VIII, p. 183 that international arbitration depends solely on the parties' intentions and not on the procedural rules of the law of the seat of arbitration.
- 62 On the delocalization theory see, J. Paulsson, 'Arbitration Unbound: Award Detached from its Country of Origin', *ICLQ*, 1981, Vol 30, p. 358, and J. Paulsson,

'Delocalization of International Commercial Arbitration, When & Why it Matters', *ICLQ*, 1983, Vol 32, p. 53.

- 63 An exception is investment arbitration under the ICSID Convention and its arbitration rules, which operates a closed system.
- 64 See Art. V of the New York Convention, and Art. 36 of the Model Law.
- 65 This is especially true when the state's interest is involved.
- 66 Under Art. 1502 Arbitration Law France, enforcement of international arbitration awards enjoy an autonomous existence subject only to international public policy but the French courts and law are still relevant in assisting and supporting parties and arbitrators in the arbitral process.
- 67 Yu and Sauzier, 'Fifth Theory of International Commercial Arbitration', at p. 114.
- 68 The source of the powers of the judge and the arbitrator are very different. The judge gets his powers from statute or the state while the primary source of the arbitrator's power is from the arbitration agreement. However, statutory arbitrations may fall within the delegation theory category.
- 69 This is especially true since each state would have to ratify and sign an international convention for it to be binding on the state. In some states, for example in the common law world, such instruments will have to be enacted into national law to become enforceable, while in other jurisdictions upon ratification the convention becomes directly applicable.
- 70 Yu and Sauzier, 'Fifth Theory of International Commercial Arbitration', at p. 120.
- 71 Yu and Sauzier, 'Fifth Theory of International Commercial Arbitration', at p. 121.
- 72 This also nullifies the claims of the contractual theorists as to the award being enforceable as a contract between the parties.
- 73 This is supported by the doctrine of separability of the arbitration clause from the underlying main contract in which it is contained examined in Chapter One.
- 74 An example is Mustill and Boyd, *Commercial Arbitration*, 2nd ed., London: Butterworths, 1989, Companion volume 2001.
- 75 Examples are Fouchard Gaillard and Goldman, Lew Mistelis and Kröll, Redfern and Hunter, Klaus Lionnett, Werner Melis, Mauro Rubino-Sammartano, and Thomas Clay.
- 76 Examples are Murray Smith and Patrik Scholdstrom.
- 77 Examples are, Gaillard and Savage, Dr Werner Melis, Prof. Philippe Fouchard, Patrik Scholdstrom, Mauro Rubino-Sammartano.
- 78 Examples are Dr Werner Melis and Prof. Philippe Fouchard.
- 79 See Chapter Four for the detailed analysis.
- 80 Rubino-Sammartano, *International Arbitration Law and Practice*, at pp. 307–12, gives a brief summary of the various theories examined.
- 81 See section 4 of the Introduction to this book.
- 82 Mustill and Boyd, *Commercial Arbitration*, at p. 219.
- 83 Mustill and Boyd, *Commercial Arbitration* at p. 222.
- 84 This proposition reveals the connection between the juridical and relationship theories, such that the juridical theory adopted would influence the relationship theory applied in explaining the legal nature of the relationships between the parties.
- 85 The state indicates this by making mandatory provisions on such matters. This might have the effect of making such an award unenforceable within the territories of the particular state. In relation to the parties, the arbitrator would be in breach of his contractual obligation to act fairly in compliance with the arbitration agreement.

- 86 Mustill and Boyd, *Commercial Arbitration*, at p. 221 and 223.
- 87 K. Lionnet, 'Arbitrator's Contract', at p. 163.
- 88 Mustill and Boyd, *Commercial Arbitration*, at p. 223 accept the differentiation.
- 89 These provisions are of course non-mandatory in character and apply in default of any contrary provisions by the disputing parties.
- 90 See the House of Lords decision in *Arenson v Arenson* [1977] AC 405. It has also been observed by Critchlow, 'Source of Power' at p. 3, that the fact that aspects of arbitration are regulated by statute does not mean the relationship cannot be contractual. He gave examples with the Sale of Goods Act (1979) and Unfair Contract Terms Act (1977). See also P.M.M. Lane, 'The Appointment of an Arbitrator, Contract or Status?' *ADRLJ*, 1994, p. 9.
- 91 An example is Art. 756 Arbitration Law Argentina.
- 92 Examples are s 29 (1) Arbitration Act England and Art. 38 Arbitration Law China.
- 93 An exception is Art. 10 Arbitration Law of China which provides for the arbitration commission.
- 94 See for example Art. 7 of the Model Law.
- 95 As noted by K. Lionnet, 'Arbitrator's Contract', at p. 162.
- 96 K. Lionnet, 'Arbitrator's Contract', at p. 161.
- 97 K. Lionnet, 'Arbitrator's Contract', at p. 164.
- 98 *K/S Norjarl A/S v Hyundai Heavy Industries Ltd* [1991] 1 Lloyd's Rep 524 and is analysed in section 4.6.2 of Chapter Four. See also the decision of Hobhouse J, in *Compagnie Europeene de Cereales SA v Tradax Export SA* [1986] 2 Lloyd's Rep 301 at p. 306 where he said, 'It is the arbitration contract that the arbitrators become parties to by accepting appointments under it.' On this reasoning, the arbitrator was restrained by an injunction from breaching the provisions of the arbitration agreement.
- 99 See M.L. Smith, 'Contractual Obligations', at p. 34, while *Fouchard Gaillard and Goldman*, at para. 1124, assert that the arbitration agreement, 'only binds the parties to the dispute'.
- 100 K. Lionnet, 'Arbitrator's Contract', at pp. 164-5.
- 101 Critchlow, 'Source of Power', sees this as a point that militates against the status theory.
- 102 Since as a creature of statute, the termination of the office will be dictated by the statute and not the disputing parties.
- 103 See *Fouchard Gaillard and Goldman*, at p. 600.
- 104 See *Fouchard Gaillard and Goldman*, at p. 601. It is clear that this position looks very similar to a contract-with-status approach. In agreement with these comments, this book argues that such statutory provisions influence the terms of the arbitrator's contract on the grounds of being mandatory provisions.
- 105 *Fouchard Gaillard and Goldman*, at para.1106.
- 106 *Fouchard Gaillard and Goldman*, at para. 1105.
- 107 K. Lionnet, 'Arbitrator's Contract', at p. 164.
- 108 K. Lionnet, 'Arbitrator's Contract', at p. 165 with footnotes omitted.
- 109 Mustill and Boyd, *Commercial Arbitration*, at p. 221, comments on the contractual theory that, 'there is the more traditional approach which is to assume a contract, and then round it out by implying terms'.
- 110 See M.L. Smith, 'Contractual Obligations', at p. 24 where he argued that this is one of the inherent weaknesses of the contract theory.
- 111 Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, at para. 12.6 in support of the agency theory wrote that where one party appoints the arbitrator it, 'is acting not only for itself but also as an agent for the other parties when concluding the contract of service with the arbitrators'.
- 112 K. Lionnet, 'Arbitrator's Contract', at p. 166.

- 113 *Christopher Michael Linnett v Halliwells LLP* [2009] EWHC 319 (TCC), [2009] All ER (D) 36.
- 114 *Linnett v Halliwells*, paras 32–4.
- 115 *Linnett v Halliwells*, paras 42–7, especially at para. 47. This was because having raised a jurisdictional challenge, Halliwells did not respond to the offer made by the adjudicator on the terms of his appointment and silence does not amount to acceptance according to *Felthouse v Brindley* (1862) 11 CB (NS) 869.
- 116 *Linnett v Halliwells*, para. 59.
- 117 *Linnett v Halliwells*, para. 60.
- 118 The judge noted at para. 32 that, ‘although adjudication is said to be “statutory adjudication” it is, on analysis contractual’.
- 119 Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, at para. 12.6 are of the opinion that, ‘the conclusion of the contract usually coincides with the appointment of arbitrators’.
- 120 See T.H. Webster, ‘Selection of Arbitrators in a Nutshell’, *JIA*, 2002, Vol 19, 261 where this action falls under the first stage of the arbitration timeline in Fig. 1 at p. 262.
- 121 An example is s 28 (1) Arbitration Act England. This assertion again implies that a non-party to the arbitration agreement cannot incur liabilities under it.
- 122 See *Linnett v Halliwells*, para. 34.
- 123 The important requirement is the notification of the respondent by the claimant of its intention to constitute the arbitral tribunal in assertion of the arbitration agreement.
- 124 In some laws, for example, s 1035 Arbitration Act Germany, the other party must be notified of the appointment of the arbitrator for such appointment to become binding on that party. In *Tradax Export SA v Volkswagenwerk AG* [1970] 1 QB 537 where the other party had been notified of an arbitrator’s appointment before the arbitrator was appointed, the Court of Appeal (England) held that the arbitrator had not been appointed at the relevant time. Thus it is important that the arbitrator accepts the offer of appointment before the other party is notified. It is his acceptance that triggers the notification where applicable.
- 125 K. Lionnet, ‘Arbitrator’s Contract’, at p. 166.
- 126 It is conceded that the respondent may not be interested in constituting the arbitral tribunal.
- 127 See s 59 Arbitration Act England which helpfully lists what are included in the costs of the arbitration.
- 128 The predominant cost allocation test in international commercial arbitration where the parties have not agreed otherwise is the cost following the event.
- 129 This was in effect the decision of Ramsey J in *Linnett v Halliwells* discussed above.
- 130 Again without the participation of the contesting party in the reference, according to the decision in *Linnett v Halliwells*.
- 131 According to this analysis, the disputing parties contracting jointly affects all contracts they are party to so that the same analysis applies to the contract between the disputing parties and arbitration institution.
- 132 I recognize that where under ad hoc arbitral references a choice of the seat of arbitration has been made and the parties have not chosen any arbitration rules to apply so that the default provisions of the arbitration law of the seat will apply as the applicable terms may lead to the presumption that the terms are based on statute. However, as already argued above, these non-mandatory provisions of the law of the seat of arbitration will become the terms of the arbitrator’s contract so that in effect the terms will still be contractual.
- 133 Critchlow, ‘Source of Power’, at p. 1 (and in Footnote 3) defined status as, ‘an empowerment which derives from the ultimate authority in a legal system’.

134 This assertion becomes more obvious in Chapter Four where the various theories on the relationships between the core participants are examined.

3 Parties to the arbitrator's contract

- 1 See section 1.1 of Chapter One for more details on the nature of the parties to the arbitration agreement.
- 2 See Art. 740 Arbitration Law Argentina, Art. 10 Arbitration Law Brazil, and Art. 1448 Arbitration Law France. For the position on the effect of the arbitrator signing the terms of reference, see Y. Derains and E.A. Schwartz, *A Guide to the ICC Rules of Arbitration*, 2nd ed., The Hague: Kluwer Law International, 2005, at p. 228 described the origins of the Terms of Reference and explained its objective as a submission agreement, 'to lend to the arbitration from the outset the formal imprimatur of the Court and to obtain a signed form of submission (compromise) that would be recognised as binding in jurisdictions ... that would not recognise the validity of an agreement to arbitrate future disputes'. The terms of reference and its role in the arbitral reference is also examined by M. Bühler and T.H. Webster, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, London: Sweet & Maxwell, 2005.
- 3 J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *Comparative International Commercial Arbitration*, The Hague: Kluwer Law International, 2003, para. 8.31. The authors' reference in the quoted text to signing is by the disputing parties and not the arbitrator. This implies that naming the arbitrator in the submission agreement evidences the identity of the arbitrator appointed and this does not make him party to the arbitration agreement.
- 4 Article 10 Arbitration Law Brazil. Other requirements are: the name, profession, marital status and domicile of the parties, the subject matter of the arbitral proceedings, and the place where the arbitral award shall be made. Article 11 requires the following non-mandatory additional requirements: the place or places where the arbitral proceedings shall be held, authorization for the arbitrators to act in equity if agreed by the parties, time limit for making the arbitral award, choice of law or rules applicable to the arbitral procedure, fees and costs and their allocation for payment.
- 5 See for example Art. 740 Arbitration Law Argentina, while Art. 10 Arbitration Law Brazil does not require the submission agreement to be signed, Art. 16 Arbitration Law China replaces the requirement for the arbitrator with arbitration commission. See also s 6 Arbitration Act England, s 1029 Arbitration Law Germany, s 7(2) Arbitration Act India, s 1 (1) (a) Arbitration Act Nigeria, s 1 Arbitration Act Sweden, Art. 178 (1) Federal Arbitration Law Switzerland, and s 2 Federal Arbitration Act US, all of which do not require the name of the arbitrator or his signature on the submission agreement.
- 6 Most national arbitration laws simply provide for a clear intention by the parties to refer existing disputes to arbitration. The French law which makes detailed provisions on the submission agreement accepts such agreements that do not contain the name(s) of the arbitrators but provide the method of appointment. The provision in the Arbitration laws of Argentina and Brazil are however, mandatory.
- 7 This is envisaged by the non mandatory provision in Art. 11 Arbitration Law Brazil.
- 8 Article 1447 Arbitration Law France expressly provides that the parties to a submission agreement 'submit an existing dispute to the arbitration of one or more persons'.
- 9 This is a more likely occurrence and agrees with the view of E. Gaillard and J. Savage, eds., *Fouchard Gaillard and Goldman on International Commercial*

Arbitration, The Hague: Kluwer Law International, 1999, at p. 601 that the arbitrator's contract and its terms are gradually concluded.

- 10 Article 16 Arbitration Law China.
- 11 In accordance with Art. 13 Arbitration Law China.
- 12 Article 1448, para. 3 Arbitration Law France.
- 13 See Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, paras 21.24–21.25.
- 14 See A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Law and Practice of International Commercial Arbitration*, 4th ed., London: Thomson, Sweet & Maxwell, 2004, para. 3.71. See also section 5 of Chapter One.
- 15 The disputing parties will then have to either agree on a set of arbitration rules to apply or fall back on the *lex loci arbitri* where they have agreed on a seat or approach a national court for assistance with the appointment of the arbitrator.
- 16 The same problem arises where the arbitration agreement appoints a non-existent or incorrectly described arbitration institution with the result that the agreement becomes inoperative but not null and void. Various courts confronted with such problems have taken positive steps to give effect to the disputing parties' intention to arbitrate. For example see, *Lucky-Goldstar Int'l (Hong Kong) Ltd v Ng Moo Kee Engineering Ltd*, YBCA, 1995, Vol XX p. 280 and *HZI Research Centre Inc (US) v Sun Instruments Japan Co Inc (Japan)*, YBCA, 1996, Vol XXI p. 830.
- 17 For example, the arbitrator named in the submission agreement cannot insist on the disputing parties performing that appointment where the parties decide no longer to appoint him but another arbitrator.
- 18 *K/S Norjarl A/S v Hyundai Heavy Industries* (1992) 1 QBD 863, [1991] 1 Lloyd's Rep 260, on appeal to the Court of Appeal [1991] 1 Lloyd's Rep 524. This is a case on the right of arbitrators to claim cancellation fees, which is examined in detail in Chapter Five.
- 19 K. Lionnet, 'The Arbitrator's Contract', *Arb Int*, 1999, Vol 15, p. 161 at 164.
- 20 For general commentary on the arbitrator see A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Law and Practice of International Commercial Arbitration*, 4th ed., London: Thomson, Sweet & Maxwell, 2004, paras 4.01–4.50; D.J. Sutton, J. Gill and M. Gearing, *Russell on Arbitration*, 23rd ed., London: Sweet & Maxwell, 2007, pp. 114–80; E. Gaillard and J. Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, The Hague: Kluwer Law International, 1999, pp. 750–93; Gary Born, *International Arbitration and Forum Selection Agreements, Planning, Drafting and Enforcing*, The Hague: Kluwer Law International, 1999 pp. 615–43; G.B. Born, *International Commercial Arbitration*, The Netherlands: Kluwer Law International, 2009, pp. 1131–232, 1349–592, 1593–674; J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *Comparative International Commercial Arbitration*, The Hague: Kluwer Law International, 2003, pp. 223–52; Rubino-Sammartano, *International Arbitration Law and Practice*, pp. 307–61; M.J. Mustill and S.C. Boyd, *Commercial Arbitration*, 2nd ed., London: Butterworths, Companion volume, 2001, pp. 247–8; R. Merkin, *Arbitration Law*, London: LLP, pp. 415–28.
- 21 For example Art. 13 Arbitration Law Brazil, Art. 38 Arbitration Law China, s 14(3) Arbitration Act England.
- 22 Article 11 (1) of the Model Law.
- 23 Article 1451 Arbitration Law France.
- 24 Article 743 (2) Arbitration Law Argentina.
- 25 Article 1451 Arbitration Law France.
- 26 Article 13 Arbitration Law Brazil.
- 27 See J. Kleinheisterkamp, *International Commercial Arbitration in Latin America*, New York: Oceana, 2005, pp. 162–70 for the position in various Latin American countries.

- 28 Article 13 Arbitration Law China.
- 29 *Fouchard Gaillard Goldman*, at p. 438.
- 30 *The Chambers Dictionary*, 2nd ed., Edinburgh: Chambers, Harrap Publishers, 2001, defines a profession as 'a non-manual occupation requiring some degree of learning or training'. The current advancement in the area of teaching, research and development dedicated to the law and practice of arbitration can qualify arbitration as a profession on the basis of this definition.
- 31 R. Merkin, *Arbitration Law*, at para. 10.2.
- 32 *Russell on Arbitration*, at para. 4.020 argues that under English law, there is no minimum requirement for arbitrators, 'because the authority of the arbitral tribunal arises from the parties' contract, and the law allows contracting party's complete freedom to choose their tribunal'.
- 33 Such prerequisites must be identified and communicated to the arbitrator before he accepts appointment.
- 34 A. Redfern, 'Experts and Arbitrators – An International Perspective', *Int ALR*, 2001, Vol 4, p. 109.
- 35 This does not transform the arbitration into an expert determination procedure.
- 36 L. Mistelis, 'International Arbitration: Corporate Attitudes and Practices, 12 Perceptions Tested: Myths, Data and Analysis', *Am Rev Int Arb*, 2004, Vol 15, p. 525 at 573.
- 37 See for example Art. 13 Arbitration Law China.
- 38 *Sacheri v Robotto*, YBCA, 1991, Vol XVI, p. 156.
- 39 See M. Klug and S. Dutson, 'The Role of the Legal Profession in Arbitration', *ADRLJ*, 1999, Vol 8 (3), at p. 208 where they argued that an expert arbitrator would serve the process better if he also possessed knowledge of the law of arbitration while in all cases the arbitrator should be trained in the art of dispute resolution.
- 40 In *Pratt v Swanmore Builders & Baker* [1980] 2 Lloyd's Rep 504, the arbitrator was removed because he lacked elementary skill and got the arbitration off to a wrong start.
- 41 For clarity, common sense is defined in *Chambers Dictionary* as, 'average understanding; good sense or practical wisdom'.
- 42 See E. Onyema, 'Selection of Arbitrators in International Arbitration', *Int ALR*, 2005, Vol 8 (2), p. 45.
- 43 *Russell on Arbitration*, at para. 4.020 concludes that parties may insure against such eventuality.
- 44 See s 19 Arbitration Act England which in relevant part requires the court to 'have due regard to any agreement of the parties as to the qualifications required of the arbitrators'. See also to the same effect, s 1035 (5) Arbitration Law Germany, s 11 (8) Arbitration Act India, and s 7 (5) Arbitration Act Nigeria.
- 45 It is a waiveable defect under the Model Law since the parties by continuing with the arbitral reference without challenging the arbitrator according to the provisions of the Model Law (or any applicable rules) cannot challenge the resultant award on a ground substantiated by the defect.
- 46 An example is s 24 (1) (b) Arbitration Act England.
- 47 Article 12 (2) of the Model Law provides in relevant part 'An arbitrator may be challenged ... if he does not possess qualifications agreed to by the parties ...'
- 48 D.J Sutton, J. Gill and M. Gearing, *Russell on Arbitration*, at para. 4.023, citing the following English authorities: *Rahcassi Shipping Co SA v Blue Star Line Ltd* [1969] 1 QB 173, [1967] 3 WLR 1382, [1967] 3 All ER 301, [1967] 2 Lloyd's Rep 261; and *Pando Compania Naviera SA v Filmo SAS* [1975] 1 QB 742.
- 49 D.J Sutton, J. Gill and M. Gearing, *Russell on Arbitration*, at para. 4.023.
- 50 CLOUT Case No 454, YBCA, 2003, Vol XXVIII, p. 261.

- 51 The methods by which arbitrators are appointed are examined in detail in Chapter Four. See also *Fouchard Gaillard Goldman*, at p. 607. See Redfern and Hunter, *International Commercial Arbitration*, at para. 4.22; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, at para. 10.1.
- 52 See E. Onyema, 'Selection of Arbitrators', at p. 52.
- 53 T. Landau, 'Composition and Establishment of the Tribunal', *Am Rev Int Arb*, 1990, Vol 9 at p. 45 agrees that confirmation by arbitration institutions of arbitrators removes the final appointing power from the disputing parties.
- 54 This is the case even under national laws where there is no express provision to such effect. See J. Kleinheisterkamp, *International Commercial Arbitration in Latin America*, at pp. 196–8 on the position in Latin American countries.
- 55 Article 1452 Arbitration Law France; Art. 1029 (1) Arbitration Law Netherlands provides that, 'an arbitrator shall accept his mandate in writing'.
- 56 Article 744 (1) Arbitration Law Argentina.
- 57 Article 33 Arbitration Law of China 1994.
- 58 An example is Art. 1687 (1) Arbitration Law Belgium.
- 59 See also Canon 1C AAA/ABA Code and Art. 1 SIAC Code of Ethics for the same requirements.
- 60 In *Robinson v Moody* (1995) ADRLJ, p. 262 the arbitrator accepted appointment but before the other party received the notification, time for commencement of the arbitration had lapsed. The court had to determine if the arbitrator's appointment was within time.
- 61 In *Oliver v Collings* (1809) 11 East 367; 103 ER 1045, it was held that the mere fact that the parties are dissatisfied with the appointment of the third arbitrator by the party appointed arbitrators would not affect the validity of such appointment and in *Reyn Gray* (1698) 1 LD Raym 223 it was held that an appointment is conditional on the arbitrator's acceptance.
- 62 Article 1683 (4) Arbitration Law Belgium provides, 'The appointment of an arbitrator may not be withdrawn after notification of the appointment.'
- 63 *Tradax Export SA v Volkswagenwerk AG (La Loma)* [1970] 1 Lloyd's Rep 62 at 64; *Fal Bunkering of Sharjah v Grecale of Panama* [1990] 1 Lloyd's Rep 369.
- 64 An example is England.
- 65 As noted in Footnote 32 above this attitude may be changing as the courts take notice of the realities of the professionalization of the practice of arbitration.
- 66 An example is s 29 Arbitration Act England.
- 67 See for example, Art. 756 Arbitration Law Argentina, Art. 18 Arbitration Law Brazil, Art. 38 Arbitration Law China.
- 68 The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct (September 2004) available online at <http://www.arbitrators.org/Member/m1/Resources/ethical_conduct.asp> (last accessed 16 June 2009.)
- 69 See section 2 of Chapter Two above on the theories of the relationship between parties and arbitrators.
- 70 D.J. Sutton, J. Gill and M. Gearing, *Russell on Arbitration*, at para. 4.201 in support of this proposition clarify that, 'statutory immunity extends only to appointment of arbitrators and not to the administration of arbitrations'.
- 71 P. Fouchard, *Final Report on the Status of the Arbitrator*, ICC Bull Special Supp, Vol 7, No. 1, May 1996, at p. 31.
- 72 Reproduced from the translation by E. Kleiman, 'Paris Court of Appeal decides on application of ICC rules' available online at <<http://www.internationallawoffice.com>> (last accessed 25 June 2009).
- 73 The sum payable as fees may vary between members of the arbitral tribunal.
- 74 *Fal Bunkering of Sharjah v Grecale Inc of Panama* [1990] 1 Lloyd's Rep 369.
- 75 An arbitrator is challenged for an act or omission personal to him. He would not be challenged for the act or omission of another member of the panel.

- 76 W. Melis, 'Function and Responsibility of Arbitral Institutions', *CL Ybk Int Bus*, 1991, Vol 13, p. 107 at 109. See Redfern and Hunter, *International Commercial Arbitration*, at paras 1.109–1.112 listed a degree of permanency, modern rules of arbitration and qualified staff as basic requirements for an arbitration institution. See also Rubino-Sammartano, *International Arbitration Law and Practice*, pp. 367–75.
- 77 E. Müller, in 'How do Institutions Select Arbitrators? Arbitration Institution of the Stockholm Chamber of Commerce (SCC Institute)', *JIA*, Vol 17 (3), 2000 at p. 157 notes that, 'the SCC Institute is an independent entity within the Stockholm Chamber of Commerce'. See also A.V. Schlaepfer and C. Girod, 'Institutional v ad hoc arbitration', in G. Kaufmann-Kohler and B. Stucki, eds., *International Arbitration in Switzerland*, The Hague: Kluwer Law International, 2004, pp. 5–14; E Schäfer, H. Verbist, C. Imhoos, *ICC Arbitration in Practice*, The Hague: Kluwer Law International, 2005.
- 78 Some examples are the LCIA, AAA, and DIS.
- 79 Some examples include the regional centres created under the auspices of the Asian-African Legislative Consultative Committee (AALCC) such as the Cairo and Lagos Regional Centres and the International Centre for the Settlement of Investment Disputes (ICSID).
- 80 For example is the Euro-Arab Chamber of Commerce.
- 81 Some examples include the various maritime arbitration associations/institutes (for example the London Maritime Arbitration Association) and trade associations such as the Grains and Feeds Trade Association (GAFTA)).
- 82 An example is the World Intellectual Property Organization (WIPO).
- 83 ICSID has jurisdiction over states and investors from other contracting states according to Art. 25 ICSID Convention.
- 84 It could also identify the applicable rules. These may be the UNCITRAL Arbitration Rules *in toto* or an adapted version of the rules. Examples are the arbitration rules of the Regional Centres in Cairo and Lagos.
- 85 P. Fouchard, 'Relationships between the Arbitrator and the Parties and the Arbitral Institution', *ICC Bull*, 1995, p. 12 and p. 15.
- 86 D.J Sutton, J. Gill and M. Gearing, *Russell on Arbitration*, at para. 3.046, gave the various roles of arbitration institutions to include acting as appointing authority, account holder, supervision of the arbitral proceedings, and production of arbitration rules.
- 87 Those arbitration institutions that do not perform these minimal functions are primarily mere appointing authorities as examined in subsequent chapters.
- 88 Of the arbitration rules referenced in this book, the rules of the Cairo and Lagos regional centres, and AAA IA are based on the UNCITRAL Arbitration Rules while the rules of CIETAC, DIS, ICC, LCIA, SIAC, SCC and Swiss are not.
- 89 The version of the arbitration rules of the ICC, LCIA and UNCITRAL examined in this book are currently undergoing review.
- 90 See section 4.1 of Chapter Four.
- 91 An example is Art. 6 (2) ICC Rules, see also Art. 6 (1) CIETAC Rules, and Art. 9 SCC Rules. In *Ceskolowenska Obchodni Bank AS (Cecobank) v ICC* (1986) Rev Arb (1987) 367; *Medt & ME AQ*, 1987, Vol 1, p. 3, the court held that ICC Court administrative decision on the existence of an arbitration agreement is not binding on a national court or the arbitrators. In this case, the ICC Court declared there was no arbitration agreement between Cecobank and Bank Mediterranee Sarl. Cecobank sued to compel the ICC to form a tribunal, and damages for breach of contract.
- 92 In 2007, the Swiss Chambers rejected four references to it on this ground.
- 93 Arbitration rules of institutions give general guidelines, for example, on nationality, special requirements in the arbitration agreement, impartiality

and independence, but the final determining criteria by which one nominee is chosen instead of another nominee, are not made public.

- 94 Some examples include the, AAA, Cairo Regional Centre, CIETAC, DIS, ICC, Lagos Regional Centre, LCIA, SIAC, and the SCC.
- 95 Article 6 (4) AAA IA Rules, Art. 6 (4) Cairo Regional Centre Rules, Art. 9 (1) ICC Rules, and see also Art. 9 (3) Lagos Regional Centre Rules, Art. 13 (6) SCC Rules and Art. 6 (4) UNCITRAL Rules.
- 96 See Art. 7 (bis) Cairo Regional Centre Rules, Art. 21 (2) CIETAC Rules, Art. 17 DIS Rules, Art. 9 (1) ICC Rules, Art. 5.5 LCIA Rules, Art. 5 SIAC Rules, and Art. 5 Swiss Rules.
- 97 For details on appointing authority see Chapter Four.
- 98 In accordance with Art. 12 (1) UNCITRAL Rules.
- 99 In accordance with Art. 12 (2) UNCITRAL Rules.
- 100 Article 6 (2) UNCITRAL Rules provides in part, ‘... or if the Appointing Authority agreed upon refuses to act’.
- 101 See Art. 9 AAA IA Rules, Art. 12 (bis) Cairo Regional Centre Rules, Art. 26 (6) CIETAC Rules, Art. 11(3) ICC Rules, Art. 15 (1) Lagos regional Centre Rules, Art. 11 (1) LCIA Rules, Art. 12 (1) SIAC Rules, Art. 15 (4) SCC Rules, Art. 12 (1) Swiss Rules and Art. 12 (1) (a) UNCITRAL Rules.
- 102 In *AT&T Corporation & Lucent Technologies Inc v Saudi Cable Co*, [2000] 2 All ER (Comm) 625, [2000] 2 Lloyd’s Rep 127, AT&T pursuant to the Arbitration Act filed its challenge application before the Queen’s Bench (England) after the ICC Court rejected its challenge of the chairman of the tribunal. Article 13 (3) of the Model Law permits an unsuccessful challenge to be heard again by the court.
- 103 See s 10 (a)-(c) Federal Arbitration Act US, and the decision in *Commonwealth Coatings Corporation v Continental Casualty Co*, 393 US 145 (1968).
- 104 *Centre Canadien d’Arbitrage Commercial v Garantie des Baltiments Residentiels Neuf de l’APCHQ Inc*, Case No 2005 QCCA 728 of 17 August 2005.
- 105 *Raffineries de Petroles D’Homs et Bamas v ICC*, decision of Tribunal of First Instance, Paris, 28 March 1984, quoted by L. Craig, W.W. Park and J. Paulsson, *International Chamber of Commerce Arbitration*, 3rd ed., New York: Oceana, 2000, at p. 55; *Societe Opinter France v Sarl Dacomex*, Rev Arb 1987, at 475 decision of French Supreme Court.
- 106 See Art. 9 AAA IA Rules, Art. 13 Cairo Regional Centre Rules, Art. 27 CIETAC Rules, Art. 18 (3) DIS Rules, Art. 12 ICC Rules, Art. 16 Lagos Regional Centre Rules, Art. 11 LCIA Rules, Art. 13 SIAC rules, Art. 17 SCC Rules, Art. 13 Swiss Rules and Art. 13 UNCITRAL Rules.
- 107 See for example, Art. 26 (7) CIETAC, Art. 12 (5) ICC Rules and Art. 12 (2) LCIA Rules provides for the challenged arbitrator to continue with the proceedings until a decision is made while Art. 14 Swiss Rules implies the arbitral tribunal will wait for a replacement arbitrator to be appointed.
- 108 See the provision of Art. 17 (2) SCC Rules.
- 109 See Art. 32 AAA IA Rules, Art. 39 Cairo Regional Centre Rules, Art. 69 (1) CIETAC Rules, Art. 31 ICC Rules, Art. 42 Lagos Regional Centre Rules, Art. 28.1 LCIA Rules, Art. 30 SIAC Rules, Art. 43 (2) SCC Rules, and Art. 39 (2) Swiss Rules.
- 110 See for example the calculator on the ICC website at <<http://www.iccwbo.org/court/arbitration/id4097/index.html>> (last accessed 03 June 2009).
- 111 An example is the awards from the Cairo Regional Centre published by Kluwer Law International. Even more readily available are the decisions of ICSID tribunals including the documents filed by the parties, which are published on the ICSID website.
- 112 W. Melis, ‘Function and Responsibility of Arbitral Institutions’, at p. 110.
- 113 J.D.M. Lew, ‘The Arbitrator’s Rights in International Commercial Arbitration’,

- paper delivered at the International Commercial Arbitration Forum of the Japan Commercial Arbitration Association, in Japan, 23–24 November 2000.
- 114 The question of whether the parties will each be bound by the agreement reached with each of the party appointed arbitrators independently or by just one party is analysed in Chapter Four.
- 115 G. Aksent, 'The Constitution of Arbitral Tribunals: Proper Bounds for Communication between Counsel and Party Arbitrators', paper delivered at the 14th CCI/CIRDI/AAA Conference on 21 November 1997.
- 116 For example in *Norjarl v Hyundai*, the arbitrator appointed by Hyundai was not part of the cancellation fee fiasco.
- 117 The contractual effect being that the arbitrator will not be able to sue in contract for payment for all services rendered before the conclusion of the arbitrator's contract and on its terms.
- 118 An example is where disputing parties settle the dispute *before* the appointment of the presiding arbitrator (so that there is no arbitral tribunal in existence) but *after* the appointment of the party appointed arbitrators who have held some meetings towards the appointment of the presiding arbitrator. The party appointed arbitrators will be remunerated for their work on the basis of their individual arbitrator's contracts.
- 119 Where all members of the arbitral tribunal are appointed by the same authority or institution then the same position of the sole arbitrator forming the arbitral tribunal applies.
- 120 Mustill and Boyd, *Commercial Arbitration*, at p. 223 emphasize that arbitrators owe rights and duties equally to and by both parties, 'even in those references where each of the two arbitrators is nominated by one of the parties'.
- 121 This is the result of the personal nature of the arbitrator's mandate.
- 122 This includes such matters as notifying the arbitrator who has accepted appointment of his fees, the institution's arbitration rules.
- 123 This will result in each arbitrator being perceived as acting either as agent or advisor of its appointing party which does not reflect international commercial arbitral practice.
- 124 This argument is further supported by the fact that all disputing parties owe the same duties for which they are jointly and severally liable to the arbitrators and are entitled to the same rights from the arbitrators.
- 125 This contention is argued in Chapter Four.
- 126 In Chapter Two the capacity of the party to so act was examined.
- 127 Since the disputing parties form one contracting unit, all the disputing parties will be bound to each arbitrator but on different contracts. In practice these contracts will contain principally the same terms.
- 128 The law applicable to the arbitrator's contract is further examined in Chapter Five.
- 129 *Fouchard Gaillard and Goldman*, at para. 1111 adopt the same view.

4 Formation of the arbitrator's contract

- 1 See the following commentators on the formation of arbitral tribunal: A. Tweeddale and K. Tweeddale, *Arbitration of Commercial Disputes*, Oxford: OUP, 2007, pp. 139–47; A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Law and Practice of International Commercial Arbitration*, 4th ed., London: Thomson, Sweet & Maxwell, 2004, pp. 177–99; A. Singh, *Law of Arbitration and Conciliation*, 8th ed., New Delhi: Eastern Book Company, 2007, pp. 115–66; E. Gaillard and D. Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards*, London: Cameron, May 2008, pp. 729–56; D.J. Sutton, J. Gill and M. Gearing, *Russell on Arbitration*, 23rd ed., London: Sweet & Maxwell,

- 2007, pp. 124–41; E. Gaillard and J. Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, The Hague: Kluwer Law International, 1999, pp. 451–555; G.B. Born, *International Commercial Arbitration*, The Netherlands: Kluwer Law International, 2009, pp. 1349–1592; J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *Comparative International Commercial Arbitration*, The Hague: Kluwer Law International, 2003, pp. 223–53; J. Kleinheisterkamp, *International Commercial Arbitration in Latin America*, New York: Oceana, 2005, pp. 159–98; J.O. Orojo and M.A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*, Lagos: Mbeyi & Associates, 1999, pp. 117–41; R. Merkin, *Arbitration Law*, London: LLP, 2004, pp. 420–48; M.J. Mustill and S.C. Boyd, *Commercial Arbitration*, 2nd ed., London: Butterworths, Companion volume, 2001, pp. 133–57; M.L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge: CUP, 2008, pp. 116–49; M. Rubino-Sammartano, *International Arbitration Law and Practice*, The Hague: Kluwer Law International 2001, at pp. 307–11; A.A. De Fina, ‘The Party Appointed Arbitrator in International Arbitrations – Role and Selection’, *Arb Int*, 1999, Vol 15 (4) p. 381; A. I Okekeifere, ‘Appointment and Challenge of Arbitrators under the UNCITRAL Model Law: Part 1 Agenda for Improvement’, *Int ALR*, 1999, Vol 2 (5/6), p. 167; E. Onyema, ‘Selection of Arbitrators in International Arbitration’, *Int ALR*, 2005, Vol 8, p. 45; G. Aksent, ‘The Constitution of Arbitral Tribunals: Proper Bounds for Communications between Counsel and Party Arbitrators’ (paper delivered in Washington DC on 21 November 1997); J.H. Carter, ‘The Selection of Arbitrators’, *Am Rev Int Arb*, 1994, Vol 5, p. 84; J.H. Critchlow, ‘The Source of Power: A Critical Appreciation of the Relationship of the Arbitrators and the Parties’, *Arb*, 1997, Vol 63, p. 1; K. Lionnet, ‘The Arbitrator’s Contract’, *Arb Int*, 1999, Vol 15, p. 161; P. Fouchard, ‘Relationships between the Arbitrator and the Parties and the Arbitral Institution’, *ICC Bull*, 1995, p. 12; M.L. Smith, ‘Contractual Obligations Owed by and to Arbitrators – Model Terms of Appointment’, *Arb*, 1992, Vol 8 p. 33; S. Jarvin, ‘The Sources and Limits of the Arbitrators Powers’, *Arb Int*, 1986, Vol 2, p. 140; Tatsuya Nakamura, ‘Appointment of Arbitrators According to the UNCITRAL Model Law on International Commercial Arbitration’, *Int Arb*, 2005, Vol 8, p. 179; T.H. Webster, ‘Selection of Arbitrators in a Nutshell’, *JIA*, Vol 19 (3) 2002, p. 261.
- 2 Rubino-Sammartano, *International Arbitration Law and Practice*, 2nd ed., The Hague: Kluwer Law International, 2001, at p. 311.
 - 3 One contract is with the disputing parties and another contract is with the arbitrator.
 - 4 For example of laws that provide for appointment of arbitrator by the disputing parties, see Art. IV European Convention, Art. 11 (3) (b) of the Model Law, Art. 743 Arbitration Law Argentina, Art. 13 Arbitration Law Brazil, Arts 31 and 32 Arbitration Law China, s 16 Arbitration Act England, Art. 1455 Arbitration Law France, s 1035 Arbitration Law Germany, s 11 Arbitration Act India, s 44 Arbitration Act Nigeria, s 15 Arbitration Act Sweden, Art. 179 Federal Arbitration Law Switzerland, s 5 Federal Arbitration Act United States. Arbitration rules also make provisions for the appointment of arbitrations, for example, Arts 6–8 UNCITRAL Rules.
 - 5 An example is Art. 6 (1) (a) UNCITRAL Rules.
 - 6 For a description of the list procedure see, Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 3rd ed., London: Sweet & Maxwell, 1999, paras 4.26–27, and D.E. McLaren, ‘Party-appointed vs List-appointed Arbitrators: A Comparison’, *JIA*, 2003, Vol 20 (3), p. 235.
 - 7 A party appointed arbitrator can act as a sole arbitrator where the other party fails to appoint its arbitrator. See s 17 (2) Arbitration Act England, and confirmed in *Minermet SpA Milan v Luckyfield Shipping Corpn SA* [2004] 2 Lloyd’s Rep 348.

- 8 On the role of appointing authorities see Art. 11 (3) (b) of the Model Law and Art. 6 (2) UNCITRAL Rules which goes further to provide for either party to request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority. It is not mandatory for the parties to make this request so that they may request the court at the place of arbitration (if a place had been agreed upon) to make the appointment.
- 9 This is the position under s 44 (2) Arbitration Act Nigeria.
- 10 See s 1035 (4) Arbitration Act Germany, and s 15 (2) Arbitration Act Sweden.
- 11 Article 6 (1) (b) UNCITRAL Rules; The Model Law refers to the Secretary General (SG) of the PCA to act as the appointing authority.
- 12 The PCA is paid an administrative fee (currently 750 Euros) for the services of its SG to act as appointing authority as stated on their website at <http://www.pca-cpa.org/showpage.asp?pag_id=1062> (last accessed 29 May 2009).
- 13 This applies despite Art. 5 (3) ICC as Appointing Authority Rules requiring a prospective arbitrator to sign a declaration of acceptance, statement of independence and disclose, 'in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties'. These requirements enable the ICC as appointing authority to discharge its obligations to the disputing parties.
- 14 This is relevant to situations under Case Study 6 where one party unilaterally requests the appointing authority to appoint the arbitrator.
- 15 The Arbitration Act Nigeria also does not make provisions on what the parties should do in the event that the appointing authority refuses or is unable to act. I will suggest that in the spirit of the Arbitration Act which is to promote 'fair and efficient settlement of commercial disputes by arbitration', according to the Preamble of the Act, a party in such a situation will be assisted by the national courts in the appointment of the arbitrator pursuant to s 7 (3) by virtue of s 43 of the Act.
- 16 In *Philips Hong Kong Ltd (Hong Kong) v Hyundai Electronics Industries Co Ltd (Hong Kong)* (1993) 1 HKLR 263, the Hong Kong Supreme Court held that such applications were 'premature'.
- 17 See section 5 of Chapter One.
- 18 As of 12 June 2009, the ICC charges USD\$2,500 when acting as appointing authority. This amount is stated in the Appendix to the ICC as Appointing Authority Rules. The PCA charges 750 Euros as mentioned above.
- 19 See the PCA website for a list of services and fees payable and Art. 6 (2) ICC Appointing Authority Rules.
- 20 The HKIAC provides for 'Additional Arbitration Support Services of the HKIAC' for a fee listed on its website.
- 21 The HKIAC administers international arbitrations under the UNCITRAL Rules as an appointing authority. The Rules contain a list of administrative and other services the centre renders for ad hoc arbitration proceedings. Such other services are not pursuant to its role as appointing authority.
- 22 Article 6 (3) UNCITRAL Rules.
- 23 See Art. 11 (4) (c) of the Model Law; Art. 739 Arbitration Law Argentina and Art. 13 para. 2 Arbitration Law Brazil – both of which refer to the state court originally competent to decide the case; Art. 32 Arbitration Law China refers to the arbitration commission and not a national court; s 18 (2) Arbitration Act England refers to the High Court defined in s 104 (1); Art. 1444 Arbitration Law France refers to the President of the Tribunal de Grande Instance; s 1062 Arbitration Law Germany refers to the Higher Regional Court in whose district the place of arbitration is situated; s 2 (1) (e) Arbitration Act India refers to the Principal Civil District Court; s 44 (2) Arbitration Act Nigeria refers to the appointing authority which in default shall be the SG of the PCA pursuant to s

- 53 (2); s 12 para. 3 Arbitration Act Sweden refers to the district court; Art. 179 (2) Federal Arbitration Law Switzerland refers to the state judge at the seat of arbitration, and s 4 Federal Arbitration Act US refers to the US district court that would have had jurisdiction.
- 24 The jurisdiction of the national court can always be revived in arbitrator challenge or other relevant proceedings.
- 25 The decision of the French Supreme Court in *The State of Israel v National Iranian Oil Company* with Note by P. Fouchard Rev Arb, 2002 407 shows that a state may assist the parties even where the connection the arbitral reference has with the state is tenuous. In this case, there was no connection to France, but as the arbitration process was being frustrated by one party, the court assisted, reasoning that without such assistance, the parties would not reach a resolution.
- 26 For possible connectors see s 2 Arbitration Act England, Art. 1493 Arbitration Law France, s 1025 Arbitration Law Germany, s 2 (2) Arbitration Act India, Art. 176 Federal Arbitration Law Switzerland, and s 1 Federal Arbitration Act US.
- 27 *Spiliada Maritime Corp'n v Cansulex Ltd* [1987] AC 460. In *Novus Aviation Ltd v Onur Air Tasimacilik* [2009] EWCA Civ 122, the Court of Appeal held that the following connecting factors will be considered by an English court in determining the natural forum for a dispute: availability of witnesses, residence of place of business of the parties, ground on which jurisdiction is relied, the governing law of the agreement, and matters of public policy.
- 28 An example is the decision of the French Supreme Court in *State of Israel v NIOC*.
- 29 Article II (3) of the New York Convention mandates the court of a contracting state to, 'refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed'. Various jurisdictions have given effect to this provision in their laws. This ensures that the supervisory court satisfies itself of the existence of a valid arbitration agreement before assisting the parties in appointing the arbitrator(s). All that is required is the presence of a *prima facie* valid arbitration agreement. This is because the question of validity of the arbitration agreement is a jurisdictional one that can be raised and determined by the arbitral tribunal in the determination of its own jurisdiction over the arbitration.
- 30 Examples are, Art. 13 para. 1 Arbitration Law Brazil, Art. 30 Arbitration Law China, Art. 1454 Arbitration Law France, s 1035 (3) Arbitration Law Germany, s 44 Arbitration Act Nigeria.
- 31 Examples are, s 15 (3) Arbitration Act England, s 10 (2) Arbitration Act India, s 5 Federal Arbitration Act US.
- 32 Examples are, Art. 10 (2) of the Model Law and Art. 743 para. 1 Arbitration Law Argentina, s 13 Arbitration Act Sweden.
- 33 Examples are, Art. 11 (3) (a) of the Model Law, Art. 743 para. 1 Arbitration Law Argentina, Art. 31 para. 1 Arbitration Law China, s 16 (5) Arbitration Act England, s 1035 (3) Arbitration Law Germany, s 11 (3) Arbitration Act India, s 44 (5) Arbitration Act Nigeria, and s 13 Arbitration Act Sweden.
- 34 See Art. 31 Arbitration Law China.
- 35 See Art. 13 para. 2 Arbitration Law Brazil.
- 36 An example of an arbitral reference where such requirement was helpful was when the party appointed arbitrator in *Himpurna Californian Energy Ltd (Bermuda) v PT (Persero) Perusahaan Listrik Negara (Indonesia)*, YBCA, 2000, Vol XXV, p. 3, 14 *Mealey's IAR*, 1999, Vol 14, p. A1, was forcibly prevented from continuing in the deliberations of the arbitral tribunal. The truncated tribunal continued the deliberations and rendered its award (against Indonesia); Stephen Schwebel, 'Injunction of Arbitral Proceedings and Truncation of the Tribunal', *Mealey's IAR*, 2003, Vol 18 (4), p. 33.

- 37 See for example s 16 (6) and s 21 Arbitration Act England.
- 38 This means that the two party appointed arbitrators enter into the arbitral reference without the umpire whose appointment will not be necessary if the two party appointed arbitrators reach a unanimous decision.
- 39 The umpire, his role and status in the arbitral reference is therefore not examined in this book.
- 40 An example is Art. 743 (1) Arbitration Law Argentina which provides for appointment by the parties.
- 41 Article 11 (3) (a) of the Model Law provides that, 'the two party appointed arbitrators thus appointed shall appoint the third arbitrator'.
- 42 Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, para. 4-37.
- 43 The decision of the Mayor and the City of London Court (Mr Recorder Goodies QC) in *Tackaberry v Phaidon Navegacion SA*, ADRLJ, 1992, p. 112 to the effect that the two party appointed arbitrators acted within their mandate in agreeing fees with the umpire who they appointed pursuant to terms of the arbitration agreement between the parties. The parties were held bound to pay the umpire the fees agreed on their behalf by the arbitrators.
- 44 This argument resonates with the one arbitrator's contract theory examined in section 4.1 of Chapter Three.
- 45 It exists from the time the arbitrator accepted his appointment.
- 46 This argument resonates with the three arbitrators contract theory examined in section 4.2 of Chapter Three.
- 47 The situation regarding domestic arbitrations and applicable rules in the United States was that a party appointed arbitrator was not neutral. This position has now changed to the effect that parties can opt out of arbitrator neutrality and notify the other party and arbitrators. However as regards international commercial arbitration references in the United States all arbitrators remain neutral.
- 48 An example is Art. 1046 (3) Arbitration Law Netherlands which provides, 'the parties shall in consultation with each other appoint one arbitrator or an uneven number of arbitrators'. Failing this, the President of the District Court in Amsterdam will make the appointment at the request of one party to the arbitral proceeding.
- 49 See Art. 11 (3) (b) of the Model Law, while Art. 6 (2) UNCITRAL Rules goes further to provide for either party to request the Secretary-General of the PCA at The Hague to designate an appointing authority. The parties do not have to make this request. Thus, they may request the court at the place of arbitration (if a place had been agreed upon) to make the appointment.
- 50 An example is s 16 (7) which refers to s 18 (2) Arbitration Act England which gives the court power to make the appointment.
- 51 This relationship and arbitrator appointment by institutions are examined by various legal commentators including, A.A. De Fina, 'Different Strokes for Different Folks: Institutional Appointment of Arbitrators', *ADRLJ*, 2000, p. 31; A. Kassis, 'The Questionable Validity of Arbitration and Awards under the Rules of the International Chamber of Commerce', *JIA*, 1989, Vol 6, p. 79; B.P. Marchias., 'Composition of ICSID Tribunals', *News from ICSID*, 1987, Vol 4 (2), p. 5; B.W. Vigrass, 'The Role of Institutions in Arbitration' in R. Bernstein and D. Wood. (eds) *Handbook of Arbitration Practice*, 3rd ed, London: Sweet & Maxwell, p. 461; C. Partasides, 'The Selection, Appointment and Challenge of Arbitrators', *VJ*, 2001, Vol 5, p. 217; De Ly, 'Judicial Review of the ICC Court of International Arbitration', *JIA*, 1990, Vol 7 (1), p. 153; E. Müller, 'How Do International Institutions Select Arbitrators? Arbitration Institution of the Stockholm Chamber of Commerce (SCC Institute)', *JIA*, 2000, Vol 17 (3), p. 157; E. Robine, 'The Liability of Arbitrators and Arbitral

Institutions in International Arbitrations under French Law', *Arb Int*, 1989, Vol 5 p. 323; J.Y. Art, 'Challenge of Arbitrators: Is an Institutional Decision Final?', *Arb Int*, 1986, Vol 2 (3), p. 261; J. Paulsson, 'Vicarious Hypochondria and Institutional Arbitration', *Arb Int*, 1990, Vol 6 (3), p. 226; M.A. Calvo, 'The Challenge of ICC Arbitrators: Theory and Practice', *JIA*, 1998, Vol 15 (4), p. 63; P.B. Rutledge, 'On the Importance of Institutions: Review of Arbitral Awards for Legal Errors', *JIA*, 2002, Vol 19 (2), p. 261; M.F. Hoellering, 'The Role of the Institution in Managing the Arbitration Process', *Disp Res Journ*, 1994, Vol 49, p. 12; P. Fouchard, 'Final Report on the Status of the Arbitrator', *ICC Bull*, Vol 7 (1), May 1996, p. 27; P. Fouchard, 'Relationships between the Arbitrator and the Parties and the Arbitral Institution', *ICC Bull Special Supp*, December 1995, p. 12; S. Bond, 'The Selection of ICC Arbitrators and the Requirement of Independence', *Arb Int*, 1988, Vol 4 (4), p. 300; T. Landau, 'Composition and Establishment of the Tribunal', *Am Rev Int Arb*, 1998, Vol 9, p. 45; T. Landau 'The Effect of the New English Arbitration Act on Institutional Arbitration', *JIA*, 1996, Vol 13 (4), p. 113; W. Melis, 'Function and Responsibility of Arbitral Institutions', *CL Ybk Int Bus*, 1991, Vol 13, p. 107.

52 See section 3 of Chapter Three.

53 W. Melis, 'Function and Responsibility' at p. 111 confirms that under the old Austrian law, there are legal relationships between the arbitral institution and the parties, the institution and the arbitrators, and the parties and arbitrators. P. Fouchard, 'Relationships', at p. 29 affirmed that, 'in every case, the arbitrator and the parties are bound by a specific contract'. He also confirmed the existence of two other contracts between the parties and the arbitration institution, and between the institution and the arbitrators. Rubino-Sammartano, at pp. 324–75 agrees, but leaves unanswered the question of whether there is a contract between the disputing parties and arbitrators under institutional arbitral references.

54 See section 4 of Chapter Three, supported by *Fouchard Gaillard and Goldman*, who argue at para. 1111 in favour of the conclusion of three contracts.

55 Article 5.5 LCIA Rules provide, 'The LCIA Court alone is empowered to appoint arbitrators'.

56 See Art. 7.1 LCIA Rules, and for the same requirement see Art. 9 (2) ICC Rules, and Art. 5 Swiss Rules.

57 See Art. 5.5 SIAC Rules.

58 See T. Landau, 'Composition and Establishment of the Tribunal', at p. 11 where he argues that confirmation of party appointments by institutions removes the final appointing power from the parties.

59 Arbitrators appointed from the institution's list have already been assessed by the institution and determined to meet its appointment criteria before being listed so that on appointment they get automatic confirmation from the institution.

60 It must be noted that the arbitration agreement cannot amend mandatory provisions of the arbitration rules of the institution. Therefore such mandatory provisions override any contrary provision in the arbitration agreement.

61 Article 1 (a) and (c) of AAA Rules, and see also, Art. 1 (1) Cairo Regional Centre, Art. 2 (5) CIETAC Rules, Art. 1.1 (a) Lagos Centre Rules, Art. 3 LCIA Rules, Art. 6 of Appendix I to the SCC Rules.

62 An example is where the nominee in the opinion of the arbitration institution lacks independence or impartiality, or fails to meet any other relevant appointment requirements of its rules. In this case, the arbitration institution can validly decline to confirm the appointment of such nominee. See Jan Paulsson, 'Vicarious Hypochondria', at p. 242.

63 An example is the Declaration of Independence form required to be completed by the arbitrator under Art. 9 (2) of the ICC Rules.

- 64 Article 5.4 LCIA Rules expressly states that the institution appoints the arbitral tribunal while Art. 5.5 provides that 'The LCIA Court alone is empowered to appoint arbitrators.' Article 5 (1) Swiss Rules also provide in part, 'All designations ... made by the parties or arbitrators, are subject to confirmation by the Chambers, upon which the appointments shall become effective.'
- 65 W. Melis, 'Function and Responsibility' at p. 115.
- 66 Dr Melis alludes to the conclusion of several arbitrators' contracts as between the arbitration institution and appointed arbitrators.
- 67 W. Melis, 'Function and Responsibility', at p. 110.
- 68 An example is Art. 24 CIETAC Rules. However Art. 20 (2) permits appointment of non-panel members.
- 69 In some institutions interested arbitrators are only required to submit a copy of their curriculum vitae.
- 70 An example is Art. 25 CIETAC Rules.
- 71 See Art. 39 (c) Cairo Regional Centre Rules, Art. 69 (1) CIETAC, Art. 30 (2) ICC Rules, Art. 30 (2) ICC Rules, Art. 42.1 (a) Lagos Regional Centre Rules, Art. 28.1 LCIA Rules, and Art. 39 (1) Swiss Rules.
- 72 The arbitration rules of institutions in comparison exist as standard form contracts on which the institution contracts with the arbitrator and the disputing parties.
- 73 An example is Art. 7 Cairo Regional Centre Rules, Art. 22 (4) CIETAC (the Chairman of CIETAC appoints by default), Art. 8 (4) ICC Rules, Art. 10.1 Lagos Regional Centre Rules and Art. 8 (2) Swiss Rules, the Chambers also appoint by default.
- 74 A different result will be achieved where the institution itself appoints the presiding arbitrator, since it will act as principal in its contract with the presiding arbitrator, and as agent in the contracts with the co-arbitrators.
- 75 An example is Art. 7 (1) LCIA Rules, which states, 'If the parties have agreed that any arbitrator is to be appointed by one or more of them or by any third person ...'
- 76 See Arts 7 and 8 of the SIAC Rules.
- 77 The same question arises as to whether the institution is party to the arbitrator's contract.
- 78 Statistics from various arbitration institutions reveal a rise in the number of multiparty disputes submitted for arbitration. For example the ICC, in 2007 reported that the proportion of cases involving more than two parties represented some 31% of all cases filed during the year in *ICC Bull*, 2008, Vol 19 No 1, p. 8.
- 79 *Siemens AG & BKMI Industrienlagen GmbH v Dutco Construction Co*, Cass Civ 7 January 1992, YBCA, 1993, Vol XVIII, p. 140. See also Jean-Louis Delvolve, 'Multipartism: The *Dutco* Decision of the French Cour de Cassation', *Arb Int*, 1993, Vol. 9, p. 197.
- 80 See for example Art. 8 (bis) Cairo Regional Centre Rules, Art. 10 (2) ICC Rules, Art. 8 (3) Swiss Rules.
- 81 See for example Art. 8.1 LCIA Rules, Art. 24 (1) CIETAC Rules, Art. 8.2 Lagos Regional Centre Rules. See also The Andersen Arbitration (1999) 10 *Am Rev Int Arb* 437 where the ICC appointed a sole arbitrator.
- 82 Such groupings are predicated on the grounds that each group would have identical or very similar interests in the arbitration. This structure is impracticable where the interests are dissimilar.
- 83 Article 24 (2) CIETAC Rules and Art. 10 (1) ICC Rules.
- 84 Article 8.1 and Art. 8.2 LCIA Rules which empowers the LCIA to disregard any prior appointment agreements since it is couched in mandatory terms so as to override any contrary provisions of the arbitration agreement.

- 85 Article 5 (5) Milan Chamber of Commerce International Arbitration Rules provides, 'In the absence of a specific provision in the arbitration clause or a factual situation leading to a Tribunal of more than three arbitrators, the Arbitral Council shall appoint as many arbitrators as are needed to obtain in any case an uneven number of arbitrators.'
- 86 Examples include the ICC, LCIA, CIETAC, and Swiss Chambers.
- 87 Examples include the AAA, Cairo Regional Centre, DIS, Lagos Regional Centre, SIAC and SCC.
- 88 P. Fouchard, 'Relationships', at para. 15.
- 89 *Fouchard Gaillard and Goldman*, at para. 1113.
- 90 Rubino-Sammartano, *International Arbitration Law and Practice*, at p. 309.
- 91 *Fouchard Gaillard and Goldman*, at para. 1115 – refers to Swiss authors in Footnote 231 in favour of this theory.
- 92 See P. Fouchard, 'Relationships', pp. 15–17.
- 93 *Fouchard Gaillard and Goldman*, at para. 1117.
- 94 *Fouchard Gaillard and Goldman*, at para. 1116–18.
- 95 Neither do they take instructions from the parties. These form the major reasons for the unattractiveness of categorizing the arbitrator's contract under the law of agency.
- 96 Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, at para. 12–6.
- 97 *Fouchard Gaillard and Goldman*, at para. 1119.
- 98 P. Fouchard, 'Relationships,' p. 16.
- 99 K. Lionnet, 'Arbitrator's Contract', p. 164.
- 100 *Fouchard Gaillard and Goldman*, at para. 11.22.
- 101 For court decisions to this effect see, *Cecobank v ICC* (1986) Rev Arb 1987, 367, *York Hannover Holding AG (Switzerland) v AAA*, YBCA, 1995, Vol XX, p. 856, and *Republic of Guinea v Chamber of Arbitration Paris* (1987) Rev Arb 371, and see also Rubino-Sammartano, *International Arbitration Law and Practice*, pp. 367–72.
- 102 W. Melis, 'Function and Responsibility', p. 112.
- 103 See section 2.2 in Chapter Four above.
- 104 *Fouchard Gaillard and Goldman*, para. 1110 at p. 602 (footnote omitted).
- 105 W. Melis, 'Function and Responsibility', at p. 112.
- 106 W. Melis, 'Function and Responsibility', at p. 113.
- 107 See section 3.1 of Chapter Three.
- 108 This issue is directly relevant to the contract between the disputing parties and arbitration institution. However, it is equally relevant to the arbitrator's contract since the arbitration rules contain the terms of the arbitrator's contract.
- 109 *SNF SAS v ICC*, Paris Court of Appeal, First Section C, decision of 22 January 2009, 07–19492.
- 110 This version of the ICC Rules came into force on 1 January 1998 and is currently under review.
- 111 See *SNF SAS v ICC*, Paris First Instance Court, decision of 10 October 2007, 07/19492, Rev Arb 2007, p. 851 with Note by C. Jarrosson.
- 112 *SNF SAS v ICC*, Paris Court of Appeal, First Section C, decision of 22 January 2009, 07–19492.
- 113 For a summary of this proceeding in English see E. Kleiman, 'Paris Court of Appeal decides on application of ICC rules', available online at <<http://www.internationalalawoffice.com>> (last accessed 13 June 2009).
- 114 Article 1 (a) AAA IA Rules, and see also for provisions to the same effect, Art. 1.1(a) Lagos Regional Centre Rules, Introduction to LCIA Rules, Art. 1 (1) SIAC Rules, and paragraph titled 'Entry into Force of SCC Rules'.
- 115 Article 6 (1) ICC Rules, and see also for wording to the same effect, Art. 1 a

- AAA Rules, Art. 1 (3) Cairo Regional Centre Rules, Art. 4 (2) CIETAC Rules, Art. 1 (1) DIS Rules, and Art. 1 (3) Swiss Rules.
- 116 The 1998 ICC Arbitration Rules are currently undergoing review and so it is important that the wording of this article is tightened up to clearly indicate that it is the current version of the rules that would apply just like the LCIA clause.
- 117 Various courts have come to the same conclusion. The English Commercial Court (England) in 1997 in *China Agribusiness Development Corporation v Bali Trading* (unreported) and Singapore in *Jurong Engineering Ltd (Singapore) v Black & Veatch Singapore Pte Ltd (Singapore)* [2004] 1 SLR 333. However in *Komplex v Voest-Alpine Stahl*, (1994) ASA Bull 226 the Swiss Federal Tribunal held that where the changes to the new rules are of such a fundamental nature as to affect the interests of the parties and the changes are unforeseen, they will have no binding effect on the parties. This however did not exclude the application of the new rules. Other cases where the question of the relevant rules was examined include: *Bunge SA v Kruse* [1979] 1 Lloyd's Rep 279; *Management Corp'n Strata Title Plan No 1933 v Liang Huat Aluminium Ltd* [2001] 3 SLR 253; *Pacific Century Regional Development Ltd v Canadian Imperial Investment Pte Ltd* [2001] 2 SLR 443; *Perez v John Mercer & Sons* [1922] 10 LIL rep 584; *Peter Cremer v Granaria BV* [1981] 2 Lloyd's Rep 583; *Prenn v Simmonds* [1971] 3 All ER 237; *Reardon SmithLine Ltd v Hansen-Tangen* [1976] 3 All ER 570; *Offshore Int SA v Banco Central SA* [1976] 2 Lloyd's Rep 402, and *Martens & Co PVBA v Veevoeder Import Export Vimex BV* [1979] 2 Lloyd's Rep 372.
- 118 The possibility of adaptation of an institution's arbitration rules make its knowledge of its appointment imperative, since it can decline to act before accepting appointment by the parties.
- 119 Examples are Art. 1 a AAA rules, Art. 1 (3) Cairo Regional Centre Rules, Art. 4 (1) CIETAC Rules, Art. 6 (1) ICC Rules, Art. 1.1 (a) Lagos Regional, Art. 1.1 LCIA Rules and Art. 1 (3) Swiss Rules.
- 120 An example is agreeing on the number of arbitrators to be appointed and the appointment mechanism.
- 121 The ICC arbitration clause in the *Dutco* arbitration adapted the ICC arbitration clause by providing for three arbitrators to be appointed. This made the application of the 1988 version of the ICC Rules in the appointment of the arbitrators invalid. *Siemens AG & BKMI Industrielagen GmbH v Dutco Construction Company*, YBCA, 1993, Vol XVIII, p. 140, see Jean-Louis Delvolve, 'Multipartism: The *Dutco* Decision', p. 197.
- 122 See for example, Art. 3 (7) Cairo Regional Centre Rules, Art. 4 CIETAC Rules, Art. 6 (2) ICC Rules and Art. 3 (6) Swiss Rules. The Swiss Chambers rejected five arbitration cases because the arbitration agreements did not refer to arbitration under the Swiss Chambers' Rules. This is reported in the 2005 Annual Report available online at <https://www.sccam.org/sa/download/annual_report_2005.pdf> (last visited 25 June 2009). Whereas, in 2008, the Swiss Chambers rejected four cases, as reported in the Statistics for 2008 available online at <https://www.sccam.org/sa/download/statistics_2008.pdf> (last accessed 25 June 2009).
- 123 A.A. De Fina, 'Different Strokes' at p. 35, contends that the obligation of the arbitral tribunal to render a final and enforceable award will in part be satisfied when the jurisdictional issue of ensuring a properly constituted arbitral tribunal is appointed by the arbitration institution in accordance with the agreement of the parties. This will ensure that the final award is not set aside under Art. V.1 (d) of the New York Convention.
- 124 Institutional rules provide for such notification or deemed notification of acceptance by fixing the date of receipt of the request as the date of commencement of the proceedings. See for example, Art. 2 (2) AAA rules, Art. 3 (2) Cairo

- Regional Centre Rules, Art. 11 CIETAC Rules, Art. 4 (1) ICC Rules, Art. 6.2 Lagos Regional Centre Rules, Art. 1.2 LCIA Rules and Art. 3 (2) Swiss Rules.
- 125 In ICC administered arbitrations, the parties can remedy this situation by concluding the Terms of Reference, which would also evidence the agreement between the parties to arbitrate. Derains & Schwartz, *IA Guide to the ICC Arbitration Rules*, 2nd ed, The Hague: Kluwer Law Int'l, 2005, at p. 247–9.
- 126 In some institutions, the file will be recorded only after the required deposit has been paid. At the same time, a shortfall in the deposit can interrupt and stall proceedings. See Art. 28.5 LCIA Rules and Art. 30 (4) ICC Rules. Article 2 para. 2 of the Tunis Centre for Conciliation and Arbitration Rules expressly provides, 'The Arbitral Tribunal will be legally constituted, providing that the arbitrators expressly accept their appointments, and the parties pay all administrative expenses, in addition to paying a deposit on the arbitrators' fees as fixed by the Center.'
- 127 The possibility of such occurrence is limited since the arbitration rules contain provisions expressly stating what version of the arbitration rules are applicable and the arbitration rules form part of the arbitration agreement. It is therefore an agreed term of the arbitration agreement to apply the arbitration rules which are current when a dispute eventuates.
- 128 This is based on the premise that where the institution makes the offer, its amendment of its rules will no longer be in issue since the rules operate akin to general contract terms unilaterally drafted by one party and binding on the other.
- 129 *Fouchard Gaillard and Goldman*, at para. 1110.
- 130 *Fouchard Gaillard and Goldman*, at para. 1110.
- 131 Article 3.1 LCIA Rules declare that, 'The functions of the LCIA Court under these Rules shall be performed in its name.'
- 132 See Art. 38 Cairo Regional Centre Rules, Art. 46 (1) CIETAC Rules, Art. 31 (1) ICC Rules, Art. 28.1 LCIA Rules and Art. 38 (f) Swiss Rules.
- 133 Article 35 AAA rules, Art. 34 ICC Rules, Art. 31.1 LCIA Rules and Art. 44 (1) Swiss Rules all contain partial exclusion of liability clauses. The LCIA would be liable where, 'the act or omission is shown by that party to constitute conscious and deliberate wrongdoing'. See W. Melis, 'Function and Responsibility', at p. 114 where he expressed doubts as to the validity of such rules. He concludes, 'I do not think that such exclusion agreements would be considered as valid in many jurisdictions where liability for gross misconduct (*culpa lata*) cannot be contracted out.'
- 134 Article 8 AAA rules, Art. 9 Cairo Regional Centre Rules, Art. 26 (2) CIETAC Rules, Art. 11 ICC Rules, Art. 13 Lagos Regional Centre Rules, Art. 10 LCIA Rules and Art. 10 Swiss Rules.
- 135 By analogy, if a sub-contractor performs dissatisfactory works under its sub-contract with the main contractor, which causes the employer damage, the employer seeks redress from the main contractor with whom he has a contract and not with the sub-contractor with whom he has no privity of contract. This is irrespective of the fact that the employer was aware that the works were performed as a sub-contract including where the sub-contractor is nominated by the employer.
- 136 An example is Art. 13 of the Model Law, which subjects the parties contractually agreed challenge mechanism to the right to bring the challenge application before the court at the seat of arbitration.
- 137 Examples are Art. 13 (3) of the Model Law, s 24 (2) and Sch 1 Arbitration Act England.
- 138 See for example Art. 38 Swiss Rules where the institution acts as agent.
- 139 See for example Art. 7 (1) DIS Rules, which expressly provide for separate

payment of the institution's administrative fees and arbitrator's costs. Here the institution clearly acts as agent.

- 140 W. Melis, 'Function and Responsibility', at p. 111. This argument seeks to align the parties to the arbitrator's contract in both ad hoc and institutional references, with the institution treated as agent to the disputing parties.
- 141 W. Melis, 'Function and Responsibility', at p. 110 refers to these as 'ad hoc phases'.
- 142 *Fouchard Gaillard and Goldman*, at para. 1112.
- 143 Examples of this include, appointing the arbitrators, agreeing fees and reimbursable expenses with the arbitrators, paying the arbitrators. Another obvious example is the institution providing all administrative and secretarial assistance along with procedural rules in the arbitration proceeding.
- 144 The obligations of arbitrators are examined in Chapter Five under terms of the arbitrator's contract.
- 145 Jarvin, 'Arbitrators Powers', at p. 142.
- 146 These four contracts correspond to those found by Fouchard, 'Relationships', p. 12 at para. 4.

5 Terms of the contracts

- 1 Some commentators that have examined the rights and obligations of the disputing parties and arbitrators include, A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Law and Practice of International Commercial Arbitration*, 4th ed., London: Thomson, Sweet & Maxwell, 2004, pp. 194–266; 233–48; A. Singh, *Law of Arbitration and Conciliation*, New Delhi: Eastern Book Company, 2007, pp. 133–75, 176–202, 225–7; A. Tweeddale and K. Tweeddale, *Arbitration of Commercial Disputes*, Oxford: OUP, 2007, pp. 97–138, 215–53; D.J. Sutton, J. Gill and M. Gearing, *Russell on Arbitration*, 23rd ed., London: Sweet & Maxwell, 2007, pp. 141–80; E. Gaillard and J. Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, The Hague: Kluwer Law International, 1999, pp. 599–632; G.B. Born, *International Commercial Arbitration*, The Netherlands: Kluwer Law International, 2009, pp. 197–1226; J. Kleinheisterkamp, *International Commercial Arbitration in Latin America*, New York: Oceana, 2005, pp. 51–158; J.O. Orojo and M.A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*, Lagos: Mbeyi & Associates, 1999; J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *Comparative International Commercial Arbitration*, The Hague: Kluwer Law International, 2003, pp. 255–74, 275–300, 301–28; M.L. Smith, 'Contractual Obligations Owed by and to Arbitrators: Model Terms of Appointment', *Arb Int*, 1992, Vol 8, p. 33; M.J. Mustill and S.C. Boyd, *Commercial Arbitration*, 2nd ed., London: Butterworths, 1989, pp. 166–177; R. Merkin, *Arbitration Law*, London: LLP, pp. 361–448; W.W. Park, *Arbitration of International Business Disputes*, 2006, Oxford: OUP, 2006, pp. 377–88.
- 2 See *Fouchard Gaillard and Goldman*, at paras 1126–68 where they refer to some of these terms as contractual obligations.
- 3 See Michael Fumston, *Cheshire, Fifoot & Fumston's Law of Contract*, 15th ed., Oxford: OUP, 2006, Chapter 6.
- 4 A third category of terms known as 'innominate' terms exists but such terms are not categorized until they are breached so that the consequence of their breach will then determine whether the term is a condition or warranty.
- 5 Matters affecting the recognition and enforcement of the resultant award fall outside the arbitrator's contract and so do not fall within the terms examined in this chapter.
- 6 See S. Jarvin, 'The Sources and Limits of the Arbitrators Powers', *Arb Int*, 1986, Vol 2, p. 140, and B.G. Poznanski, 'The Nature and Extent of an Arbitrator's Powers in International Commercial Arbitration', *JIA*, 1987, Vol 4, p. 71.

- 7 National arbitration laws have been listed first because the arbitration agreement and arbitration rules are subject to their mandatory provisions. However most legal commentators list arbitration agreements as the first source.
- 8 This is in addition to the default provisions of national arbitration laws.
- 9 J.D.M. Lew, 'The Arbitrator's Rights in International Commercial Arbitration', a paper delivered at the International Commercial Arbitration Forum of the Japan Commercial Arbitration Association, Japan, 23–24 November 2000. See also Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, para. 12.10.
- 10 Examples of such rules include for ad hoc arbitral proceedings, the UNCITRAL Arbitration Rules and the Rules of the Centre for Public Resources for Non-administered Arbitration of International Disputes (CPR Rules) and for institutional proceedings, the rules examined are those of the AAA, Cairo Regional Centre, CIETAC, DIS, ICC, Lagos Regional Centre, LCIA, SIAC, SCC, and the Swiss Chambers.
- 11 An example is Art. 22 LCIA Rules, which lists additional powers granted to arbitral tribunals under the Rules.
- 12 See the detailed discussion in section 4.1.1 of Chapter Four.
- 13 *SNF SAS v ICC*, Paris Court of Appeal, First Section C, decision of 22 January 2009, 07–19492.
- 14 Examples are Art. 14 (1) of the Model Law and s 1 (a) Arbitration Act England.
- 15 For examples of such jurisdictions see, Art. 21 Arbitration Act Sweden.
- 16 This duty is imposed on the arbitrator by this statute.
- 17 See for example Art. 755 Arbitration Law Argentina (time to be fixed by the court), Art. 23 Arbitration Law Brazil (6 months from date of commencement and can be extended by agreement of parties and arbitrator), s 50 Arbitration Act England (time to be agreed by parties and can be extended by the arbitrator or court), Art. 1456 Arbitration Law France, (6 months from the constitution of the arbitral tribunal and extended by the court), s 33 DIS Rules (within a reasonable time), Art. 42 CIETAC Rules (6 months from the constitution of the arbitral tribunal and can be extended by chairman of CIETAC), Art. 24 ICC Rules (6 months from signing or approval of the terms of reference and extended by the ICC court), and Art. 37 SCC Rules (6 months from the date the arbitration was referred to the arbitrator and can be extended by the SCC Board).
- 18 The loss suffered by the parties is the cost of the arbitration. It is debatable if this includes attorney's fees since the parties incurred such fees in preparation for and in the prosecution of the fruitless arbitration.
- 19 Remedies under the arbitrator's contract are more fully discussed in Chapter Six.
- 20 *Russell on Arbitration*, at para. 4.020–023.
- 21 Where the other party is an arbitration institution contracting as principal, the institution will be liable to the disputing parties for appointing the arbitrator. This liability will arise under the contract between the institution and disputing parties.
- 22 See, *Rahcassi Shipping Co SA v Blue Star Line Ltd* [1969] 1 QB 173 where the clause expressly required arbitrators or umpire to be 'commercial men and not lawyers', the two arbitrators appointed a junior counsel as umpire. Roskill J held that the umpire was a lawyer and so disqualified. In *Pando Compania Naviera SA v Filmo SAS* [1975] 1 QB 742 Donaldson J held that a former solicitor who had for over 15 years prior to his appointment acted as arbitrator in various charterparty disputes and was actively involved in the shipping business was a 'commercial man' and so satisfied the requirement of the arbitration clause.
- 23 See, *Myron (Owners) v Tradax Export SA* [1970] 1 QB 527 where it was suggested that a full time arbitrator specializing in such disputes may be 'engaged' in the trade.

- 24 An example is r 3.5 GAFTA Arbitration Rules.
- 25 *Pan Atlantic Group Inc v Hassneh Insurance Co of Israel Ltd* [1992] 2 Lloyd's Rep 120.
- 26 *China Nanhai Oil v Gee Tai Holdings Co Ltd* [1995] ADRLJ 127.
- 27 Article 12 (2) of the Model Law and s 24 (1) (b) Arbitration Act England.
- 28 *Pan Atlantic Group Insurance v Hassneh Insurance Co of Israel Ltd* [1992] 2 Lloyd's Rep 120.
- 29 *Continental Grain Co v China Petroleum Technology & Development Corporation* (unreported) (1998) cited by R. Merkin, *Arbitration Law*, 2004, London: LLP, at para. 10–18.
- 30 It is suggested that where after the conclusion of the arbitrator's contract, a change in circumstance occurs such that the disputing parties decide they want an arbitrator with certain special qualifications to decide their dispute, they should then terminate the arbitrator's contract, remunerate the arbitrator for work done and possibly pay cancellation fees, then conclude another arbitrator's contract with a suitably qualified arbitrator. Their requirement becomes an amendment by mutual agreement of their arbitration agreement. This process avoids the disputing parties breaching the arbitrator's contract.
- 31 In *Ascot Commodities NV v Olan Int'l Ltd* [2001] 2 All ER (Comm) 980, [2001] 2 Lloyd's Rep 359, [2001] All ER (D) 342 (May) the court held that arbitrators must deal with the case put before them and cannot disregard arguments to decide the matter by reference to other criteria.
- 32 The decision of the Court of Appeal (England) in *LG Caltex Gas Co Ltd & Contigroup Companies Inc v China National Petroleum Technology and Development Company* [2001] BLR 325 confirms the importance of determining the scope of the parties' agreement and its effect on the scope of the arbitrator's jurisdiction over the dispute.
- 33 In *Taylor Woodrow of Nigeria Ltd v SE GmbH* (1991) 2 NWLR 602, the court held that it was an abuse of office by the arbitrator when acting outside the scope or in excess of his powers.
- 34 See Art. V (1) of the New York Convention, Art. 34 of the Model Law.
- 35 Under English law, this term may qualify as an innominate term whose description (as a condition or warranty) will depend on the consequence of its breach. For a judicial definition of innominate terms see *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.
- 36 *Kano State Urban Development Board v Fanz Construction Co Ltd* (1990) 4 NWLR 1, *Varley v Spatt* [1956] ALR 71.
- 37 See Art. 19 (2) of the Model Law, Art. 751 Arbitration Law Argentina, ss 34, 35, 37–9 Arbitration Act England, Art. 1494 Arbitration Law France.
- 38 See Art. 15 (1) Cairo Regional Centre Rules, Art. 29 (1) CIETAC Rules, Art. 15 (1) ICC Rules, Art. 18.1 Lagos Regional Centre Rules, Art. 22 LCIA Rules, and Art. 15 (1) Swiss Rules.
- 39 See for example, Art. 17 of the Model Law and s 4 (2) Arbitration Act England.
- 40 See for example, Art. 35 ICC Rules and Art. 32.2 LCIA Rules.
- 41 See Art. 7 (5) ICC Rules.
- 42 *York Hannover Holding AG (Switzerland) v American Arbitration Association (USA)*, YBCA, 1995, Vol XX, p. 856.
- 43 See Phillips J's judgment in *Norjarl v Hyundai* [1991] 1 Lloyd's Rep 260.
- 44 An example can be seen in, *Oxford Shipping Co Ltd v Nippon Yusen Kaisha (The Eastern Saga)* (1984) 3 All ER 835, where it was held that the arbitrators had no power in the absence of consent to order the concurrent hearing of two arbitrations in which the same individuals were arbitrators, disputes were closely associated but with different parties.
- 45 In *Gbangbola v Smith & Sheriff Ltd* [1999] TCLR 136, the court held that failure

to follow the principles of natural justice by affording the parties a proper opportunity to deal with an argument, which an arbitrator had in contemplation, amounted to serious irregularity for which the award can be set aside. In *Bunge (Australia) Pty Ltd v Crest Mills Pty Ltd* [1961] NSW 181, the arbitrators considered submissions by one party, not seen by the other party. This was held to be a breach of natural justice.

- 46 *A v B*, ICC Final Award No 3267 of 1979.
- 47 For example, Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, at pp. 275–96, and *Fouchard Gaillard and Goldman*, at paras 1126–32.
- 48 See Art. 7 (6) ICC Rules, see also Art. 32 (2) LCIA Rules.
- 49 *Himpurna California Energy Ltd v The Republic of Indonesia*, YBCA, 2000, Vol XXV, p. 109 containing both the Interim Award of 26 September 1999 and Final Award of 16 October 1999.
- 50 *Sabini Costruttori SpA & Italstrade SpA v The Federal Republic of Ethiopia, Addis Ababa Water and Sewerage Authority*, ICC Case No 10623/AER/ACS of December 7 2001 available online at <<http://www.asil.org/ilib/ilib0616.htm#j2>> (last accessed 25 June 2009). See the observations of Constantine Partasides, ‘Solutions Offered by Transnational Rules in Case of the Interference by the Courts of the Seat’, on the arbitral tribunal’s denial of the expectation of the parties to have recourse to the courts at the seat of arbitration, available online at <<http://www.transnational-dispute-management.com/samples/freeArticles/tv1-2-Article204b.htm>>, (last accessed 09 May 2006).
- 51 See Art. 7 CIETAC Rules.
- 52 J.P. Ancel, ‘Measures Against Dilatory Tactics: The Cooperation Between Arbitrators and the Courts’, *ICCA Congress Series*, 1999, Vol 9, p. 410.
- 53 See *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (‘MV Pamphilos’)* [2002] EWHC 2292 (Comm).
- 54 The disputing parties promise to comply with the decisions of the arbitrator in its contract with the institution, since otherwise, the disputing parties can easily frustrate the performance of the promise made by the institution in their contract.
- 55 Such action may initially be to write the disputing party involved with copies to the other disputing parties and arbitrators reminding them of the relevant articles of its arbitration rules and the need to comply with the decisions of the arbitral tribunal.
- 56 See *Cohen v Baram* [1994] 2 Lloyd’s Rep 138, where it was held that an arbitrator is entitled to his fees for serving. See also Smith, ‘Contractual Obligations’, at p. 17 where he proposed 19 contract terms, 14 of which were on arbitrator’s fees.
- 57 *Norjarl v Hyundai*, at 524.
- 58 See Mustill and Boyd, *Commercial Arbitration*, pp. 233–46; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, pp. 283–5; Redfern and Hunter, *The Law and Practice of International Commercial Arbitration*, 3rd ed., London: Sweet & Maxwell, 1999, paras 4.113–4.126; Merkin, *Arbitration Law*, paras 10.59–10.76; Rubino-Sammartano, *International Arbitration Law and Practice*, 2nd ed., The Hague: Kluwer Law Int’l, 2001, p. 359.
- 59 This was the conclusion of the Ontario High Court in *Cohen Highley Vogel Dawson v Bon Appetit Restaurant* (1999) 44 OR (3ed) 731, even after the Costs Assessor had assessed the fees payable to the arbitrator at zero with the parties left to bear the wasted costs of the arbitral reference.
- 60 *Cohen v Baram* [1994] 2 Lloyd’s Rep 138.
- 61 Merkin, *Arbitration Law*, at para. 10.60.
- 62 Lew, ‘Arbitrator’s Rights’, JCAA Conference.
- 63 In addition to this where the institution acts as agent, the disputing parties have the primary responsibility to pay the arbitrator.

- 64 *Christopher Michael Linnett v Halliwells LLP* [2009] EWHC 319 (TCC).
- 65 Remuneration for the purposes of this section includes both professional fees payable and reimbursable expenses.
- 66 It may equally be influenced by the scale of fees operating in the profession of the arbitrator.
- 67 The arbitral tribunal may request an arbitration institution to open an escrow account for these purposes. An example of an institution that offers such service is the LCIA.
- 68 Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, at paras 4–126.
- 69 Smith, ‘Contractual Obligations’, proposed 14 terms on fees, which arbitrators can include in their terms of appointment.
- 70 These expenditures are all included in the costs of the arbitration to be borne by the disputing parties.
- 71 Article 744 (Argentina) envisages that the arbitrator would accept an appointment *after* reaching agreement on the terms of reference, which would include the question of fees. Thus, the arbitrator and the parties would not need to argue over fees after the arbitrator has accepted the appointment.
- 72 Under Art. 14 (1) of the Model Law, however, see Art. 1689 Arbitration Law Belgium, which forbids resignation by an arbitrator who has accepted appointment except with leave of the Court of First Instance.
- 73 The amount of fees payable to the arbitrator would depend on what service he has already rendered on the arbitral reference.
- 74 According to Art. 1689 Arbitration Law Belgium and Art. 16 Arbitration Law Brazil the arbitrator can only withdraw prior to accepting appointment. However under s 25 (1) Arbitration Act England, it is possible for an arbitrator to withdraw after accepting appointment.
- 75 *Carter (T/A Michael Carter Partnership) v Harold Simpson Associates (Architects) Ltd* [2004] 2 Lloyd’s Rep 512 at paras 26–8.
- 76 An example is s 61 (1) Arbitration Act England.
- 77 Lew, ‘Arbitrator’s Rights’, JCAA Conference.
- 78 Rule 5 (1) SIAC Code of Ethics for an Arbitrator provides, ‘In accepting an appointment, an arbitrator agrees to the remuneration as settled by the SIAC, and he shall make no unilateral arrangements with any of the parties or their counsel for any additional fees or expenses without the agreement of all the parties and the consent of the Registrar, SIAC.’
- 79 ICC Interim Award, *A v B*, ASA Bull (2003) 802, emphasis added. This decision was a departure from earlier decisions. An example is in ICC Interim Award in, *A v B*, ASA Bull (2001) 285.
- 80 Applied under Section V Cairo Regional Centre Rules, Arbitration Fee Schedule of the CIETAC Rules, Art. 2 (2) of Appendix III to the ICC Rules, Costs of Arbitration of Lagos Regional Centre Rules and Appendix C of the Swiss Rules.
- 81 See Smith, ‘Contractual Obligations’, Model terms 5–7 & 11.
- 82 See for example the procedure under the LCIA Rules.
- 83 Where a rate is payable per hour, greater complexity means the arbitrator will spend more hours than probably estimated on the case, so that where no maximum number of hours to be spent on the reference was agreed, a variation will not be necessary. However a variation of the rate may be applied to take account of the complex nature of the arbitration.
- 84 See Phillips, J at first instance in *K/S Norjarl A/S v Hyundai Heavy Industries* [1991] 1 Lloyd’s Law Rep 260 at 262.
- 85 This appointment structure reflects the formation of three arbitrator’s contracts under Figure 4.1 in Chapter Four above.
- 86 *K/S Norjarl A/S v Hyundai Heavy Industries*, at 268.

- 87 *K/S Norjarl A/S v Hyundai Heavy Industries*, at 531.
- 88 *K/S Norjarl A/S v Hyundai Heavy Industries*, at 535.
- 89 *K/S Norjarl A/S v Hyundai Heavy Industries*, at 537.
- 90 *Town Centre Securities Plc v Leeds City Council* [1992] ADRLJ 54.
- 91 See s 28 (5) Arbitration Act England, which confirms the validity of such contractual provisions.
- 92 Article 31 (2) ICC Rules.
- 93 Fees payable to arbitrators can only be varied after they are agreed. Before agreement, such fees are still under negotiation. This issue is treated as a variation where the arbitrators have entered into their mandate or concluded the arbitrator's contract before agreeing fees.
- 94 *A v B & C*, 4P 263/2002, decision of the Swiss Federal Court.
- 95 *Norjarl v Hyundai*, op. cit., at 260.
- 96 *Norjarl v Hyundai*, op. cit., at 531.
- 97 *Sea Containers Ltd v ICT Pty Ltd* [2001] NSWCA 84.
- 98 G. Griffith and R.P. Lopez, 'Renegotiating Arbitrator's Terms of Remuneration', *JIA*, 2002, Vol 19 (6), p. 581, examined the decision and concluded that it, 'is a salutary reminder of what is required to maintain the integrity of the fee agreement process.'
- 99 In comparison to a sale contract, the arbitrator's fee is equivalent to the price for goods sold by a seller.
- 100 *Agrimex Ltd v Tradigrain SA* [2003] EWHC 1656 (Comm) where Thomas J held that the excessive amount paid to a draftsman as part of the cost of arbitration should be paid back to the losing party.
- 101 Section 2.12 below examines issues of determining the law applicable to this contract.
- 102 See for example s 28 (2) Arbitration Act England. See also Merkin, *Arbitration Law*, at para. 10.63.
- 103 Article 34 AAA Rules, Art. 30 LCIA Rules contains confidentiality rules binding on the parties and the LCIA Court also.
- 104 See Art. 9 IBA Rules of Ethics.
- 105 Other examples include, Art. 35 AAA Rules, Art. 9 IBA Rules, Art. 4.2 Lagos Regional Centre Rules, Art. 30.2 LCIA Rules, Art. 7 SIAC Code, and Art. 37 (bis) 2 Cairo Regional Centre Rules which limit confidentiality of deliberations to a dissenting opinion.
- 106 On arbitral tribunals see, *Amco Asia Corporation & Others v Republic of Indonesia*, 24 ILM 365.
- 107 See *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041.
- 108 On third party (non party) application for access to documents generated from an arbitration see *Ali Shipping Corporation v Shipyard Trogir* [1998] 2 Lloyd's Rep 643, *Glidepath BV v Thompson* [2005] EWHC 818.
- 109 As in, *Hassneh Insurance Co of Israel & Others v Stuart J Mew* (1993) 2 Lloyd's Rep 243. In *Dolling-Baker v Merrett & another* [1990] 1 WLR 1205, [1991] 2 All ER 890, it was held that the documents for disclosure had to be relevant to the issues and necessary for the fair disposal of the case.
- 110 *City of Moscow v Banker's Trust & IIB* [2004] EWCA Civ 314.
- 111 *Esso Australian Resources Ltd v Minister for Energy and Minerals* (1995) 183 CLR 10, (1993) Mealey's IAR 8 (6) D1. See also, *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* [1995] 36 NSWLR 662. For the position in New Zealand see, *Television New Zealand Ltd v Langley Productions Ltd* [2001] 2 NZLR 250.
- 112 *Aita v Ojeh*, Rev Arb, 1986, 583.
- 113 *Bulgarian Foreign Trade Bank Ltd v A.I. Trade Finance Inc*, Case No T-111-98 of 1998, Mealey's IAR, YBCA, 1999, Vol XXIV, p. 321.

- 114 Examples are ICSID and WIPO. The UNCITRAL publishes Model Law decisions on its website under CLOUT online at <http://www.uncitral.org/uncitral/en/case_law.html>. NAFTA awards and documents are published online at <<http://www.naftaclaims.com/>>.
- 115 *Interbulk Ltd v Aiden Shipping Co Ltd (The Vimeira)* [1984] 2 Lloyd's Rep 66.
- 116 See for example, Art. 15 Cairo Regional Centre Rules (equal treatment and full opportunity), Art. 29 (1) CIETAC Rules (reasonable opportunities), Art. 15 (2) ICC Rules (reasonable opportunity), Art. 18.1 Lagos Regional Centre Rules (equal treatment and full opportunity), Art. 14 (1) LCIA Rules (reasonable opportunity), Art. 15 (1) Swiss Rules (ensures equal treatment and right to be heard), Art. 15 (1) UNCITRAL Rules (full opportunity).
- 117 For example where s 33 (1) (a) Arbitration Act England, which is couched in the form of a duty of the arbitral tribunal, applies.
- 118 See also, *Russian Seller v German Buyer*, YBCA, 2002, Vol XXVII, p. 445, CLOUT No. 35 (19/10/2001) the Court of Appeal of Bavaria refused to recognize in Germany a final award which had become binding in Russia, because the arbitral proceedings violated the principle of due process. The court also held that the right to be heard encompassed the right to be informed of and summoned to a hearing in due time. In *Guangdong Overseas Shenzhen Co Ltd v Tao Shun Group Int'l Ltd*, IAR, 1998, Vol 13, H1, the award was delivered on the same day the plaintiff delivered its case on the merits, which was held to amount to a lack of fair hearing. See also, *Paklito Investments Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39, YBCA, 1994, Vol, XIX, p. 212.
- 119 *Parsons & Whittemore Overseas Co Inc v Societe Generale l'Industrie de Papier (RAKTA)* 508 F 2d 969 (2nd Cir, 1974).
- 120 See *Goldtron Ltd (Singapore) v Media Most BV (Netherlands)*, YBCA, 2003, Vol XXVIII, p. 814.
- 121 *Iran Aircraft Ind v Avco Corporation*, YBCA, 1993, Vol XVIII, p. 599, 980 F 2d 141 (2nd Cir, 1992).
- 122 *Corporation Transnacional de Inversiones, SA de CV v STET International SpA & STET International Netherlands, NV*, (1999) 45 OR (3d) 183.
- 123 *Minmetals (Germany) v Ferco Steel*, YBCA, 1999, Vol XXIV, p. 739. See also *Karaha Bodas Co LLC (Cayman Islands) v Perussahaan Pertamina Minyak Dan Gas Bumi Negara – Pertamina (Indonesia)*, YBCA, 2003, Vol XXVIII, p. 752, [2002] HKCFI 1409, [2003] HKCFI 288, and *Glencore Ltd v Agrogen SA de CV*, YBCA, 2003, Vol XXVIII, p. 967, 36 Fed Appendix 28 [2002] US CA (2nd Cir).
- 124 *Hebei Import and Export v Polytek Engineering Co* [1999] 2 HKC 205.
- 125 The issue of whether the parties can also seek damages in this circumstance is discussed in Chapter Six.
- 126 This breach leads to a challenge of the arbitrator, which if successful leads to the termination of the arbitrator's contract, making the term a condition or a fundamental one.
- 127 This is examined in detail in section 2.12 on applicable law below.
- 128 The discussion in this section is as it affects international arbitrators. In some jurisdictions (for example, the USA) party appointed arbitrators in domestic arbitration are non-neutrals. They do not make the same degree of disclosure as neutral arbitrators. For example in *Sunkist Soft Drinks, Inc v Sunkist Growers, Inc*, 10 F 3d 753 (11th Cir 1993), the party appointed arbitrator disclosed that he had contact with the appointing party's witness before his appointment and intended to continue this contact. The Court of Appeal in a challenge procedure held that the party appointed arbitrator made a good disclosure.
- 129 In *Annahold v L'Oreal* Rev Arb 438 (1996), (1992) Mealey's IAR (7) A1.
- 130 *York Hannover AG v AAA*, YBCA, 1995, Vol XX, p. 856.

- 131 See Art. 3.1 IBA Rules of Ethics, and Art. 3 (1) SIAC Code, Canon 2 AAA/ABA Code, which addressed these issues along with disclosure requirements.
- 132 Article 34 Arbitration Law China, which is also a mandatory provision. Thus the arbitrator in such circumstances must withdraw. Failing to do this gives the parties the right to challenge.
- 133 See Art. 14 (1) Arbitration Law Brazil which provides, 'persons appointed as arbitrators are obliged to disclose, before accepting to act as such, any facts likely to give rise to justified doubts as to their impartiality and independence'.
- 134 These commentators include, Mustill and Boyd, *Commercial Arbitration*, pages 249–56; Andrew G. Tweeddale, 'Recent Cases on Serious Irregularity', *Arb*, Vol 66 (4), 2000, p. 313; A.F. Lowenfeld, 'An Arbitrator's Declaration of Independence', *ASA Bull*, 1995, p. 85; A.S. Rau, 'On Integrity in Private Judging', *Arb Int*, 1998, Vol 14, p. 115; Christopher Staughton, 'Bias for Judges and Arbitrators', *Arb Int*, Vol 16 (2), 2000, p. 215; David Bristow, 'The Gathering Storm of Arbitrators and Mediators Liability', *ADRLJ*, August 2000, p. 323; David Hacking, 'Ethics, Elitism, Eligibility: A Response. What Happens if the Icelandic Arbitrator Falls Through the Ice', *JIA*, Vol 15 (4), 1998, p. 73; D.E. Zubrod, 'Evident Partiality and Misconduct of Arbitrators', *JIA*, Vol 11 (2), 1994, p. 115; M.D. Disco, 'The Impression of Possible Bias: What a Neutral Arbitrator must Disclose in California', *Hastings LJ*, Vol 45 (1), 1993, p. 113; Gillian Eastwood, 'A Real Danger of Confusion? The English Law Relating to Bias in Arbitrators', *Arb Int*, Vol 17 (3), 2001, p. 287; G. Pointon, 'Impartiality and Independence of Arbitrators', (1990 conference paper); A.C. Chernov, 'Participation in Similar Cases Doesn't Damage Arbitrator's Impartiality', *IAR*, Vol 11 (6), 1996, p. 3; Hong-Lin Yu and Laurence Shore, 'Independence, Impartiality and Immunity of Arbitrators – US and English Perspectives', *ICLQ*, 2003, Vol 52, p. 935; Jan Paulsson, 'Ethics, Elitism, Eligibility', *JIA*, Vol 14 (4), 1997, p. 13; J. Werner, 'The Independence of Arbitrators in Totalitarian States', *JIA*, Vol 14 (2), 1997 p. 141; Kevin Lazarus, 'Arbitrators, Bias, and the Arbitration Act 1996', *Arb*, Vol 66 (4), 2000, p. 258; L.A. Glick, 'Bias, Fraud, Misconduct and Partiality of the Arbitrator', *Arb Journ*, Vol 22 (3), 1967, p. 161; Lani J Bader, 'Arbitrator Disclosure: Probing the Issues', *JIA*, Vol 12 (3), 1995, p. 39; Aldo Berlinguer, 'Impartiality and Independence of Arbitrators in International Practice', *Am Rev Int Arb*, Vol 6 (4), 1995, p. 339; L.A. Glick, 'Bias, Fraud, Misconduct and Partiality of the arbitrator', *Arb Journ*, Vol 22 (3), 1967, p. 161; Laurence Shore, 'Disclosure and Impartiality: An Arbitrator's Responsibility Vis-à-vis Legal Standards', *DRJ*, Vol 57 (1), 2001, p. 32; Robert von Mehren, 'An International Arbitrator's Point of View', *Am Rev Int Arb*, 1999, Vol 10, p. 203; S. Donahy, 'The Independence and Neutrality of Arbitrators', *JIA*, Vol 9 (4), 1992, p. 31; Tiziana Tampieri, 'International Arbitration and Impartiality of Arbitrators: The Italian Perspective', *JIA*, Vol 18 (5), 2001 p. 549; William W. Park, 'Independence and Neutrality of Arbitrators', *JIA*, Vol 9 (4), 1992, p. 31.
- 135 On the special position of party appointed arbitrators and issues of independence and impartiality see, Anthony A. De Fina, 'The Party Appointed Arbitrator in International Arbitration: Role and Selection', *Arb Int*, Vol 15 (4), 1999, p. 381; A.F. Lowenfeld, 'The Party Appointed Arbitrator in International Controversies: Some Reflections', *Tex ILJ*, Vol 30 (1), 1995, p. 361; James Carter, 'Improving Life with the Party Appointed Arbitrator: Clearer Conduct Guidelines for 'Non-Neutral'', *Am Rev Int Arb*, Vol 11, 2000, p. 295; James Carter, 'Living with the Party Appointed Arbitrator: Judicial Confusion, Ethical Codes and Practical Advice', *Am Rev Int Arb*, Vol 3, 1990, p. 153; M.F. Hoellering, 'The Independence of Party Appointees', *NYLJ*, June 1993, p. 3; Murray Smith, 'Impartiality of the Party Appointed Arbitrator', *Arb Int*, Vol 6 (4), 1990, p. 320; R.M. Mosk, 'The Role of Party Appointed Arbitrators in International Arbitration: The Experience of the Iran-United States Claims Tribunal', *Trans Lawy*, Vol 1 (1), 1988, p. 253.

- 136 Arthur Marriott, 'Conflicts of Interest', *ASA Bull*, 2001, Vol 19, p. 246 in which he advocated that the international arbitration community should adopt the English standard of, 'real danger of bias,' set in *R v Gough* [1993] AC 646.
- 137 IBA Guidelines on Conflicts of Interests in International Arbitration, approved by the IBA Council on 22 May 2004.
- 138 The IBA Working Group adopted 7 General Standards regarding impartiality, independence and disclosure requirements. It then gives a 'traffic lights test' to be applied. The Red List contain the waiveable and non-waiveable lists for issues which the arbitrator must disclose; then the Orange list for which the arbitrator has a duty to disclose, and the Green List for which the arbitrator has no duty to disclose.
- 139 See Lord Goldsmith in his address to the IBA 2003 San Francisco Conference, 'Terrorism and Individual Liberty: The Responsibilities of the State', *Int'l Bar News*, Vol 57 (4), 2003, p. 9, where he noted as part of the 'core values' that cannot be negotiated, 'the right to a fair trial by an independent and impartial tribunal established by law', even regarding international terrorists.
- 140 An example is subs 24 (1) (a) Arbitration Act England.
- 141 An example is Art. 7 (1) ICC Rules.
- 142 See the same provisions in Art 34 Arbitration Law China and on arbitration rules see, Art. 7 (1) AAA Rules, Art. 9 Cairo Regional Centre Rules, Art. 25 CIETAC Rules, Art. 5.2 LCIA, Art. 12.1 Lagos Regional Centre Rules, Art. 9 (2) Swiss Rules, and Art. 9 UNCITRAL Rules.
- 143 As a requirement under private law, the obligation of disclosure is applicable throughout the arbitral reference with particular relevance to the duration of the arbitrator's contract. On this see, Art. 7 (1) AAA Rules, Art. 9 Cairo Regional Centre Rules, Art. 25 (2) CIETAC Rules, Art. 5.3 LCIA Rules, Art. 12.1 Lagos Regional Centre Rules, Art. 9 (2) Swiss Rules, and Art. 9 UNCITRAL Rules.
- 144 See *Andros Compania Maritima v March Rich & Co AG*, 579 F 2d 691, decision of US Court of Appeals (2nd Cir 1978).
- 145 *The State of Israel v Desert Exploration 1976 Incident*, the case is summarized in Lawrence Ebb, 'A Tale of Three Cities: Arbitrator Misconduct by Abuse of Retainer and Commitment Fee Arrangements', *Am Rev Int Arb*, Vol 3, 1992, p. 177. This comment implies that as between the parties, disclosure is a duty they owe each other while the arbitrator owes both parties the same duty to disclose.
- 146 *Commonwealth Coatings Corporation v Continental Casualty Co* 393 US 145 (1968).
- 147 *Annahold BV v L'Oreal*, Rev Arb (1996) 483.
- 148 *Raoul Duval v V*, decision of Court of Appeal (Paris) of 12 October 1995, Rev Arb. (1996) 411.
- 149 *AT&T Corporation and Lucent Technologies Inc v Saudi Cable Company* [2000] 2 All ER (Comm) 625.
- 150 Yu and Shore, 'Independence, Impartiality and Immunity, at p. 941, where they commented in response to Lord Woolf's comments on p. 639 of the judgment that, 'If experience could negate bias, then the application of any test would have to take experience levels into account.'
- 151 L. Shore, 'Disclosure and Impartiality', at p. 37.
- 152 Article 4 (1) IBA Rules of Ethics. This in effect means that the disqualification serves as a punitive measure for not disclosing.
- 153 Per Lord Goldsmith at the 2003 IBA Conference in San Francisco.
- 154 In addition to the cases discussed in this section on an arbitrator's lack of independence and impartiality see also, *Bank of Credit & Commerce Int'l SA (BCCI) v Ali* (2002), *ALM*, June 2002, p. 1, *Aviall Inc v Ryder System Inc* 110 F 3d 892 (2nd Cir 1997), *R v Gough* [1993] AC 646, *Unit Four Cinemas v Tosara Investment* [1993] 2 EGLR 11, *Peoples Sec Life Insurance Co v Monumental Life Insurance Co* 991 F 2d 141 (4th Cir 1993), *KFTCIC v Icori Estero SpA*, Vol 6 IAR 91 decision of Paris CA

- 28 June 1991, *R v Mulvihill* [1990] 1 WLR 438, *Asia Construction v Crown Pacific* (1988) 44 BLR 135, *Hunt v Mobil Oil Corpn* 654 F Supp 1487 (SDNY 1987), *Bremer v Ets Soules* [1985] 2 Lloyd's Rep 199, *Cook Int'l v BV Handel* [1985] 2 Lloyd's Rep 225, *Hagop Ardahalian v Unifert Int'l* [1984] 2 Lloyd's Rep 84, *Tamari v Bache Halsey Stuart Inc* 619 F 2d 1196 (7th Cir 1980), and *Harvey v Shelton* (1844) 7 Beav 455. On the independence and impartiality requirement for judges see, *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 2 WLR 870, *DG of Fair Trading v The Proprietary Association of Great Britain* [2001] 1 WLR 700.
- 155 The decision of the Commercial Court (England) in *Weissfisch v Julius & Ors* [2006] EWCA Civ 218 also reflects the importance of disclosure by the arbitrator and its waiver effect.
- 156 The wording of Articles 9 and 10 of the Model Law (and all other laws modelled after it) suggests that it is for the arbitrator to decide what to disclose in his opinion, and not from the parties' view like the ICC rules. The Model Law provision is difficult to agree with, considering that the parties are not in a position to know. The arbitrator has the necessary knowledge and should disclose. Such disclosure will save costs and time.
- 157 Article 7 (2) ICC Rules.
- 158 The fact that the *ATT v Saudi Cable* decision was made pursuant to the ICC Rules raises further doubts as to its reasonableness. Under the ICC Rules, the question to be asked is whether the non-disclosure affected the independence of the arbitrator in the eyes of the parties.
- 159 See Canon II B AAA Code of Ethics, also Art. 4 (2) IBA Rules, Art. 2 (2) SIAC Code.
- 160 On matters of arbitrator challenge see, G.B. Born, *International Commercial Arbitration*, pp. 1593–1674; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* paras 4.67–4.85; R. Merkin, *Arbitration Law*, paras 10.22–10.35, 10.77–10.89; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, pp. 301–22; Rubino-Sammartano, *Arbitration Law and Practice*, pp. 330–52; Mustill and Boyd, *Commercial Arbitration*, pp. 249–56.
- 161 R. Merkin, *Arbitration Law*, at para. 10.26 referred to these as 'contractual challenge procedures'.
- 162 See section 1.2.1 of Chapter Four and Figure 4.2.
- 163 Article 6 UNCITRAL Rules.
- 164 An example is Art. 747 (1) (Argentina).
- 165 This is for the reason that he or she cannot be a judge in his own cause (*nemo iudex in causa sua*). However Art. 747 (2) (Argentina) implies that the challenged arbitrator will participate in the challenge hearings and decision making.
- 166 *Compania de Aguas del Aconquija SA & Vivendi Universal v Argentine Republic* ICSID Case No. ARB/97/3 available online at <<http://www.worldbank.org/icsid/cases/9deci-e.pdf>> (accessed 25 June 2009).
- 167 The challenged arbitrator does not participate in the challenge hearing and decision because he cannot be a judge in his own cause. This is a question of international public policy reflecting an aspect of due process from which the parties to the arbitrator's contract cannot derogate.
- 168 Termination of the arbitrator's contract is discussed in Chapter Seven.
- 169 It is noted that a replacement arbitrator can be appointed not just in successful challenge situations. This will also happen where an arbitrator becomes incapable of continuing his or her mandate. This may be as a result of ill health, death, loss of civil rights, amongst others provided for in Art. 10 AAA Rules, Art. 13 Cairo Regional Centre Rules, 27 (1) CIETAC Rules, Arts 12 (1) and (2) ICC Rules, Art. 16.1 Lagos Regional Centre Rules, Arts 10.1 and 10.2 LCIA Rules, and Art. 12 (1) Swiss Rules, and Art. 13 (1) UNCITRAL Rules.
- 170 Under some arbitration rules, the institution itself appoints the replacement

- arbitrator irrespective of the original arbitrator appointment method adopted. See, Art. 12 (4) ICC Rules, and Art. 11.1 LCIA Rules.
- 171 An example is the ICC which in 2007 upheld just one arbitrator challenge out of a total of 22 requests, as reported in, *ICC Bull*, 2008, Vol 19 (1), p. 9.
- 172 See Art. 26 (2) CIETAC Rules, Art. 10.3 LCIA Rules, Art. 10 (1) Swiss Rules, and Art. 10 (1) UNCITRAL Rules. See also, *Gascor v Ellicott & Others* (1996) 1 VR 332, where it was held that disclosure is triggered by justifiable doubt as to the arbitrator's impartiality or independence.
- 173 Article 11 (1) ICC Rules.
- 174 *Imperial Ethiopian Government v Baruch-Foster Corporation*, 535 F 2d 334, (5th Cir Texas 1976).
- 175 *Lucke v Spiegel*, 266 NE 2d at 508.
- 176 *Hagop Ardahalian v Unifert Int'l SA (The Elissar)* [1984] 2 Lloyd's Rep 84.
- 177 Article 11 & 12 UNCITRAL Rules.
- 178 For the requirements under the institutions examined see, Arts 8 (2) and 8 (3) AAA Rules, Art. 11 Cairo Regional Centre Rules (within fifteen days), Art. 26 (3) CIETAC Rules (within 15 days, complaint sent to CIETAC whose Chairman shall decide), Art. 11 ICC Rules (within 30 days, complaint sent to the Secretariat while the ICC Court decides the challenge), Art. 14.1 Lagos Regional Centre Rules (within fifteen days), Art. 10.4 LCIA Rules (within 15 days, complaint sent to the LCIA Court which decides), and Art. 11 Swiss Rules (complaint to Special Committee who also decides).
- 179 *AT&T Corporation & Lucent Technologies Inc v Saudi Cable Co*.
- 180 Article 13 (3) of the Model Law, Art. 747 (2) Arbitration Law Argentina, s 24 (2) Arbitration Act England.
- 181 *Excel v Logitech*, with an abstract of the decision available online at <<http://www.internationalawoffice.com/Newsletters/Detail.aspx?r=12927>> (last accessed 25 June 2009).
- 182 *Russell on Arbitration*, at para. 4.002 on the role of the arbitrator agrees that, 'an arbitrator's task is to determine disputes referred to him'.
- 183 A final award is that award which finally disposes of the substantive issues in dispute between the parties including partial final awards. Various courts have held that the terminology of the document is irrelevant if it meets the finality test. See the decision of the Supreme Court of Queensland in *Resort Condominiums Int'l Inc v Bolwell*, *Int'l Arb Rep*, 1994, Vol 9, A1, the Court of Appeals, Paris in *Braspetro Oil Services Co v The Management & Implementation Authority of the Great Man-Made River Project*, Mealey's IAR, 1999, Vol 14, G1-G7, and the United States Court of Appeal, 7th Circuit in *Publicis Communications & Publicis SA v True North Communications Inc*, YBCA, 2000, Vol XXV, 1152.
- 184 Under those arbitration rules and laws that require a majority award.
- 185 Either as a member of the majority decision makers or minority decision maker.
- 186 Except of course in the very rare situation where in a panel of arbitrators all the arbitrators refuse to render an award.
- 187 If this is determined to amount to a frustrating event, then both parties to the contract (the institution and disputing parties) will be relieved of their obligations under the contract, so effectively bringing the contract to an end.
- 188 The contract theory on the juridical nature of arbitration advocates that the award is a contractual term agreed by the disputing parties and is thereby complied with as a contractual obligation.
- 189 The law of the place of enforcement of the final award or under the New York Convention, for Convention awards.
- 190 This connection is again exemplified under Article IV of the New York Convention, which requires both an arbitration agreement and the final award to be presented for enforcement purposes.

- 191 Just like any other award or decision or order of the arbitral tribunal.
- 192 See for example Art. 26 of Arbitration Law Brazil which provides that the Arbitral Award shall mandatorily contain the parties personal data.
- 193 See for example Art. 34.2 and 36.2 of the DIS Rules according to which the parties should be fully identified in the award and one original of the award should be delivered to each party.
- 194 An example is Switzerland.
- 195 This is because the tribunal may be reconvened to make, among others, typographical corrections.
- 196 See Art. 45 CIETAC Rules, Art. 27 ICC rules, Art. SIAC Rules, Art. SCC Rules, and Art. Swiss Rules.
- 197 See Derains & Schwartz, *A Guide to the ICC Arbitration Rules*, 2nd ed, The Hague: Kluwer Law Int'l, 2005 at p. 290.
- 198 Article 45 CIETAC Rules. See Art. 27 ICC Rules, which requires the ICC Court to lay down modifications, 'without affecting the Arbitral Tribunal's liberty of decision', while Art. 40 (4) Swiss Rules requires the arbitral tribunal, 'to submit a draft award to the Chambers for consultation on the decision as to the assessment and apportionment of the costs'.
- 199 This obligation of the institution is the same whether the institution acts as principal or agent.
- 200 An example is Art. 43 (3) CIETAC Rules, which mandates CIETAC to affix its stamp on the award.
- 201 R. Merkin, *Arbitration Law*, at para. 10.54.
- 202 Article 42 CIETAC Rules provides for a time limit of six months from the date of formation of the arbitral tribunal.
- 203 See Art. 42 (2) CIETAC Rules, and Art. 24 (2) ICC Rules.
- 204 See *Fouchard Gaillard and Goldman*, at para. 1130.
- 205 This is one of the reasons why Mustill and Boyd fault the contract theory since the disputing parties do not avert their minds to the fact that they conclude a contract with the arbitrator who accepts their appointment. This fact alone is not enough however, to deny the existence of the contract.
- 206 Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards*, New York: Oceana, 1978, para. 82.
- 207 See para. (2) of the Preamble to Regulation (EC) No 593/2008 of 17 June 2008 (Rome 1) which was formally the Rome Convention of the Law Applicable to Contractual Obligations 1980.
- 208 Article 2 Rome 1.
- 209 Article 1 Rome 1.
- 210 Article 1 (2) (e) Rome 1.
- 211 Article 3.1 Rome 1.
- 212 Article 3.1 Rome 1. This is a more precise provision than the 'demonstrated with reasonable certainty' of the Rome Convention.
- 213 See Art. 4.2 Rome 1.
- 214 See Art. 4.3 Rome 1.
- 215 See Art. 4.4 Rome 1.
- 216 K. Lionnet, 'The Arbitrators Contract', *Arbitration International*, Vol 15 (2), 1999, p. 161 at 169.
- 217 *Chairman of Arbitral Tribunal (Austria) v Company X (Germany)*, YBCA, 2001, Vol XXVI, p. 221.
- 218 *Chairman of Arbitral Tribunal (Austria) v Company X (Germany)*, at pp. 222–5. The court noted at p. 223, 'The agreement between the party and the arbitrator is concluded when an arbitrator ... accepts his mandate. If more than one arbitrator is appointed, the agreement with each arbitrator is to be examined separately.'
- 219 Article 34 of the Model law. This provision is necessary in satisfying the

- requirement of 'foreign' under Art. 1 of the New York Convention for convention awards.
- 220 See Art. 16 (1) AAA Rules, Art. 33.1 Cairo Regional Centre Rules, Art. 43 (1) CIETAC Rules, Art. 17 (1) ICC Rules, Art. 36.1 Lagos Regional Centre Rules, Art. 22.3 LCIA Rules, and Art. 33 (1) Swiss Rules.
- 221 See for example Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, at pp. 440–55, where the authors give a detailed discussion of choosing substantive applicable law in arbitration references.
- 222 This office was opened on 18 April 2009. The LCIA office in Dubai is a joint enterprise with the Dubai International Financial Centre and so is not, strictly speaking, an independent LCIA office.

6 Remedies

- 1 On this see, A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Law and Practice of International Commercial Arbitration*, 4th ed., London: Thomson, Sweet & Maxwell, 2004, pp. 226–32; A. Singh, *Law of Arbitration and Conciliation*, New Delhi: Eastern Book Company, 2007, pp. 183–8; A. Tweeddale and K. Tweeddale, *Arbitration of Commercial Disputes*, Oxford: OUP, 2007, pp. 97–138; D.J. Sutton, J. Gill and M. Gearing, *Russell on Arbitration*, 23rd ed., London: Sweet & Maxwell, 2007, pp. 141–80; J. Kleinheisterkamp, *International Commercial Arbitration in Latin America*, New York: Oceana, 2005, pp. 51–158; E. Gaillard and J. Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, The Hague: Kluwer Law International, 1999, pp. 609–32; G.B. Born, *International Commercial Arbitration*, The Netherlands: Kluwer Law International, 2009, pp. 1646–62; M.L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge: CUP, 2008, pp. 17–38; J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *Comparative International Commercial Arbitration*, The Hague: Kluwer Law International, 2003, pp. 286–300; M.J. Mustill and S.C. Boyd, *Commercial Arbitration*, 2nd ed., London: Butterworths, 2001, pp. 166–77; R. Merkin, *Arbitration Law*, London: LLP, pp. 361–448.
- 2 See Charles Chatterjee, 'Contractual Negligence can Fall Within an Arbitration Clause: An Analysis of the Judicial Guidelines Developed by the English Courts', *Arb*, Vol 64 (4), 1998, p. 304.
- 3 See *Fouchard Gaillard and Goldman*, para. 1135.
- 4 See s 38 (2) Arbitration Act India.
- 5 If permitted under the arbitration law of the seat of arbitration the other party can apply to the national court for assistance with an order to produce but this right is anchored on the arbitration agreement between the parties and not the arbitrator's contract.
- 6 See for example s 64 Arbitration Act England.
- 7 *Roulas v Professor J Tepora*, Case No KKO 2005:14, decision of Supreme Court Finland of 31 January 2005.
- 8 The 1992 Finnish Arbitration Act makes no provision limiting or excluding the liability of arbitrators.
- 9 The Tort Liability Act 1974 (Finland) requires that only where especially weighty reasons exist may compensation be payable for economic loss that is not connected to personal injury or damage to property.
- 10 See Gustaf Möller, 'The Finnish Supreme Court and the Liability of Arbitrators', *JIA*, Vol. 23 (1), 2006, p. 95 at 99 where Judge Möller denied that the correct interpretation of this decision is that the arbitrator and parties have a contractual relationship.
- 11 See *SNF SAS v ICC*, Paris Court of Appeal, First Section C, decision on 22 January 2009 examined in section 4.1.1 of Chapter Four.

- 12 See J.D.M. Lew (ed.), *Immunity of Arbitrators*, London: Lloyd's of London Press, 1990, for a compilation of the treatment of arbitrator immunity issues in various jurisdictions by various authors.
- 13 The Model Law is silent on this issue along with Arbitration Law Germany, Arbitration Act Nigeria, Arbitration Law France, Arbitration Act Sweden, Federal Arbitration Act Switzerland, Federal Arbitration Act US.
- 14 An example is s 29 (1) Arbitration Act England which is a restatement of the position under the common law. See *Chambers v Goldthorpe* (1901) 1 KB 624, where it was held that an arbitrator would be liable for fraud.
- 15 Examples are Art. 743 Arbitration Law Argentina and Art. 38 Arbitration Law China.
- 16 See Mattieu de Boisseson and Thomas Clay, 'Recent Developments in Arbitration in Civil Law Countries', *Int ALR*, 1998, p. 154.
- 17 See *Russell on Arbitration*, at paras 4.200–4.208; Rubino-Sammartano, *International Arbitration Law and Practice*, 2nd ed., The Hague: Kluwer Law Int'l, 2001, pp. 356–9; Merkin, *Arbitration Law*, paras 10.36–10.46; Lew, Mistelis and Kröll, pp. 288–96.
- 18 R. Merkin, *Arbitration Law*, at para. 10.38.
- 19 An example is Schedule 1, Arbitration Act England.
- 20 See also for wording to the same effect, Art. 35 AAA Rules, Art. 37 (bis) Cairo Regional Centre Rules, s 44 DIS Rules, Art. 45 Lagos Regional Centre Rules, Art. 31 LCIA Rules, Art. 33 SIAC Rules, Art. 44 Swiss Rules. UNCITRAL Rules do not make any provisions on exclusion or limitation of liability of the arbitrators.
- 21 Article 34 ICC Rules.
- 22 See the opinion of *Fouchard Gaillard and Goldman*, at para. 1110 that 'it may well be that the Courts hold such clauses to be ineffective in the case of gross fault by the institution, abusive or unconscionable conduct'.
- 23 See *SNF SAS v ICC*.
- 24 In *Chairman of Arbitral Tribunal (Austria) v Company X (Germany)*, YBCA, 2001, Vol XXVI, p. 221, the Austrian Supreme Court while referring the matter back to the Court of First Instance, said *inter alia*, that the liability exemption in the relevant arbitration rules might be invalid if found to be unfair, since (on the facts of the case) it is a general obligation of arbitrators to treat the parties objectively and equally.
- 25 Article 20 ICSID Convention.
- 26 See s 74 (1) Arbitration Act England. In the same spirit, subs (2) extends this cover to anything done by the arbitrator the institution appoints while subs (3) also covers the acts of the employees and agent of the arbitral or other institution.
- 27 This is the same limitation on the immunity granted to the arbitrator himself. In this manner, a party cannot recover damages indirectly by suing the arbitration institution for an act or omission of the arbitrator. If it is recoverable, then the arbitrator would be liable directly. The immunity of arbitrators and arbitration institutions under English law was upheld in *Adler v Dickson* [1955] 1 QB 158.
- 28 Section 2GN (Hong Kong). This provision practically produces the same effect as the English Act provision.
- 29 *Road Rejuvenating & Repair Services v Mitchell* (1992) 1 ADRLJ 46 at 47.
- 30 Under English law (but for the protection under s 74 Arbitration Act) as it affects arbitration institutions, this limitation of liability may be caught under subs 2 (2) and (3) and subs 3(2) (a) and (b) of Unfair Contract Terms Act 1977, subject to satisfaction of the reasonableness test under s 11 (1).

7 Termination of the contracts

- 1 On this see, A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Law and Practice of International Commercial Arbitration*, 4th ed., London: Thomson, Sweet & Maxwell, 2004, pp. 207–16; D.J Sutton, J. Gill and M. Gearing, *Russell on Arbitration*, 23rd ed., London: Sweet & Maxwell, 2007, pp. 141–180; E. Gaillard and J. Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, The Hague: Kluwer Law International, 1999, pp. 617–23; G.B. Born, *International Commercial Arbitration*, The Netherlands: Kluwer Law International, 2009, pp. 1552–92; R. Merkin, *Arbitration Law*, London: LLP, pp. 361–448; J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *Comparative International Commercial Arbitration*, The Hague: Kluwer Law International, 2003, pp. 301–2; J.O. Orojo and M.A. Ajomo, *Law and Practice of Arbitration and Conciliation in Nigeria*, Lagos: Mbeyi & Associates, 1999, pp. 139–42; M.J. Mustill and S.C. Boyd, *Commercial Arbitration*, 2nd ed., London: Butterworths, 1989, pp. 166–77.
- 2 The law that will determine this question is the contract law of the law of any of the contracts.
- 3 See for example, Art. 32 of the Model Law, Art. 29 Arbitration Law Brazil, Art. 1475 Arbitration Law France, s 1056 Arbitration Law Germany, and s 32 Arbitration Act India.
- 4 See Art. 33 of the Model Law, Art. 30 Arbitration Law Brazil, Art. 56 Arbitration Law China, s 57 Arbitration Act England, Art. 1475 Arbitration Law France, s 1058 Arbitration Law Germany, s 33 Arbitration Act India, s 28 Arbitration Law Nigeria, and s 32 Arbitration Act Sweden.
- 5 See Art. 30 AAA Rules, Arts 35–7 Cairo Regional Centre Rules, Arts 47–8 CIETAC Rules, s 37 DIS Rules, Art 29 ICC Rules, Arts 38–40 Lagos Regional Centre Rules, Art 27 LCIA Rules, Art 28 SIAC Rules, Art 41 SCC Rules, and Arts 35–7 Swiss Rules.
- 6 See for example Art. 29 AAA Rules, Art. 34 Cairo Regional Centre Rules, Art. 40 (6) CIETAC Rules, s 32 DIS Rules, Art. 26 ICC Rules, Art. 26.8 LCIA Rules, Art. 27.7 SIAC Rules, Art. 39 SCC Rules, Art. 34 Swiss Rules, and Art. 34 UNCITRAL Rules.
- 7 Examples are Art. 30 (1) of the Model Law, s 51 (2) Arbitration Act England.
- 8 Examples are Art. 28 Arbitration Law Brazil, Art. 49 Arbitration Law China, s 2C Arbitration Ordinance Hong Kong.
- 9 Article 30 (2) of the Model Law, Art. 51 Arbitration Law China, s 51 (3) Arbitration Act England.
- 10 See *Fouchard Gaillard and Goldman*, at para. 1138.
- 11 Gaillard & Savage, *Fouchard Gaillard and Goldman*, at para. 1138.
- 12 See for example Art. 14 of the Model Law which provides that, ‘where the arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates’. See also Art. 16 Arbitration Law Brazil, s 26 Arbitration Act England, Art. 1464 Arbitration Law France, s 1038 Arbitration Law Germany, s 14 Arbitration Act India, s 10 Arbitration Act Nigeria.
- 13 Quoting Art. 1464 Arbitration Law France.
- 14 For arbitration laws see Art. 25 of the Model Law, Art. 42 Arbitration Law China, s 41 (3) Arbitration Act England, s 1048 (1) Arbitration law Germany, s 25 (a) Arbitration Act India, and s Arbitration Act Nigeria. For arbitration rules see, Art. 28 (1) Cairo Regional Centre Rules, Art. 31 (1) Lagos Regional Centre Rules, Art. 30 (1) SCC Rules, and Art. 28 (1) Swiss Rules.

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Index

Note: page numbers in **bold** refer to figures and tables.

- AAA (American Arbitration Association) 95, 107, 128; Code of Ethics 142–3, 149; International Arbitration Rules 2008 4, 95, 107, 128
- ABA (American Bar Association) 69
- abandonment 24–5
- ad hoc arbitration: definition of 25–6; arbitrator replacement in 152; awards in 157; contracts in 89, 115–16, 118, 150, 170; duties in 123; and law of seat of arbitration 58; phases of 97; remuneration in 132–3
- adjudicators 52–4
- adverse inference 131, 169
- agency, law of 103
- annulment 29, 119, 148, 151
- arbitrability 14, 19–20, 23, 34, 42, 178; subjective 38
- arbitral award: additional 158, 175; challenge to 22, 119–20, 168; challenging 22, 119–20; by consent 176–7; in contractual theory 36; corrections to 158; dual nature of 155; enforcement of 29, 34–5, 38, 174; failure to pursue 178–9; failure to render 156; nullification of 170, 178; publication of 76; time limits on 158–9
- arbitral hearings 27, 29, 35–6, 75, 124, 164
- arbitral immunity *see* arbitrator, liability of
- arbitral reference: ad hoc *see* arbitration, ad hoc; collateral contracts in 104; commodity trade 125; delay in 8; forms of 25; joint funding of 16; multiparty 93, 101; responsibility of tribunal 71; role of arbitrators in 8, 47, 67; role of institution in 8, 29, 58, 72, 76, 98, 101, 115, 117; source of 36; termination of 131
- arbitral tribunals: and applicable law 161; and arbitrator's contract 79–80; confidentiality of deliberations 142; constitution of 30, 50, 55, 68, 78–80; contesting jurisdiction of 133; and court system 40; dissenting opinions in 155; finances of 133–4; formation of 36; individual responsibility of members 77; misleading 145; number of arbitrators 91–3; relationship between members 70–1; rights of 121
- arbitration: attractions of 65; background of 1–2; consent to 17; domestic 61; equal treatment in 144; essence of 64; guidelines for 96; international *see* international arbitration; internationalization of 41; juridical nature of 36, 39–40, 120; popularity of 43; regulation of 33; resources on 6–7; right to 24–5; time limits on 123–4
- Arbitration Act (India) 168
- Arbitration Act 1950 (England) 137
- Arbitration Act 1992 (Finland) 170
- Arbitration Act 1996 (England) 4, 21, 52, 66, 123–4, 137, 144, 172–3
- Arbitration Act 1999 (Sweden) 4
- arbitration agreements: agency in 51–2; and appointment of arbitrators 55–6, 61, 65, 87–8, 100–1; and arbitration rules 29, 48;

- arbitration agreements (*continued*)
 and arbitrator's function 57, 127;
 autonomy of *see* separability, doctrine
 of; context of 6; and contracts 30,
 63, 89; date of acceptance 111;
 enforcing 128, 144; existence of
 15, 23, 30, 73; and institutional
 arbitration 109; law applicable to
 9, 22–3, 31; and non-signatories
 12–13; parties to 9–11, 13–14, 82–3;
 partnership in 53; performing terms
 of 54; *prima facie* 73, 109; primacy
 of 8; promise in 16–17; purpose of
 62; and qualifications of arbitrators
 125; rescission of 147; scope of
 121; separability of *see* separability,
 doctrine of; termination of 24–5,
 110; terms of 128; validity of 17, 21–2;
 void 48–9, 56, 62; who can conclude
 14–15, 34, 38, 43, 120; written records
 of 9–10, 17–19
- Arbitration and Conciliation Act 1988
 (Nigeria) 4
- Arbitration and Conciliation Act 1996
 (India) 4
- arbitration clauses: autonomy of *see*
 separability, doctrine of; and main
 contract 20–2; and submission
 agreements 8, 15; validity of 18
- arbitration commissions 62, 65, 67, 91
- arbitration institutions: and ad hoc
 arbitration 26; and appointment
 of arbitrators 48, 94–101, **100**,
 126–7, 150; categories of 101–2; and
 challenges to arbitrators 114, 153–4;
 contracts with 28, 30, 44, 97, 104–6,
 109–11, 158, 170–1, 174–6; expansion
 of 28; fees charged by 28, 75–6, 135;
 function of 71–3, 76; funding of
 136; legal status of 76, 94; liability
 of 125, 156, 172–3; organization of
 72; records of 75–6; regulation of
 48; relationship with arbitrator 115;
 relationship with disputing parties 94,
 104–5, 112–14; remuneration of 158,
 171, 175; rights of 121, 152, 158; roles
 of 40, 69, 72–3, 95; young 4
- Arbitration Law (Argentina) 65
- Arbitration Law (Brazil) 60, 91
- Arbitration Law (France) 35, 61–2, 67
- Arbitration Law 1995 (China) 4, 62, 91,
 146
- arbitration laws: and appointment of
 arbitrators 86, 90–2; and arbitral
 awards 156–7; and arbitrator's
 powers 127; and breaches of contract
 169; and challenges to arbitrators
 151, 153; in contractual theory
 36–7; default provisions of 26, 121;
 evolution of 40; in hybrid theory
 39; and liability of arbitrators 28,
 171; modern 2, 18, 34–5; non-
 mandatory provisions of 29, 122;
 regulation of arbitrators 57–8, 65–9;
 and removal of arbitrators 134; and
 replacement of arbitrators 152;
 representative selection of 4; and
 rights of arbitrators 168; sphere of
 application 26–7; in status theory 48;
 and submission agreements 60; and
 termination of contracts 174–6
- arbitration proceedings: attendance at
 123; confidentiality of 142–3; control
 of 128
- arbitration rules: and applicable law
 164; and arbitration agreement 27,
 29, 121–2, 176; different versions of
 106–8, 110, 121–2; of institutions 29,
 40, 73, 75, 96–7, 99–101, 105–16, 166,
 171; limits on 29; and terminatio
 of contracts 176
- Arbitration Rules of the Cairo Regional
 Centre for International Commercial
 Arbitration 2007 4
- Arbitration Rules of the Lagos Regional
 Centre for International Commercial
 Arbitration 2008 4
- arbitration theories: agency 52–4;
 autonomous 29, 40–1, 43, 58;
 concession 32, 41–3; delegation 42;
 delocalization 29, 41–2; hybrid 38–9,
 42, 45, 57–8; juridical 6, 32, 40, 58;
 jurisdictional 33–6, 42; partnership
 51, 53–6; power of attorney 51, 53,
 56; relationship 6, 32, 43–4; status
 44–6, 48, 58–9
- arbitrator: availability of 123;
 challenge to 75, 81, 114, 125, 130,
 148, 150–4, 167–8; choice of 47;
 codes of ethics for 142; compliance
 with decisions of 129–31; death
 of 178; duties of 45–7, 70, 124–5,
 147; enlistment methods 97–8;
 international 32, 37, 49, 64–6, 68–9,
 92, 147, 153; liability of 42, 45–7,
 69, 166, 170–3; losses incurred by
 168; misconduct by 140, 148, 177;
 named in submission agreement 60;

- obligations of 119, 144, 146–7, 155, 158; personal attributes of 64–5; powers of 37, 46, 48–9, 61, 121, 123, 127, 129; presiding 55, 68, 78–9, 81–2, 91–4; qualifications of 65–7, 125–7; relationship with appointing authority 56; relationship with disputing parties 44–5, 49–50, 70, 115–16; relationship with institution 48, 50; remuneration of 16–17, 114, 131–41, 169, 175, 177–8; replacement of 151–2; rights of 63; role of 37, 104, 155
- arbitrator appointment: acceptance of 37, 48, 53, 62–3, 67–8, 70, 81, 84, 88–9, 93, 140; by courts 89–90, **91**; delegation of 60; indirect 67; joint 85–6; methods of 84, 101, 116; in multiparty disputes 93, 101; non-contract means of 51; notification of 54–5; of panels 91, 99; by parties 6, 55–6, 77–82, 85, 91–3, 100; ratification of 125–6; responsibility for 47, 51–2; role of institutions 5, 73, 96–7, **96**; sole 51–2, 77, 85–9, **86**, **88**, 91, 98–9, 101; under ad hoc reference 85
- arbitrator disclosure *see* disclosure, duty of
- arbitrator's contract: and appointment of arbitrators 4–6, 48, 66, 79, 84, 99–100; and appointment of arbitrators 4–6, 48, 66, 79, 84, 99–100; and arbitration agreement 30, 49–50, 64; autonomy of 168–9; breach of 177; breaches of 126, 142, 145, 155, 163, 167–9; categorization of 102–4, 111–12; and challenges to arbitrators 153–4; disputes arising from 165–6; duties of parties under 129–30; formation of 1, 3, 50, 53–4, 70, 84, 93, 99, 102, 105–6, 117, 121–2; frustration of 156, 177–8; fulfilment of 157, 174; law governing 82, 146, 159–66; and new arbitrators 175; and non-signatories 13, 132–3; obligations under 119–20; parties to 60, 88, 116, 142; performance of 161, 164; place of formation 163; role of institutions in 75–6, 96, 98–9; single or multiple 76–83, **80**, **82**; sole arbitrator 81; termination of 119, 141, 145, 148, 151, 154, 167–8, 174, 176–8; terms of 6, 118–20, 122–5, 127, 130–1, 141, 144–6, 148, 150–1, 153, 155, 158, 172, 176; under ad hoc reference 84–5, 116; under institutional reference 93–4, 115–17
- arbitrator's fees *see* arbitrator, remuneration of
- autonomy: party *see* party autonomy; principle of *see* separability, doctrine of
- bias 7, 68, 137, 140, 146, 148–9
- cancellation fees 132, 139–40, 147
- Chartered Institute of Arbitrators 69, 173
- CIETAC (China International Economic Trade Arbitration Commission) 72, 158; Arbitration Rules 2005 4, 129–30, 158
- Civil Code of Procedure (Netherlands) 155
- claimants 51, 53–5, 85, 93, 101
- Code of Civil Procedure (Germany) 4
- Code of Civil Procedure (France) 4
- Commercial Arbitration Act 1984 (NSW) 140
- companies: in arbitration agreements 10–11; as legal entities 41; officers of 11
- competence-competence, doctrine of 48, 73
- conciliators 2
- confidentiality 70, 123, 141–3
- conflict of laws 23, 31, 36, 160–1, 165
- contract: of agency 103; autonomous 104; capacity to *see* legal capacity; collateral 1, 9, 84, 96, 104, 116, 155, 159; intention to 15–16; principles of 44; privity of 13, 113; of service 87, 103, 161, 166; trilateral 63
- contract law 1, 3, 44, 46, 156, 162, 168
- contractual relationships 41, 49, 56, 71, 87, 94, 98, 100, 105, 113, 135, 159, 173
- courts: appointment of arbitrators 89–91, 116–17; attitudes to arbitration 37, 40–1; and breaches of arbitrator's contract 169; compared to arbitration institutions 48; and international arbitration references 35
- damages: from arbitrator default 71, 106, 116; award of 168–9, 171, 173;

damages (*continued*)

for breaches of contract 119, 141; for delay 124; from failure to award 156

DIS (German Institution of Arbitration) 67: Arbitration Rules 1998 4

disclosure, duty of 128, 146–9

dispute resolution 1–2, 49, 95, 107, 165, 176; clauses 141, 165–6

due process 34

duress 21, 25

electronic communication 18–19

European Convention 20, 23

expenses, reimbursable 132, 134–6

fair hearing 45, 116, 119, 123, 144–5

Federal Arbitration Act 1925 (US) 4, 148

Federal Arbitration Law (Switzerland) 13–14, 22–3

Federal Statute on Private International Law (Switzerland) 4

FIDIC (International Federation of Consulting Engineers) Terms of Contract 129

fraud 21, 25, 148

Geneva Convention 1927 34

Geneva Protocol 1923 34

good faith 130

'group of companies' doctrine 11–12

IBA (International Bar Association) 69, 147; Guidelines on Conflicts of Interest 147, 153; Rules of Ethics 68–9, 142, 146, 149

ICC (International Chamber of Commerce) 10, 12, 28, 69, 72–3, 75, 97, 107, 110, 129, 136, 143, 149, 154, 172; Court of International Arbitration 28, 138; Rules of Arbitration 1998 4, 12, 27–8, 69, 73, 97, 107–8, 122, 128–9, 135–6, 149, 153, 159, 172–3

ICSID (International Centre for the Settlement of Investment Disputes) Convention 151, 172

impartiality 70, 79, 113, 119, 123, 128, 146–7, 149–50, 162

independence 70, 79, 113, 119, 123, 128, 146–7, 149–50, 153

innominate terms 131

institutional arbitration: definition of 27–9; agreements for 109; and appointment of arbitrators 99–101; awards in 157–8; and challenges to arbitrators 75, 113; compliance with rules of 127; contracts in 118; duties in 123; and exclusion of liability 112; increase in 36, 40, 58; and remuneration 135, 139; and replacement of arbitrators 152

international arbitration: arbitrator's contract in 32; characteristics of 2–3; contracts in 9; and 'groups of companies' doctrine 12; and national laws 34–5, 37, 151; party autonomy in 40; and public policy 41; role of arbitrator in 1; role of institutions in 43, 72; sovereign states in 34

International Centre for Dispute Resolution 95, 107

Iran-US Claims Tribunal 143

judges 12, 33, 46–8, 53, 173

jurisdictional challenges 22

Law No. 9.307 of 23 September 1996 (Brazil) 4

LCIA (London Court of International Arbitration) 28, 95, 108, 127–8, 163, 165; Arbitration Rules 1998 4, 94, 99, 108, 127, 142, 163

legal capacity 9, 14, 21, 43, 65, 94, 178

legal entities 9, 14, 16, 41, 64, 94

legal personality 10, 12, 41, 76, 83

legal relationship, defined 8–9, 17, 19, 34

legal representation 144

lex loci arbitri *see* seat of arbitration

lex mercatoria 40, 164

liability: exclusion of 69, 165, 172, 174; exemption of 122; limitation of 118, 167, 170–1

liquidators 10

List procedure 85, 88

litigation 1–2, 9, 16, 24, 47, 120, 166

loyalty, duty of 148

misrepresentation 21, 25, 139

Model Law *see* UNCITRAL Model

Law on International Commercial Arbitration

multiple arbitrator contracts theory 80, 82, 155

- National Code of Civil and Commercial Procedure Law (Argentina) 4
- negligence 46, 69, 167, 170–1, 177
- New York Convention 1958 4, 9, 17–20, 23, 34–6, 38, 41, 43, 120, 151, 162
- partnership law 53
- party autonomy: and appointment of arbitrator 85; and choice of law 160; in contractual theory 36–7, 40; and control over arbitrator 49; limitations on 27; and regulation of arbitration agreement 22; and repudiation of agreement 25; and role of state 38; and terms of arbitrator's contract 122
- power of attorney 1, 51–4
- pre-contractual agreements 78
- private law 38
- professionals 68, 71, 103–4
- public law 38–9, 69
- Regulation on the Law Applicable to Contractual Obligations 2008 (EC) *see* Rome 1
- respondents 26, 51–5, 85, 93, 101, 124
- Rome 1 (Rome Convention) 159–61, 163
- SCC (Stockholm Chamber of Commerce) 72; Arbitration Rules 2007 4, 10
- seat of arbitration: and ad hoc arbitration 26–7; and appointment of arbitrators 90; and arbitrability 20; and challenging arbitrators 114, 154; changing 35–6, 162–4; choosing 128–9; in contractual theory 37; establishing 162; in jurisdictional theory 33–5; law of 23, 29, 41, 58, 76, 86–7, 127, 146, 151, 162, 165; national courts at 28; and powers of disputing parties 120–1; public policy requirements of 43
- separability, doctrine of 8, 20–2, 61
- settlement, right of 176
- SIAC (Singapore International Arbitration Centre) Arbitration Rules 2007 4, 25, 95, 100
- signature 19, 21, 61, 159
- single arbitrator's contract theory 77–81, 80, 151–2
- soft laws 4
- specific performance 169, 171, 173
- states, sovereign 13–14, 33–4, 38, 40, 42–3, 45, 58, 69, 156
- submission agreement 8, 12, 15, 22, 60–3, 83, 87, 110, 134–5
- Swiss Rules of International Arbitration 2004 4
- trade associations 2, 125
- transnational rules of law 159, 164–5
- umpire 92
- UNCITRAL (United Nations Commission on International Trade Law) 41, 67; Arbitration Rules 1976 4, 25, 72, 87, 129, 153; Model Law on International Commercial Arbitration 1985 2–4, 14, 18–19, 41, 64, 66–7, 126, 144, 147, 151
- warranties 119, 125, 131, 154, 166