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4

Arbitration agreement

1 Introduction

4.1 Arbitration agreements embody the consent of the parties to submit their disputes to arbitration. In essence they oust the jurisdiction of domestic courts to decide certain disputes and instead empower an arbitral tribunal to resolve those disputes. The extent and scope of these two functions are dependent on the words of the arbitration agreement and the laws governing both that agreement and the arbitration proceedings. The arbitration agreement is especially important in determining the jurisdiction and powers of an arbitral tribunal.

4.2 Some suggest that arbitration agreements are so powerful that they are supranational and beyond domestic laws. The French courts have on occasion adopted this position. They have held that an arbitration agreement is independent of all national laws and forms a supranational source of authority for arbitral jurisdiction.

4.3 This chapter begins with a general discussion of the form and formal requirements of arbitration agreements in Section 2. Section 3 explains the concept of the doctrine of separability, which concerns the separation of an arbitration clause from the contract in which it is contained. Section 4 moves on to consider the issues of identity, non-signatories and capacity, following which Section 5 addresses the requirement of a defined legal relationship. The focus of the chapter then turns to the issues of consolidation, joinder and intervention of third parties in Section 6. Section 7 considers the enforcement of arbitration agreements. Section 8 covers the important topic of arbitrability and distinguishes between subjective arbitrability and objective arbitrability. Finally Section 9 addresses the drafting of arbitration agreements.

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2 Arbitration agreement

2.1 Is an arbitration agreement necessary?

The short answer is yes: an arbitration agreement is necessary in order to institute arbitration proceedings. The Philippines Supreme Court (among many others) has stated this in clear and simple language:[1] 4.4

> Disputes do not go to arbitration unless and until the parties have agreed to abide by the arbitrator's decision. Necessarily, a contract is required for arbitration to take place and to be binding.

Every international commercial arbitration requires an arbitration agreement. Arguably, there are exceptions where no arbitration agreement exists but where the parties are treated as though one had been concluded between them. For example, the definition of arbitration agreements in Article 7(2) of the Model Law includes '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'. An arbitration could thus be based on the failure to deny an arbitration agreement even if that agreement did not in fact exist. Similarly, arbitrations may take place without an arbitration agreement if an estoppel or similar legal doctrine operates to preclude a party from denying the existence of an arbitration agreement. This may occur when that party fails to object to the absence of an agreement during the early stages of an arbitration or because, on the basis of a party's conduct, it would be unfair for that party to deny the existence of an arbitration agreement. The effect of estoppel on arbitration agreements is discussed below.[2] 4.5

Furthermore, in some domestic jurisdictions, the law provides for so-called 'compulsory arbitration'. This refers to the court practice of compelling parties to submit their dispute to arbitration whether or not the parties have signed an arbitration agreement. 4.6

Another exception occurs in the context of investor-state arbitration. The state's consent to arbitrate may be given in a bilateral or multilateral treaty, such as the 1988 Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments,[3] or the North American Free Trade Agreement.[4] In this situation there is no direct arbitration agreement between the state and an investor who institutes arbitration against that state. The consent to arbitrate is derived in two separate phases. The state provides its consent in the provisions of the treaty and the investor's consent is deemed to be provided when 4.7

1 *Jorge Gonzales v Climax Mining Ltd*, G.R. No. 161957/ G.R. No. 167994 [2007] PHSC 6.
2 See Section 4.2.1.
3 Signed and entered into force on 11 July 1988, (1988) *Australian Treaty Series* no. 14.
4 Signed 12 December 1992, entered into force 1 January 1994, 32 *International Legal Materials* 296 and 605.

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it institutes arbitration proceedings pursuant to the treaty. Consequently, an arbitration takes place in the absence of a direct arbitration agreement between the parties. Jan Paulsson has famously described this type of dispute resolution as 'arbitration without privity'.[5] Investor-state arbitration is examined in Chapter 10.

2.2 Types of arbitration agreements

4.8 Arbitration agreements may be concluded before or after the dispute arises. The latter are called 'submission agreements'. In practice, most arbitration agreements are contained in contracts. Submission agreements are relatively rare because once a dispute arises one side may see an advantage in arbitration while the other refuses to arbitrate in order not to give the first side an advantage and/or to delay resolution of the case.

4.9 If the arbitration agreement is in the form of a clause contained in a substantive contract (which is the norm), the arbitration agreement will generally be considered as having been formed at the same time as the contract is formed. However, despite the identical time of formation and the fact that the arbitration agreement is a clause of the substantive contract, the arbitration agreement is normally treated as an agreement separate from the rest of the contract.[6] This means that it is possible for an arbitration agreement to have been made even though the substantive contract in which that agreement is contained never came into existence. In these circumstances the arbitration agreement is preserved to resolve a dispute relating, for example, to the formation of the substantive contract.

2.3 Definition and formal requirements of an arbitration agreement

2.3.1 General

4.10 The 1985 version[7] of Article 7 of the Model Law provides a useful definition of arbitration agreements. However, it must be recalled that the particular form requirements may vary from country to country.

Article 7. Definition and form of arbitration agreement

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

5 J Paulsson, 'Arbitration without Privity', (1995) 10 *International Centre for Settlement of Investment Disputes Review – Foreign Investment Law Journal* 232.

6 See Section 3.

7 This is the version of the Model Law that is most prevalent. At the time of writing only Australia, (Florida, USA), Ireland, Mauritius, New Zealand, Peru, Rwanda, Singapore and Slovenia have implemented some or all of the 2006 Model Law amendments. Hong Kong is understood to be in the process of passing legislative amendments. See also the discussion of the Model Law in Chapter 2.

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agreement may be in the form of an arbitration clause in the contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is 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. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

4.11 The 1985 Model Law Article 7(2) was directly inspired by the New York Convention. Articles II(1) and (2) of the New York Convention use much of the same language.[8]

4.12 From the plain language of Article 7(2) of the 1985 Model Law and Article II of the New York Convention it appears essential that a valid arbitration agreement be in writing. However, this is not quite correct. A distinction should be drawn between a requirement which, if not satisfied, renders an arbitration agreement void (sometimes called a solemn form requirement); and a requirement which is not a condition but an evidentiary rule making it difficult to prove the existence or validity of the arbitration agreement (sometimes called a proof form requirement). Reading closely it can be seen that both the Model Law and the New York Convention require that an arbitration agreement be evidenced in writing.[9] An oral arbitration agreement could therefore be valid and enforceable if the consent of all parties was recorded in writing.

4.13 The writing requirement was further relaxed in the 2006 version of the Model Law. In that version, two optional texts for Article 7 are provided. The second does not stipulate any writing requirement whatsoever:

Option I

Article 7. Definition and form of arbitration agreement

(1) 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

8 New York Convention Article II provides:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. 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.

9 For a contrary view on the New York Convention, see JF Poudret and S Besson, *Comparative Law of International Arbitration*, 2nd edn, Thompson, 2007, at para 188.

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(2) The arbitration agreement shall be in writing.
(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 useable for subsequent reference; 'electronic communication' means any communication that the parties make by means of data messages; 'data message' means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option II

Article 7. Definition of arbitration agreement
'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

4.14 The note accompanying the 2006 version of the Model Law observes that the movement away from a strictly enforced writing requirement reflects modern realities:[10]

> It was pointed out by practitioners that, in a number of situations, the drafting of a written document was impossible or impractical. In such cases, where the willingness of the parties to arbitrate was not in question, the validity of the arbitration agreement should be recognized. For that reason, article 7 was amended in 2006 to better conform to international contract practices. In amending article 7, the Commission adopted two options, which reflect two different approaches on the question of definition and form of arbitration agreement. The first approach follows the detailed structure of the original 1985 text . . . . It follows the New York Convention in requiring the written form of the arbitration agreement but recognizes a record of the 'contents' of the agreement 'in any form' as equivalent to traditional 'writing'. The agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded. This new rule is significant in that it no longer requires signatures of the parties or an exchange of messages between the parties . . . . It also states that 'the reference in a contract to any document' (for example, general conditions) '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'. It thus clarifies that applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration agreement allegedly made 'by reference'.

10 UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, United Nations Publication, Sales No. E.08.V.4 (2008), at 28.

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> The second approach defines the arbitration agreement in a manner that omits any form requirement.

4.15 Even prior to its adoption of the 2006 revision to the Model Law, New Zealand expressly recognised arbitration agreements made orally and similarly recognises any resulting award.[11] The language of the New Zealand statute, '[a]n arbitration agreement may be made orally or in writing,' is expressed inclusively. This position can be contrasted with the negative phrasing of Hong Kong's Arbitration Ordinance, Section 2AC of which expressly states that for the purpose of that Ordinance an agreement is not an arbitration agreement if it is not in writing.[12] This is a subtle but significant drafting difference – the latter may be considered an example of a solemn form requirement as explained above.[13] However, fortunately Section 2AC has been interpreted very liberally. In the Hong Kong District Court decision of *Winbond Electronics (HK) Ltd v Achieva Components China Ltd* it was noted:[14]

> *H Smal Ltd. v Goldroyce Garment Ltd.* [1994] 2 HKC 526, 529 where it was said that 'There is no basis for arguing that the arbitration agreement can be established by a course of dealings or the conduct of the parties . . . unless there is a record whereby the defendant has in writing assented to the agreement to arbitrate.' In view of the present Section 2AC, what was there said or held is no longer the law – the arbitration agreement may now be established by a course of dealings or conduct of the parties provided there is reference to terms (of arbitration) that are in writing.

4.16 As the quoted passage indicates, the statute in Hong Kong was amended between these two decisions. Somewhat appropriately, Neil Kaplan commented on *H Smal Ltd v Goldroyce Garment Ltd* in a lecture given approximately two years later, and after he had retired from judicial service. Kaplan said of the decision:[15]

> I venture to suggest that this decision, even if technically correct, produces an absurd result which is inconsistent with commercial reality. There was no doubt that the parties entered into a contract which was contained in or evidenced by the written order and B's conduct. Why on earth should the arbitration clause in the contract require to be established by any higher degree of proof than the basic contractual terms themselves? I hasten to add that I am not advocating the bringing within the New York Convention of oral agreements to arbitrate. All I am suggesting is that on the facts of the case under discussion there are sufficient legal theories available which could lead to a form of words which would bring the case not only within the Model Law but also the New York Convention.

11 New Zealand Arbitration Act 1996 Article 7(1), Schedule 1. 'An arbitration agreement may be made orally or in writing. Subject to [section 11], an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.'
12 Section 2AC(1) of the Hong Kong Arbitration Ordinance states 'An agreement is not an arbitration agreement for the purposes of this Ordinance unless it is in writing'.
13 See para 4.12.
14 [2007] HKCU 1514, at 6.
15 N Kaplan, 'Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?', (1996) 12(1) *Arbitration International* 28, at p. 30.

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4.17 In response to the sorts of criticisms and observations made by Kaplan, UNCITRAL formulated the 'Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session'. In relevant part it states:

> Taking into account also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement [sic] governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards,
>
> Considering that, in interpreting the Convention, regard is to be had to the need to promote recognition and enforcement of arbitral awards,
>
> 1. *Recommends* that article II, paragraph 2, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, be applied recognizing that the circumstances described therein are not exhaustive.

4.18 Kaplan's view is attractive, especially his rhetoric as to 'Why on earth should the arbitration clause in the contract require to be established by any higher degree of proof than the basic contractual terms themselves?' Ultimately, the role of the writing requirement is to assist in proving that an arbitration agreement exists and the terms of that arbitration agreement. So long as that proof can be established, then there appears to be no reason to place a significantly higher burden on a party trying to establish the existence or content of an arbitration agreement than one trying to establish the existence or content of any other contractual obligation.[16] The evolution in the Model Law and UNCITRAL's guidance on interpretation are therefore to be commended.

4.19 Whereas the discussion above considers the policy behind the 'in writing' requirement, we now turn to consider what 'in writing' actually means. Increasingly, countries are expanding the definition of writing to include examples of newer forms of communication, such as electronic communications. These clarifications are usually drafted to remove doubt.[17] Hong Kong adopted a different approach by defining writing as 'includ[ing] any means by which information can be recorded'.[18] The writing requirement must necessarily be understood with reference to its underlying purpose, and interpreted according to technology and business practices that prevail today, not those that existed over 50 or 25 years ago when, respectively, the New York Convention and the Model Law were originally drafted.

16 A view shared by JD Lew, LA Mistelis and SM Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, para 7–9.
17 For instance, the specific addition of electronic communications, found in Article 1 of the Supreme People's Court's Interpretation of Several Issues regarding the Application of the Arbitration Law of the PRC (FaShi [2006] No. 7), the Australian International Arbitration Amendment Act 2010, and Singapore International Arbitration (Amendment) Act 2009 to note just a few examples. However, specific note should be taken that the Singaporean amendments only apply to Part II of the Singapore International Arbitration Act and not Part III. The Explanatory Statement which accompanies the Bill states that the distinction is because Part III deals with the New York Convention which does not have a modernised definition of an arbitration agreement.
18 Hong Kong Arbitration Ordinance, Section 2AC(4).

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2.3.2 Incorporation by reference

4.20 Difficulties can arise when the arbitration agreement is said to have been incorporated by reference. This situation arises where parties have not included an arbitration agreement in their own contract, but merely include a reference to another document which contains an arbitration agreement. The question is whether the arbitration agreement in the other document is binding on the parties to the contract.

4.21 Although some arbitration laws provide guidance, the question of whether or not a clause has been properly incorporated must ultimately be considered in light of the law governing the arbitration agreement. Born notes that different jurisdictions have adopted different approaches to this issue. After commenting that most jurisdictions will recognise the incorporation of an arbitration clause where it has been specifically drawn to the attention of a party, he observes that where there is a general reference to the other document as a whole, 'there is little apparent uniformity among different national legal regimes'.[19] As we explain below, there appears to be a consistent approach adopted by the majority of countries within the Asia-Pacific region.

4.22 Where we find Born persuasive is that the question of incorporation by reference should not in any way be confused with or influenced by the doctrine of separability. That doctrine is dealt with in detail in the next section. Essentially, it treats an arbitration clause in a contract as a separate and independent agreement from the contract containing it. Born notes that some might incorrectly assume that because the arbitration agreement is considered separate, it could not as a matter of construction be incorporated without some specific reference.[20] Indeed, denying that an arbitration agreement has been incorporated by reference on this reasoning alone would be insufficient.

4.23 The general issue of incorporation by reference has come before different national courts in this region on a number of occasions. It typically arises in the context of an application to stay court proceedings. The factual scenarios often involve charterparty agreements and bills of lading, where reference is made in the bill of lading to the charterparty agreement – and the arbitration agreement is found in the charterparty agreement. Although there have been some exceptions, the general approach adopted in the Asia-Pacific region is that it is not necessary to refer specifically to the arbitration agreement for it to be incorporated by reference. The test is simply whether the parties intended to incorporate the arbitration agreement. A specific reference, while not strictly necessary, is nevertheless advisable to avoid sometimes lengthy arguments on the point.

19 G Born, *International Commercial Arbitration*, Kluwer, 2009, p. 700. For other commentaries on this issue in a European context, see V Van Houtte, 'Consent to Arbitration through Agreement to Printed Contracts: The Continental Experience', 2000 16(1) *Arbitration International* 1; L Huber, 'Arbitration Clauses "by Reference"', *ASA Special Series No. 8* (December 1994), pp. 78–88; M Blessing, 'The New International Arbitration Law in Switzerland: A Significant Step Towards Liberalism', (1988) 5(2) *Journal of International Arbitration* 9, at p. 30.
20 Born, ibid., p. 703.

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4.24 Traditional arguments for requiring a specific written reference reflect a belief that an arbitration agreement is particularly special because it precludes avenues of state judicial recourse. As Born has noted this reasoning has been discredited in the context of international arbitration. He further states:[21]

> . . . international arbitration is adopted in large part to avoid the resulting jurisdictional disputes and confusion, which frequently deprive one or both parties of effective access to a judicial forum or legal remedy. Accordingly, whatever the rule in domestic cases, there is no satisfactory basis for imposing any heightened proof requirement for establishing the existence of international arbitration agreements.

4.25 The Malaysian Court of Appeal decisions in *Bauer (M) Sdn Bhd v Daewoo Corp*,[22] and *Bina Puri Sdn Bhd v EP Engineering Sdn Bhd*[23] endorse the view that the test is one of intent, with or without express wording. In the latter case, Justice Gopal Sri Ram was called upon to consider the incorporation of an arbitration clause in the absence of specific wording. Following a review of various authorities, he observed:[24]

> The principle then to be distilled from the decided cases is this. Whether a term or a clause in one contract has been incorporated in another depends on the facts and circumstances of each case. There may be express incorporation or incorporation by conduct.

4.26 The subsequent Malaysian High Court case of *Usahasama SPNB-LTAT Sdn Bhd v Borneo Synergy (M) Sdn Bhd*[25] has also adopted this test. Similarly, Justice Lim Teong Qwee of the Singaporean High Court stated in *Concordia Agritrading Pte Ltd v Cornelder Hoogewerff (Singapore) Pte Ltd*:[26]

> I think it is a question of construction in each case. There must be a clear intention to incorporate an arbitration clause. If the words of incorporation are specific that intention may well have been clearly expressed.

4.27 In *Conagra International Fertiliser v Lief Investments*,[27] Justice Rolfe of the New South Wales Supreme Court considered a long line of authorities from both Australian and UK courts. The judgment contains an enlightening discussion of those authorities. Although not personally convinced, Justice Rolfe reached the view, based on the weight of authority, that specific reference was required to incorporate an arbitration agreement pursuant to Australian law. His Honour's preferred position would have been to determine simply on a case by case basis whether the parties had intended to incorporate the term absent a specific

21 Ibid., p. 647.
22 [1999] 4 MLJ 545. This is an interesting case because although the Court of Appeal agreed with the trial judge that the parties had not incorporated an arbitration agreement into their contract, it then found that the acts of the respondent in participating in the arbitration estopped it from subsequently denying the arbitrator's jurisdiction. For a further discussion of this point see Section 4.2.1.
23 [2008] 3 MLJ 564.
24 Ibid., at 571.
25 [2009] MLJU 0001.
26 [2001] 1 SLR 222 at 228.
27 (1997) 141 FLR 124.

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reference. This is akin to the approach adopted by the Malaysian courts noted above. The *Conagra* decision was appealed to the New South Wales Court of Appeal. That court found that no terms had been incorporated. However it also observed that 'if the parties had agreed to the incorporation of the terms and conditions of Sinochem's standard contract and these could have been identified with certainty, [then] there was no textual or policy consideration'.[28] Therefore the position in Australia (at least for New South Wales) should now be simply a question of intent without the need for any particular wording.

4.28 Likewise, it appears that South Korea follows the same approach. The South Korean Supreme Court has noted that as a general rule explicit reference is required, but:[29]

> for an effective incorporation to take place an assignee (a holder) of the bill of lading knew or should have known about the existence of such an arbitration clause to be incorporated and an arbitration clause should not contradict with the other terms and conditions of the bill of lading after being incorporated; moreover, such arbitration clause of vessel hiring contract should be phrased comprehensively so that an arbitration clause of vessel hiring contract covers not only disputes arising between an owner of vessel and a vessel hiring person, but also applies to a holder of bill of lading.

4.29 The exception outlined above renders this position as simply a question of fact – did the parties intend to incorporate the arbitration agreement?

4.30 The 1990 decision of the Philippines Supreme Court in *National Union Fire Insurance Company of Pittsburg Pa/American International Underwriter (Phil) Inc v Stolt-Nielsen Philippines Inc and Court of Appeals*[30] similarly states that no explicit reference is required:[31]

> It is settled law that the charter may be made part of the contract under which the goods are carried by an appropriate reference in the Bill of Lading [. . .]. This should include the provision on arbitration even without a specific stipulation to that effect. The entire contract must be read together and its clauses interpreted in relation to one another and not by parts.

4.31 In the 2008 Hong Kong Court of First Instance decision of *Parkson Holdings Ltd v Vincent Lai & Partners (HK) Ltd*,[32] Justice Burrell accepted that an arbitration clause in a domestic arbitration had been incorporated notwithstanding the absence of explicit wording to that effect. This decision accorded with the position he had taken in the 2003 case of *Tsang Yuk Ching T/A Tsang Ching Kee Eng Co v Fu Shing Rush Door Joint Venture Co Ltd*.[33] In his 2003 decision Justice Burrell quoted the passage below from *Gay Construction Pty Ltd v Caledonian Techmore*

28 [1998] NSWSC 481 per Sheller JA.
29 Supreme Court Decision 2000Da70064 [2003] KRSC 1 (10 January 2003). This quotation is taken from the website of the South Korean Supreme Court, http://library.scourt.go.kr/jsp/html/decision/2.4.2000Da70064.htm. However, it should be noted that the site warns that the translation is provisional and subject to revision.
30 184 SCRA 682 (G.R. No. 87958 April 26, 1990). See also E Lizares, *Arbitration in the Philippines and the Alternative Dispute Resolution Act of 2004*, EPL Publications, 2004, at pp. 63–64.
31 184 SCRA 682 at 687.
32 [2008] HKCU 1985.
33 [2003] HKCU 1072.

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(Building) Ltd.[34] This was a case involving an international arbitration and in which the Hong Kong High Court considered Article 7 of the Model Law. In *Gay Construction* Justice Kaplan (as he then was) stated:[35]

> To require a specific reference to the arbitration clause would be far too restrictive and clearly was not intended by those drafting the Model Law.

4.32 There have been cases in Hong Kong which appear to take a contrary view; however, they can be distinguished as not being exactly on point.[36] In light of the persuasive decisions delivered by Justices Kaplan and Burrell referred to above, it can be said that the test in Hong Kong, like those countries discussed above, is simply a question of whether there was an intention to incorporate the arbitration clause, and there is no requirement that there be a specific reference.

4.33 Proceedings under the New York Convention to enforce an award are another context in which incorporation of an arbitration clause by reference raises difficulties. Article II(2) of the New York Convention does not refer directly to incorporation by reference. It states:

> (2) 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.

4.34 As Di Pietro notes:[37]

> Article II does not deal directly with incorporation of arbitration clauses by reference. Therefore, it is unclear whether Article II(2) only applies to cases where the arbitration clause is contained in the documents exchanged by the parties or whether it also applies to cases where:
> (a) although the documents exchanged do not contain an arbitration clause, nonetheless, they make express reference to an arbitration clause contained in another document (a so-called *relatio perfecta*); or
> (b) the documents exchanged by the parties do not contain an arbitration clause but make reference to a document containing one, although there is no express reference to it in the exchange of documents (a so-called *relatio imperfecta*).
> . . . the prevailing case law seems to support the argument that the exchange of documents described under Article II(2) should be read as entailing scenario (a) above. Whether scenario (b) applies is much more controversial.

34 [1994] 2 HKC 562.
35 Ibid., at 566.
36 See, e.g. *Owners of and/or other Persons entitled to sue in respect of cargo lately laden on board the ship or vessel Yaoki v Owners of and/or Demise Charterers of the ship or vessel & Quotyaoki & Quot and the ships or vessels listed in schedule hereto* [2006] HKCU 765. At para 14 the court suggests that '[t]he general discussion on this subject in Carver shows that incorporation of [an] arbitration clause is possible if sufficiently clear words exist in the bill of lading incorporation provision and the intention to incorporate such clause is clear'. The court in this case was being asked to consider whether an exclusive jurisdiction clause had been incorporated. Applying the rationale established for arbitration agreements, it found that such a reference had not been incorporated. The court was further asked to consider whether a vague reference to terms could override a clear and express intent to arbitrate. It found that it could not. For China, see also Reply of Supreme People's Court to Request for Enforcement of a UK Arbitral Award by Han Jin Shipping Co., Ltd (Civil 4, Miscellaneous), No. 53 (2005).
37 D Di Pietro, 'Incorporation of Arbitration Clauses by Reference', (2004) 21(5) *Journal of International Arbitration* 439, at p. 441.

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In the context of an enforcement proceeding, Di Pietro refers to the *Jiangxi Prov'l Metal & Minerals Imp & Exp Corp v Sulanser Co*[38] decision of the Supreme Court of Hong Kong. In that case the court reasoned that the omission in Article II(2) of the word 'only' meant that the definition in that provision was not exhaustive. Di Pietro observes that this reasoning may not sit as well with the other language versions of the Convention, such as the French and Spanish versions which do use terms equivalent to 'only'.[39] 4.35

3 Doctrine of separability

The doctrine of separability treats an arbitration agreement contained in a contract as a separate agreement from the contract itself. The Supreme Court of the Philippines has noted:[40] 4.36

> The doctrine of separability, or severability as other writers call it, enunciates that an arbitration agreement is independent of the main contract. The arbitration agreement is to be treated as a separate agreement and the arbitration agreement does not automatically terminate when the contract of which it is part comes to an end.

The doctrine is supported by case law[41] and arbitration rules.[42] As the following discussion demonstrates it is also found in arbitration laws. Even if it were not so supported, the compelling logic of the doctrine would make it difficult to present a reasoned argument against it.[43] 4.37

Article 16(1) of the Model Law codifies the doctrine of separability as follows: 4.38

> *Article 16 – Competence of arbitral tribunal to rule on its jurisdiction*
>
> 1. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

38 [1995] 2 HKC 373.
39 Di Pietro, op. cit. fn 37, p. 442, n 7 which states: 'The French version of art. II(2) reads: "[o]n entend par 'convention écrite' une clause compromissoire insérée dans un contrat, ou un compromis, signés par les parties ou contenus dans un échange de lettres ou de télégrammes."' The phrase 'on entend', which in this context can be translated into the English 'it is understood' seems much narrower than the phrase 'shall include' employed in the English version and seems also to contradict what was advocated in the decision taken by the Supreme Court. Similar observation [sic] can be made with reference to the Spanish version according to which: '[l]a expresión "acuerdo por escrito" denotará una cláusula compromisoria incluida en un contrato o un compromiso, firmados por las partes o contenidos en un canje de cartas o telegramas'. Also here, the verb 'denotar', which can be translated into the English 'to denote', seems to challenge the interpretation advocated by the Supreme Court in Hong Kong.
40 *Jorge Gonzales, et al. v Climax Mining Ltd., et al.* GR No. 161957, 22 January 2007, citing P Capper, *International Arbitration: A Handbook*, Informa Legal Publishing, 2004, p. 12.
41 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192; *Fung Sang Trading Ltd v Kai Sun See Products and Food Co Ltd* [1992] HKCU 380; *H Smal Ltd v Goldroyce Garment Ltd* [1994] 2 HKC 526; T Tateishi, 'Inquisitorial Approach in Dispute Resolution – A Japanese Way to Mete Out Justice', 44 *WaveLength – Bulletin of the Japan Shipping Exchange Inc* 8, at pp. 14–15 citing Heisei 10 (wa) 3851; Hanrei Jiho no. 1707.
42 See, e.g. HKIAC Rules Article 20.2; SIAC Rules, Rule 25.1; ACICA Rules Article 24.2.
43 However, see A Baron, 'Arbitration and the Fiction of Severability', (1999) 19 *Australian Bar Review* 50, at pp. 50–66 and discussion below.

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4.39 Within this region, most laws on separability follow the Model Law example. However, in the past China was considered a notable exception. Article 19 of the Chinese Arbitration Law was previously criticised as 'one of the most ambiguous provisions of the [Arbitration Law]', providing only 'partial separability'.[44] Now this law must be interpreted in the light of the Supreme People's Court's Interpretation of Several Issues regarding the Application of the Arbitration Law of the PRC.[45] As a consequence 'the arbitration agreement is now unconditionally independent and, accordingly, an arbitral tribunal has the jurisdiction over the dispute even if the existence and effect of the main contract is questioned'.[46]

4.40 Without the doctrine of separability, or some equivalent, the entire arbitral process could be frustrated – a party wanting to avoid arbitration could simply assert that the contract was void and therefore go to court. But the doctrine of separability is not without its critics. Some commentators disagree with the present manifestation of the doctrine of separability, describing it as a legal fiction that favours commercial pragmatism over logic.[47] Others support the importance of the doctrine in general but dispute its application where there is an allegation that the contract never existed at all.[48] These two criticisms are discussed in turn below.

4.41 The core problem identified by those arguing that the doctrine is a legal fiction is that if a contract is void ab initio then as a matter of law it never had any effect; necessarily implying that the arbitration agreement never had any legal effect either. In our view it is incorrect to describe the doctrine of separability as a legal fiction. The argument fails to recognise modern forms of contracting such as point by point negotiation. All that is necessary is a finding that the parties intended to treat their arbitration agreement separately. There has been some debate about whether this would need to be explicit. However, it seems likely that implicit presumptive intent is sufficient.[49]

4.42 Those who argue against separability in cases of disputed existence of the contract then turn their attention to the actual language of the arbitration agreement. They contend that if the arbitration agreement refers to a contractual relationship then there is a problem. According to them, even if the parties intended their arbitration agreement to survive, its scope is limited to disputes relating to the contract which never came into existence. There is certainly logic to this

44 Gu Weixia, 'China's Search for Complete Separability of the Arbitral Agreement', (2007) 3 *Asian International Arbitration Journal* 163, at p. 168 citing Lianbin Song, Jian Zhao and Hong Li, 'Approaches to the Revision of the 1994 Arbitration Act of the People's Republic of China', 2003(2) *Journal of International Arbitration* 169, at p. 181.

45 FaShi [2006] No. 7.

46 Gu Weixa, op. cit. fn 44, at p. 188. See also Wan Exiang and Yu Xifu, 'Latest Evolution in the Judicial Intendence Mechanism over Arbitration in China,' (2008) 3(2) *Front Law China* 181, at 172.

47 Baron, op. cit. fn 43.

48 See, e.g. A Redfern, M Hunter, N Blackaby and C Partasides, *Law and Practice of International Commercial Arbitration*, 4th edn, Sweet & Maxwell, 2004, para 5–43. Contrast with E Gaillard and J Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International, 1999, p. 201 who found it necessary to state explicitly that contrary to other texts they did not distinguish between void/voidable contracts and those that never existed.

49 See *QH Tours Ltd v Ship Design & Management (Aust) Pty Ltd* (1991) 104 ALR 371 per Justice Foster; *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701 per Lord Justice Ralph Gibson, as cited by Baron, op. cit. fn 43.

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assertion but it will not apply if the arbitration agreement is found to cover disputes about formation of a contract, or claims relating to pre-contractual gains or expectations – *quantum meruit* or *culpa in contrahendo* for example. To determine this question, the arbitral tribunal, or court as the case may be, will need to consider as a matter of fact what was the parties' intended scope of the arbitration agreement. In doing so, consideration should be given to the language of and law governing the arbitration agreement,[50] and the evidence led by the parties.

4.43 Some authors appear to suggest that for the purposes of the separability doctrine it is necessary to distinguish between cases in which a contract originally existed but thereafter was terminated or voidable and cases where there was never a contract from the beginning. Similarly, some courts in the US have demonstrated a preference to decide the existence or otherwise of an arbitration agreement when the existence of the entire contract is also in question.[51] The practical reasons behind this distinction are at best questionable. One possible explanation for the view can be found in the interpretation of the English Arbitration Act 1996. Section 9(4) of that Act states that 'on an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed'. While its key operative language is identical to Article 8(1) of the Model Law and Article II of the New York Convention, Section 9(4) has been interpreted to mean that a court must first find that an arbitration agreement actually exists before it will order a stay.[52]

4.44 This interpretation should not be extended to international arbitration generally, and in particular not to Model Law countries despite the identical language in Article 8(1). Article 16(1) of the Model Law specifically empowers the arbitral tribunal to decide 'any objections with respect to the existence or validity of the arbitration agreement'. (Emphasis added). In contrast, Section 30 of the English Arbitration Act 1996, which sets forth the competence-competence rule[53] in that jurisdiction, empowers the arbitral tribunal to decide 'whether there is a valid arbitration agreement' and 'whether the arbitral tribunal is properly constituted', without mentioning existence.

50 See Section 8.1, in particular the discussion of how different phrases can have different meanings when interpreted according to different laws.

51 T Várady, C Barceló and A von Mehren, *International Commercial Arbitration – A Transnational Perspective*, 3rd edn, Thomson, 2006, at p. 90, citing *Sandvik AB v Advent International Corp*, 220 F 3d 99 (3d Cir 2000) (Party seeking stay of court action in favour of arbitration claimed container contract did not come into existence because its purported signatory did not have authority. It nevertheless sought to rely on the arbitration clause in the container contract. The Third Circuit Court of Appeals refused to apply the separability concept and ruled that a court decision on the existence of the contract was a prerequisite to sending the parties to arbitration.).

52 See *Albon (trading as N A Carriage Co) v Naza Motor Trading SDN BHD* [2007] 2 All ER 1075. In this case the court was asked to stay proceedings in favour of an arbitration seated in Malaysia. The party resisting the stay application alleged that the signature on the arbitration agreement was a forgery. The court refused to stay the proceedings on the ground that it was not satisfied that an arbitration agreement actually existed. See commentary on the decision – N Pengelley, 'Albon v Naza Motor Trading: Necessity for a Court to Find that there is an Arbitration Agreement Before Determining that it is Null and Void', (2008) 24 *Arbitration International* 171.

53 The competence-competence rule is explained in Chapter 5, Section 4.

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4.45 The doctrine of separability simply instructs the inquirer to treat the arbitration agreement separately from the main contract for the purposes of determining its existence and validity. If the alleged main contract never existed, then it might well be that the arbitration clause never existed either. Consequently the existence of the arbitration agreement still needs to be considered. Take for example a situation where one party (Buyer) puts forward to another (Seller) an offer to enter a sales contract which contains an arbitration agreement. Buyer purports to withdraw or revoke its offer, while at the same time Seller purports to accept it. Seller now claims that a sales contract exists which Buyer denies. If the sales contract does exist, then so will the arbitration agreement. But even if the sales contract does not exist, the arbitration agreement may still exist as the parties may still have intended to have any dispute resolved by arbitration. Thus the doctrine of separability applies to situations where the main contract existed but was terminated or voidable, as well as situations where it is alleged that the main contract never came into existence.

4.46 Three broad consequences may follow from the application of the doctrine of separability: the arbitration agreement's validity is considered separately from the main contract's validity (which we have touched on in the discussion above); 'juridical autonomy', meaning that a different law may apply to the arbitration agreement than that which applies to the substantive contract; and finally there is an aspect of autonomy from all laws. Although this last aspect is not generally found in Asia-Pacific international arbitration jurisprudence it has influenced arbitral practice and doctrine. These three points will be discussed in turn.

3.1 Validity of main contract and arbitration agreement

4.47 When parties conclude a contract containing an arbitration agreement, they are in effect concluding two separate agreements. In the words of Judge Schwebel, formerly of the International Court of Justice, '[w]hen the parties to an agreement containing an arbitration clause enter into that agreement, they conclude not one but two agreements, the arbitral twin of which survives any birth defect or acquired disability of the principal agreement'.[54] In a 1994 New South Wales Court of Appeal decision, former Justice Kirby (then President of that court) adopted the following explanation:[55]

> validity of the arbitration clause does not depend upon the validity of the remaining parts of the contract in which it is contained. This allows an arbitration tribunal to declare a contract invalid and yet retain its jurisdiction to decide a dispute as to the consequences of such invalidity provided that the arbitration clause is valid as a separate entity and is sufficiently broad in its wording so as to cover non-contractual disputes.

4.48 As a consequence, the arbitral tribunal can determine whether the main contract is valid, or even whether it exists, without contradicting its own jurisdiction.[56] As

54 S Schwebel, *International Arbitration: Three Salient Problems*, Grotius Publications, 1987, pp. 2–3.
55 *Ferris v Plaister* (1994) 34 NSWLR 474 quoting a passage from *Sojuznefteexport (SNE) v Joc Oil Ltd*, (1990) XV *Yearbook of Commercial Arbitration* 384.
56 The power of arbitrators to rule on their own jurisdiction is discussed in Chapter 5, Section 4.

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suggested above, the reasons for this are logically compelling. If the arbitration clause were part of the main contract, the arbitration clause would not come into existence unless the main contract did, and would be terminated when the main contract terminates. Further, separability in this context avoids a paradox. If the arbitration clause were part of the main contract, and one party contended that the main contract was void, an arbitral tribunal may not be able to decide that allegation because if it finds that the contract was void, the basis of its power to make that decision would never have existed.

4.49 Thus the validity of an arbitration clause must be considered as a question separate from the validity of the contract containing that arbitration clause. Moreover, the arbitral tribunal remains competent not only to determine its own jurisdiction but also to determine the validity or existence of the substantive contract. This concept has important ramifications. The arbitration agreement can for example survive the novation, nullity, or termination of the main contract. The House of Lords has noted:[57]

> 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. 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. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.
>
> On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorized or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.

3.2 Law governing main contract and arbitration agreement

4.50 As an arbitration clause in a contract is an agreement separate from that in which it is contained, the determination of the law that governs the arbitration clause and that which governs the contract must also be separate. Since the two agreements have different purposes, it is quite conceivable that a different

57 *Premium Nafta Products Ltd v Fiji Shipping Company Ltd* [2007] 2 All ER (Comm) 1053, at paras 17 and 18 per Lord Hofmann.

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law applies to each. This does not mean that the governing laws are necessarily different, but rather that they might be different.

4.51 Much like the practice that exists in relation to commercial contracts, parties are free to choose the law that governs their arbitration agreement.[58] This freedom of choice is implicitly recognised in the Model Law and the New York Convention. Article 34(2)(a) of the Model Law and Article V(1)(a) of the New York Convention refer to the determination of the validity of an arbitration agreement 'under the law to which the parties have subjected it'. There is no doubt that parties are free to choose the law that governs their arbitration agreement, even if it is a different law from that governing the main contract or from the *lex arbitri*. In practice, however, parties very rarely express a choice as to the law that governs the arbitration agreement so a question arises as to how it is to be determined.

4.52 Following England's lead, common law jurisdictions have historically applied a rebuttable presumption that the law governing the main agreement will also govern the arbitration agreement. It is indeed only a presumption.[59] However that position, in England at least, appears to be changing. In the English Court of Appeal decision of *C v D*, Lord Justice Longmore speaking for the entire court said by way of obiter dictum:[60]

> if there is no express law of the arbitration agreement, the law with which that agreement has its closest and most real connection is the law of the underlying contract or the law of the seat of arbitration. It seems to me that . . . the answer is more likely to be the law of the seat of arbitration than the law of the underlying contract.

4.53 The Indian case of *Shin-Etsu Chemical Co Ltd v Aksh Optifibre Ltd* expounds an interesting hybrid between the common and (as explained below) civil law positions, but nevertheless highlights the fact that a different law can apply to the arbitration agreement:[61]

> This question of choice of law has been conclusively decided by the judgment of this court in National Thermal Power Corporation v. Singer Company, where it was observed: 'The proper law of the arbitration agreement is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so even where the proper law of the contract is expressly chosen by the parties. Where, however, there is no express choice of the law governing the contract as a whole, of the arbitration agreement as such, a presumption may arise that the law of the country where the arbitration is agreed to be held is the proper law of the arbitration agreement. But that is only a rebuttable presumption.'

4.54 It makes a lot of sense that the presumption, in as much as there is one, should be in favour of the law of the seat of arbitration. It is generally in accord with the

58 An explanation of the extent to which arbitrating parties are free to choose the law governing their contract is provided in Chapter 3, Section 3.
59 M Pryles, 'Choice of Law Issues in International Arbitration', (1997) 63(3) *Arbitration – The Journal of the Chartered Institute of Arbitrators* 200, at p. 202; see also *Sonatrach Petroleum Corporation (BVI) v Ferrell International Ltd* [2002] 1 All ER (Comm) 627 (Queen's Bench, Commercial Court).
60 [2007] EWCA Civ 1282 at para 22.
61 (2005) 7 SCC 234, at pp. 268–269 (Supreme Court of India).

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approach adopted in a number of civil law countries[62] including China,[63] and arguably also in the USA.[64] The substantive law, if determined by the application of conflict of laws rules, is selected because of the connection that that law has to the substance of the principal contractual obligations under the contact. For example, in a contract dealing with the construction of a facility in Indonesia, the choice of Indonesian law would seem most relevant given its close connection to the characteristic performance (i.e. construction) in Indonesia. If we were to apply that same principle – i.e. looking for the law with the closest connection to the characteristic obligation – to determine the law governing the arbitration agreement, would we end up with the same law? The characteristic or principal obligation under an arbitration agreement is an obligation to arbitrate disputes. The obligation to undertake the procedure of arbitration to resolve one's disputes appears much more closely related to the place that that procedure will happen – that is the legal place of that procedure, in other words the seat of arbitration. The performance will occur at the seat of arbitration and therefore the obligation is most closely connected to that place and that law.

4.55 Moreover, if the parties have chosen a seat of arbitration that is outside the place of the substantive contractual law, the parties could be considered to have indicated an intention to separate their substantive obligations under the contract from their obligations in relation to arbitration. There might be a very good reason for this. Take the Indonesian project example just given. In that case, if Indonesian law governed the arbitration agreement that agreement would be subjected to certain peculiarities of Indonesian Arbitration law which are not quite in line with international arbitration standards. On the other hand, if the parties had chosen a Singapore seat of arbitration, Singapore law should be presumptively considered (i.e. if the parties have not expressly chosen a law to govern the arbitration agreement) as governing all aspects of the dispute resolution process. It would be reasonable to expect that Singapore law was intended to govern this part of the agreement to avoid the Indonesian particularities mentioned above.

4.56 The Singapore High Court decision of *Philippines v Philippine International Air Terminals Co Inc*[65] is an example of just how significant this the choice of law to govern an arbitration agreement can be. In that case, a contract between the Philippines Government and a private foreign consortium operating through a Philippines incorporated company provided for ICC arbitration with the seat in Singapore. The contract also included a choice of law clause providing that it

62 See Born, op. cit. fn 19, pp. 470–475 referring particularly to Japan, Germany, Switzerland and Sweden, but Born also notes that the approach is not uniformly settled. See also Poudret and Besson, op. cit. fn 9, at para 300 noting authority from Belgium and Italy in favour of the main contract law presumption.
63 Under Chinese law the position has been settled in favour of applying the law of the seat, or in the absence of a seat being designated, the law of the forum, Article 16 of the Supreme People's Court's Interpretation of Several Issues regarding the Application of the Arbitration Law of the PRC (FaShi [2006] No. 7); Reply of Supreme People's Court to the Query about the Arbitration Clause in the Sales Contract between *Baoyuan Trade Co v Yu Jianguo*, (Civil 4, Miscellaneous), No. 38 (2007). See also Wan Exiang and Yu Xifu, op. cit. fn 46, at p. 190.
64 Redfern, Hunter, et al, op. cit. fn 48, para 2–91. But see also Born, op. cit. fn 19, p. 485 et seq; and Poudret and Besson, op. cit. fn 9, para 300, n 716a.
65 [2007] 1 SLR 278.

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was to be governed by Philippines law. The Philippines Government challenged jurisdiction, arguing that since the entire contract had been invalidated by the Philippines Supreme Court there was no arbitration agreement. A preliminary question for the arbitral tribunal was which law governed the arbitral proceedings and the arbitration agreement.

4.57 The arbitral tribunal delivered a partial award finding that it had jurisdiction. The reported judgment is a challenge to that award before the Singapore courts. After first accepting the doctrine of separability,[66] the arbitral tribunal went on to consider whether an arbitration agreement could have a proper law different to that of the main agreement. Having found that it could, the arbitral tribunal was then required to determine what law governed the arbitration agreement in this instance. The arbitral tribunal found that Singapore law governed both the arbitration agreement and the arbitral proceedings. This was despite the choice of Philippines law as the law governing the main contract, despite the fact that both parties were Filipino, and despite the fact that the contract related to a project carried out entirely in the Philippines. According to the arbitral tribunal, although all relevant connecting factors pointed to the Philippines, the fact that parties had deliberately chosen ICC arbitration seated in Singapore indicated that the parties preferred a law other than that of the Philippines to govern their dispute resolution clause and the related process.

4.58 If Philippines law had been found to govern the arbitration it seems likely that there would have been no arbitration agreement and consequently no arbitral jurisdiction as a result of decisions already taken by the Philippines Supreme Court. In this case, the advantage of the principle that a different law can govern the arbitration agreement should therefore be obvious. As the Arbitral Tribunal held:[67]

> In the opinion of the arbitral tribunal a strong implication arises that the parties not only removed non-construction and Works disputes from the jurisdiction of the Philippines but also intended that the obligation to arbitrate these disputes should not be referred to the law of the Philippines. In other words, by designating Singapore and the ICC Rules in contrast to the other arbitration obligation appertaining to construction and Works disputes, the parties implied a choice of Singapore law to govern the arbitration agreement as well as the arbitral proceedings for nonconstruction and Works disputes.
>
> One further point can be made. Mustill and Boyd state that if the choice lies between two systems of law, one of which would uphold the arbitration agreement and the other would not, the former may be preferred. A question may arise in this case as to whether the arbitration agreement is valid under the law of the Philippines in view of the decision of the Supreme Court of the Philippines holding that the ARCA is void ab initio. This factor also inclines towards construing the agreement to arbitrate disputes in Singapore as governed by the law of Singapore.

66 One of the grounds of appeal in the case was that the Government of the Philippines was taken by surprise when the arbitral tribunal made a determination on the doctrine of separability. Dismissing this objection Judge Prakash found that such a determination was implicit in the issue of determining the validity of the arbitration agreement. [2007] 1 SLR 278 at 287.
67 Partial Award, paras 84 and 85 as extracted in [2007] 1 SLR 278 at 283.

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The Singapore court dismissed the challenge to the partial award, and although noting that it was not necessary for it to comment on the process adopted by the arbitral tribunal, it nevertheless indicated its endorsement of that process. 4.59

Once the law governing the arbitration agreement has been identified, the arbitration agreement must be interpreted according to that law. An exception to this position may be found in France as described in the following section. 4.60

3.3 Validity of arbitration agreement determined independently of all national laws

Some French decisions from the mid 1970s prompted discussion about whether an arbitration agreement needs to be governed by any law at all. The theory was that the existence and validity of an arbitration agreement should be determined simply by looking at the facts of the case in order to establish the parties' intentions. Reference to any governing law was considered unnecessary. 4.61

The French position was first espoused in the 1975 decision of the Court of Appeal of Paris in the case of *Menicucci*. The Court of Appeal held:[68] 4.62

> it is sufficient, for determining objections to the arbitral tribunal's competence, to note that taking account of the autonomy of the arbitration agreement in an international contract, that agreement is valid independently of the reference to any state law.

Several French cases have followed this decision or reached a similar result, most recently in the 2009 decision of *Soerni v ASB*,[69] but it continues to be the subject of academic debate. In their analysis of *Menicucci* and cases that followed, Poudret and Besson observe that the prevailing opinion among French authors supports the rule.[70] However, Poudret and Besson persuasively criticise it, noting that the approach contradicts the need for connecting factors found in Article V(1)(a) of the New York Convention.[71] 4.63

An approach which seeks to determine the validity of an arbitration agreement independently of all national laws has notions of delocalisation at its heart.[72] When expressed as the simple proposition that a court should only examine whether the parties agreed to arbitrate – which is a question of fact not law – it at first sounds attractive. However, when carefully considered this approach cannot be endorsed as it is not a question of fact at all. Rather it is simply saying 4.64

68 *Menicucci:* Paris, 13 décembre 1975, *Revue de l'arbitrage*, 1977.147, note Ph Fouchard; *Journal du droit international (Clunet)*, 1977.107, note E Loquin; *Revue critique de droit international privé*, 1976.506, note B Oppetit.
69 Cour de Cassation, Première chambre civile, 8 July 2009. See also L Graffi, 'Securing Harmonized Effects of Arbitration Agreements Under the New York Convention', (2006) Spring *Houston Journal of International Law* 718 citing the *Dalico* (1993) and *Bomar Oil* (1993) decisions.
70 Poudret and Besson, op. cit. fn 9, para 182.
71 Ibid. For discussion on the New York Convention see Chapter 9, Section 6.2.1 of this book.
72 See Chapter 2, Section 5.2.1.

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that as a matter of law (i.e. French law), consent is the only element required to determine that there is an arbitration agreement. Thus although the rule is clothed in language of an international material rule, in reality it is applied as a domestic legal concept and part of French law.

4.65 It therefore comes as no surprise that Asia-Pacific courts have not adopted the same approach. Courts and arbitral tribunals in this region seek to establish a governing law for the arbitration agreement, on the basis of which validity is then considered.

4 Identifying the parties to an arbitration agreement

4.66 As arbitration is based on consent, an arbitration agreement can bind only those who are parties to it. The question of identity of the parties to an arbitration agreement can arise when a party to the arbitration agreement seeks to enforce that agreement against another entity which contests that it is a party to the arbitration agreement or vice versa, that is where a party to the arbitration agreement denies that another entity is a party to that arbitration agreement.

4.67 An example of the latter is found in the High Court of Brunei decision *Royal Brunei Airlines Sdn. Bhd. v Philip Tan Kok Ming*.[73] The defendant was attempting to stay litigation proceedings commenced against him by invoking an arbitration agreement. The defendant was not a signatory to the arbitration agreement himself, but had provided a guarantee in favour of one of the signatories. Chief Justice Roberts of the Brunei High Court stated:[74]

> It seems to me to follow, from the fact that neither an assignee of a debt nor a surety is bound by an arbitration award, that it would not be open to the court to stay proceedings before it in either event, since neither the assignee nor the surety could properly be said to be acting 'through or under' the assignor or the principal debtor.
>
> . . .
>
> I do not consider that it is reasonable to stay these proceedings. The effect of such a stay would be to make Tan subject to an arbitration agreement to which he was not a party.

4.1 Non-signatories

4.68 The consensual nature of arbitration has been repeatedly emphasised throughout this chapter, and indeed throughout this book. It is so important that as a general rule written evidence is required to establish an arbitration agreement. However, a strict signature requirement would not accommodate the realities of cross-border trade, multinational companies and the inevitable temporal

73 *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1993] BNHC 18.
74 Ibid.

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evolution of corporate structures and ownership. Courts, arbitral tribunals and commentators have developed numerous theories that may bind non-signatories to an arbitration agreement. Several of these theories were conveniently set out in the 1995 US decision of *Thomson-CSF SA v American Arbitration Association and Evans & Sutherland Computer Corporation*.[75] The court recognised five theories whereby a non-signatory could be bound by an arbitration agreement:[76]

(i) *Incorporation by reference*. This has been discussed elsewhere in the context of the formalities of an arbitration agreement.[77]

(ii) *Assignment/Assumption*. As the name suggests, this describes the circumstance when a non-signatory assumes or takes over one party's obligations under a contract. Together with taking on any potential liability, the non-signatory may also assume the remedial right (and obligation) to arbitrate. This is discussed at Section 4.1.3.

(iii) *Agency*. The question of whether an agent has the authority to enter into an arbitration agreement is one which will most likely be determined by reference to domestic laws. Accordingly, the arbitral tribunal would need to conduct a conflict of laws determination to ascertain which agency laws apply.[78] This is a question for the arbitral tribunal not a court.[79]

(iv) *Alter Ego/Group of Companies*. This is discussed at Section 4.1.1.

(v) *Estoppel*. This is discussed at Section 4.1.2.

4.1.1 Alter ego and group of companies

The alter ego theory arises where:[80] 4.69

> one party so dominates the affairs of another party, and has sufficiently misused such control, that it is appropriate to disregard the two companies' separate legal forms and to treat them as a single entity.

This question is often said to turn on actual or de facto control, and most likely requires 'unfettered control'.[81] Whether this exists is a matter for determination by the arbitral tribunal.[82] 4.70

75 64 F 3d 773, 776 (2d Cir 1995) (US Court of Appeals, 2nd Circuit).
76 For a summary of some of these theories, see also M Saraf, 'Who is a Party to an Arbitration Agreement – Case of the Non-Signatory, Institutional Arbitration in Asia', Collection of Papers Presented at ICC–SIAC Symposium, Singapore, 18–19 February 2005, pp. 1–71; and A Yeo, 'Who is a Party – Case of the Non-Signatory, Institutional Arbitration in Asia', Collection of Papers Presented at ICC–SIAC Symposium, Singapore, 18–19 February 2005, pp. 72–80.
77 See Section 2.3.2.
78 See generally Chapter 3.
79 For example, see the Hong Kong High Court decision of *Private Company Triple V Inc v Star (Universal) Co Ltd, Sky Jade Enterprises Group Ltd* [1995] HKCU 27 which decided that the question of whether an agent could bind a principle to an arbitration agreement was a question for the arbitrator.
80 Born, op. cit. fn 19, p. 1154.
81 See, e.g. in relation to shareholders, Malaysian Court Practice Rules of the High Court, Rule 24.1 states, among other things, 'Accordingly, in *Re Tecnion Investments* [1985] BCLC 434 at 439, the Court of Appeal held that a majority shareholder in a company does not necessarily have power over company documents. Although he is in a dominant position, he does not have "unfettered control" of the company so as to be its "alter ego"'.
82 *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR 174.

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4.71 Parties frequently incorporate special purpose vehicles for a particular transaction, for example a local subsidiary may be incorporated by a foreign multinational construction company for a project it is undertaking in the subsidiary's country. It may be this subsidiary that actually signs the contract containing the arbitration agreement. Since it is a separate legal entity, its foreign parent will not be prima facie bound by the contract or its arbitration agreement even if it owns 100% of the subsidiary's shares. Domestic legal systems provide a variety of mechanisms by which this 'corporate veil' can be 'lifted' or 'pierced', for instance where there has been fraud or a deliberate attempt to abuse the corporate system for an illegal purpose such as evading liabilities.[83] Generally, legal systems and courts protect corporate personality and are reluctant to lift or pierce a corporate veil.

4.72 In addition to domestic legal provisions relating to piercing a corporate veil or groups of companies, there are several theories that have developed in arbitration practice pursuant to which related companies, particularly parent companies, are considered parties to arbitration agreements. These theories are closely related to domestic alter ego type theories and can be found in both common and civil law jurisprudence.[84] Here the key question is usually factual participation by the related entity in the negotiations and/or, most importantly, the performance of the underlying transaction. The fact that a party and a non-signatory may be part of the same group of companies is not in and of itself sufficient.[85]

4.73 Use of the group of companies and alter ego doctrines in international arbitration is well-established in certain European jurisdictions[86] and certain US states, but has seen very limited application by courts in this region. A Global Arbitration Review publication 'Getting the Deal Through' surveyed the conduct of international arbitration in over 30 countries.[87] Participating authors were asked specifically about the application of the group of companies doctrine. Relevant to this region, it was said to be unsettled law in Australia, not recognised in India (and perhaps Japan), there were no reported cases in Hong Kong, and it was found only to apply in taxation or insolvency matters in New Zealand. While case law from Singapore indicates that both the alter ego and single economic group of companies theories will be recognised in some matters, Singaporean law

83 See, e.g. Korean Supreme Court, Case no. 2004Da26119 (25 August 2006) and the Hong Kong Court of Appeal decision in *China Ocean Shipping Co v Mitrans Shipping Co Ltd* [1995] HKCA 604. See generally, A Capuano, 'The Realist's Guide to Piercing the Corporate Veil: Lessons from Hong Kong and Singapore', (2009) 23 *Australian Journal of Corporate Law* 1. See also Chapter 10, Section 4.4.

84 See, e.g. *Smith Stone and Knight v Birmingham Corporation* [1939] 4 All ER 116. For a broad but comprehensive discussion of these issues see J Hosking, 'The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent', (2003–2004) 4 *Pepperdine Dispute Resolution Law Journal* 469, at p. 469. For an even more comprehensive study, see B Hanotiau, 'Problems Raised by Complex Arbitrations Involving Multiple Contracts – Parties – Issues', (2001) 18(3) *Journal of International Arbitration* 251. See also S Jarvin, 'The Group of Companies Doctrine', (2002) *ASA Special Series* 19 (December) p. 19.

85 Born, op. cit. fn 19, p. 1171.

86 However, the group of companies doctrine was expressly rejected as part of English law in *Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm).

87 G Wegen and S Wilske (eds), *Getting the Deal Through – Arbitration in 33 Jurisdictions Worldwide*, Global Arbitration Review, Law Business Research Inc, 2007. The information is expressed to be current to February 2007.

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remains unsettled.[88] It is likely that national perspectives will be influenced by the respective approaches to piercing the corporate veil found in each country's corporate law regime.

4.74 While such theories have not been readily applied by domestic courts in the Asia-Pacific, international arbitral tribunals seated in the region have applied such theories on numerous occasions.[89] Given the strong trend towards recognising alter ego or group of companies theories in continental Europe and the US, it is possible that Asia-Pacific jurisdictions will eventually follow suit. The juridical foundation for this development may be the good faith requirement most prevalent in civil legal jurisdictions but also emerging in some common law jurisprudence. It is also possible, however, that those Asia-Pacific jurisdictions following the Common Law tradition will be influenced by the rather conservative approach taken by English courts.

4.1.2 Estoppel

4.75 Estoppel is basically a legal principle by which a party is prevented from denying representations arising out of words or deeds on which another party has relied to its detriment. Even if there is no detrimental reliance, the party making the representations may also be estopped from denying them where such a denial would be unconscionable. Estoppel is a common law principle, although it has been accepted in other jurisdictions in particular in the context of international arbitration.[90] Furthermore, civil law jurisdictions achieve similar results through principles such as good faith and *venire contra factum proprium*.[91]

4.76 There are two stages of the arbitral proceedings at which estoppel may be raised in relation to the arbitration agreement. The first is in front of a domestic court which has been asked to stay litigation, and so prior to the arbitration commencing a party may be estopped (prevented) by that court from denying the existence of the arbitration agreement. The second occurs after an arbitration has been commenced, or even concluded, and one party asserts that there is no arbitration agreement.[92]

88 *Win Line (UK) Ltd v Masterpart (Singapore) Pte Ltd* [2000] 2 SLR 98. It is interesting to note that the judge in that case was Judith Prakash who is frequently tasked with hearing arbitration cases. In this particular case, Judge Prakash refused to extend the doctrines to encompass two companies with completely different shareholders.

89 See, e.g., the arbitration described in the Singaporean court decision of *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR 174, and commentary on that decision suggesting that it can be taken as the first endorsement of the alter ego doctrine in Singapore arbitration law; L Boo, 'Arbitration Law', (2006) 7 *Singapore Academy of Law Annual Review of Singapore Cases* 51.

90 For example in France, see *Golshani v Islamic Republic of Iran*, (Cour de Cassation) dated 6 July 2005, Case no. 01–15912 and more recently *Merial SAS v Klocke Verpackungs – Service GmbH*, 9 October 2008, Case no. 07–06619.

91 The broad acceptance of estoppel and like theories is demonstrated by their utilisation in international law. See JR Weeramantry, 'Estoppel and the Preclusive Effects of Inconsistent Statements and Conduct: The Practice of the Iran-United States Claims Tribunal' (1996) 27 *Netherlands Yearbook of International Law* 113, at pp. 114–15.

92 The Malaysian case of *Bintulu Development Authority v Pilecon Engineering Bhd* [2007] 2 CLJ 422 is one example. From China the Reply of Supreme People's Court to Request of Enforcement of Arbitral Award made in England by Swiss Bangji Co., Ltd (Civil 4, Miscellaneous), No. 47 (2006), also demonstrates this although in the context of enforcement proceedings.

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4.77 Examples of both situations can be found in Malaysian jurisprudence. The case of *Lai Sing Kejuruteraan (M) Sdn Bhd v Ten Engineering Sdn Bhd*[93] is an example of the first situation. It was alleged in that case that the arbitration clause had been incorporated by reference. The judge found that the conduct of the party resisting arbitration had been such that it could not be allowed to deny it had intended to incorporate all terms (including the arbitration agreement) into its relationship with the other party.[94] The Malaysian Court of Appeal decision in *Bintulu Development Authority v Pilecon Engineering Bhd*[95] is an example of the second situation. In this case one party attempted to dispute the existence of an arbitration agreement despite its participation in the arbitration without denying jurisdiction. The estoppel takes effect because during the arbitration the party's acts were inconsistent with its subsequent assertion that no arbitration agreement existed. The court there found in favour of arbitration.[96]

4.1.3 Assignment

4.78 An assignment is a legal term that refers to the transfer of property or rights (such as contractual benefits and obligations) to another party.[97] This other party may be a third party that was previously unrelated to the transaction. As such, where a contract containing an arbitration agreement is assigned, the third party ordinarily will not have signed the contract or the arbitration agreement.

4.79 Born has noted a lack of uniform rules concerning the assignment of arbitration agreements.[98] The question of whether rights and obligations of an arbitration agreement are capable of assignment is sometimes addressed within the arbitration agreement itself.[99] Alternatively, a separate clause in the contract may indicate whether the contract as a whole can be assigned. In such a case or where there is no contractual provision expressing this power, regard will need to be had to a number of laws.

4.80 Redfern and Hunter suggest that the effect of an assignment on an arbitration agreement will be determined primarily by two laws – the law governing the assignment and the law governing the arbitration agreement.[100] With respect to the law governing the assignment, some jurisdictions require specific intent to assign the arbitration clause but others assume such intent when a general

93 [1997] MLJU 197.

94 Judicial Commissioner Kamalanathan Ratnam made this finding notwithstanding that estoppel had not been pleaded by the parties. He stated 'so long as evidence has been led from which the Court can perceive estoppel there is no need to actually spell it out as a plea' at para 6 citing *Boustead Trading (1985) Sdn BhD v Arab Malaysia Merchant Bank Bhd* [1995] 3 MLJ 331.

95 [2007] 2 MLJ 610.

96 See the discussion of waiver in Chapter 5, Section 3.5.

97 For a detailed discussion of assignment in Anglo-Australian contract law see, G Tolhurst, *The Assignment of Contractual Rights*, Hart Publishing, 2006.

98 Born, op. cit. fn 19, p. 1192.

99 See, e.g., the arbitration clause extracted in the Kuala Lumpur Supreme Court case of *Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309 – the relevant part reads 'All disputes, differences and questions which may at any time arise between the parties hereto or their respective representatives or assigns touching or arising out of or in respect of this agreement or the subject matter thereof shall be referred to a single arbitrator'.

100 Redfern, Hunter et al, op. cit. fn 48, para 3–34.

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assignment of rights takes place. In the Philippines, the Manila Court of Appeals has held:[101]

> the assignee will be bound by the [arbitration] agreement because assignment involves a transfer of rights as to vest in the assignee the power to enforce such rights to the same extent as the assignor could have enforced them against the other party to the agreement.

4.81 A similar position is found in Australia,[102] as well as in China, following the 2000 decision of *China Henan Import-Export Co v Xinquan Trade Ltd*.[103] The position in China was further clarified in the Supreme People's Court's Interpretation of Several Issues regarding the Application of the Arbitration Law of the PRC.[104] Article 9 of the Interpretation indicates that an assignment will bind the assignee, unless the parties have agreed otherwise, the assignee has clearly objected to the arbitration agreement at the time of the assignment, or the assignee is unaware of the arbitration agreement at the time of the assignment.[105]

4.82 Finally, where the enforcement of an arbitral award involving an assignee is sought, it may also be necessary to consider the validity of the assignment pursuant to the laws of the place of enforcement. Although such considerations are undesirable from a policy perspective, an example of it occurring is found in the Malaysian decision of *Harris Adacom Corporation v Perkom Sdn Bhd*.[106] It is not clear why the judge believed it was necessary to consider whether the assignment was valid under Malaysian law in that instance, after having first found that the parties had agreed that Florida law applied to the assignment.

4.2 Capacity

4.83 A party must have the capacity to enter into an arbitration agreement. In every jurisdiction, rules regulate a legal person's ability (be they an individual or corporate entity) to enter into a binding contract. The issue of a party's capacity to enter into an arbitration agreement should be relatively straightforward. An arbitration agreement is no different from any other contract in this respect.[107] Issues as to capacity may be raised before or during the arbitration and may be submitted as a ground to set aside the award. Capacity to enter into an arbitration agreement can also be relevant at the time of enforcement of an award. Article V1(a) of the New York Convention states that enforcement may be refused if one of the parties was 'under some incapacity'.

4.84 A question of capacity often becomes a point of dispute when one of the parties is a state entity. In some jurisdictions, state entities or statutory bodies

101 *Heritage Park v Construction Industry*, CA-G.R SP No. 86342, 9 February 2005.
102 See *Paxton Enterprises Pty Ltd v Brancote Australia NL* [2000] WASC 273.
103 Supreme People's Court, (Civil, Economic), Final, No. 48 (2000).
104 FaShi [2006] No. 7.
105 Chen Wei-qi, 'Recent developments in the judicial interpretation on Arbitration Law in China' (2007) 4(5) *US–China Law Review* 57, at pp. 59–60.
106 (1993) 3 MLJ 506.
107 Capacity was also considered briefly in Chapter 3, Section 2.

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are precluded from entering into arbitration agreements. In other situations, where a state offical or body (such as a ministry) has signed the arbitration agreement, a question may arise as to whether that signature binds the state itself.

4.85 This issue has been considered by Dunham and Greenberg.[108] The authors observe that nation states should not be permitted to rely on their own laws to escape an arbitration agreement:[109]

> This principle is also recognised in international arbitral jurisprudence. One leading example is [ICC Case No 1939] rendered in 1971 in which the tribunal stated: 'international ordre public would vigorously reject the proposition that a state organ, dealing with foreigners, having openly, with knowledge and intent, concluded an arbitration clause that inspires the co-contractant's confidence, could thereafter, whether in the arbitration or in execution proceedings, invoke the nullity of its own promise.' The principle that a state may not rely on its national law to escape its obligation to arbitrate appears as a 'truly international public law provision for international arbitration law' which is independent from the content of the domestic law of the state concerned.

5 Defined legal relationship

4.86 The requirement of a 'defined legal relationship' found in Article 7(1) of both the 1985 and 2006 versions of the Model Law, as well as Article II(1) of the New York Convention, means that a single arbitration agreement cannot purport to cover all disputes that might arise between the parties. The arbitration agreement has to be limited in scope to disputes arising *in respect of a defined legal relationship*. The precise circumstances that would amount to a *defined legal relationship* have not been clarified in legislation and any attempt to do so may be fraught with difficulty. New Zealand Court of Appeal authority suggests that 'a defined legal relationship was a relationship which gave rise to the possibility that one party was entitled to some form of legal remedy against the other'.[110] At an earlier stage of those proceedings, Justice Fisher of the New Zealand High Court had opined:

> The next phrase traversed in argument was 'a defined legal relationship'. Several factors suggest that this phrase has a particularly broad meaning. First, the relationship need not be contractual ('whether contractual or not'). Secondly, s 10(1) [of the *New Zealand Arbitration Act 1996*] appears to envisage that arbitration agreements can embrace any dispute which the parties have agreed to submit to arbitration so long as the arbitration agreement is not contrary to public policy or, under any other law, is not capable of determination by arbitration. Thirdly, the survey of policy considerations and implied legislative intentions conducted earlier suggests that Parliament would not have intended to reduce the range of disputes previously amenable to arbitration.

108 P Dunham and S Greenberg, 'Balancing Sovereignty and the Contractor's Rights in International Construction Arbitrations Involving State Entities', (2006) 23(2) *International Construction Law Review* 130.
109 Ibid., p. 132 (footnotes omitted). See also Chapter 3, fn 10.
110 *Methanex Motunui Ltd v Spellman* [2004] 3 NZLR 454, at para 61.

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> Those considerations support the view that 'defined legal relationship' is neither confined to relationships recorded in documents nor to formal relationships such as contracts, trusts or partnership agreements. Consistent with this view, it has been held that they include relationships between persons in breach of statutory duty and their victims: *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* (1997) 145 ALR 500 (arbitration clause upheld where dispute under Trade Practices Act 1974 (Aust), the Australian equivalent of the Fair Trading Act 1986 (New Zealand), appeal allowed on another aspect (1998) 149 ALR 142).
>
> There must be some limitation imposed by the expression 'defined legal relationship' if complete redundancy is to be avoided. As a bare minimum, the expression would seem to indicate that the dispute must be of a legal nature as distinct from a merely religious, cultural, academic, or social one.[111]

4.87 A similarly broad approach can be seen in Australian case law. In *Hi-Fert Pty Ltd v Kiukiang Marine Carriers Inc*,[112] Justice Tamberlin of the Australian Federal Court found that a statutory relationship between a party alleged to have engaged in misleading conduct and the party who claimed loss was a relevant and sufficiently defined legal relationship.

4.88 Born has noted that in practice, 'the "defined legal relationship" requirement has seldom been tested and has very limited practical importance'.[113] His discussion of the issue suggests that the requirement may have originated from historical distinctions between arbitration agreements and submission agreements.[114] The historical distinctions were directed at whether an arbitration agreement was a valid contract, whereas nowadays the focus appears to be on the intended scope of an arbitration agreement. This shift in focus can be seen in the discussion of this issue by Redfern and Hunter.[115] It is also evident in the deliberations of the UNCITRAL Working Group revising the UNCITRAL Arbitration Rules. The phrase 'defined legal relationship' now appears in Article 1 of the 2010 rules. The Working Group's report on its 46th session stated:[116]

> The Working Group considered whether the words 'in respect of a defined legal relationship, whether contractual or not,' should be added to paragraph (1). It was suggested that these words should not be added as they might unnecessarily limit the scope of the Rules and could raise difficult interpretative questions. It was also said that the reference to a 'defined legal relationship' might not easily be accommodated in certain legal systems.
>
> In response, it was said that the words 'in respect of a defined legal relationship, whether contractual or not' were well recognized given that they were derived from the New York Convention, and were also included in article 7, paragraph (1) of the UNCITRAL Arbitration Model Law. In favour of their retention, it was said that these words put beyond doubt that a broad range of disputes, whether or not arising out of a contract,

111 [2004] 1 NZLR 95, at para 83.
112 *Hi-Fert Pty Ltd v Kiukiang Marine Carriers Inc* (1997) 145 ALR 500.
113 Born, op. cit. fn 19, p. 256.
114 See Section 2.2.
115 Redfern, Hunter et al, op. cit. fn 48, para 3–10.
116 UN Doc A/CN.9/619, paras 22 and 23.

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could be submitted to arbitration under the Rules and that their deletion could give rise to ambiguity. It was also suggested that these words would have educational impact on the future developments in the field of international arbitration. (Emphasis added)

6 Consolidation, joinder and third party notices

4.89 Consolidation, joinder and intervention are increasingly associated with procedural aspects of arbitrations arising from disputes involving more than two parties or two parties but more than one contract. In contrast, the use of third party notices in international arbitration appears to be less common. Fundamentally, they are all issues of consent and as such are intimately connected to the arbitration agreement(s).

4.90 Consolidation involves the fusion of two or more separate and independently existing arbitrations into one. Joinder and intervention, on the other hand, concern the introduction of one or more additional parties[117] into a single, existing arbitration. Joinder and intervention are opposite sides of the same coin. The former refers to the situation where an existing party to the arbitration seeks to add a new party. The latter is when an entity that is not a party to the arbitration wishes to become a party. Third party notices are a device more commonly known to domestic court procedure and used when one party (typically the respondent) wants a third party, for instance its supplier, to be present at the arbitration because it may have a subsequent action against the third party.

4.91 The practice of consolidating court cases or joining third parties to court actions is widespread within domestic courts. It may further the interests of justice to combine related cases so as to avoid inconsistent outcomes. Mechanisms accordingly exist for courts to make compulsory orders to this effect when it is procedurally efficient to do so. However, as Born notes 'consolidation, joinder and intervention in international arbitration, as well as domestic arbitration, raise additional or different issues than in national court litigation'.[118] A fundamental difference is that a national court with appropriate jurisdiction has the power to compel a party's participation, whereas arbitrators have authority only over proper parties to the arbitration. Another difference stems from the origin and purpose of a national court. Whereas an arbitral tribunal owes its existence and power to the parties' agreement, a national court is an organ of the state. This means the court must consider its jurisdiction at large rather than simply the mandate to resolve particular disputes between parties. Competent courts can, therefore, both unilaterally invite[119] and even compel the participation of third parties.

117 Although it is common to speak of the introduction of 'parties', see the discussion of ICC Case No. 12171 below in section 6.3.

118 Born, op. cit. fn 19, p. 2069.

119 ICSID and NAFTA tribunal decisions also have a public interest aspect and it is therefore not surprising that they are given the power to invite third party submissions. See further C Kessedjian, 'Sir Kenneth Bailey Memorial Lecture: Dispute Resolution in a Complex International Society', (2005) 29 *Melbourne University Law Review* 765 at 784. Rule 37(2) of the ICSID Rules was inserted into those Rules in 2006 and NAFTA Free Trade Commission, *Statement of the Free Trade Commission on Non-disputing Party Participation*, 7 October 2003. It states that 'the Tribunal may allow a person or entity that is not a party to the dispute . . . to file a

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4.92 Consolidation, joinder and intervention deserve proper consideration given the increased complexity of cross-border commercial relationships and the consequential rise in international arbitrations involving more than two parties. This increase can be seen, by way of example, from ICC statistics on multiparty arbitrations. In 2009, 233 ICC arbitrations (or 28.5% of all ICC arbitrations for that year) involved more than two parties. Out of these 233 cases, 206 (88.4%) involved between three and five parties, 21 (9%) involved between six and 10 parties, and six (2.6%) involved more than 10 parties. One case filed in 2009 had 19 different parties. The existence of multiple parties to an arbitration does not, however, necessarily mean that issues of joinder or consolidation will arise. In the three years from 1 January 2007 to 31 December 2009, the ICC Court dealt with only 24 contested requests for consolidation of cases, eight of which were accepted by the court and the remainder rejected. In the same time period, the court heard twenty one contested requests for joinder of a new party, 13 of which were allowed and the rest rejected.[120]

4.93 There are numerous issues that can arise when consolidation, joinder or intervention is sought. For example, the more parties involved in an arbitration the longer it is likely to take, and thus adding parties may adversely affect the speed and efficiency of resolving the initial dispute. Similarly concern for the maintenance of confidentiality can arise. Confidentiality may be an important factor in a party's decision to choose arbitration over litigation. A perceived problem with allowing consolidation, joinder or intervention is that it potentially increases the number of entities that become aware of both the dispute and the evidence. The decision to consolidate, join or permit intervention must therefore give due consideration to issues of confidentiality.[121]

4.94 Consolidation, joinder and intervention, and third party notices are discussed further in turn below. However, irrespective of which of these is being considered, evidence of consent of all participants avoids any debate about whether it is possible. The solutions offered by arbitral rules differ on whether specific consent is needed at the time of the proposed third party participation or whether this can be given broadly, before the issue arises. Voser suggests that joinder should only be permitted on consideration of all the circumstances and in cases where the

written submission with the Tribunal regarding a matter within the scope of the dispute'. It then proceeds to set out relevant criteria for the ICSID tribunal to consider including the assistance that the non–party could provide in determining a factual or legal matter and whether that party has a significant interest in the proceedings. It also adds that '[t]he Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission'. One of the reasons for including this amendment was the public character of many of the issues that arise in ICSID arbitrations and the impact that these arbitrations may have on the wider community. Nonetheless, the rule does not grant the ICSID tribunal a power to compel the filing of a written submission by third party.

120 These figures only include applications for joinder or consolidation made to the ICC Court. Under the ICC Rules and practice it is only the court, and not arbitral tribunals, that can decide to join a new party or consolidate arbitrations. Parties nonetheless sometimes make (misguided) applications to arbitral tribunals for such relief. These statistics are cited from S Greenberg, J Feris and C Albanesi, 'Consolidation, Joinder, Cross-Claims, Multiparty and Multicontract Arbitrations: Recent ICC Experience', in B Hanotiau and EA Schwartz (eds), *Multiparty Arbitration*, Dossier VII, ICC Institute of World Business Law, ICC Publication No. 701, September 2010.

121 Confidentiality is discussed in Chapter 7, Section 11.

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'balancing of interest between the party refusing joinder and the party requesting joinder clearly strikes in favour of the party requesting the joinder'.[122] Any dispute as to whether consent had been given would be for the arbitral tribunal to decide, rather than a matter requiring domestic court intervention.

4.95 Given the rise in multi-party arbitrations,[123] it may be desirable that arbitration rules and laws address the issues of consolidation, joinder and intervention more specifically. It is expected that these matters will form a substantive change in the forthcoming ICC Rules, which are expected to become effective as of January 2011.

6.1 Consolidation

4.96 As noted above, consolidation involves bringing two or more separate arbitrations together and hearing them as one. If all parties to all arbitrations agree, consolidation can easily be effected. Courtesy dictates that the arbitral tribunal's consent is necessary, but it would be difficult to conceive of a situation where the arbitral tribunal (or arbitral tribunals) would refuse consolidation in the face of an agreement of all parties. Problems arise when at least one party to one of the arbitrations does not agree to consolidation.

4.97 The Model Law and the New York Convention are silent on the issue of consolidation. This should not be interpreted as meaning that consolidation is not possible, but rather that it is a matter of party autonomy. Born notes that the drafters of the Model Law 'considered but rejected proposals to address [consolidation, joinder and intervention], both in the original 1985 version of the Law and in the 2006 revisions'[124] as it was a matter for party agreement.

4.98 Several countries in the Asia-Pacific region have incorporated specific consolidation provisions into their international arbitration laws. Those provisions generally require parties expressly to opt in to the consolidation regime. Section 24 (in combination with Section 22) of the Australian International Arbitration Act 1974 is an example. When parties have opted in, the relevant arbitral tribunal is empowered to make a decision on consolidation. In contrast, the legislation of Hong Kong and New Zealand ordinarily grants power to their courts to order consolidation in domestic arbitrations and thus it is not necessary for parties specifically to opt in. In both those jurisdictions, parties to an international arbitration may agree to the application of the relevant legislative provisions, but absent such an agreement those legislative provisions are applicable to domestic arbitrations only.[125] The provisions are therefore of the opt-in variety for international arbitration. The laws of Singapore and Malaysia also consider the

122 N Voser, 'Multi-party Disputes and Joinder of Third Parties', (2008) 14 *ICCA Congress Series* 343, at p. 395.
123 Referred to above at para 4.92.
124 Born, op. cit. fn 19, p. 2077 (footnotes omitted).
125 Hong Kong Arbitration Ordinance, Section 6B. The New Zealand legislation first grants the power to the arbitral tribunal, but in the event the arbitral tribunal refuses to order consolidation, a party can seek the same order from a court, New Zealand Arbitration Act 1996, Second Schedule, Article 2.

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possibility of consolidation in domestic arbitration. In both jurisdictions the power may be given to the arbitral tribunal where the parties have agreed to confer such a power.[126] It is possible for parties conducting their international arbitration in Malaysia to opt into the application of its law governing the consolidation of domestic arbitrations.

4.99 The arbitral rules used by some institutions in the Asia-Pacific region also contain specific provisions on consolidation. The Indian Council of Arbitration Rule 39 permits the registrar, with the consent of all parties, to direct that hearings be heard jointly, or refer different applications for arbitration proceedings to the same arbitral tribunal. That rule goes on to state specifically that a separate award must still be given in each arbitration. In effect, this procedure does not amount to consolidation but rather a parallel hearing of separate cases by the same panel of arbitrators in each. Similarly, the Rules of the Bangladesh Council for Arbitration specifically state that an arbitral tribunal does not have the power to consolidate proceedings unless consent is given on agreed terms by the parties.[127] JCAA Rule 44 provides that either the JCAA or any arbitral tribunal may, on its own initiative, consider whether consolidation should occur, but may only consolidate once written consent of all the parties is obtained. If, however, the arbitrations all arise out of the same arbitration agreement, then such consent is not needed.[128] There is no apparent requirement that the parties be identical in the different arbitrations to be consolidated under these rules. Such a requirement exists in Article 4(6) of the ICC Rules, giving it the advantage of predictability, but is sometimes criticised as being unnecessarily restrictive.

4.100 Finally, if parties wish to ensure that related arbitrations can be consolidated, this should be considered at the time the arbitration agreement (or agreements, where there are multiple contracts) is drafted. A properly drafted consolidation clause in the contract (or in each of the related contracts, as the case may be) is the best way to ensure that consolidation takes place as the parties desire.

6.2 Joinder and intervention

4.101 The issues of joinder and intervention are similar. Both deal with the introduction of a third party to an existing arbitral proceeding. In the case of joinder, an existing party to the arbitration attempts to bring a third party into the proceedings, and to have that third party bound by the outcome of the proceedings. In the case of intervention, it is the third party itself that is seeking to participate in the arbitration proceedings. As noted above, these questions relate fundamentally to consent.

126 Singapore Arbitration Act 2001, Section 26; Malaysian Arbitration Act 2005, Section 40(2).
127 BCA Rules, Rule 23.1.
128 JCAA Rules, Rule 44(1) provides: 'If the Association or the arbitral tribunal determines that it is necessary to consolidate multiple requests for arbitration that contain claims that are essentially and mutually related, the arbitral tribunal, after obtaining the written consent of all the relevant parties, may examine such cases together in the same proceedings; provided that, if multiple requests for arbitration arise out of the same arbitration agreement, no consent of the parties is necessary.'

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4.102 If all of the parties to the existing arbitration as well as the potential new party consent to joinder or intervention, there should be no problem effecting it. As an additional part of its consent, the new party would need to agree to the already constituted arbitral tribunal (if there is one) and to the prior proceedings of the arbitration. As in consolidation, the arbitral tribunal's consent would need to be sought as a matter of courtesy.

4.103 Much like consolidation, problems relating to joinder and intervention arise when at least one party – either an existing party or the new party – does not agree. The arbitral tribunal or arbitral institution must consider whether the parties have previously given their consent, and whether that is sufficient.

4.104 Although most arbitration agreements and arbitral rules are silent on the question of joinder, arbitral tribunals have inherent power to consider whether consent has been given to the type of joinder application that is being sought. This power results from the arbitral tribunal's general power to determine the procedure, and is supported analogously by the doctrine of competence-competence.[129] Where the arbitral rules contain specific reference to joinder, an arbitral tribunal will need to apply the mechanism and elements of these provisions carefully, as they reflect exactly the process to which the parties have consented.

4.105 The SIAC Rules specifically describe the conditions for joinder. SIAC Rule 24(b) states that an arbitral tribunal may 'allow other parties to be joined in the arbitration, provided that such person is a party to the arbitration agreement, with the written consent of such third party . . . '. This is one of the rules that was specifically amended in the 4th Edition of the SIAC Rules following criticism of the 2007 version.[130] The 2010 UNCITRAL Arbitration Rules also now permit joinder in Article 17(5). Pursuant to the new UNCITRAL rule the arbitral tribunal may at the request of any party join a third party provided that the party to be joined is a party to the arbitration agreement, and only after giving existing parties the opportunity to object on the basis of prejudice.

4.106 Beyond this region, examples of rules which deal with joinder and/or intervention include LCIA Rules Article 21.1(h), and Swiss Rules Article 4(2). The Swiss Rules provision is particularly interesting because it does not refer to consent at all:

> Where a third party requests to participate in arbitral proceedings already pending under these Rules or where a party to arbitral proceedings under these Rules intends to cause a third party to participate in the arbitration, the arbitral tribunal shall decide on such request, after consulting with all parties, taking into account all circumstances it deems relevant and applicable.

4.107 There has been a wide range of commentary on this Swiss provision. Some commentators believe that by virtue of this article the parties give their consent to the participation of third parties at the time they conclude their arbitration

129 Competence-competence is dealt with in Chapter 5.
130 Voser, op. cit. fn 122, p. 399.

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agreement – that is usually long before any dispute arises.[131] Other commentators disagree and argue that it is not reasonable to find implicit consent in this way.[132]

4.108 The ICC International Court of Arbitration, while its rules are silent on the question of joinder, developed a practice beginning from 2001 according to which the ICC Court itself decides whether new parties can be joined to an arbitration upon the application of an existing party. Three conditions need to be satisfied:

(i) no step has been taken towards the constitution of the arbitral tribunal (since the third party should, once included, have the right to participate in constituting the arbitral tribunal);

(ii) the party to be joined signed the arbitration agreement (this shows a clear intention beyond basic participation in the negotiation and performance of the contract); and

(iii) the party requesting the joinder has introduced claims against the party to be joined (merely reserving the right to raise claims later, or raising a conditional claim is generally insufficient, but an unfounded claim might be accepted as it is not for the ICC Court to determine whether a claim is well-founded).[133]

4.109 During the initial years of implementing this practice, the ICC Court was strict in relation to the second element, that is requiring that the party to be joined signed the contract containing the arbitration agreement. However, in recent years the ICC Court has relaxed that requirement provided that there is evidence that the new entity to be joined is or could be a party to that arbitration agreement.[134] Some examples are described below.[135]

4.110 The ICC Court allowed joinder of a third party where the third party had signed an MOU amending the initial contract, but had not signed the contract itself. The new party was the claimant's parent company. In addition to the new party's signature of the MOU, which indisputably related to the contract and incorporated provisions of it, the ICC Court took into account many other factors, including that the new party had closely participated in the performance of the contract and had played a key role in settlement negotiations relating to the dispute.

4.111 In another case, the ICC Court joined a third party which was, undisputedly, the legal successor of a party to the contract containing the arbitration clause. The successor had signed a second, related contract which contained an identical arbitration clause. In another succession case, the arbitration was commenced by a claimant under a Joint Venture Agreement ('JVA') which it had not signed.

131 T Zuberbühler, K Müller and P Habegger (eds), *Swiss Rules of International Arbitration: Commentary*, Kluwer Law International, 2005, at p. 41; Lew, Mistelis and Kröll, op. cit. fn 16, para 16–42.
132 A Meier, *Einbezug Dritter vor internationalen Schiedsgerichten*, Schulthess, 2007, p. 152.
133 See A Whitesell and E Silva-Romero, 'Multiparty and Multicontract Arbitration: Recent ICC Experience', *ICC International Court of Arbitration Bulletin*, Special Supplement, 2003, p. 10.
134 L Malintoppi and S Greenberg, 'The Practice of the ICC International Court of Arbitration Concerning Multi-Party Contracts and Scrutiny of Awards', *ICC Young Arbitrators Forum*, Barcelona, 26–29 June 2008, para 23 et seq. For a thorough explanation of all the ICC Court's practices in respect of multiparty and multicontract arbitration, see Greenberg, Feris and Albanesi, op. cit. fn 120.
135 The examples are from Malintoppi and Greenberg, ibid.

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The respondent in the proceedings (a signatory to the JVA) sought to join a new party which had signed the JVA. According to the claimant, this third party had assigned to the claimant all of its rights, interests and obligations under the JVA. However, the respondent contended that the third party remained separately bound by non-compete obligations in the JVA, and by its arbitration clause. The ICC Court decided that the third party should be joined, leaving to the arbitral tribunal the decision as to whether it had jurisdiction over the new party and, if so, whether that party owed any substantive obligations to the respondent after the assignment.

4.112 Intervention covers the situation where a third party requests to participate as a party in an existing arbitration. Again, as is the case in joining a party, the focus of the arbitral tribunal should be on the consent of the parties. For example, Rule 43 of the JCAA Rules appears to suggest that general consent to its rules is not sufficient and that specific consent from all parties (excluding the third party attempting to intervene) is required:

> *Rule 43. Participation in Proceedings*
> 1. Any interested person who is not a party to a particular arbitration may, with the consent of all the parties to such arbitration, participate in such arbitration as a claimant or be allowed to participate therein as a respondent.
> 2. If the participation in the arbitration provided for in the preceding paragraph occurs before the establishment of the arbitral tribunal, the arbitrators shall be appointed subject to the provisions of Rule 45 and, if such participation occurs after the establishment of the arbitral tribunal, the composition thereof shall not be affected.

4.113 As we observed at the conclusion of the section on consolidation, the best time for parties to contemplate joinder and intervention is during the drafting of the arbitration agreement.[136] A properly drafted joinder clause in the contract (or contracts) is the best way to ensure that it will work effectively and in the way desired by the parties.

6.3 Third party notices

4.114 There is another capacity in which a non-party to the arbitration might be required to participate in it. Third party notices address the situation where an existing party, typically a respondent party, believes it has a right to pursue a third party for any liability that may be awarded against it in the arbitration. Some domestic laws state that by causing the third party to participate in the proceedings, the third party will lose its right to assert that the respondent did not defend the initial case properly. To accommodate these laws, court systems have mechanisms such as 'third party notices' or 'vouching in'. It is questionable whether similar mechanisms are or should be available in international arbitration. However, an ICC arbitral tribunal seated in Zurich has noted that '[d]espite

136 See also E Tong Chun Fai and N Dewan, 'Drafting Arbitration Agreements with 'Consolidation' in Mind?', (2009) 5 *Asian International Arbitration Journal* 70.

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the lack of statutory regulations, scholars and courts agree that the participation of third persons to an arbitration procedure . . . based on third person notice is possible in principle . . . '.[137]

4.115 The arbitral tribunal in that instance drew a distinction between participating in an arbitration as a party and participating as a 'collateral intervener'.[138] This distinction was considered important because it was not necessary for a collateral intervener to be a party to the arbitration agreement. The arbitral tribunal further noted that 'the conclusion of an arbitration agreement reflects the intention of the parties to be subject to private and confidential proceedings that exclude third persons. Therefore, third persons can only be admitted to the arbitration proceedings if all parties to the proceedings agree to this'.

7 Enforcement of arbitration agreements

4.116 Most arbitration agreements constitute an exclusive mechanism for resolving disputes. By agreeing to arbitrate, the parties agree to waive their right to submit their dispute to a national court. Notwithstanding such agreement, it is often the case that once a dispute arises one of the parties will see an advantage in commencing court proceedings rather than arbitration or will simply want to delay the matter.

4.117 Enforcement of arbitration agreements concerns the extent to which a domestic court will respect the parties' exclusive arbitration agreement by staying its own proceeding when a party alleges that there is an arbitration agreement covering the dispute in question. This issue is addressed in the New York Convention,[139] Article II(1) of which provides:

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

4.118 If a court in a New York Convention state is called upon to recognise and enforce an arbitration agreement, and the Convention is applicable, pursuant to Article II(3), it must stay the proceedings in favour of arbitration. That Article provides:

> a court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article,[[140]] shall, at

137 *ICC Case No. 12171*, Award on Third Person Notice, 7 April 2004, (2005) 23(2) *ASA Bulletin* (references omitted).
138 The arbitral tribunal uses the German expression 'Nebenintervention' which it translates as collateral intervener but might also be translated as 'side intervener' or 'side party'.
139 The New York Convention is better known for its provisions on enforcement of arbitral awards. In fact, its title refers only to the recognition and enforcement of arbitral awards.
140 An agreement within the meaning of New York Convention Article II(3) is defined in Article II(1).

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> the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

4.119 The word 'shall' means that the state court has no discretion to refuse to stay its own proceedings and must refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[141] Similar wording can be found in Article 8(1) of the Model Law:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

4.120 Not surprisingly, given the obligatory nature of the stay, there have been many attempts to narrow the application of this requirement as it appears in the respective international arbitration laws of the countries in this region.[142]

4.121 Neither the New York Convention nor the Model Law stipulates whether the court should investigate the validity of an arbitration agreement. On one interpretation of these provisions, they appear to conflict with the competence-competence rule. That rule and the potential conflict are discussed in detail in Chapter 5.[143]

7.1 Existence of a dispute

4.122 An interesting issue sometimes raised in attempts to deny the enforcement of an arbitration agreement is the question whether the court must determine if there is in fact a dispute. Malaysian legislation follows the New Zealand position of permitting a court to refuse a stay where it finds that there is no dispute between the parties.[144]

> 10. (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds –
> (a) that the agreement is null and void, inoperative or incapable of being performed; or
> (b) that there is in fact no dispute between the parties with regard to the matters to be referred.

4.123 Judicial criticism of the New Zealand position was made in *Todd Energy Ltd v Kiwi Power (1995) Ltd*.[145] In other jurisdictions, without the wording found in

141 The extent of a domestic court's ability to investigate or decide whether an arbitration agreement is null and void, inoperative or incapable of being performed is discussed in Chapter 5, see section 4.2.
142 In addition to the discussion elsewhere in this book, see a discussion of Australian case law on this issue by R Garnett, 'The Current Status of International Arbitration Agreements in Australia', (1999) 15 *Journal of Contract Law* 29.
143 See Chapter 5, Section 4.2.
144 The extracted text is from the Malaysian Arbitration Act 2005; see also Article 8, Schedule 1 of the New Zealand Arbitration Act 1996.
145 High Court, Wellington, CP 46/01, 29 October 2001, per Master Thomson.

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the Malaysian and New Zealand legislation, courts have also been called on to determine whether there was in fact a dispute. In the Singaporean High Court case of *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* it was observed:[146]

> The existence or non-existence of a dispute or difference as envisaged under the relevant arbitration agreement between the parties is crucial to the granting of a stay. For this purpose, a dispute will exist unless there has been a clear and unequivocal admission not only of liability but also quantum : see *Louis Dreyfus v. Bonarich International (Group) Limited* [1997] 3 HKC 597; *Tai Hing Cotton Mill Limited v. Glencore Grain Rotterdam BV* [1996] 1 HKC 363, at 375A-B. In the absence of admissions as to both these aspects, a mere denial of liability or of the quantum claimed, even in circumstances where no defence exists, will be sufficient to found a dispute for the purposes of section 6 of the Ordinance (and Article 8 UNCITRAL Model Law). Thus, finding out whether a dispute (as defined in this way) exists, is the only exercise that the court carries out in a stay application (apart of course from construing the arbitration agreement to discover its full ambit): it does not involve itself in evaluating the merits of the claim.

7.2 Attaching conditions

4.124 In some jurisdictions, such as Singapore and Australia,[147] statutes have clothed courts with additional powers to impose conditions on the parties as part of the process of enforcing the arbitration agreement. For example, Section 6(2) of the Singapore International Arbitration Act 2002 states:

> The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

4.125 In the case of The 'Duden'[148] Judge Andrew Ang of the Singapore High Court said: 'The discretion of the court to impose terms and conditions upon a stay of court proceedings in favour of arbitration is an unfettered discretion.'[149] He continued:

> That having been said, discretionary power must, of course, be exercised judiciously. The corollary to a wide discretionary power is the great caution with which it should be exercised. Unfortunately, there is little case law (both local and from Australia) on the court's exercise of its discretion with regard to the imposing of conditions on a stay of court proceedings in favour of arbitration.
>
> The main guiding principle in my view is that courts generally should be slow to interfere in the arbitration process.

146 [2005] 4 SLR 646, at 663.
147 Section 7(2) of the Australian International Arbitration Act 1974. See also *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 1102; the commentary on that decision in C Kee, 'Australian Conditions Imposed in Stay of Foreign Arbitration Matter', (2006) 44(7) *New South Wales Law Society Journal* 68; *WesTrac Pty Ltd v Eastcoast OTR Tyres Pty Ltd* (2008) 219 FLR 461.
148 [2008] 4 SLR 984.
149 Ibid., at 989 (emphasis in original).

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4.126 In that case Judge Ang imposed a condition that the defendant waive the time bar defence that might have otherwise been available to it. Had the defendant not made such a waiver, the matter would not have been allowed to go to arbitration. A similar situation arose in the Victorian Supreme Court decision of *Ansett Australia Ltd (Subject to a Deed of Company Arrangement) v Malaysian Airline System Berhad*.[150] In that decision Justice Hollingworth dealt with the limitation period issue by requiring that the arbitration be treated as if it had been commenced on the same day as the litigation had originally commenced. This approach avoided the need to determine issues that would otherwise be left up to the arbitrator, such as the applicable law, as well as not requiring either party to waive their rights expressly. Justice Hollingworth had been asked to impose a number of other conditions which she declined to do. This approach is consistent with that of the New South Wales Court of Appeal which has observed:[151]

> The 'conditions' which s 7(2) of the [Model Law] contemplates are machinery conditions. They relate to hearing and the like procedures and not to conditions which determine, in effect, the substantive rights of the parties.

4.127 The power to impose conditions on the decision to enforce a stay application is unusual. It can be contrasted with Article 8, Schedule 1 of the New Zealand Arbitration Act 1996, and Article 8 of the Model Law, neither of which refer to the ability to impose conditions.

8 Arbitrability

4.128 At its simplest, the question of 'arbitrability' concerns whether a dispute is capable of determination by arbitration. For a matter to be determined by arbitration the parties must have agreed for it to be determined by arbitration – this is a subjective act; something that is personal to the parties. In addition to party agreement, the applicable law must allow disputes of that kind to be determined by arbitration – this is objective; if resolution of that kind of dispute by arbitration is prohibited, the parties' intentions become irrelevant.

8.1 Subjective arbitrability

4.129 Subjective arbitrability concerns whether the parties have agreed to arbitrate certain claims or issues. Usually this requires interpreting the arbitration agreement, including phrases such as 'in connection with' or 'arising out of' the contract. However, phrases like these are not unique to arbitration law. Often domestic jurisdictions will have specific meanings that have been attributed to these phrases by courts. Perhaps unfortunately, the meaning of these phrases may vary

150 (2008) 217 FLR 376.
151 *O'Brien v Tanning Research Laboratories Inc* (1988) 14 NSWLR 601, at 622.

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from jurisdiction to jurisdiction. Identifying which law applies to the arbitration agreement, and applying that law to it, may significantly affect the outcome.[152]

4.130 Take the phrase 'arising out of this contract'. Do claims for pre-contractual misrepresentation arise out of a contract? It is generally accepted that they do, however some jurisdictions previously applied a temporal limitation.[153] For something to arise out of a contract it was argued that it must have occurred post-contract formation. If such a timing requirement existed then pre-contractual claims would fall outside the scope of that phrase in an arbitration agreement.[154] Such an interpretation of an arbitration agreement would be devoid of common, commercial sense. Where commercial parties agree to arbitrate, their presumed desire is for all of their claims – pre-contractual or post-contractual – arising in any way from that relationship to be decided by arbitration. It is very unlikely that they would want to be engaged in a process where some claims relating to a dispute are resolved by a court and other claims in that dispute are determined by arbitration. Such an inefficient and unduly complex process should be avoided.[155]

4.131 In China the Supreme People's Court's Interpretation of Several Issues regarding the Application of the Arbitration Law of the PRC[156] has addressed the issue of intended scope of an arbitration agreement. It is cited as stating that 'when parties to an agreement agreed generally that contractual disputes shall be submitted to arbitration, then the contractual disputes shall be construed as including disputes arising from the establishment, validity, change, assignment, performance, default, interpretation and termination of a contract'.[157]

4.132 The 2007 Hong Kong decision in *Newmark Capital Corporation Ltd v Coffee Partners Ltd*[158] provides insight into the interpretative process that may be

152 For further elaboration of the meaning of such phrases and the significance of this see Kee, op. cit. fn 147; and C Kee, 'Set-Off in International Arbitration – What Can the Asian Region Learn?', (2005) 1(2) *Asian International Arbitration Journal* 141.

153 See, e.g. *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192. But see the Malaysian case of *Jan De Nul NV v Inai Kiara Sdn Bhd* [2006] 3 CLJ 46, where the Court of Appeal found that tort claims were not covered by an arbitration clause that read 'any dispute or difference arising out of and/or in connection with this agreement'. The Malaysian court refers with approval to the Full Federal Court of Australia decision of *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers* (1998) 159 ALR 142. Aspects of the *Hi-Fert* decision closely related to this issue were specifically overruled by the Full Federal Court in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192.

154 This appeared to be the position in Australia prior to the Full Federal Court Decision of *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192. In the leading judgment Justice Allsop makes it quite clear that 'arising out of' definitely now includes pre-contractual claims under Australian law. For a discussion of the meaning of other such phrases in Australian law see *Incitec Ltd v Alkimos Shipping Corp* (2004) 206 ALR 558, at 563–564 per Justice Allsop. Further in an Australian domestic context the Victorian Supreme Court in *Transfield Philippines Inc v Pacific Hydro Ltd* [2006] VSC 175 has noted that 'the words "in connection with", which are used in arbitration agreements, are words of the widest import and should not, in the absence of compelling reason to the contrary, be read down'. In New Zealand see, e.g. *Bowport Ltd v Alloy Yachts International Ltd* [2004] 1 NZLR 361; *Mount Cook (Northland) Ltd v Swedish Motors Ltd* [1986] 1 NZLR 720. In Brunei see *L & M Prestressing Sdn Bhd v Engineering Construction Pte Ltd* [1991] BNHC 39.

155 In this context, see the speech by Lord Hoffman in the UK House of Lords decision *Premium Nafta Products Ltd v Fili Shipping Company Ltd* [2007] 2 All ER (Comm) 1053, at para 13. This was an appeal from *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951.

156 FaShi [2006] No. 7.

157 Wan Exiang and Yu Xifu, op. cit. fn 46, p. 185.

158 [2007] HKCU 241 (emphasis in original). For other Hong Kong authority see *Xu Yi Hong v Chen Ming Han* [2006] HKCU 1663; *Tommy Cp Sze & Co v Li & Fung (Trading) Ltd* [2003] 1 HKC 41, at 57; *Getwick Engineers Ltd v Pilecon Engineering Bhd* HCA 558/2002 (unreported).

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followed by a common law court in this region when determining the scope of an arbitration agreement:

> But the scope of the arbitration clause still has to be ascertained by reference to applicable principles of law and construction.
>
> . . .
>
> The first cause of action is a claim in misrepresentation. It does not concern any of the matters mentioned in the arbitration clause. In particular I do not think that the claim is one 'touching' or 'relating' 'to the affairs of CPL' (. . . Mr. Bartlett's skeleton arguments . . . stressed the words 'touching' and 'affairs of the Company' but I do not think that, properly read, the word 'touching' applies to the phrase 'affairs of the Company'; the phrase 'affairs of the Company' is preceded by the word 'to' and the more natural word to apply to the entire phrase 'to the affairs of the Company' must be 'relating' and not 'touching'; be that as it may I shall deal with the word 'touching' as well). In no way can the issue of whether certain representations were made . . . prior to [the Plaintiffs] even signing the SPAs (and becoming members) be regarded as 'affairs of [CPL]'.
>
> . . .
>
> It may be said that the alleged acts of making misrepresentations formed part of the 'affairs' . . . . Further, some of the alleged misrepresentations related to the way the company would be run and managed, and that in demonstrating the 'falsity' of the representations one had to look at the way in which the 'affairs' . . . were conducted and hence the claim falls within this part of the clause. But I do not think that the phrase 'touching . . . relating to the affairs of [CPL]' meant these sorts of disputes. I accept . . . that the phrase 'affairs of the Company' . . . is intended to cover a complaint about the administration . . . such as allegations of unfair prejudicial conduct, fraud on minority and similar claims. Otherwise, the clause will cover any or all disputes with CPL, because all disputes with CPL must necessarily arise out of things done (or not done) by CPL and disputes about any such acts or omissions by CPL would be a dispute on the "affairs" of CPL. Article 21.1 is not and cannot be as broad as that. If it is as broad as that, then much of Article 21.1 would be otiose. It would only need to say "all or any disputes with CPL whatsoever". That, however, is not what Article 21.1 says.

4.133 The first sentence of the extracted passage above raises the important consideration of contract construction. The manner in which contracts are construed in each jurisdiction may vary. A well-drafted arbitration clause should be capable of reflecting the parties' intent accurately in any relevant jurisdiction. Most jurisdictions employ an objective theory of contract interpretation, which has led to statements from the Singapore High Court such as '[t]he defendants contended that their subjective intention was for SIAC Rules to apply given the international dimension of the Contract. But it was well established that the subjective intention of a party should not be considered by the court when construing a written document'.[159] It should be noted, however, that approaches to the objective theory of contract interpretation are not uniform, as different jurisdictions allow different levels of consideration of surrounding circumstances and other relevant materials.

159 *Jurong Engineering Ltd v Black & Veatch Singapore Pte Ltd* [2004] 1 SLR 333, at 345.

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4.134 In the 2007 decision of *Premium Nafta Products Ltd v Fili Shipping Company Ltd*,[160] the House of Lords took what Lord Hoffmann described as a fresh start to the construction of arbitration clauses pursuant to English law. He considered whether there was a difference between the meaning of 'under' a contract and 'arising out of' a contract. His Lordship noted:[161]

> In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction.

4.135 This decision, although not generally binding on courts in this region of the world, should be considered particularly persuasive in common law countries. The fresh start was required in part to bring English law into line with world practice,[162] and the decision is to be commended. During the course of his judgment Lord Hope of Craighead referred with approval to the Australian Full Federal Court of Appeal decision in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*.[163] In the *Comandate* decision Justice Allsop had similarly observed:[164]

> This liberal approach is underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places. This may be seen to be especially so in circumstances where disputes can be given different labels, or placed into different juridical categories, possibly by reference to the approaches of different legal systems. The benevolent and encouraging approach to consensual alternative non-curial dispute resolution assists in the conclusion that words capable of broad and flexible meaning will be given liberal construction and content. This approach conforms with a common-sense approach to commercial agreements, in particular when the parties are operating in a truly international market and come from different countries and legal systems and it provides appropriate respect for party autonomy.

4.136 Unfortunately, a subsequent Australian decision of *Seeley International Pty Ltd v Electra Air Conditioning BV*[165] neither referred to the House of Lords decision nor adopted its robust approach. The dispute resolution clause which the court in *Seeley* was called upon to consider referred the parties first to 'friendly discussions' and, failing resolution by that method, to arbitration. The scope of the arbitration clause was quite broad and included 'a dispute, question or difference of opinion ("Dispute") between the parties concerning or arising out of this

160 [2007] 2 All ER (Comm) 1053, an appeal from *Fiona Trust & Holding Corporation v Privalov* [2007] 4 All ER 951.
161 *Premium Nafta Products Ltd v Fili Shipping Company Ltd* [2007] 2 All ER (Comm) 1053, at para 13.
162 'This approach to the issue of construction is now firmly embedded as part of the law of international commerce' per Lord Hope of Craighead, *Premium Nafta Products Ltd v Fili Shipping Company Ltd* [2007] 2 All ER (Comm) 1053, at para 31.
163 [2006] FCAFC 192.
164 Ibid., at para 165.
165 [2008] FCA 29.

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Agreement or its construction, meaning, operation or effect or concerning the rights, duties or liabilities of any party'. It also included a separate subclause which read '[n]othing in this [clause] prevents a party from seeking injunctive or declaratory relief in the case of a material breach or threatened breach of this Agreement'.

4.137 The plaintiff had commenced court proceedings seeking two declarations: the first to confirm a particular obligation of the respondent; and the second to state that the respondent was in breach of that obligation. The respondent sought a stay on the basis of the arbitration agreement. After determining that seeking declarations and injunctions from an arbitral tribunal was possible, Justice Mansfield went on to consider whether the parties had in fact included this within the scope of their arbitration agreement. Justice Mansfield noted that the scope of the clause should be robustly assessed, but then decided that in this case the parties had objectively intended recourse to the courts for injunctive or declaratory relief. Justice Mansfield then made declarations in the form requested by the plaintiff.

4.138 As a consequence, Justice Mansfield necessarily determined issues that were clearly within the ambit of the arbitration clause – *the rights, duties or liabilities of any party*. Although upheld on appeal,[166] this decision appears to be incorrect and out of touch with modern arbitral practice and court decisions in most of the world. The decision seems to find a temporal element in the clause, in effect construing the parties' agreement to mean that what was and was not arbitrable would be determined by the relative urgency of the claim – despite the fact that the urgency or not of the particular declarations sought was not analysed in the decision. We respectfully submit that the better interpretation of a contract that specifically gives the power of injunctive and declaratory relief to a court is that it is intended to maintain the status quo that exists between the parties at the time of the commencement of the arbitration proceedings, such as issuing injunctions to prevent property from being destroyed or removed. Such clauses are not for the purposes of enabling courts to determine finally the substantive rights of the parties, which is the task of the arbitral tribunal.

8.2 Objective arbitrability

4.139 Objective arbitrability concerns matters the law actually permits parties to resolve by arbitration. It is a legal, objective test. If the law prevents a particular kind of dispute from being decided by arbitration, then the consent of all the parties to arbitrate that type of dispute becomes irrelevant.

4.140 It was noted in Chapter 1 that judicial attitudes towards arbitration have not always been positive. Despite a now very positive global acceptance of

166 *Electra Air Conditioning BV v Seeley International Pty Ltd* [2008] FCAFC 169.

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arbitration, some legal systems (and/or courts) occasionally seek to retain some control over the kinds of disputes that may be arbitrated.[167] That control is the issue at the heart of any discussion on objective arbitrability.

4.141 In his article 'A Plea for a Trans-national Approach to Arbitrability in Arbitrable Practice',[168] Lehmann attempted to justify such an approach through a comparison of French, Swiss, German, English and US law. His comparative analysis 'revealed a trend existing in a number of legal systems, incumbent in countries of different legal cultures and with divergent traditions regarding arbitration toward extending the categories of disputes in which arbitral adjudication is permitted'.[169]

4.142 That trend is reflected in several Asia-Pacific jurisdictions. In Singapore for example 'no specific subjects have been identified by statute as being or as not being arbitrable'.[170] However, '[i]t is generally accepted that issues, which may have public interest elements, may not be arbitrable, for example citizenship or legitimacy of marriage, grants of statutory licences, validity of registration of trade marks or patents, copyrights, winding-up of companies'.[171]

4.143 In Sri Lanka, Section 2 of the Arbitration Act states that only matters of an indictment or criminal proceedings are excluded from reference to arbitration. Similarly, but more explicitly, under the Philippines Alternative Dispute Resolution Act, the following matters are not subject to arbitration, mediation, or any other alternative dispute resolution method: 'labour disputes, civil status of persons, validity of marriage, grounds for legal separation, jurisdiction of courts, future legitime [inheritance expectation], criminal liability, and those which by law cannot be compromised.'[172] China's Arbitration Law is also prescriptive. Article 3(1) excludes the arbitration of disputes concerning marriage, adoption, guardianship, support and succession as well as administrative disputes that must be handled by administrative organs as prescribed by law.[173] The Japanese Arbitration Act on the other hand takes an inclusive approach rather than an exclusive one. That Act states that an arbitration agreement will be valid when its subject matter is a civil dispute that may be resolved by settlement between the parties. It does not separately define civil dispute other than to exclude divorce and separation.[174] Indonesia adopts a similar approach. Article 5 of the Indonesian Arbitration and Dispute Resolution Act 1999 reads:

167 For a recent example, see the Indian Supreme Court decision of *N Radhakrishnan v Maestro Engineers* No. 7019 of 2009 which found that although squarely within the scope of the arbitration agreement, an arbitrator would not be competent to deal with a complex matter involving allegations of fraud.
168 M Lehmann, 'A plea for a transnational approach to arbitrability in arbitrable practice', (2004) 42 *Columbia Journal of Transnational Law* 753.
169 Ibid., p. 770.
170 *Aloe Vera of America Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR 174, at 205.
171 Ibid.
172 Alternative Dispute Resolution Act 2004 (Republic Act No. 9285) Chapter 1, Section 6.
173 Article 3 must be read in conjunction with Article 2 of the Supreme People's Court's Interpretation of Several Issues regarding the Application of the Arbitration Law of the PRC (FaShi [2006] No. 7). See also Chen Wei-qi, op. cit. fn 105, at pp. 58–59.
174 Japanese Arbitration Act 2003, Article 13(1).

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Article 5

(1) Only disputes of a commercial nature, or those concerning rights which, under the law and regulations, fall within the full legal authority of the disputing parties, may be settled through arbitration.
(2) Disputes which may not be resolved by arbitration are disputes where according to regulations having the force of law no amicable settlement is possible.

Korean legislation is similarly broad, with one commentator noting that since the 1999 amendment to the Korean Arbitration Act, all that is required now is that the dispute be 'private and legal'.[175]

4.144 The Australian courts have also taken a positive attitude towards the objective arbitrability of international disputes and consequently there are few types of commercial disputes where arbitration is prohibited. Matters capable of settlement by arbitration have been interpreted as 'any claim for relief of a kind proper for determination in a court'.[176] The leading Australian decision is *Walter Rau Neusser Oel Und Fett AG v Cross Pacific Trading Ltd*[177] in which Justice Allsop promotes a liberal approach. However, as noted above with reference to the Philippines, there are exceptions. Unlike the Philippines legislation non-arbitrable issues are not specifically identified in Australia's enabling arbitration legislation itself – rather it is necessary to look to other issue specific legislation. For example, Section 11 of Australia's Carriage of Goods by Sea Act 1991 declares void an arbitration agreement in a bill of lading or similar document relating to the international carriage of goods to or from Australia, unless the place of arbitration is in Australia. Similarly, Section 8 of the Australian Insurance Contracts Act 1984 potentially impacts the arbitrability of insurance related disputes.[178]

4.145 This type of legislation is not unique to Australia. Section 8 of the New Zealand Insurance Law Reform Act 1977 stipulates that clauses in insurance policies requiring arbitration are not binding. Similarly, in India the Carriage by Air Act 1972, the Specific Relief Act 1963, the Atomic Energy Act 1962 and the Aircraft Act 1934 all have provisions that affect arbitrability and the operation of the Indian Arbitration and Conciliation Act 1996 generally.[179]

4.146 In many jurisdictions, disputes are not arbitrable if determining them through arbitration would contravene public policy or the public interest. However, these are amorphous concepts that are not precisely defined in most, if indeed any,

175 Seung Wha Chang, 'Article V of the New York Convention and Korea', (2008) 25(6) *Journal of International Arbitration* 865, at p. 866. Chang also suggests that 'arbitrability is not often an issue in Korean court proceedings'.
176 See, for an early example, *Elders CED Ltd v Dravo Corporation* [1984] 59 ALR 206.
177 [2005] FCA 1102. For discussions on how this case differs from the previous position espoused in *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896, see J Morrison, 'Drawing a Line in the Sand: Defining the Scope of Arbitrable Disputes in Australia', (2005) 22(5) *Journal of International Arbitration* 395; J Morrison, 'Defining the Scope of Arbitrable Disputes in Australia: Towards a "Liberal" Approach?', (2005) 22(6) *Journal of International Arbitration* 596; Kee, op. cit. fn 147, p. 68.
178 Australian courts have also refused stay applications where the dispute involves bankruptcy or insolvency. However, the courts have not stated that these matters are inherently not capable of settlement by arbitration. See, for further discussion, Garnett, op. cit. fn 142, pp. 29–57, and *Tanning Research Laboratories Inc v O'Brien* [1990] 64 ALJR 211.
179 For a list of non-arbitrable subjects in India see V Reddy and V Nagaraj, 'Arbitrability: The Indian Perspective', (2002) 19 *Journal of International Arbitration* 117, at p. 117.

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jurisdictions. Defining public policy or the public interest depends heavily on the local law.[180] We would add another category of dispute that may not be objectively arbitrable in some jurisdictions – *in rem* rights. *In rem* rights are typically rights that can be exercised directly over property, for example a right of exclusive possession. Such rights may not be enforceable by arbitration, as any arbitral award should be enforceable only against the parties to the arbitration agreement. However, damages claims arising out of the breach of *in rem* rights are usually arbitrable.

9 Drafting arbitration agreements

4.147 If a contractual dispute arises, the last thing that parties want is an additional dispute about the dispute resolution agreement itself. It stands to reason that arbitration agreements must therefore be drafted with great care and precision. A multitude of issues could be dealt with in an arbitration agreement, however, this section limits itself to dealing with the essential and most advisable elements.

9.1 Essential elements to include in an arbitration agreement

4.148 There are four certainties required for an effective arbitration agreement:

(i) certainty regarding the identity of the parties;
(ii) certainty that the parties have agreed to submit their disputes exclusively to arbitration (and not another method of dispute resolution);
(iii) certainty as to the subject matter or scope of arbitrable disputes; and
(iv) certainty of the seat of arbitration, if designated.

9.1.1 Identity of parties

4.149 It is essential to ensure that the arbitration agreement specifies the identities of those who are agreeing to arbitrate. If the arbitration agreement forms part of a substantive contract, the term 'parties' will usually be defined in the contract, or will be assumed to mean all the parties to the contract. However, in complex commercial transactions where there is a series of contracts and some of the parties are different in the different contracts, the arbitration clause should be clear about which parties are bound by it.[181]

9.1.2 Obligation to arbitrate

4.150 Arbitration agreements should provide that the dispute will be referred to arbitration. If an arbitration agreement provides that a dispute may be referred to arbitration, or words to the effect that 'the parties might decide to refer a dispute

180 This must be distinguished from international public policy that is discussed in the context of setting aside and enforcement of awards in Chapter 9.
181 See, e.g. Reply of Supreme People's Court to the Non-enforcement Decision by Yulin Intermediate Court against Dongxun Investment Co., Ltd (Civil 4, Miscellaneous), No. 24 (2006).

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to arbitration', there is not a clear obligation to arbitrate. Ambiguity may lead to disputes concerning whether the matter is to be referred to the courts or to arbitration, and could even deny enforceable effect to the arbitration agreement.

4.151 Clauses providing for the settlement of disputes by arbitration but which are silent as to whether the parties may also go to court have sometimes led to arguments that the silence permits parties to litigate in courts. Such arguments should not prevail. As the Hong Kong Court of Appeal stated in *Grandeur Electrical Co Ltd v Cheung Kee Fung Cheung Construction Co Ltd*, 'a clause in a contract providing for disputes to be settled by arbitration should not readily be construed as giving a choice between arbitration and litigation unless that is specifically and clearly spelt out'.[182]

4.152 Uniform practice does not exist in relation to whether arbitration agreements containing an option either to arbitrate or litigate are invalid for lack of certainty. In Australia such optional agreements are valid.[183] Similarly, the High Court of Singapore has observed that 'it is clear that an agreement in which the parties have the option to elect for arbitration which, if made, binds the other parties to submit to arbitration is an arbitration agreement'.[184] These remarks were made when considering an earlier decision of a Sri Lankan court involving the same parties. The defendant in the Singaporean proceedings had commenced proceedings against the plaintiff before the Colombo High Court. The plaintiff had sought a stay on the basis of Section 5 of the Sri Lankan Arbitration Act 1995. Section 5 provides:[185]

> Where a party to an arbitration agreement institutes legal proceedings in a court against another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement, the Court shall have no jurisdiction to hear and determine such matter if the other party objects to the court exercising jurisdiction in respect of such matter.

4.153 The arbitration clause that the plaintiff relied on read:

> This Agreement shall be governed by and construed in accordance with the laws of England and Wales. In the event that the parties have a dispute over any term or otherwise relating to this Agreement they shall use their best endeavours to resolve it through good faith negotiations. In the event that they fail to do so after 14 days then either party may elect to submit such matter to arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules') for the time being in force which rules are deemed to be incorporated by reference with this clause to the exclusive jurisdiction of which the parties shall be deemed to have consented. Any arbitration shall be referred to three arbitrators, one

182 [2006] HKCU 1245, Hong Kong Court of Appeal, citing with approval *Tommy CP Sze and Co v Li & Fung (Trading) Ltd* [2003] 1 HKC 418.
183 *Liverpool City Council v Casbee Pty Ltd* [2005] NSWSC 590, citing with approval *PMT Partners Pty Ltd (in liq) v Australian National Parks & Wildlife Service* (1995) 184 CLR 301, at 310, 323; and *Savcor Pty Ltd v State of New South Wales* (2001) 52 NSWLR 587, at p. 594.
184 *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603, at para 30.
185 Section 5 is unusual because it omits the language allowing a court to refuse the stay if the arbitration agreement is 'void, inoperative or incapable of being performed' (see, e.g. Article 8(1) of the Model Law). See also the discussion of this point in Chapter 5, Section 4.2.

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> arbitrator being appointed by each party and the other being appointed by the Chairman of the SIAC and shall be conducted in the English language. (Emphasis added)

4.154 As is explained in the Singaporean judgment, the Colombo High Court found that the Sri Lankan Arbitration Act referred to compulsory arbitration agreements – that is agreements where the parties were compelled to arbitrate rather than having litigation as an alternative. In this instance, the words 'may elect' were interpreted by the Sri Lankan court to mean that the parties could choose either arbitration or the courts, and thus the clause was not of the sort contemplated by Section 5. The High Court of Colombo refused the stay application and asserted jurisdiction over the dispute.

4.155 Confirmation that the drafting of optional arbitration clauses should be avoided can also be found in judgments from China and South Korea. In China, the Supreme People's Court 'appears to have declared that such a clause is an invalid arbitration clause, but the other party wishing to rely on this article must raise its objection prior to the first substantive hearing in the arbitration'.[186] In South Korea the courts have ruled:[187]

> An optional arbitration clause such as 'the dispute shall be referred to adjudication/arbitration in accordance with the laws of the Purchaser's country' shall be deemed to become valid as an arbitration agreement if any party to the Goods Supply Contract of the present case opts for a recourse to arbitral proceedings instead of the adjudication by a court against the other party and the other party, without particular objections, submits itself to such arbitral proceedings. Therefore, where the other party clearly objected to a settlement by arbitration by vigorously contending the non-existence of an arbitration agreement in its Answer to the defendant's Request for an arbitration, the arbitration clause cannot be deemed as valid as an arbitration agreement.

4.156 When drafting an arbitration clause it is also very important that it is arbitration that the parties are choosing as their dispute resolution method. To be safe, the word 'arbitration' or something similar (e.g. 'arbitrator', 'arbitral tribunal') must appear in the arbitration agreement.

4.157 There is sometimes confusion about the difference between arbitration and expert determination. Although these two processes share some similarities, there are nevertheless fundamental differences, and different consequences at law. For example, a matter may not at law be capable of resolution by arbitration, whereas expert determination of that same dispute may still be possible.[188] While indicative, simply because parties refer to someone as an 'arbitrator' will not clothe that person with the attributes of one, and that person may in fact be

186 M Lin, 'Supreme People's Court Rules on PRC Arbitration Issues', (2007) 24(6) *Journal of International Arbitration* 597, at p. 601, referring to Article 7 of Fa Shi [2006] No. 7.
187 Supreme Court Decision 2003 Da318 [2003] KRSC 21 (22 August 2003).
188 In an Australian domestic context this issue arose in *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2003] VSC 307 (Supreme Court of Victoria). In this case the question was whether an agreement to submit disputes to expert determination was void under Section 14 of the Victorian Domestic Building Contracts Act 1995. Section 14 renders any arbitration agreement in a domestic building contract void.

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simply an expert.[189] Arbitration is a process involving a judicial inquiry, whereas expert determination does not involve such an activity.[190]

4.158 The two forms of dispute resolution have been contrasted by the Singapore High Court:[191]

> The crucial difference between expert determination and arbitration laid in the procedure and the absence of remedies for procedural irregularity in expert determination. An expert could adopt an inquisitorial, investigative approach, and need not refer the results to the parties before making the decision while an arbitrator needed the parties' permission to take the initiative, and had to refer the results to the parties before making the award.

4.159 Further guidance can be taken from the Hong Kong decision of Justice Kaplan (as he then was) in *Mayers v Dlugash*.[192] He there stated:

> Arbitration is a tried and tested method of dispute resolution where the parties do not wish to litigate their differences before state courts. Expert determination, although having been used for centuries, is perhaps not so widely known. The classic features of expert determination are:
> 1. The expert makes a final and binding decision.
> 2. The decision can only be challenged in the most exceptional circumstances such as where the expert answers the wrong question (see *Jones v Sherwood Computer Services Inc* [1992] 1 WLR 277, *Campbell v Edwards* [1976] 1 WLR 403 and *Nikko Hotels (UK) Ltd v MEPC* (1991) 28 EG 86).
> 3. The expert can be sued for negligence in the absence of an agreed immunity (*Arenson v Gasson Beckman Rutley* [1997] AC 405).
> 4. The expert's determination cannot be enforced as an arbitral award.

4.160 In the context of international commercial arbitration, point 4 is of significant practical relevance. One of the significant advantages of international arbitration is the international enforceability of the award. Expert determinations are not covered by the New York Convention and there is no other international regime for their enforcement. These determinations can only be enforced as a matter of ordinary contract law. Nevertheless the process does have some popularity in various national construction industries. In most cases, parties seeking to enforce such a determination would need to commence proceedings (probably for breach of contract) in the jurisdiction where enforcement is sought.

4.161 The final observation to make about the obligation to arbitrate is that in many jurisdictions it must be an equally shared obligation between all the parties to

189 *Uttam Wires & Machines P. Ltd v State of Rajasthan* [1990] AIR (Del) 72 (High Court, Delhi) as cited by A Jain, 'Pathological Arbitration Clauses and Indian Courts', (2008) 25 *Journal of International Arbitration* 433, at p. 439. Jain identifies a number of Indian decisions on this particular issue and other issues which may lead to a pathological arbitration clause. For a general discussion of pathological arbitration clauses see Section 9.6 below.
190 *Age Old Builders Pty Ltd v Swintons Pty Ltd* [2003] VSC 307, at para 59 (Supreme Court of Victoria).
191 *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR 634 at 635.
192 [1994] 1 HKC 755, at 757, cited with approval in *Milibow Assets Ltd v Dooyang Hong Kong Ltd* [2001] HKCU 767.

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the agreement.[193] An obligation to arbitrate requires that all parties be bound by the outcome. However, this is not quite the same as stating that each party must have the same rights. For example, must all parties to the arbitration agreement have the right to initiate arbitration? In Australia, the answer appears to be no.[194] The influence of English law may well lead the other common law jurisdictions in this region to the same position.[195] In contrast, Yuen has noted that a one-sided agreement, such as one which only allows the seller to designate an arbitral commission would be invalid under Chinese law.[196]

9.1.3 Subject matter and scope of arbitration

4.162 An arbitration agreement must clearly specify which disputes it covers. This is closely linked to subjective arbitrability, addressed above. Parties sometimes seek to limit the disputes that will be resolved by arbitration. Extreme care needs to be exercised if parties wish to do this in advance of a dispute arising in order to avoid future disputes about which claims fall within the scope of the arbitration agreement. In the absence of a real reason to limit the scope of arbitrable disputes, and in order to avoid the possibility of parallel court proceedings, an advisable strategy is to maximise as far as possible the scope of the arbitration agreement. Broad wording should be used, such as 'all disputes arising out of, connected with or in any way related to this contract shall be resolved by arbitration.'

4.163 The scope of arbitration agreements was considered in more detail under the headings of subjective arbitrability[197] and defined legal relationship.[198]

9.1.4 Certainty of the seat if designated

4.164 It is strongly advisable to designate a seat of arbitration in the arbitration agreement.[199] If one is designated, it must be clear and certain.[200] There are two reasons for this. First, an ambiguous reference to the seat of arbitration can in a worst case scenario give rise to doubts about the validity or effectiveness of the arbitration agreement. Even in a best case scenario it is possible that additional jurisdictional disputes will arise in the arbitration proceedings and/or a separate court action will be commenced. Second, the chosen seat may have particular

193 For European perspectives on this issue see A Frignani, 'Drafting Arbitration Agreements', (2008) 24 *Arbitration International* 561, at p. 563.
194 See *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301. While this case concerned a domestic arbitration conducted pursuant to legislation that has now been repealed, the relevant definition of 'arbitration agreement' has not changed. It should also be noted here that in the context of ICSID arbitration, only the investor and not the state has the right to institute an ICSID arbitration.
195 For the English position, see *Law Debenture Trust Corp Plc v Elektrim Finance BV* [2005] 1 All ER 476. For commentary on this case, see S Nesbitt and H Quinlan, 'The Status and Operation of Unilateral or Optional Arbitration Clauses', (2006) 22 *Arbitration International* 133.
196 P Yuen, 'Arbitration Clauses in a Chinese Context', (2007) 24 *Journal of International Arbitration* 581, at p. 591.
197 See Section 8.1.
198 See Section 5.
199 A discussion of how a seat is designated in the absence of party agreement can be found in Chapter 2 at Section 6.1.
200 M Hwang and Fong Lee Cheng, 'Relevant Considerations in Choosing the Place of Arbitration', (2008) 4(2) *Asian International Arbitration Journal* 195, at p. 214.

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requirements for an arbitration agreement. For example, if the parties chose a seat located in China, the arbitration agreement would need to comply with Article 16 of the Chinese Arbitration Law. That article states that an agreement must contain: (i) an expression of the intent to arbitrate; (ii) a description of the matters subject to arbitration; and (iii) a designated arbitration commission.[201] If parties fail to designate the seat of arbitration, there are default mechanisms in rules and laws for its determination.[202]

9.2 Advisable elements to include

4.165 In addition to the required elements noted above, it is advisable, but not essential, to include the following selective elements in an arbitration agreement:

(i) the number of arbitrators;
(ii) the language of the proceedings;
(iii) the confidentiality of the arbitration proceedings and the resulting award; and
(iv) any desired special powers for the arbitral tribunal.

4.166 The number of arbitrators is discussed further in Chapter 6.[203] Whether or not it is necessary or desirable to choose the number of arbitrators in advance may depend on the chosen arbitration rules, and whether they provide a suitable mechanism for determining the number of arbitrators in the absence of party choice. Selecting a language in the arbitration agreement may avoid a dispute prior to the commencement of the arbitration as to what should be the language. In choosing the language, the potentially substantial cost, time and logistical issues relating to document translation and use of interpreters during the hearing must be borne in mind.

4.167 Concerning confidentiality, as discussed in Chapter 7,[204] while arbitrations are private, documents and information disclosed during an arbitration may not necessarily be confidential in the absence of a further contractual obligation. In this region, this is especially important for arbitrations seated in Australia and possibly Singapore.[205] The Australian case of *Esso v Plowman*[206] cast doubt on the extent of confidentiality in arbitration under Australian law. In many jurisdictions an obligation of confidentiality is implied. However, it is prudent to assume that it is not. Most sets of arbitral rules now also include specific confidentiality provisions.[207]

4.168 When parties intend to grant arbitrators particular powers, these should be clearly specified in the arbitration agreement. Such specificity is necessary, for example, where parties wish the arbitrators to act as *amiable compositeur*, or to resolve the dispute on the basis of fairness and equity.[208] Special powers

201 For further discussion on the requirement of an arbitral institution, see Section 9.3.
202 See Chapter 2, Section 6.1.
203 See Chapter 6, Section 2.1.
204 See Chapter 7, Section 11.
205 Outside the Asia-Pacific, this is also an important consideration in Sweden and the US.
206 (1995) 183 CLR 10. This case is also discussed in Chapter 7, Section 11 of this book.
207 See, e.g. SIAC Rules, Rule 34; HKIAC Rules Article 39; ACICA Rules Article 18.
208 See Chapter 3, Section 8.

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might also be given to affirm the arbitral tribunal's authority to award punitive damages, issue ex parte interim relief, make special costs awards, or award specific performance.

9.3 Ad hoc or institutional arbitration?

4.169 Once parties have decided that arbitration will be their chosen method of dispute resolution, they face the further choice as to whether the arbitration will be ad hoc or institutional.[209] That decision should be specified in the arbitration agreement. In an institutional arbitration, the arbitral institution provides certain support services for the arbitration. In ad hoc arbitrations there is no institution involved. Most international arbitrations are conducted under the auspices of an arbitral institution.[210]

4.170 Although never going so far as to usurp the arbitral tribunal's decision-making power, different institutions administer arbitrations in varying degrees.[211] It is important that parties and their legal representatives appreciate these differences when choosing an institution. The choice of institution and corresponding rules can have a significant influence on the kind of arbitration that will occur.

4.171 The ICC and SIAC Rules, for example, provide for considerable institutional involvement and supervision, whereas the ACICA Rules take a much more hands-off approach. This difference is manifested in a number of ways throughout the arbitration. For instance, an award delivered in an ICC or SIAC arbitration will be reviewed by the ICC Court or SIAC Registrar,[212] while there is no similar provision in the ACICA Rules.

4.172 In terms of costs, under the ACICA Rules arbitrators are paid based on the arbitrators' usual hourly rates. The ICC and SIAC, on the other hand, both administer all of the costs in their arbitrations, each using a comparable system based on the monetary value of the dispute.

4.173 The ICC, SIAC and ACICA Rules all follow a similar procedure with regard to challenges to arbitrators. Challenges are determined by the institution. A different procedure has been adopted by the Vietnam Arbitration Centre. The Arbitration Rules of the Centre refer challenges first to the unchallenged arbitrators. The President of the Centre then effectively acts as an umpire if necessary.

4.174 Aside from technical differences in institutional rules, it is very important to understand that when parties choose a set of institutional rules they are not simply choosing that procedure, but that institution as well. Institutions vary immensely in their level of experience and the quality of the staff.

4.175 Drawing an analogy between choosing a law firm and choosing an arbitration institution serves to illuminate the particularities associated with the latter choice. There are two essential differences. First, the choice of an arbitral institution is usually made in a contractual dispute resolution clause. Such clauses are

209 See also Chapter 7, Section 3.1.2.
210 See the statistics in Chapter 1, Section 3.4.7.
211 The basic services provided by arbitral institutions were explained in Chapter 1, Section 3.4.7.
212 ICC Rules Article 27; SIAC Rules, Rule 27.1.

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agreed long before a dispute actually arises and before anyone knows the type or subject matter of the dispute or how much it could be worth to the parties. Conversely, a law firm is usually chosen as and when the need arises: the choice is made with the benefit of knowing the particular dispute or commercial issues. Second, it is generally not possible to change the choice of arbitral institution after signing the contract in which that choice is contained. That choice can only be varied if all of the parties to the arbitration agree. This contrasts with the choice of a law firm, which can usually be changed at any time if the client is not satisfied with the legal services rendered. Consequently, in choosing an arbitration institution, it is advisable to consider carefully the costs, range of services, supervision and support it is able to provide before it is selected and agreed to in a dispute resolution clause.

4.176 Parties sometimes attempt to agree on one institution's rules but with a different institution administering those rules. Mason notes that 'ICC officials have complained that the "mixing and matching" scenario is something they have been faced with quite a bit'.[213] The problem is not one limited to ICC experience as Mason also cites LCIA and ICDR examples. Trying to mix and match institutional rules is a very dangerous and risky strategy. In the case of a highly specialised institution like the ICC, for example, other institutions are not able to provide the services that are contemplated under the ICC Rules. The attempted mix and match is highly likely to lead to costly jurisdictional disputes and to invalidate the award or make it unenforceable.[214]

4.177 As noted above, an 'ad hoc arbitration' is one that is not administered by an institution. Ad hoc is something of a term of art in arbitration. In common parlance, the phrase refers to something established for a singular or sole purpose. In the context of arbitration, the emphasis is instead on the lack of institutional administration of the arbitration. This specific focus is understandable and quite logical – every single arbitration would be ad hoc if the common parlance meaning was applied. In *Bovis Lend Lease Pte Ltd v Jay-Tech Marine & Projects Pte Ltd*,[215] the High Court of Singapore had cause to consider the difference between ad hoc and institutional arbitration. It chose to explain that difference in this way: '. . . the parties selected an ad hoc arbitration since they did not submit it to the administration of any particular institution . . . .'[216]

4.178 There may be some limited institutional involvement in an ad hoc arbitration, such as performing the role of appointing authority. This should not be considered as an act of administering the arbitration. Parties agree to institutions performing this role because they are usually best placed to do so, particularly because they often possess lists of suitable and competent arbitrators at their disposal. Parties

213 PE Mason, 'Whether Arbitration Rules Should Be Applied by the Issuing Arbitral Institution', (2009) *Lexis Nexis Emerging Issues Analysis 1149*, p. 4. See also *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] 1 SLR 23 (High Court of Singapore) discussed in Section 9.6.
214 See further J Kirby, 'Insigma Technology Co Ltd v Alstom Technology Ltd: SIAC Can Administer Cases under the ICC Rules?!?', (2009) 25 *Arbitration International* 319, at p. 326 on the costs involved.
215 [2005] SGHC 91.
216 Ibid., para 21.

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may nominate anyone (e.g. a private individual, an institution, a judge, etc.) to act as appointing authority.

Ad hoc arbitration agreements often adopt a set of ad hoc rules, the most common being the UNCITRAL Arbitration Rules.[217] The parties can alternatively rely on the local law at the seat of arbitration to provide the relevant rules of arbitration (e.g. the procedure set out in the Model Law for those countries that have adopted it), or can stipulate at length in the contract specifically agreed procedures to be followed. 4.179

Aside from practical issues relating to the everyday conduct of the arbitration, the choice between ad hoc or institutional arbitration can, in rare circumstances, affect the validity of the arbitration agreement, and thus jeopardise the enforceability of the award. An institution must be chosen where China is the seat of arbitration.[218] Furthermore, if the seat is in China, it is unclear whether non-Chinese institutions can administer the arbitration.[219] The issue arose in the *Wuxi Woco-Tongyong Rubber Engineering Co Ltd v Züblin Int'l GmbH*[220] case, in which the Wuxi Intermediate People's Court refused to enforce an award on the basis of Article V(1)(a) of the New York Convention. This article permits enforcement to be denied if the arbitration agreement is not valid under the law of the place where the award was made. The court had reasoned that the arbitration agreement did not specify an institution. It appeared to be making a very literal interpretation of the arbitration agreement, which read 'Arbitration: ICC Rules, Shanghai shall apply'. Since that decision, the Interpretation of Several Issues regarding the Application of the Arbitration Law of the PRC[221] was promulgated by the PRC Supreme People's Court. It indicates in contrast to the *Züblin* decision that an arbitration agreement will be valid if an arbitral institution can be identified from the chosen arbitral rules.[222] 4.180

9.4 Multi-tiered arbitration agreements

A multi-tiered arbitration clause provides for one or more other steps, such as an amicable form of dispute resolution, before arbitration. For example, the clause might first require negotiation, followed by mediation and then arbitration. 4.181

217 It is interesting to note that appointing authorities are expected to be given an increased role and greater responsibility under the proposed revisions to these rules.

218 Article 16 of the Chinese Arbitration Law has been interpreted in this way. See the discussion in Section 9.3. See also Wan Exiang and Yu Xifu, op. cit. fn 46, p. 185; Chi Manjiao, 'Is the Chinese Arbitration Act Truly Arbitration-Friendly: Determining the Validity of Arbitration Agreement under Chinese Law', (2008) 4(1) *Asian International Arbitration Journal* 104.

219 Jingzhao Tao and C von Wunschheim, 'Articles 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions', (2007) 23 *Arbitration International* 309.

220 *Wuxi Woco-Tongyong Rubber Engineering Co Ltd v Zueblin Int'l GmbH*, Wuxi Intermediate People's Court, (Civil 3), (Final), No. 1 (2004) – (decision dated July 19, 2006).

221 FaShi [2006] No. 7.

222 For further discussion of this case and the situation regarding institutional arbitration agreements in China generally, see N Darwazeh and F Yeoh, 'Recognition and Enforcement of Awards under the New York Convention China and Hong Kong Perspectives', (2008) 25 *Journal of International Arbitration* 837; and F Yeoh, 'The People's Courts and Arbitration A Snapshot of Recent Judicial Attitudes on Arbitrability and Enforcement', (2007) 24 *Journal of International Arbitration* 635.

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According to a 2008 survey these clauses are becoming increasingly popular.[223] A variety of issues need to be considered when drafting these clauses. Do the parties intend that negotiation and then mediation are conditional prerequisites to arbitration, such that there is no consent to arbitrate until mediation has occurred? Or do the parties intend that in the event there is a serious disagreement between the parties, mediation can be overlooked and a party may commence arbitration directly without attempting mediation?[224] Clauses may also permit a choice between arbitration and court litigation but, as previously discussed, this is not advisable.[225]

4.182 Because of the many difficulties that can plague a multi-tiered arbitration clause, it is advisable to use one prepared by an institution and modify it only to the extent absolutely necessary. The sample ACICA clause is:

> Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, shall be resolved by mediation in accordance with the ACICA Mediation Rules. The mediation shall take place in Sydney, Australia [or choose another city] and be administered by the Australian Centre for International Commercial Arbitration (ACICA).
>
> If the dispute has not been settled pursuant to the said Rules within 60 days following the written invitation to mediate or within such other period as the parties may agree in writing, the dispute shall be resolved by arbitration in accordance with the ACICA Arbitration Rules. The seat of arbitration shall be Sydney, Australia [or choose another city]. The language of the arbitration shall be English [or choose another language]. The number of arbitrators shall be one [or three, or delete this sentence and rely on Article 8 of the ACICA Arbitration Rules].

9.5 What *not* to include in an arbitration agreement

4.183 Long and detailed arbitration clauses generally take a long time to draft and in the event of arbitration are not overly helpful. Although at the time of drafting the procedure to be followed may seem clear and certain in a lengthy arbitration clause, it might produce some problems if an unforeseen circumstance eventuates (which is often the case) and the clause lacks the flexibility to deal with this in an appropriate way. Consequently, it is best to keep the clause as simple as possible and carefully adapt a standard form institutional clause to fit any particular

223 *International Arbitration: Corporate Attitudes and Practices 2008*, study conducted by Pricewaterhouse-Coopers and Queen Mary College, p. 11.

224 An example of the difficulties which might be encountered when using a multi-tiered clause can be seen in the Sichuan PepsiCo arbitrations. In April 2008, the Intermediate People's Court of Chengdu refused enforcement of an arbitral award based on Article V(1)(d) of the New York Convention. The court indicated that the party seeking enforcement could not establish that it had complied with the consultation requirements in the dispute resolution clause. It should be noted that other factors may have influenced this decision, such as the criminal conviction of one of the majority arbitrators. For further discussion of this case, see Darwazeh and Yeoh, op. cit. fn 222. The issue has arisen a number of times in investor-state arbitrations where the investment treaty under which a claim is brought requires a period of consultation or negotiation before an arbitration claim is filed.

225 Clauses of this kind were discussed above in Section 9.1.2.

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requirements. If a complex or detailed clause is desired for any reason, it should be checked by an expert arbitration lawyer.

Parties are sometimes inclined to put time limits in arbitration agreements; 4.184
for example, time limits for the parties to choose their respective arbitrators for nomination; or time limits for the arbitrator to render the award. Unless drafted particularly carefully, attempts of this kind are dangerous. Potentially, the failure to meet a time limit could invalidate the entire arbitration proceeding. Thus where institutional or ad hoc rules contain time limits, these should be preferred. Such rules contain methods that enable the modification of time limits if necessary.

9.6 Pathological arbitration agreements

Frederic Eisemann, a former Secretary-General of the ICC Court, was the first 4.185
legal commentator to use the term 'pathological' in the context of arbitration agreements.[226] It has since been used to describe ambiguous or unclear arbitration agreements. Such agreements frequently cause additional problems when a dispute between the parties arises. While in theory a pathological arbitration agreement could be fixed by subsequent agreement of the parties, the reality is that parties often refuse to agree on anything once a dispute has arisen.

The modern trend in international arbitration law is to apply an interpretation 4.186
that favours arbitration and gives meaning and effect to the clause, even if an arbitration agreement is at first blush potentially pathological.[227] The French phrase for this approach is often used – '*effet utile*' (effective interpretation). As a consequence of this approach to interpretation, the defects in many arbitration clauses are overcome and the arbitration proceeds.

Examples of defects include: 4.187

(i) naming the arbitral institution incorrectly or identifying a non-existent institution;
(ii) empowering one institution to administer another institution's rules;[228]
(iii) referring to an arbitral institution by its location rather than by its name;[229]
(iv) failing to indicate clearly that the award is final and binding;[230]
(v) identifying a specific arbitrator who has died or become unable to act thereafter; and

226 F Eisemann, 'La clause d'arbitrage pathologique' in Associazione italiana per l'arbitrato, *Commercial Arbitration Essays in Memoriam Eugenio Minoli*, UTET, 1974.
227 For example, the Seoul Civil District Court upheld the validity of an arbitration agreement which provided for more than one arbitration institution in the clause. The court found that once one party had elected an institution, the other party was deemed to have waived its rights to object to jurisdiction, 83 Kahap 7051, 12 April 1984 as cited in Seung Wha Chang, op. cit. fn 175. See also *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] SGCA 24, at para 31.
228 See also *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] SGCA 24, at para 31.
229 See, e.g. Arbitration Court of the German Coffee Association, *Panamanian buyer v Papua New Guinean seller*, 28 September 1992, Rechtsprechung kaufmännischer Schiedsgerichte, vol. 5, Section 3B.
230 See, e.g. *Undisclosed Plaintiff v Cosmo Futures Co Ltd* (Japan), 16 May 2003 (Sapporo District Court).

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(vi) drafting terms that are inherently contradictory to other terms in the arbitration agreement.

4.188 The first of the typical defects noted above has been described by Lawrence Boo, then Deputy Chairman of SIAC, as the most common. In a presentation to the Regional Arbitration Conference organised by the Malaysian Institute of Arbitrators in June 2007, Boo provided a number of examples of problematic clauses received by SIAC. The examples concerning non-existent institutions where SIAC jurisdiction was declined included:

> . . . Any dispute will be settled by the rules of arbitration of the **International Chamber of Trade of Singapore** by one or several arbitrators appointed accordingly [sic] to the rules . . .
>
> . . . Such arbitration shall be held under the auspices of **A.A.L.C.C. Regional Centre for Commercial Arbitration at Singapore** in accordance with the UNICTRAL Arbitration Rules as modified by the rules of the centre . . .

4.189 Yang reports that in several cases in China confusion has arisen over references to CIETAC, stating that '[a]t least one published case has held that the choice of CIETAC could refer to any of the three institutions in the CIETAC group'.[231] Yang indicates that in the case in question the same parties conducted two CIETAC arbitrations simultaneously, one in Shanghai and the other in Beijing, with opposite results.

4.190 The second category referred to above concerns requesting one institution to administer the rules of another. This can be particularly problematic because in general only the institution whose rules it is can properly administer arbitrations conducted under those rules. Clauses that attempt to choose two institutions at once will almost certainly cause greater cost and significantly increase the risk of an unenforceable award.[232]

4.191 An example of this situation was considered by the High Court of Singapore in *Insigma Technology Co Ltd v Alstom Technology Ltd*.[233] The circumstances of this case demonstrate the difficulties associated with clauses of this kind. The arbitration agreement at issue appeared as a clause in the parties' contract. It read in part:

> . . . Any and all such disputes shall be finally resolved by arbitration before the Singapore International Arbitration Centre in accordance with the Rules of Arbitration of the International Chamber of Commerce in effect and the proceedings shall take place in Singapore and the official language shall be English . . .

4.192 When a dispute arose, the defendant began an ICC arbitration. The plaintiff objected on the basis that either the clause was pathological or that it called for SIAC arbitration using the ICC Rules. After both parties nominated their

231 Howard Yinghao Yang, 'CIETAC Arbitration Clause Revisited', (2008) 24 *Arbitration International* 603, at pp. 605, 606.
232 See Kirby, op. cit. fn 214, at p. 326 on the costs involved.
233 [2009] 1 SLR 23.

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arbitrators but before full constitution of the arbitral tribunal, the proceedings before the ICC Court were withdrawn and referred to SIAC.

4.193 As has been noted elsewhere,[234] an arbitral tribunal has the authority to hear arguments about its own jurisdiction. In this case the respondent made submissions to the arbitral tribunal that it lacked jurisdiction, arguing amongst other things that there was not a valid arbitration clause. The arbitral tribunal found that a valid arbitration clause existed. As the parties had clearly intended to arbitrate their disputes, the critical question for the arbitral tribunal was whether the manner agreed to was workable. The arbitral tribunal found that it was workable because the SIAC (in a letter to the arbitral tribunal) had indicated which bodies and individual officers within the SIAC would perform the roles of the functionaries described under the ICC Rules – for example the function of the ICC Court would be performed by the SIAC Board of Directors. The arbitral tribunal also placed significant emphasis on the respondent's assertion in the abandoned ICC arbitration that the clause provided for ICC arbitration administered by SIAC. The arbitral tribunal, applying principles analogous to estoppel, considered that the respondent should not be permitted to go back on its submissions made to the ICC that SIAC had been agreed as the administering body.

4.194 The respondent had also challenged the manner in which the arbitral tribunal had been constituted. It was argued that as the SIAC appointment process had been followed, and not that prescribed in the ICC Rules, the arbitral tribunal was improperly constituted. The arbitral tribunal also found against the respondent on this point since it had not established that different arbitrators would have been appointed under the ICC Rules.

4.195 The respondent challenged the finding of jurisdiction and commenced proceedings in the High Court of Singapore. Judge Prakash upheld the award. While we support the pro-arbitration position adopted in the judgment, we do not believe it can be taken as a precedent. The case certainly should not be understood as inferring that an arbitration agreement which calls on one institution to apply the rules of another will be upheld as valid. The reasoning of the judgment is not without difficulties, in particular the finding that the parties had not bargained for institutional arbitration but for a hybrid ad hoc arbitration. Accordingly the decision should be interpreted as turning on particular actions by the parties involved, in particular the respondent's express position taken during the abandoned ICC arbitration.[235] The decision was appealed unsuccessfully to the Court of Appeal, which agreed with the High Court's reasons.[236]

234 See Section 3.
235 See also Kirby, op. cit. fn 214, at p. 328.
236 *Insigma Technology Co Ltd v Alstom Technology Ltd* [2009] SGCA 24, at para 29.