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Procedure and evidence

1 Introduction

- 7.1 This chapter concerns the procedure governing the conduct of an arbitration. Its temporal scope commences from the claimant's initiation of the arbitration and extends up to the closure of the arbitral proceedings.
- 7.2 Parties opting for international commercial arbitration are given considerable freedom to choose and individually tailor the procedure of the arbitration. Arbitral procedure may be conducted in flexible, cost-efficient and innovative ways that are attractive to the business community. Through this free choice of the parties, arbitral procedure has evolved to be significantly distinct from the rigid procedures traditionally adopted by courts. In a study on the views of in-house counsel at leading multinational corporations published in 2006, flexibility of procedure emerged as the most widely recognised advantage of international commercial arbitration.¹ Another relevant finding in that study was that 'active participation of the parties in determining and shaping the procedure inspires confidence in the process'.²
- 7.3 Section 2 of this chapter explores the important role of party autonomy in arbitral procedure. Rules, procedural law and guidelines are discussed in Section 3. Section 4 focuses particularly on core arbitral procedural rights and

¹ *International Arbitration: Corporate Attitudes and Practices 2006*, study conducted by PricewaterhouseCoopers and Queen Mary College, 2006, p. 6. See also, L. Mistelis, 'International Arbitration – Corporate Attitudes and Practices – 12 Perceptions Tested: Myths, Data and Analysis Research Report', (2004) 15 *American Review of International Arbitration* 525, at p. 547 et seq. Similarly, in a subsequent study *International Arbitration: Corporate Attitudes and Practices 2008*, PricewaterhouseCoopers and Queen Mary College, 2008, p. 5, most of the corporate counsel surveyed considered that the flexibility of procedure was a major benefit of arbitration.

² PricewaterhouseCoopers and Queen Mary College, 2006, *ibid.*, p. 6.

duties. Section 5 deals with the way international arbitration balances traditional differences between the common and civil law systems on matters of procedure. Section 6 considers a number of procedural stages involved in an arbitration. Issues relating to evidence are discussed in Section 7. This is followed by an overview of procedural aspects of arbitration hearings in Section 8. Sections 9 and 10 deal with, respectively, interim measures and security for costs. The chapter concludes with an examination of privacy and confidentiality in Section 11.

2 Party autonomy

2.1 The principle

A foundation stone on which the entire edifice of international commercial arbitration rests is the principle of party autonomy. A major component of this principle involves the parties' freedom to choose the procedure to be applied in their arbitration.³ During the preparatory work of the Model Law, party autonomy was referred to in the following terms:⁴ 7.4

Probably the most important principle on which the model law should be based is the freedom of the parties in order to facilitate the proper functioning of international commercial arbitration according to their expectations. This would allow them to freely submit their disputes to arbitration and to tailor the 'rules of the game' to their specific needs.

Ultimately, the drafters of the Model Law embodied this principle in Article 19(1), which has since been referred to as 'the Magna Carta for party autonomy in all modern laws on international commercial arbitration'.⁵ That bedrock provision declares:⁶ 7.5

Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

Further confirmation of the party autonomy principle is found in Article V(1)(d) of the New York Convention and Article 34(2)(a)(iv) of the Model Law, which 7.6

³ Other facets of party autonomy include freedom to choose the seat of arbitration, the applicable law, the number of arbitrators, the procedure for appointing and challenging the arbitrators, etc. See e.g. Model Law Articles 10, 11, 13 and 28.

⁴ 'Report of the [UN] Secretary-General: Possible Features of a Model Law on International Commercial Arbitration', 14 May 1981, UN Doc A/CN.9/207, (1981) XII *UNCITRAL Yearbook*, p. 78, para 17. Similarly, see Justice Prakash's observation in *Bovis Lend Lease Pty Ltd v Jay-Tech Marine and Projects Pte Ltd* [2005] SGHC 91 (Singapore High Court) 6 May 2005, at para 18 ('One of the most important principles in arbitration law is that of party autonomy').

⁵ VV Veeder, 'Whose Arbitration is it Anyway: The Parties' or the Arbitration Tribunal's: An Interesting Question?', in LW Newman and RD Hill (eds), *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn, Juris Publishing, 2008, p. 337, at p. 341.

⁶ This provision is found in various forms in almost all international arbitration laws in the region, including the Australian International Arbitration Act (by way of adoption of the Model Law pursuant to Section 16 of that Act and see also Section 21); the Chinese Arbitration Law Article 4; the Hong Kong Arbitration Ordinance Section 2AA(2)(a); the Indian Arbitration and Conciliation Act Section 19(2); the Japanese Arbitration Law Article 26; the Korean Arbitration Act Article 20; the Singapore International Arbitration Act Section 15.

empower a court to refuse enforcement or set aside an award if the party resisting enforcement establishes that 'the arbitral procedure was not in accordance with the agreement of the parties'.

2.2 Limits to party autonomy

- 7.7 Despite its importance, the autonomy of parties to determine the procedure is not absolute. In a number of circumstances, their freedom is controlled or limited by law.⁷ The reason why total freedom is not granted was well articulated during the preparatory work of the Model Law:⁸

... To give parties the greatest possible freedom does not mean, however, to leave everything to them by not regulating it in the model law. Apart from the desirability of providing 'supplementary' rules... what is needed is a positive confirmation or guarantee of their freedom. Thus, the model law should provide a 'constitutional framework' which would recognize the parties' free will and the validity and effect of their agreements based thereon.

... Yet... it is not suggested to accord absolute priority to the parties' wishes over any provision of the law. Their freedom should be limited by mandatory provisions designed to prevent or to remedy certain major defects in the procedure, any instance of denial of justice or violation of due process. Such restrictions would not be contrary to the interest of the parties, at least not of the weaker and disadvantaged one in a given case. They would also meet the legitimate interest of the State concerned which could hardly be expected to issue the above guarantee without its fundamental ideas of justice being implemented.

- 7.8 The main limits or constraints on party autonomy are summarised below:

- (i) *Parties' failure to agree* – Party autonomy is premised on consent. The power of parties to dictate the way the proceedings are conducted dissipates rapidly when they are unable to reach agreement. In such cases, specific default provisions in the chosen set of rules or the *lex arbitri* may be triggered or the arbitral tribunal may be empowered to make the relevant determination.
- (ii) *Fundamental, mandatory due process principles* (also known as natural justice principles) – These principles are discussed in Section 4, and are found in some form in all arbitration legislation. Article 18 of the Model Law encapsulates two of the key due process principles: 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.'⁹ The consensus in virtually all systems of law is that these principles are essential requirements akin to basic human rights that

⁷ For a detailed analysis of this subject, see M Pryles, 'Limits to Party Autonomy in Arbitral Procedure', (2007) 24(3) *Journal of International Arbitration* 327.

⁸ 'Report of the [UN] Secretary-General: Possible Features of a Model Law on International Commercial Arbitration', op. cit. fn 4, paras 18–19. See also F Nariman, 'Judicial Supervision and Intervention: Before or During Arbitral Proceedings under the UNCITRAL Model Law of Commercial Arbitration 1985 and under the New Indian Law – the Arbitration and Conciliation Act 1996' in M Pryles and M Moser (eds), *The Asian Leading Arbitrators' Guide to International Arbitration*, JurisNet, 2007, p. 329, at p. 330 ('Modern States, both in the West and in the East, have shown a marked reluctance to universalize the concept of absolute arbitral freedom.').

⁹ As to the meaning of a 'full' opportunity, see Section 4.1.

cannot be overridden by private agreement. An award might be set aside or be unenforceable if tainted by transgressions of such due process requirements.

- (iii) *Other mandatory procedural laws* – If the procedural rules agreed by the parties conflict with any non-derogable provisions of the *lex arbitri*, then the latter will usually prevail.¹⁰ For example, Section 15A of the Singapore International Arbitration Act states explicitly that any rules of arbitration chosen by the parties shall be given effect only to the extent that they are not inconsistent with provisions in the Model Law or Part II of that Act (relating to international arbitration) from which the parties cannot derogate.¹¹ A noteworthy mandatory law in mainland China is the requirement of institutional arbitration, i.e. parties cannot choose ad hoc arbitration.¹²
- (iv) *Institutional requirements* – Although not a major impediment to party autonomy, institutional requirements may occasionally constrain party autonomy. For example, under some institutional rules parties are not free to exclude the supervision that is part of that institution's procedure.¹³ At the same time, it is only by virtue of party autonomy that such institutional rules could apply in the first place, because the parties would have chosen them.
- (v) *Third parties* – No matter what the parties to the arbitration agree, their agreement by itself cannot legally bind a third party. Further, while procedural rules may enable arbitral tribunals to request a third party to perform a certain act (e.g. under IBA Rules of Evidence Article 8(4)), this request contains no legal force. In such a case, however, assistance may be sought from the national courts of a competent jurisdiction to issue an order that legally obliges a third party to act.
- (vi) *Arbitral tribunal discretion* – Subject to the exceptions cited above, where parties agree on the procedure to be adopted, the arbitral tribunal is in principle duty-bound to follow that agreement. Philip Yang has observed that '[i]t is generally accepted that if the parties agree on certain matters in arbitral proceedings, then the arbitral tribunal is duty-bound or has no choice but to follow such wishes of the parties . . . The parties can even terminate the arbitration proceedings by agreement'.¹⁴ If the arbitral tribunal cannot accept the parties' agreement on a matter of procedure, it should ordinarily offer its resignation. However, in practice an experienced arbitral tribunal may effectively require the parties to abide by certain procedural rules

¹⁰ See, e.g. SIAC Rules, Rule 1.1; ACICA Rules Article 2.2. Mandatory laws are discussed in Chapters 2 and 3; see especially Chapter 2 Section 7.2, and Chapter 3, Section 4.

¹¹ See also the provision for mandatory rules in Article 4(1) and Schedule 1 of the English Arbitration Act 1996.

¹² See, e.g. *People's Insurance Company of China, Guangzhou Branch v Guangdong Guanghe Power Co Ltd*, (2003) *Min Si Zhong Zi No. 29*, cited in Chua Eu Jin, 'Arbitration in China', (2005) 1 *Asian International Arbitration Journal*, p. 86. See also Wang Wenying, 'Distinct Features of Arbitration in China: An Historical Perspective', (2006) 23(1) *Journal of International Arbitration* 49, at pp. 53 and 57.

¹³ See, e.g. ICC Rules Article 27; SIAC Rules, Rule 27; CIETAC Rules Article 45. See also Chapter 8, Section 3.6.

¹⁴ P Yang, 'The Organisation of International Arbitration Proceedings', in Pryles and Moser (eds), *op. cit.* fn 8, p. 165, at p. 217.

and decisions despite a reluctance by both parties. Usually, this is done by gentle persuasion, but sometimes more senior arbitrators possess the confidence, judgment and experience to express strong views on a matter, which the parties effectively have to accept.

- (vii) *The role of domestic courts* – Court decisions concerning a given arbitration are often not fully consistent with what the parties originally agreed in relation to that arbitration. A notable example of court interference with party autonomy is found in the Singapore case of *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd*.¹⁵ In that case the parties chose the UNCITRAL Arbitration Rules to apply to their arbitration but the court took the view that because they were not fully compatible with the Model Law, they were completely excluded in favour of the Model Law.¹⁶

3 Rules, procedural law and guidelines

3.1 Arbitration rules

3.1.1 Choice of arbitration rules

- 7.9 The parties may, but are not required to, agree on a set of institutional or ad hoc arbitration rules to apply to their arbitration. If they do not agree on a set of arbitration rules, then none will apply. Alternatively, they may simply formulate their own rules or rely on the procedural law at the seat of arbitration.
- 7.10 If a set of arbitration rules is chosen, the choice may be expressed in the parties' arbitration agreement or made before or during the arbitral proceedings. Parties commonly refer in their arbitration agreement to a set of institutional rules. For instance, parties may agree to an arbitration clause that reads:

Any dispute, controversy or claim arising out of or relating to this contract, including the validity, invalidity, breach or termination thereof, shall be settled by arbitration in Hong Kong under the Hong Kong International Arbitration Centre Administered Arbitration Rules in force when the Notice of Arbitration is submitted in accordance with these Rules.

- 7.11 By virtue of this clause, the procedural rules of HKIAC will govern the proceedings if a dispute arising out of that contract is submitted to arbitration. Should the procedural rules chosen by the parties be silent as to any matter, the necessary procedure may be chosen by further agreement between the parties or it may be determined by the arbitral tribunal or the *lex arbitri*.
- 7.12 If no specific rules are indicated but reference is made to an arbitration institution only, that reference generally implies that the parties have agreed on the

¹⁵ [2002] 2 SLR 164 (Singapore High Court).

¹⁶ Swift legislative action followed to avoid damage to Singapore's reputation as an arbitration-friendly venue. Article 15A was inserted into the Singapore International Arbitration Act, which provides that a provision in the arbitration rules chosen by the parties would be given effect to the extent that it is not inconsistent with mandatory provisions of that Act. See generally, M Pillay, 'The Singapore Arbitration Regime and the UNCITRAL Model Law', (2004) 20 *Arbitration International* 355, at pp. 375–383.

rules of that institution. The reverse also applies. If the parties choose a set of institutional arbitration rules, they are presumed to have chosen that institution to administer the arbitration.

Consistent with the party autonomy principle, parties are free to choose the procedural rules of any arbitral institution. Some of the arbitration institutions in the region that have formulated their own rules include ACICA, CIETAC, JCAA, KCAB, SIAC and HKIAC. The KLRCA, on the other hand, has not drafted its own detailed set of rules but has adopted (with modifications) the UNCITRAL Arbitration Rules to govern arbitrations conducted under its auspices.¹⁷ If an arbitration is ad hoc, the rules typically adopted by the parties are the UNCITRAL Arbitration Rules. However, an arbitration can be entirely ad hoc, with no set of arbitration rules involved. 7.13

A number of arbitration institutions offer two or more sets of rules from which parties may choose. Those rules may be designed specifically for the business sector in which the parties operate or the type or magnitude of dispute that may arise. For example, the HKIAC has adopted 'Short Form Arbitration Rules' that contain very brief periods (e.g. 14 days) within which to submit written submissions; a 'Small Claims Procedure' for disputes involving less than US\$50 000; 'Securities Arbitration Rules'; and a 'Semiconductor Intellectual Property Arbitration Procedure'.¹⁸ In addition to offering its own set of arbitration rules, the JCAA has 'Administrative and Procedural Rules for Arbitration under the UNCITRAL Arbitration Rules'.¹⁹ The latter facilitate arbitrations administered by the JCAA but specifically enable those arbitrations to be conducted under the UNCITRAL Arbitration Rules. 7.14

The procedural rules chosen never cover all the procedural issues that may arise. Usually, once an arbitral tribunal has been appointed, it will hold a preliminary meeting with the party representatives in which many points of procedure will be finalised. For example, at this meeting it may be decided when written submissions and documentary evidence should be filed, hearing dates may be fixed and the applicable rules of evidence may be determined. Other questions of procedure are raised and dealt with frequently during an arbitration. 7.15

It is rare that parties do not indicate (through an express choice or by implicitly incorporating institutional rules) what rules will govern their arbitration. But if they do not agree on any rules, the law of the seat of arbitration will govern the arbitral procedure. If the seat of arbitration is in a Model Law country, the Model Law specifically provides a number of fallback procedural provisions. Those relating to the procedure of the arbitration are principally contained in Articles 19–22. In other countries, absent an agreement by the parties, provisions of the domestic law (which may be different from the Model Law) will apply. 7.16

¹⁷ See Rule 1 of the KLRCA Rules.

¹⁸ These documents are available at www.hkiac.org/show_content.php?article_id=34. Similarly, SIAC has a range of arbitral rules designed for specific industry sectors, available at www.siac.org.sg/cms/. In addition, many institutions now have separate rules for expedited arbitrations. See Chapter 7, Section 6.11.

¹⁹ As amended and effective on 1 July 2009.

3.1.2 Differences between institutional and ad hoc arbitration procedure

- 7.17 The degree of supervision or administration offered by arbitral institutions varies. While the policy of most arbitral institutions is to leave the arbitral tribunal as free as possible, some are more proactive in ensuring that the arbitration proceeds smoothly and efficiently and complies with its own rules. The ICC Rules, for example, while being very flexible on procedure generally, require an arbitral tribunal to draw up 'terms of reference' that identify the issues to be determined.²⁰ The 2007 SIAC Rules also contain a requirement for a 'memorandum of issues' which is a very similar document.²¹
- 7.18 It follows that ad hoc arbitrations are generally more flexible in the procedure that they may adopt because they are not constrained by the requirements set by arbitral institutions. But the lack of an arbitral institution may in fact be a drawback because such institutions perform important administrative functions and employ counsel with the relevant legal experience, who are available to advise the arbitral tribunal and parties on day-to-day issues. Where a party is recalcitrant or otherwise difficult, the support of a supervisory institution will help to minimise that party's misconduct. Arbitrators also find comfort with the support of an experienced institution that offers a neutral sounding-board for complicated aspects of arbitration practice.²² Institutional support can also minimise the adverse impact of an arbitrator who is not performing his functions diligently or in due time by requiring the arbitrator to do so or, ultimately, by removing him.

3.1.3 Failure to object to non-compliance with procedural rules

- 7.19 A party that does not object to a failure to comply with an applicable procedural rule may be deemed to have waived its right to object subsequently. Many institutional rules contain a provision addressing this issue. For example, Article 28 of the HKIAC Rules provides:²³
- A party who knows or ought reasonably to know that any provision of, or requirement arising under, these Rules (including the agreement to arbitrate) has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be deemed to have waived its right to object.
- 7.20 This rule is related to the doctrines of waiver and estoppel.²⁴ It requires that procedural objections be raised not long after the time the non-compliance occurred,

²⁰ See ICC Rules Article 18.

²¹ See SIAC Rules, Rule 17. This requirement is not included in the 2010 SIAC Rules.

²² See, e.g. G Born, *International Commercial Arbitration*, Kluwer Law International, 2009, pp. 150–151; M Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, 2008, pp. 9–10; and JDM Lew, LA Mistelis and SM Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, paras 3–14 to 3–16 and 3–20 to 3–23.

²³ See also, Model Law Article 4; ACICA Rules Article 31; CIETAC Rules Article 8; ICC Rules Article 33; JCAA Rules, Rule 51; KCAB International Rules Article 43; SIAC Rules, Rule 35.1; UNCITRAL Arbitration Rules Article 30.

²⁴ See, e.g. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Stevens and Sons, 1953, pp. 141–149 and Y Derains and E Schwartz, *A Guide to the ICC Rules of Arbitration*, 2nd edn, Kluwer Law, 2005, p. 379. See also JR Weeramantry, 'Estoppel and the Iran-United States Claims Tribunal',

otherwise the right to object later may be lost. However, it has been commented that in China, the legality of such presumed waiver provisions in arbitration procedural rules may be questionable because they deprive parties of the legal right to sue, i.e. it may preclude them from bringing a court action to challenge the award.²⁵

3.1.4 Applicable version of rules

A question as to the applicable version of any arbitration rules can arise when the rules are revised or otherwise amended between the time the arbitration agreement is concluded and the time the arbitration is commenced.²⁶ This situation arose in *Black and Veatch Singapore Pte Ltd v Jurong Engineering Ltd*.²⁷ In that case, the contract at issue contained an agreement to arbitrate under the SIAC arbitration rules. At the time the agreement was entered into, SIAC had only one set of rules. By the time the dispute arose, SIAC had two sets of rules – one for domestic and one for international arbitration. The Singapore High Court found that the parties had agreed on SIAC administered arbitration generally, and that they would be bound to the most appropriate SIAC Rules available at the time of their submission to arbitration. Consequently, because the arbitration was domestic, it was held that the domestic rules of SIAC were applicable even though they did not exist at the time the arbitration agreement was concluded. This decision is consistent with international practice.²⁸ The Singapore Court of Appeal, confirming the High Court's decision, also noted that the burden of proving an earlier or less appropriate version of arbitration rules applies lies with the party seeking the application of such rules.²⁹

The presumption in favour of the latest or most appropriate set of arbitration rules should be compared with the KCAB's press release in 2007 announcing its new rules, which stated:³⁰

These newly enacted Rules that go into effect shall be applied to international arbitration cases in which the parties have a written agreement to resolve disputes through arbitration in accordance with these Rules. Therefore, as a general rule, the existing arbitration rules shall be applied to those cases in which the parties have no agreement about these new Rules.

(1996) 27 *Netherlands Yearbook of International Law* 113, at pp. 114–117. See also Chapter 4, Section 4.1.2 of this book.

²⁵ See J Mo, 'Legality of the Presumed Waiver in Arbitration Proceedings under Chinese Law', (2001) 29 *International Business Lawyer* 21, at p. 25 (also noting that in China, the legality of a deemed/presumed act (e.g. a waiver) must be stipulated by law, and that there is no provision in China's 1994 Arbitration Law that deals with a party's waiver of its right to challenge the validity of an arbitral award).

²⁶ See generally S Greenberg and F Mange, 'Institutional and Ad Hoc Perspectives on the Temporal Conflict of Arbitral Rules', (2010) 27(2) *Journal of International Arbitration* 225.

²⁷ [2004] SGCA 30 (Singapore Court of Appeal).

²⁸ See, e.g. ICC Rules Article 6(1) and HKIAC Rules Article 1.4. See generally Greenberg and Mange, *op. cit.* fn 26.

²⁹ [2004] SGCA 30, at para 15 and paras 19–26.

³⁰ KCAB Notice, 'New International Arbitration Rules' (7 February 2007) www.kcab.or.kr/ (viewed 11 June 2007).

3.2 IBA Rules of Evidence

- 7.23 Efforts toward greater harmonisation of arbitral procedure have been made through the adoption of guidelines or rules in areas usually left uncharted by the mainstream arbitral rules. We have seen, for example, in Chapter 6 the formulation of guidelines on arbitrators' conflicts of interest. Another prime manifestation of these efforts is the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration ('IBA Rules of Evidence').³¹ These Rules, as indicated in their Preamble, are designed not to supplant but 'to supplement the legal provisions and the international or ad hoc rules according to which the Parties are conducting their arbitration'.
- 7.24 The IBA Rules of Evidence have in large measure established a generally acceptable synthesis of common law and civil law practice in relation to presenting and obtaining evidence, including the often delicate issue of discovery or production of documents. In David Rivkin's forward to the IBA Rules of Evidence, he notes that the Rules 'reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures'. However, they have not been immune to the criticism that they are more oriented towards a common law approach.³² On the other hand, it may be said that the provisions relating to document production are more akin to the civil law approach because they require the requesting party to identify a document or a narrow category of documents. Overall, the IBA Rules of Evidence have gained a wide degree of respect and their use in international arbitration is constantly on the increase.³³
- 7.25 The IBA Rules of Evidence could play many roles in an arbitration. As the Preamble to the Rules states, they may be adopted in whole or in part by the parties and the arbitral tribunal or they may be varied or simply used as guidelines in developing procedures for the particular circumstances of an arbitration. Frequently, parties agree that the arbitral tribunal may refer to them for guidance without being bound by them.³⁴ However, even where parties have not agreed

³¹ Adopted by a resolution of the IBA Council on 1 June 1999. These 1999 Rules had their genesis in the IBA's *Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration*, adopted on 28 May 1983, (1985) *X Yearbook of Commercial Arbitration* 152. A revised version of the 1999 Rules was adopted by the IBA Council on 29 May 2010. This occurred just prior to publication. As a result, references to the 'IBA Rules of Evidence' in this book are to the 1999 Rules unless otherwise stated. Among other things, the 2010 revisions provide greater guidance on (i) the content of expert reports, (ii) requests for documents or electronic information, and (iii) issues of legal privilege. The 2010 Rules also expand confidentiality protections concerning produced or submitted documents and provide for the use of videoconference technology.

³² See G Born, *International Commercial Arbitration: Commentary and Materials*, 2nd edn, Kluwer Law International, 2001, p. 485; and Born, 2009, op. cit. fn 22, vol. II, p. 1793.

³³ See, e.g. Yang, op. cit. fn 14, pp. 184–185.

³⁴ In a survey conducted by the IBA Rules of Evidence Subcommittee, 18% of participants indicated they chose the IBA Rules of Evidence in an arbitration agreement in every case or most cases. Thirty-one percent replied that they were chosen in some instances. When asked how often the IBA Rules are adopted later (i.e. if not in the arbitration agreement), for example, in the terms of reference or in arbitral tribunal directions, 43% said in every or most cases and 42% said in some cases. These figures were kindly provided to the authors by one of the members of the IBA Rules of Evidence Subcommittee, which revised those Rules. See also TC Thye and J Choong, 'Disclosure of Documents in Singapore International Arbitrations: Time for a Reassessment', (2005) 1 *Asian Journal of International Arbitration* 49, at p. 59 ('the IBA Rules can be (and

on their use, it is not uncommon for arbitral tribunals to refer to them.³⁵ Some arbitrators consider themselves to be ‘inspired though not bound’ by the IBA Rules of Evidence while others prefer to adopt them as binding.³⁶

The broad acceptance of the IBA Rules of Evidence is also manifested in the fact that institutional rules are starting to refer to them explicitly. Article 27(2) of the ACICA Rules states that in relation to evidence and the hearing, the arbitral tribunal ‘shall have regard to, but is not bound to apply’ the IBA Rules of Evidence. However, Article 27(3) adds that ‘[a]n agreement of the parties and the Rules (in that order) shall at all times prevail over an inconsistent provision in the [IBA Rules of Evidence]’.

4 Core procedural rights and duties

State courts exercise supervisory jurisdiction over arbitrations that are seated in that state. A major aim of this supervisory function is to ensure that the fundamental procedural rights of parties are protected. The core procedural rights of parties and duties of arbitral tribunals are discussed in this section.

4.1 Right to present case

A fundamental right accorded to all parties to an arbitration is that each party be given a reasonable opportunity to present its case.³⁷ It is a procedural right based on the Latin maxim *audi alteram partem* (hear the other side). This right includes the entitlement to be notified as to the commencement of arbitration proceedings, as well as hearings and other steps in the arbitration, and the right to answer the assertions made by the opposing party.

To enable the presentation of each party’s case, all documents or information supplied to the arbitral tribunal by one party should at the same time be communicated to the other parties.³⁸ The 1976 version of the UNCITRAL

are) used as persuasive guidelines of accepted international arbitral practice. As such, they provide a useful starting point on, inter alia, how to approach the contentious issue of disclosure of documents. The IBA Rules themselves have some degree of built in flexibility, allowing the arbitral tribunal to exercise its discretion as best suits the individual case.’).

³⁵ See, e.g. P Yuen and J Choong, ‘Is Arbitration Value for Money? Assessing Some Common Complaints about the Costs of International Arbitration’, 2008 *Asian Dispute Review* 76 (commenting that the IBA Rules of Evidence ‘have been increasingly widely accepted in Asia, even where parties have not agreed in advance that they should apply.’). See also Seung Wha Chang, ‘Document Production under the Asian Civil Law System’, in Pyles and Moser, op. cit. fn 8, p. 267, at p. 268; B Hanotiau, ‘The Conduct of the Hearings’, in Newman and Hill (eds), op. cit. fn 5, at p. 359, at p. 364.

³⁶ See, e.g. Moses, op. cit. fn 22, p. 165.

³⁷ See Model Law Article 18; UNCITRAL Arbitration Rules Article 15(1); HKIAC Rules Article 14(1); ICC Rules Articles 15(2) and 22(1); KCAB International Rules Article 20(3); Hong Kong Arbitration Ordinance Section 2GA(1)(a). See also ICSID Convention Article 45(2). In Thailand, Section 17(2) of the Arbitration Act 1987 provided that ‘[u]nless otherwise agreed by the arbitration agreement or law, an arbitrator shall have the power to conduct any procedure as he deems appropriate taking the principle of natural justice as a prime consideration’ but now more fidelity toward Article 18 of the Model Law is found in Section 25 of Thailand’s Arbitration Act 2002.

³⁸ Model Law Article 24(3); UNCITRAL Arbitration Rules Article 15(3).

Arbitration Rules frames this as obligatory. However, this obligation was a matter of minor controversy during the revision of the UNICTRAL Arbitration Rules. The Working Group considered that while this contemporaneous communication generally reflected an important principle, there would be circumstances where it would be inappropriate and have the potential to create procedural inequality. It occasionally occurs that one party is given a short extension of the time in which it must communicate submissions. If the rule is rigidly enforced and the procedure calls for a simultaneous exchange of briefs, the late-filing side would arguably have an unfair advantage because it would see the opposing side's submissions that were filed on time – thus impinging on another fundamental right – to be treated equally. The Working Group therefore recommended giving the arbitral tribunal a discretion to vary the rule.³⁹ The issue was further discussed by the Commission with the result that the 2010 UNCITRAL Rules give the arbitral tribunal discretion only where it is permitted by applicable law. A related requirement is that any expert report or evidentiary document relied on by the arbitral tribunal must be communicated to the parties.⁴⁰

7.30 Certain rules and laws, such as Article 2GA of the Hong Kong Arbitration Ordinance, expressly provide for the giving of a 'reasonable' opportunity to each party to present its case.⁴¹ The term 'reasonable' avoids reference to a 'full' opportunity to present a party's case, as is the terminology used in Article 18 of the Model Law.⁴² The high standard inherent in the word 'full' has led some to comment that the phrasing may enable parties to make the arbitration unmanageable, for example, by demanding that an excessively high number of witnesses be called or by requesting the presentation of legal argument in an unreasonably lengthy fashion.⁴³ Responding to these arguments, the 2010 UNCITRAL Arbitration Rules now use the word 'reasonable'.⁴⁴

7.31 There is very little case law on expansive claims to a 'full' opportunity to present a case, perhaps indicating how spurious such a claim would be. Chamber Three of the Iran-US Claims Tribunal squarely rejected any misuse of the word 'full' when it stated:⁴⁵

³⁹ Working Group Report, UN Doc A/CN.9/665, para 127.

⁴⁰ Model Law Article 24(3).

⁴¹ Similar wording is contained in CIETAC Rules Article 29(2); HKIAC Rules Article 14; ICC Rules Articles 15(2) and 22. See also JCAA Rules, Rule 32 (referring to a 'sufficient opportunity'); KCAB International Rules Article 22 (referring to a 'fair opportunity') and Section 20 of the Malaysian Arbitration Act 2005 (referring to a 'fair and reasonable opportunity').

⁴² See, also UNCITRAL Arbitration Rules Article 15; Japanese Arbitration Law Article 25(2); Section 25 of Thailand's Arbitration Act 2002. Interestingly, Article 17(1) of the ACICA Rules employs the words 'full opportunity', whereas Article 13(1) of the ACICA Expedited Rules refers to a 'reasonable opportunity'.

⁴³ See T Sawada, 'Conduct of the Hearings', in Pryles and Moser, op. cit. fn 8, p. 289, at p. 291. However, parties now have the choice of selecting expedited procedures such as those provided by a number of arbitral institutions. See Section 6.11.

⁴⁴ Report of the Working Group on Arbitration and Conciliation on the work of its forty-fifth session, (Vienna, 11–15 September 2006), UN Doc A/CN.9/614, para 77.

⁴⁵ *Dadras International v Islamic Republic of Iran*, (1995) 31 Iran-US CTR 127, at 144. Similarly, see Bin Cheng, op. cit. fn 24, p. 296. Additionally, Redfern and Hunter suggest the word 'full' must be interpreted from an objective (rather than subjective) standpoint. A Redfern, M Hunter, N Blackaby and C Partasides, *Law and Practice of International Commercial Arbitration*, 4th edn, Sweet & Maxwell, 2004, para 6–07. See also the 1999 IBA Rules of Evidence Article 8(1) (and Article 8(2) of the 2010 version of those Rules) and Lew, Mistelis and Kröll, op. cit. fn 22, paras 22–61 and 22–71.

the Tribunal is unpersuaded that any Party can credibly claim that it has been denied a 'full opportunity of presenting [its] case' given the procedural history of these Cases. The key word is 'opportunity': the Tribunal is obliged to provide the framework within which the parties may present their cases, but is by no means obliged to acquiesce in a party's desire for a particular sequence of proceedings or to permit repetitious proceedings.

Finally, it should be noted that a party's right to present its case does not necessarily include the right to an oral hearing. Although it is not a common practice, an arbitral tribunal may decide within the discretion granted to it to determine the facts or legal points at issue on the documents alone. However, some arbitral rules do require the arbitral tribunal to hold a hearing if a party so requests. 7.32

4.2 Right to equal treatment

The rights to present one's case and to be treated equally overlap significantly.⁴⁶ 7.33 However, it is helpful to keep the two separate as each also possesses distinctive features.

The requirement that parties be treated with equality is well established and constitutes a cardinal principle of arbitral procedure.⁴⁷ This right is enshrined in virtually all international commercial arbitration instruments, and is frequently found in the same provision that deals with the opportunity to present one's case.⁴⁸ 7.34

However, there is no precise formula to determine how parties are to be treated equally. An apposite institutional rule is Article 15(2) of the ICC Rules, which provides that 'the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case'.⁴⁹ The reason for referring to 'fairly and impartially' rather than 'equal treatment' has been said to be that 'in some cases, treating the parties in precisely the same manner may lead to unfair results'.⁵⁰ It would be injudicious for an arbitrator to apply an equal treatment provision too rigidly. As one experienced arbitrator from the region has said, the arbitral tribunal's obligation 'to treat parties equally [at a hearing] does not require allowing an equal number of witnesses or an equal amount of time'.⁵¹ 7.35

In this regard, the drafting history of the UNCITRAL Arbitration Rules also provides valuable insight because an earlier draft that formed the basis for those rules 7.36

⁴⁶ See, e.g. D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary*, Oxford University Press, 2006, p. 29 ('the issue of equality has mainly arisen as a question concerning the right to present one's case').

⁴⁷ See, e.g. Bin Cheng, *op. cit.* fn 24, p. 290.

⁴⁸ See, e.g. KCAB International Rules Article 20(3); CIETAC Rules Article 19; Model Law Article 18; UNCITRAL Arbitration Rules Article 15(1); Japanese Arbitration Law 2003 Article 25(1); Hong Kong Arbitration Ordinance Section 2GA(1)(a); Malaysian Arbitration Act 2005 Section 20; Indian Arbitration and Conciliation Act 1996 Section 18.

⁴⁹ Section 2GA(1)(a) of the Hong Kong Arbitration Ordinance also uses the 'fair and impartial' wording in preference to 'equality of treatment'.

⁵⁰ Derains and Schwartz, *op. cit.* fn 24, p. 229.

⁵¹ Sawada, *op. cit.* fn 43, p. 297.

required parties to be treated with ‘absolute equality’.⁵² The modifier ‘absolute’ was subsequently deleted. Some commentators have observed that this deletion ‘indicates that the provision aims to guarantee not so much formal equality as equality in the sense of justice and fairness’.⁵³

4.3 Arbitrators’ duty to avoid delay and expense

- 7.37 Related to arbitral procedure and to some extent procedural rights is an emerging duty on arbitrators to avoid unnecessary costs and delay.⁵⁴ As an example, Section 2GA(1)(b) of the Hong Kong Arbitration Ordinance requires arbitrators ‘to use procedures that are appropriate to the particular case, avoiding unnecessary delay and expense, so as to provide a fair means for resolving the dispute to which the proceedings relate’.⁵⁵ Similar considerations are echoed in Rule 15(2) of the SIAC Rules, which provides that ‘[i]n the absence of procedural rules agreed by the parties or contained in these Rules, the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate to ensure the fair, expeditious, economical and final determination of the dispute’.⁵⁶ Where the Model Law applies, in extreme circumstances parties may apply to the court under Article 14(1) to terminate the mandate of an arbitrator if he ‘fails to act without undue delay’.⁵⁷
- 7.38 A number of institutional rules, such as Article 33 of the KCAB International Rules, impose a time limit within which the arbitral tribunal should render its award.⁵⁸ This time period is extendable. Under the ICC Rules, the failure of the

⁵² Preliminary Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade, ‘Report of the Secretary-General on the Preliminary Draft Set of Arbitration Rules’, UN Doc A/CN.9/97 (1974), reprinted in (1975) VI *UNCITRAL Yearbook* 163, at pp. 172–173.

⁵³ Caron, Caplan and Pellonpää, op. cit. fn 46, p. 28.

⁵⁴ See, e.g. Yang, op. cit. fn 14, pp. 173–176. Some rules also require the *parties* to act in a manner that makes the arbitration efficient. For example, the HKIAC Rules Article 14(7) provides that the ‘parties shall do everything necessary to ensure the fair and efficient conduct of the proceedings.’ See also the ICA Rules Annexure 1: ‘Guidelines for Arbitrators and the Parties for Expeditious Conduct of Arbitration Proceedings’.

⁵⁵ See also Hong Kong Arbitration Ordinance Section 2AA (declaring that ‘[t]he object of this Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense’) and Section 15(3) of that Ordinance (giving courts, upon application by a party, the power ‘to remove an arbitrator . . . who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award . . .’).

⁵⁶ See also JCAA Rules, Rule 32(4) (‘The arbitral tribunal shall make efforts towards the expedited resolution of the dispute.’); and ICA Rules, Rule 63 (‘The arbitral tribunal shall make the award as expeditiously as possible . . .’). The need ‘to avoid unnecessary delay or expenses’ has also been included in the HKIAC Rules Article 14(1). Similar provisions are found in Section 33(1)(b) of the English Arbitration Act 1996; and the LCIA Rules Article 14(2).

⁵⁷ Delay is also a common ground for arbitrators to be removed under the ICC Rules Article 12(2), which allows the ICC Court to remove an arbitrator ‘on the Court’s own initiative when it decides that he is prevented de jure or de facto from fulfilling his functions, or that he is not fulfilling his functions in accordance with the Rules or within the prescribed time limits’. See also JFry and SGreenberg, ‘The Arbitral Tribunal: Applications of Articles 7–12 of the ICC Rules in Recent Cases’, (2009) 20(2) *ICC International Court of Arbitration Bulletin* 12, at para 108, p. 29 (‘The most common reason for initiating replacement proceedings is when the arbitrator is causing unacceptable delays, is not responding to correspondence from the Secretariat and/or parties, or is not conducting the arbitration in accordance with the Rules.’). Similarly, see Rule 14 of the 2010 SIAC Rules, which potentially also permits a party to challenge an arbitrator for undue delays.

⁵⁸ See also CIETAC Rules Article 42; IAC Rules, Rule 63; ICC Rules Article 24; JCAA Rules, Rule 53(1). This issue is dealt with in more detail in Chapter 8, Section 3.4.

arbitral tribunal to complete the arbitration in a timely manner may lead to a reduction in its fees, which are fixed by the ICC Court, or in an extreme case one or more members of the arbitral tribunal may be replaced.⁵⁹ In certain jurisdictions, domestic courts may hold arbitrators personally liable if they have not rendered an award within the time period agreed by the parties.⁶⁰

Other rules such as the 1976 UNCITRAL Arbitration Rules do not make specific reference to delay and expense avoidance. They simply provide the arbitral tribunal with the discretion to conduct the proceedings ‘in such manner as it considers appropriate’.⁶¹ Even where the rules are silent, however, arbitral tribunals have an inherent duty to avoid unnecessary delays and expense. 7.39

Should parties choose expedited arbitral procedures, extra pressure is applied on arbitrators (as well as the parties) to complete the arbitration within a short time-frame. Article 3(1) of the ACICA Expedited Arbitration Rules, for example, states that its ‘overriding objective . . . is to provide arbitration that is quick, cost effective and fair, considering especially the amounts in dispute and complexity of issues or facts involved . . .’. Article 3(2) adds that ‘[b]y invoking these Rules the parties agree to accept the overriding objective and its application by the Arbitrator’. 7.40

Matthew Gearing has drawn attention to the growing perception that international arbitration is a slower and more expensive dispute resolution process when compared with litigation. He has taken the view that a more pro-active approach by arbitrators is needed to improve efficiency in arbitration. In his opinion, a major reason behind this problem is the conflict between an arbitrator’s duty to implement more efficient procedures and the duty to abide by the parties’ wishes.⁶² 7.41

A growing concern about time and costs in arbitration prompted the ICC Commission on Arbitration to set up a special Task Force in 2004 dedicated to the issue. As a result of its research the ICC published in 2007 a guide called *Techniques for Controlling Time and Costs in Arbitration*.⁶³ It is a practical tool designed to stimulate the conscious choice of arbitral procedures with a view 7.42

⁵⁹ See Fry and Greenberg, *op.cit.* fn 57, at p. 28 et seq for examples of the application of Article 12(2) of the ICC Rules in these circumstances. See also Derains and Schwartz, *op. cit.* fn 24, p. 303.

⁶⁰ See, e.g. *Jiliet v Castagnet*, Case 1660 FS-P+B (French Cour de Cassation), 6 December 2005, reported and reviewed in (2006) 1 *Stockholm International Arbitration Review* 149.

⁶¹ UNCITRAL Arbitration Rules Article 15(1). But see Article 17(1) of the 2010 UNCITRAL Arbitration Rules.

⁶² Matthew Gearing, address at ‘ADR in Asia Conference 2008: Arbitration and Mediation – Global Platforms for Dispute Resolution’, Hong Kong, 12 September 2008. Similar concerns about the speed and costs of international commercial arbitration were expressed by the former Chief Justice of India, Justice Lahoti, in a paper entitled ‘International Commercial Arbitration Challenges and Possibilities in Asian Countries (with Special Reference to India)’, delivered at a SIAC arbitration seminar in Singapore on ‘Arbitration in India and Singapore: Sharing Perspectives’, 27 June 2008. With specific regard to concerns of in-house counsel in corporations about the cost of arbitration, see PricewaterhouseCoopers and Queen Mary College, 2006, *op. cit.* fn 1, pp. 19–20.

⁶³ Available at www.iccwbo.org/uploadedFiles/TimeCost.E.pdf. See also the approaches to delays in arbitration addressed in D Rivkin, ‘Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited’, Instituto Universitario de Estudios Europeos, Universidad San Pablo, Madrid, *Serie Arbitraje Internacional y Resolución Alternativa de Controversias*, Número 1/2007; and BS Vasani and KD Tallent, ‘Proportional Autonomy: Addressing Delay in International Arbitration through a Deadline for the Rendering of Final Awards’, (2008) 2 *Dispute Resolution International* 255.

to organising an arbitration that is efficient and appropriately tailor-made. It is intended to encourage arbitrators and parties to create a new dynamic at the outset of an arbitration whereby the parties can review the suggested techniques and agree on appropriate procedures and, if they fail to agree, the arbitral tribunal can decide on such procedures. While this document was conceived with the ICC Rules of Arbitration in mind, the vast majority of the techniques suggested by the document can be used in virtually any arbitration.

5 Balancing common law and civil law procedure

- 7.43 International commercial arbitration frequently involves two or more parties based in jurisdictions whose legal traditions are different. Striking an appropriate balance between these traditions in terms of the arbitral procedure is one of international arbitration's key advantages. Often one party is from a common law jurisdiction and the other from a civil law jurisdiction. A traditional characterisation of these two legal systems is that the common law is said to be adversarial (i.e. the judge largely leaves the presentation of the case to the parties), whereas civil law procedure is described as inquisitorial (i.e. the judge tends to play a more active role in ascertaining the truth and is less dependent on the arguments put forward by the parties).⁶⁴
- 7.44 In the Asia-Pacific, while many jurisdictions have their roots in the common law,⁶⁵ the laws of a significant number of others are based on the civil law tradition.⁶⁶ This difference between various Asia-Pacific legal systems is sometimes overlooked by practitioners trained solely in common law jurisdictions.
- 7.45 An arbitral tribunal composed of lawyers from civil law jurisdictions may be more inclined to follow rules of procedure applied by civil law courts. A corresponding preference for common law procedure may be observed in respect

⁶⁴ Added caution must be exercised in assuming that procedure from either common or civil law is relatively homogenous. For example, US document production is significantly different from that in the UK. As regards the differences in civil law jurisdictions, it has been said that 'there is possibly as much difference between the outlook and practice of a French avocat and of a German Rechtsanwalt as between those of an English and of an Italian lawyer'. C Reymond, 'To What Extent is Civil Law Procedure Inquisitorial?', (1989) 8 *Arbitration* 159. There are also enormous differences among Asia-Pacific jurisdictions in this regard. For a general comparison of common law and civil law, including procedural issues, see, e.g. C Pejovic, 'Civil Law and Common Law: Two Different Paths Leading to the Same Goal', [2001] *Victoria University of Wellington Law Review* 42.

⁶⁵ These countries include Australia, Brunei, Hong Kong, India, Pakistan, the Philippines, Malaysia, New Zealand, Sri Lanka and Singapore.

⁶⁶ These countries include Japan, South Korea, Indonesia, Taiwan, Thailand and Vietnam. To group these countries as having similar systems of law is far from wise, and far from a reality. The variety of different legal traditions found in Asia may be gleaned from the historical origins of the laws of each country. For example, Japanese civil procedure was based on the German model. See T Nakamura, 'Commercial Litigation/Arbitration', in L Nottage (ed), *Japan Business Law Guide*, vol. 2, CCH Asia Pte Ltd, looseleaf service, paras 80–140. South Korea's legal system was modelled on the systems found in Germany, France and Japan in the 1960s. See Seung Wha Chang, 'Republic of Korea' in M Pryles (ed), *Dispute Resolution in Asia*, 3rd edn, Kluwer Law International, 2006, p. 237, at p. 237. Indonesia's was based on the Dutch system of civil law. See K Mills, 'Indonesia', in Pryles, *ibid.*, p. 165, at p. 166. Additionally, Seung Wha Chang has commented that although East Asia (i.e. China, Japan and Korea) have civil law traditions, there is a general misperception that they are deeply rooted in the legal systems of that region. Seung Wha Chang, *op. cit.* fn 35, p. 269. The background to Asia-Pacific legal cultures is discussed in Chapter 1.

of arbitral tribunals that are composed of arbitrators trained in common law jurisdictions.⁶⁷ When arbitrators from both the civil law and the common law sit together, cross-cultural influences may lead to the adoption of the better aspects from each tradition and the avoidance of weaker aspects. It is instructive to examine briefly the general features of both common law and civil law approaches to litigation. From this comparison, it is easier to identify the hybrid practices that are common in international arbitration.

The following table, at the risk of oversimplification, is an attempt to provide a general comparison of common law, civil law and international arbitration procedure for resolving private, contractual commercial disputes. What emerges from the international arbitration column is a mixed process that cannot be categorised as having a distinctly common law or civil law foundation.⁶⁸

Comparative Table			
	Civil Law ⁶⁹	Common Law ⁷⁰	International Arbitration ⁷¹
Written Submissions or Pleadings	Contain legal and factual arguments that are to be proved by the documents or witness statements and authorities attached to the pleadings. Generally a consecutive filing of statement of claim, a defence and a reply.	Contain summary statements of the material facts, with no evidence and very little law. Generally, a consecutive filing of statement of claim (by plaintiff), a defence (by defendant) and a reply (by plaintiff).	Contain facts, law, documentary evidence, witness statements, and expert reports on which the parties rely. Typically two rounds of a consecutive exchange of such submissions. Simultaneous exchanges are also sometimes made.
Witness Statements or Affidavits	Factual witness statements are of limited probative value, and are usually brief. In France, for example, there are generally few witness testimonies in civil and commercial cases. When witnesses give testimony they ordinarily submit an 'attestation' as to facts witnessed, which under Article 202 of the French Code of Civil Procedure must contain their name, their relationship with	Affidavits written in the name of a person (called a deponent) and sworn by them to be true constitute prominent documents that are filed with the court and provided to the other party. In an affidavit, the deponents – usually key witnesses – make a statement as to their knowledge or belief in relation to relevant facts or in relation to the meaning and context of key documents.	Witness statements are often attached to written briefs (see above). Where the international arbitration involves predominantly common law lawyers and arbitrators, witness statements may be exchanged at a later stage rather than with the briefs. Article 4(5)(c) of the IBA Rules of Evidence requires witnesses to affirm the truth of the statement.

(cont.)

⁶⁷ Hanotiau, op. cit. fn 35, pp. 359–360.

⁶⁸ See, e.g. Peter Caldwell's observation that '[m]any international arbitrations are conducted in a manner that can be said to be neither inquisitorial nor adversarial, but an amalgam of the two.' P Caldwell, 'Must Arbitration be a Bloodbath?', (2006) *Asian Dispute Review* 86, at p. 87.

⁶⁹ The information in the civil law column is based on Hanotiau, op. cit. fn 35, pp. 360–361 and the helpful comments provided by Maître Romain Dupeyré.

⁷⁰ This column is more reflective of English court procedure rather than US procedure.

⁷¹ This column shows a common approach in international arbitration but it is certainly not the only approach because international arbitration procedures vary immensely.

Comparative Table (cont.)			
	Civil Law	Common Law	International Arbitration
	the parties and must be handwritten. There is, however, no specific sanction when these requirements are not satisfied. Under Article 202, witnesses must also state they are aware that any false statement is punishable by criminal sanctions.	Affidavits of witnesses are typically filed at a later stage of the written process, after both sides have exchanged pleadings setting out their claims and the facts alleged to support the claims.	
Documentary Evidence	Contemporaneous documentary evidence is usually attached to written pleadings and is considered as the most important evidence. Documents do not need to be confirmed by a witness. However, the court must be convinced of the document's probity. If in doubt, it might ask for a document to be confirmed by a witness or expert.	Documents are tendered as evidence through witnesses. This is done mainly through affidavits in which the deponent exhibits the document and states from his or her knowledge how the document came into existence, e.g. the deponent drafted it. Documents may also be tendered as evidence through witnesses giving oral evidence.	Documents are attached to the written briefs of the parties or to witness statements or both. Documentary evidence (particularly if contemporaneous with the events in dispute) is given considerable weight, and may be considered as the most important evidence.
Document Requests	A party's obligation is to produce only documents on which that party relies. If a party requires documents held by the other party, it may ask the court to order the other party to produce it (see, e.g. Article 11 of the French Code of Civil Procedure). Requests for specific documents are regularly ordered, but general discovery requests are not. A party can, for example, request a court, before initiating a court action, to order the other parties to produce certain documents on which the outcome of a potential dispute might depend (see, e.g. Article 145 of the French Code of Civil Procedure).	Requests for broad and voluminous categories of documents may be granted. Frequently, if one party requests, the court will order the other party to set out in an affidavit a list of relevant documents which it has in its possession – whether or not they support or weaken the disclosing party's case. The requesting party may then inspect and take copies of those documents. This process is often referred to as document discovery.	Orders to produce documents are increasingly being granted, most often in the limited manner prescribed in Article 3 of the IBA Rules of Evidence (i.e. the requesting party must identify the document or narrow category of documents and explain why it is relevant). Broad requests are usually refused.
Hearings	A hearing may take place without witness testimony but this depends on the evidence submitted by the parties. If there is insufficient documentary evidence, the judge may call a witness. Or if a party has a strong desire to bring a witness, the court may	A hearing (also called a trial) would normally consist of opening statements, witness testimony (and cross-examination) and closing arguments. Oral evidence is considered highly important. In most cases, witnesses appear	Unless the case is relatively simple or the amount at issue does not justify the expense, a hearing is usually held. Arbitral institutions may have special rules for documents only or expedited arbitrations. See, e.g. HKIAC and ACICA.

Comparative Table (cont.)			
	Civil Law	Common Law	International Arbitration
	<p>agree. The parties restate the arguments developed in their written submissions.</p> <p>Oral testimony is considered secondary to documentary evidence.⁷²</p> <p>The oral hearing would rarely exceed one or two days.</p> <p>Hearings are not always necessary and parties may agree that the court will decide on the basis of the parties' documents and written submissions. If this is the case in France, the lawyers file their 'dossier de plaidoirie' with the court but make no oral statement.⁷³</p>	<p>at hearings and give evidence.⁷⁴</p> <p>The hearing is of critical importance because this is where the main legal arguments are submitted (and often won or lost) and where the witness evidence on the facts could make or break a case (usually depending on the judge's assessment as to the credibility of the witness and his testimony).</p> <p>It is not uncommon for hearings to take several weeks, months and occasionally even years in a complex case.</p>	<p>Documentary evidence is generally given more weight than the oral evidence from witnesses.</p> <p>The length of a hearing depends on the case but hearings are generally much shorter in duration in comparison with common law courts. A hearing of more than a week or two is considered long.</p> <p>Witnesses are usually cross-examined.</p>
Post-hearing	<p>For post-hearing activity by the court, see the section on expert witnesses below.</p> <p>Post-hearing briefs are possible only at the request of the court for additional information if needed to take a decision. This practice is known as 'note en délibéré' under French law and is subject to Article 445 of the French Code of Civil Procedure.</p> <p>Post-hearing briefs may not be permitted simply because the parties want to file them.</p>	<p>Once the hearing is over, ordinarily no more exchanges with the judge take place until the judgment is delivered.</p>	<p>It is quite common for the arbitral tribunal to accept post hearing written briefs that comment on the evidence or issues that were raised at the hearing. These briefs may also recapitulate a party's arguments generally.</p>
Expert Witnesses	<p>The court may (on its own motion or at the request of one of the parties) request the advice of one or more technical experts</p>	<p>Courts do not appoint experts. It is up to a party to retain its own expert witness to give an opinion as to, for example, a medical,</p>	<p>The parties are free to appoint their own expert witnesses. Experts are usually required to file written statements, give</p>

(cont.)

⁷² In this regard, Hanotiau remarks that '[i]f the claims are supported by contracts or exchanges of [correspondence], judges will generally not go further. If a contract is still contradicted by testimony, it is not unusual for the contract to prevail. There has traditionally been a distrust of witnesses in the civil law system. The evidence is predominantly documentary.' Hanotiau, op. cit. fn 35, p. 360.

⁷³ See L. Cadiet and E. Jeuland, *Droit judiciaire privé*, 5th edn, Litec, 2006, para 899.

⁷⁴ Of course, in cases that involve solely a dispute as to a point of law, witnesses may not be required.

Comparative Table (<i>cont.</i>)		
Civil Law	Common Law	International Arbitration
<p>appointed by the court during or after the hearing (see, e.g. Article 232 of the French Code of Civil Procedure).</p> <p>Court appointment of experts is frequent in practice. A court would draft the terms of reference of the experts. Courts are not bound by the expert's report. Parties may hire their own expert to dispute the findings of the court-appointed expert. Experts must respect the due process rights of the parties.</p>	<p>scientific or technical issue that might be in dispute. Expert witnesses appear at the oral hearing to give evidence, are cross-examined by representatives of the opposing side and questioned by the judge.</p>	<p>testimony at a hearing and be subjected to cross-examination.</p> <p>The arbitral tribunal sometimes appoints one or more independent experts to report to the arbitral tribunal. If so, any such report will normally be provided to the parties who may also request an opportunity to cross-examine the expert. See, e.g. Article 6 of the IBA Rules of Evidence.</p>

6 Arbitral proceedings

6.1 Overview of typical procedural steps

- 7.47 Again, at the risk of oversimplification, the following list sets out in sequential order many of the most typical procedural steps from the commencement to the closure of an international arbitration:
- (i) notice of arbitration;
 - (ii) response to the notice of arbitration;
 - (iii) appointment of arbitrators;
 - (iv) preliminary meeting between the arbitral tribunal and the parties at which procedural timetables and documents such as terms of reference might be prepared (this meeting may be in person, by telephone, video-link, or dispensed with altogether);
 - (v) exchange of written submissions (witness statements may instead be attached to pre-hearing briefs);
 - (vi) disclosure of documentary evidence (requests to produce);
 - (vii) oral hearing (with witnesses of fact and expert witnesses);
 - (viii) post-hearing submissions;
 - (ix) deliberations of the arbitrators;
 - (x) issuance of the award; and
 - (xi) setting aside or enforcement of the award in domestic courts.
- 7.48 As a consequence of the flexible character of arbitral procedure and party autonomy, all these steps may not feature in an arbitration and other steps not mentioned may also be adopted. In addition to the above sequence, it should be borne in mind that the arbitration procedure may sometimes be split into different phases. There may, for example, be separate phases dealing with jurisdiction, liability and quantum.

The flexibility of arbitral procedure is further enhanced by the wide discretion granted to the arbitral tribunal in its conduct of the proceedings. A typical example of this type of discretion is contained in Article 20(2) of the KCAB International Rules, which provides:⁷⁵ 7.49

Subject to the Rules, the Tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

However, vesting the arbitral tribunal with an overly wide discretion may have a negative side effect. As Philip Yang has observed, it may lead to unpredictability or uncertainty, particularly ‘if the parties and their legal representatives are going before an unfamiliar international tribunal (which often happens), as it can render every application in arbitration proceedings a guessing game’.⁷⁶ 7.50

6.2 Initiating the arbitration

The notice of arbitration (or request for arbitration) initiates the arbitration process. This document demands that a certain dispute be referred to arbitration. It typically includes details of the parties, the arbitration clause or agreement invoked, the nature of the claim and remedy sought, and proposals for the appointment of arbitrators.⁷⁷ Institutional arbitration rules often require that the respondent submit an answer (or response) to the notice or request, which is a brief document responding to the notice of arbitration.⁷⁸ Later provisions of those rules may require parties to file more detailed written submissions, such as a statement of claim (or case) or a statement of defence. 7.51

The approach of the CIETAC Rules is different in that Article 10 requires a statement of facts and grounds of claim with supporting evidence to be included in the request for arbitration. Thereafter, the respondent is required under Article 11 to submit a ‘Statement of Defence’ in which the respondent must set forth 7.52

⁷⁵ This rule is based on Article 19(2) of the Model Law and Article 15(1) of the UNCITRAL Arbitration Rules. A similar provision is found in ACICA Rules Article 17.1. Additionally, HKIAC Rules Article 14.1 instructs the arbitral tribunal to ‘adopt suitable procedures for the conduct of the arbitration, in order to avoid unnecessary delay or expenses’; and SIAC Rules, Rule 15.2 states ‘the Tribunal shall conduct the arbitration in such manner as it considers appropriate to ensure the fair, expeditious, economical and final determination of the dispute.’ A similar additional sentence is now found in Article 17(1) of the 2010 UNCITRAL Arbitration Rules: ‘The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.’ ICC Rules Article 20(1) empowers the arbitral tribunal ‘to establish the facts of the case by all appropriate means’.

⁷⁶ Yang, *op. cit.* fn 14, p. 165.

⁷⁷ See, e.g. ACICA Rules Article 4; HKIAC Rules Article 4; ICC Rules Article 4; JCAA Rules, Rule 14; KCAB International Rules Article 8; SIAC Rules, Rule 3. See also Model Law Article 23.

⁷⁸ See, e.g. ACICA Rules Article 5; HKIAC Rules Article 5; ICC Rules Article 5; JCAA Rules, Rule 18; KCAB International Rules Article 9; SIAC Rules, Rule 4. The ACICA Rules have adopted a relatively innovative step in this respect, which permits the parties to include the written statements of claim or defence (described below) in their notice of arbitration and answer. This procedure, if adopted by the parties, has the time-saving advantage of enabling work to be carried out on the statements of claim and defence at the same time as the arbitrators are being appointed. See S Greenberg, ‘ACICA’s New International Arbitration Rules’, (2006) 23(2) *Journal of International Arbitration* 193. The Swiss Rules Articles 4(c) and 8 (c) have similar provisions. SIAC Rules, Rule 3.2 provides an option for the claimant to submit its statement of case with the notice of arbitration but is silent as to whether the respondent can submit its statement of defence with its response.

‘the facts and grounds on which the defense is based’ and include ‘the relevant evidence supporting the defense’.⁷⁹

- 7.53 In arbitrations conducted under the 1976 UNCITRAL Arbitration Rules, after the notice of arbitration (which may also contain a statement of claim) is received by the respondent, there is no requirement for an answer – the parties proceed directly to appointing the arbitrator(s).⁸⁰ Following a recommendation from the Working Group, the requirement of a ‘response’ to the notice of arbitration has been included in Article 4 of the 2010 UNCITRAL Arbitration Rules.⁸¹

6.3 Representation

- 7.54 Arbitration rules and laws generally do not require that a person representing a party in an arbitration be a lawyer. Article 6 of the ACICA Rules, for example, provides that ‘parties may be represented or assisted [in the arbitration] by persons of their choice’.⁸² In practice, however, lawyers virtually always represent the parties in large international commercial arbitrations. In this regard, arbitration legislation tends to provide that lawyers need not be qualified in the jurisdiction in which the arbitration takes place in order to be permitted to represent clients in that arbitration.⁸³ And, typically, no restriction is placed on the nationality of the representatives.⁸⁴
- 7.55 In 1988, the Singapore High Court in *Builders Federal (Hong Kong) Ltd and Joseph Gartner & Co v Turner (East Asia) Pte Ltd*⁸⁵ interpreted Singapore’s Legal Profession Act as not permitting foreign lawyers to represent clients in arbitrations seated in Singapore. However, the Singapore legislature subsequently amended that Act to eliminate any restrictions on the ability of foreign lawyers to act for clients in arbitrations seated in Singapore.⁸⁶
- 7.56 In the arbitration at issue in *Government of Malaysia v Zublin Muhibbah Joint Venture*,⁸⁷ Zublin required the assistance of an American attorney. Malaysia objected on the ground that the attorney retained was not an advocate and solicitor under the Malaysian Legal Profession Act 1976. In response, Zublin applied to the High Court of Kuala Lumpur arguing that the Act did not prevent

⁷⁹ A similar procedure is found in ICA Rules 15 and 18.

⁸⁰ See, e.g. UNCITRAL Arbitration Rules Articles 3–8.

⁸¹ Report of Working Group II (Arbitration and Conciliation) on the work of its forty-ninth session, (Vienna, 15–19 September 2008), UN Doc A/CN.9/665, para 40.

⁸² ACICA Rules Article 6. Similar types of freedom as to representation are provided in other institutional rules in the region, e.g. CIETAC Rules Article 16; HKIAC Rules Article 5(8); SIAC Rule 20. But see ICA Rule 45 (‘where the dispute is purely of a commercial nature, the parties shall have no right to be represented by lawyers except where, having regard to the nature or complexity of the dispute, the arbitral tribunal considers it necessary in the interests of justice . . .’). See also Australian International Arbitration Act Section 29(2); and Hong Kong Arbitration Ordinance Section 2F.

⁸³ See Greenberg, op. cit. fn 78, p. 193; and M Polkinghorne, ‘More Changes in Singapore: Appearance Rights of Foreign Counsel’, (2005) 22 *Journal of International Arbitration* 75.

⁸⁴ See, e.g. CIETAC Rules Article 16(2).

⁸⁵ Singapore High Court, 30 March 1988, reported in (1988) 2 *Malaysian Law Journal* 280; and (1988) 5(3) *Journal of International Arbitration* 139.

⁸⁶ See Polkinghorne, op. cit. fn 83.

⁸⁷ [1990] 3 MLJ 125 (High Court, Kuala Lumpur). The Government of Malaysia filed an appeal to the Malaysian Supreme Court, which dismissed the appeal without comment. (1991) XVI *Yearbook of Commercial Arbitration* 166.

foreign lawyers from representing parties to arbitration proceedings. The High Court agreed with Zublin and dismissed Malaysia's objection. It considered that an arbitral tribunal was not a court of law and, accordingly, the Act was not applicable.

One exception in the region is found in Indonesia's BANI Rules, Article 5(2) of which provides: 7.57

if a party is represented by a foreign advisor or a foreign legal advisor in an arbitration case relating to a dispute that abides by the Indonesian law, the foreign advisor or the foreign legal advisor may attend only if he is accompanied by an Indonesian advisor or legal advisor.

The situation in China also requires specific note. The position of the Chinese Ministry of Justice has been said to be that 'Foreign law firms are not prohibited from representing clients in arbitration cases in China; however, when Chinese law is applied or Chinese law issues are concerned, they should refrain from providing legal advice or comments, but assist clients in engaging local lawyers to do so'.⁸⁸ The practical impact of this is restrictive. It has been observed that on its face this appears to permit 'foreign law firms to practice arbitration in China; however, since Chinese law is applied or otherwise implicated in almost every arbitration case in China, the prohibition on providing advice or commenting on relevant China law issues constitutes a restriction'.⁸⁹ 7.58

The cross-border freedom to provide legal services and the continuing rise in recourse to international arbitration raises a problem that will need to be addressed by the international arbitration community in the future. If the bar association in the jurisdiction where a lawyer obtains his authorisation to practise legitimately suspends or cancels that lawyer's right to practise, he may still be permitted to represent a client in an international arbitration that takes place in another jurisdiction. A standard may one day need to be established to measure and control the professional conduct of lawyers practising in international arbitration. Institutional rules and domestic laws may also need to empower arbitral tribunals to refuse a party's chosen representative in appropriate cases.⁹⁰ 7.59

6.4 Preliminary meeting

Once an arbitral tribunal has been appointed, the arbitrators may confer by tele-conference or email and discuss issues relating to the organisation and conduct of the proceedings. Thereafter, the arbitral tribunal might hold a preliminary meeting with the parties. At this preliminary meeting the arbitral tribunal, in 7.60

⁸⁸ Letter from Ministry of Justice quoted in Jingzhou Tao, 'Challenges and Trends of Arbitration in China', (2004) 12 *ICCA Congress Series* 84. See also Articles 15 and 32 of the Chinese State Council's Regulations on Representative Offices of Foreign Law Firms in China, 22 December 2001. Nonetheless, Article 16 of the CIETAC Rules places no such restriction on lawyers and states that either Chinese or foreign citizens may be authorised by a party to act as its representative.

⁸⁹ Jingzhou Tao, *ibid*.

⁹⁰ See Greenberg, *op. cit.* fn 78, pp. 193–194. The IBA formulated a code of ethics for lawyers in 1956 and revised it in 1988. References to these rules are not frequent and they do not cover the situation from the perspective of an arbitral tribunal, i.e. whether there are circumstances in which the arbitral tribunal may refuse to hear a party's chosen representative.

consultation with the parties, will decide a number of procedural issues such as: the method of communication between the arbitral tribunal and the parties; how document production will take place; how oral evidence will be heard; and a timetable for service or exchange of written submissions.⁹¹

6.5 Terms of reference

- 7.61 The ICC is well known for requiring 'terms of reference' to be drawn up by the arbitral tribunal as soon as it receives the arbitration file from the ICC Secretariat. Aside from certain administrative details, Article 18(1) of the ICC Rules requires that those terms include a summary of the parties' claims and the particulars of the applicable procedural rules. They may also include a list of issues to be determined. The terms of reference must be signed by the arbitral tribunal as well as the parties.⁹² In some instances, where an original arbitration agreement is defective, the terms of reference – because they are signed by the parties – may be considered as a substitute arbitration agreement.⁹³ A default procedure is provided in Article 18(3) in case a party refuses to sign the terms of reference.
- 7.62 A similar procedure for a 'memorandum of issues' is found in Rule 17 of the 2007 SIAC Rules. This procedure has been omitted from SIAC's 2010 Rules.
- 7.63 The terms of reference or equivalent will often be prepared or finalised at the preliminary meeting referred to above.

6.6 Written submissions

- 7.64 Like virtually all aspects of arbitration procedure, the type, number and sequence of written submissions is flexible and varies greatly.
- 7.65 Detailed written submissions are ordinarily served or submitted after the notice of arbitration and answer, but may be done away with in a small arbitration. It is common for the exchange of written submissions to take place consecutively rather than simultaneously.⁹⁴ Accordingly, the claimant is normally the first party to file a written submission on substantive issues (a respondent may be required to submit his objections first if there is an initial jurisdictional phase). This document usually takes the form of a statement of claim,⁹⁵ attached to which would be the documentary evidence and witness statements relied on by

⁹¹ Some institutional rules specify precise times within which certain procedural steps must be made. See, for example, ICC Rules Articles 5(1), 18(2) and 24; and SIAC Rules, Rules 16.3, 16.4 and 27.1. Other types of matters that might be discussed are conveniently listed in a document prepared by UNCITRAL entitled *Notes on Organizing Arbitral Proceedings* (1996), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>.

⁹² See ICC Rules Articles 18(1). See also *Commonwealth Development Corp (UK) v Montague* [2000] QCA 252 (Supreme Court of Queensland Court of Appeal), discussed in S Greenberg and M Secomb, 'Terms of Reference and Negative Jurisdictional Decisions: A Lesson from Australia', (2002) 18(2) *Arbitration International* 125.

⁹³ See Greenberg and Secomb, *ibid*.

⁹⁴ See, e.g. ACICA Rules Articles 21 and 22; HKIAC Rules Articles 17 and 18; SIAC Rules, Rule 16; UNCITRAL Arbitration Rules Articles 18 and 19.

⁹⁵ Other names used to denote this pleading include 'statement of case', 'memorial', 'claim submissions' or 'points of claim'. Philip Yang observes that the first three terms indicate informal pleadings (which would include the factual and legal arguments, as well as documentary evidence) whereas the latter suggests a briefer style of pleading. Yang, *op. cit.* fn 14, p. 187.

the claimant.⁹⁶ After a statement of claim is served or submitted,⁹⁷ the respondent is required to serve or submit a statement of defence,⁹⁸ to which would ordinarily be attached supportive documentary evidence and witness statements. If there is a counterclaim, this would usually be filed with the statement of defence.⁹⁹ There may be a second round or even further rounds of pre-hearing exchanges of submissions.¹⁰⁰

Certain international commercial arbitration rules specifically provide the option for arbitrations to be determined only on the submitted documents, including the written submissions, witness statements and documentary evidence.¹⁰¹ As a consequence, there may be no hearing at all. In this regard, Article 24(1) of the Model Law provides:¹⁰²

Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

Although in practice it is relatively rare for arbitral proceedings to be based solely on documents, this may result in very fast and economical arbitrations.¹⁰³

Documentary evidence is often attached to pre-hearing written submissions. However, in rare cases, a party might wish to withhold a document for a later stage of the proceedings. This might be part of a strategy used to withhold the document until the cross-examination of a witness. Caution should be applied in adopting such a technique because (1) that document may be required to be disclosed in a document production request and (2) it is highly probable that the other party will object to the document's later inclusion on the grounds that

⁹⁶ Certain rules may require that if the documents are especially voluminous, lists of them should be submitted in lieu of the documents. See, e.g. LCIA Rules Article 15(6).

⁹⁷ Exactly how this is done may be agreed at a preliminary meeting between the arbitral tribunal and the parties. Institutional rules often deal with the statement of claim specifically, see, e.g. ACICA Rules Article 21; HKIAC Rules Article 17; SIAC Rules, Rule 16; 1976 UNCITRAL Arbitration Rules Article 18; 2010 UNCITRAL Arbitration Rules Article 20.

⁹⁸ Other names used to denote this pleading include, 'counter-defence submissions', 'rebuttal', or 'points of defence'. Institutional rules often deal with the statement of defence specifically, see, e.g. ACICA Rules Article 22; HKIAC Rules Article 18; SIAC Rules, Rule 16; 1976 UNCITRAL Arbitration Rules Article 19; and 2010 UNCITRAL Arbitration Rules Article 21.

⁹⁹ See, e.g. ACICA Rules Article 22.2; HKIAC Rules Article 18.3; SIAC Rules, Rule 16.5; 1976 UNCITRAL Arbitration Rules Article 19(3); and 2010 UNCITRAL Arbitration Rules Article 21(3).

¹⁰⁰ See, e.g. 2010 UNCITRAL Arbitration Rules Article 24; 1976 UNCITRAL Arbitration Rules Article 22; Rule 31 of the ICSID Rules. Even in fast track arbitrations the discretion to allow further rounds is granted to the arbitral tribunal. See, e.g. the HKIAC Short Form Arbitration Rules Article 7; and the ACICA Expedited Rules Article 21.

¹⁰¹ See, e.g. HKIAC Short Form Arbitration Rules Article 12; ACICA Rules Article 17.2; HKIAC Rules Article 38; CIETAC Article 29(2) and 54; SIAC Rules, Rule 21.1; 1976 UNCITRAL Arbitration Rules Article 15(2); 2010 UNCITRAL Arbitration Rules Article 17(3); ICC Rules Article 20(6); LCIA Rules Article 19(1). See also Article 24(1) of the Model Law. One Asian arbitrator has remarked that the tendency in international arbitration is to hold hearings in all but very simple cases. Sawada, *op. cit.* fn 43, p. 290.

¹⁰² See also ICC Rules Article 20(2) and 20(6). An inversion of this rule is found in Article 36 of Indonesia's Arbitration and Dispute Resolution Act 1999, which requires that the dispute be heard and decided first on the basis of written documents, but that oral hearings may take place with the approval of the parties or if the arbitrators deem it necessary.

¹⁰³ See, e.g. Yang, *op. cit.* fn 14, pp. 171–172. Article 13.2 of the ACICA Expedited Arbitration Rules is notable here because its starting position is that no hearings should be held. However, this is subject to exceptions.

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(i) it has been submitted out of time; (ii) it is unfair to surprise the opposing party with such a document; and/or (iii) extra time is needed to respond to it, with the costs of any adjournment to be paid by the late-submitting party.¹⁰⁴

7.69 As regards the filing or service of the written submissions, deadlines are usually set by the arbitral tribunal in consultation with the parties. The amount of time may vary according to the complexity of the circumstances and legal issues in dispute. In the absence of agreement by the parties and subject to the arbitral tribunal's (or arbitral institution's) discretion, some institutional rules fix time periods for submission.¹⁰⁵

7.70 Post-hearing written submissions are common in larger cases. In these submissions, parties are typically permitted to comment on the evidence that was given during the hearing or they may be permitted to summarise in one final document all factual and legal arguments presented during the proceedings. All parties are normally required to submit these briefs simultaneously at a set date subsequent to the final hearing.¹⁰⁶

7.71 If an exhibited document is not in the language of the arbitration, the submitting party may be required to translate it. Sometimes, to save costs, it might be agreed that certain documents or documents in certain languages do not need translation. It might be felt that the time and cost of translation outweighs the benefit of translating them.

6.7 Amendment of claims

7.72 Many institutional rules and laws in the region provide for the amendment of the claim or defence. For example, Article 23 of the ACICA Rules provides that:¹⁰⁷

During the course of the arbitral proceedings either party may amend or supplement its claim or defence unless the Arbitral Tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances it considers relevant. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

7.73 The ICC Rules are different in this respect. They are silent as to 'amendments' to claims but prohibit the introduction of 'new claims' falling outside the scope

104 See, e.g. Article 36(2) of the 2005 CIETAC Rules, which provides that the arbitral tribunal may disallow evidence filed out of time.

105 See, e.g. CIETAC Rules Article 12; KCAB International Rules Article 9; LCIA Rules Article 15; SIAC Rule 16.7. It is to be noted that JCAA Rule 12 expressly prevents the parties (not the arbitral tribunal) from agreeing on an extension of the time to submit an answer to the request for arbitration or a counterclaim.

106 See Hanotiau, op. cit. fn 35, p. 388.

107 This provision is very similar to HKIAC Rules Article 19, UNCITRAL Arbitration Rules Article 20 and 2010 UNCITRAL Arbitration Rules Article 22. Article 19.2 of the HKIAC Rules adds that the administrative and arbitrators' fees may be adjusted if an amendment is made. See also CIETAC Rules Article 14; SIAC Rules, Rule 24(c); JCAA Rules, Rule 20; KCAB International Rules Article 17; Model Law Article 23(2) and Vietnam's Ordinance on Commercial Arbitration 2003 Article 28. Concerning the factors that might be considered in applying Article 20 of the UNCITRAL Arbitration Rules, see *Rockwell International Systems Inc v Government of the Islamic Republic of Iran* (1989) 23 Iran-US CTR 150, para 73; G Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal*, Clarendon Press, 1996, pp. 420–433; and Caron, Caplan and Pellonpää, op. cit. fn 46, pp. 466–475.

of the terms of reference without the arbitral tribunal's permission.¹⁰⁸ No definition of a 'new claim' is provided. A mere amendment to, say, the quantum of the claim, or refining the language of a claim will not normally be considered as a new claim. More complex amendments may give rise to arguments that they effectively constitute new claims. However, even if certain claims are considered to be new they may fall within the scope of the claims as set out in the terms of reference. Even if they do not, the arbitral tribunal has discretion to authorise them after considering 'the nature of such new claims . . . the stage of the arbitration and other relevant circumstances'.¹⁰⁹ Eric Schwartz observes that 'there should . . . not normally be an issue about whether a party's articulation of new *legal arguments* gives rise to a "new claim" within the meaning of Article 19' (Emphasis added).¹¹⁰ Furthermore, if a new claim is not admitted, that does not amount to rejection of the claim. A claim not admitted, subject to jurisdictional requirements, may be reintroduced in a later proceeding.

6.8 On-site inspections

Colloquially, an on-site inspection may be referred to as a 'see, touch and smell' exercise. It gives the arbitral tribunal an important impression of a place or object that is relevant to the arbitration and may provide the arbitrators with a deeper understanding of the factual issues in dispute. The power to conduct on-site inspections is given to most courts and arbitral tribunals.¹¹¹

The IBA Rules of Evidence cover this issue in Article 7. An inspection under those Rules may be requested by one of the parties or may be initiated by the arbitral tribunal itself. The arbitral tribunal may also require parties to allow inspection by the arbitral tribunal-appointed expert. The Rules cover the inspection of 'any site, property, machinery, or any other goods or process, or documents'. No real criteria have been provided to guide the arbitral tribunal as to why, when and how an on-site inspection should be conducted. It thus remains a largely discretionary power. In conformity with due process requirements, parties or their representatives should have the right to attend any on-site inspection.

Article 57 of the UNCITRAL Notes on Organizing Arbitral Proceedings warns against communications at on-site inspections between arbitrators and a party concerning points at issue without the presence of the other party. Otherwise this would offend the principles of equal treatment and the opportunity to present one's case. Article 58 of the Notes also cautions that statements made by

¹⁰⁸ See Article 19 of the ICC Rules ('no party shall make new claims or counterclaims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the Arbitral Tribunal . . .').

¹⁰⁹ ICC Rules Article 19. See generally Derains and Schwartz, *op. cit.* fn 24, pp. 266–270.

¹¹⁰ E Schwartz, "New Claims" in ICC Arbitration: Navigating Article 19 of the ICC Rules', (2006) 17(2) *ICC International Court of Arbitration Bulletin* 55, at p. 58.

¹¹¹ See, e.g. Model Law Article 24; HKIAC Rules Article 15.3; ICSID Rules, Rule 37; JCAA Rules, Rule 37(3); KCAB International Rules Article 22(1)(b); SIAC Rules, Rule 24(f); UNCITRAL Arbitration Rules Article 16(3). The 2010 UNCITRAL Rules appear to now include this power in Article 18(2) although the provision is worded differently. It is now based on the wording in the LCIA Rules. As to national courts in Asian common law countries, see C Lau, 'The Process of Obtaining Evidence and Discovery in Asia' in Pryles and Moser, *op. cit.* fn 8, p. 259, at p. 265.

representatives of a party present at an on-site inspection should not be treated as evidence in the proceedings.

- 7.77 Finally, Article 24(2) of the Model Law provides that for any meeting of the arbitral tribunal at which inspection of property is to take place, the parties should be given sufficient advance notice. Again, this is simply an application of due process principles.¹¹²

6.9 Bifurcation and trifurcation

- 7.78 A procedural device that may increase efficiency in arbitration involves splitting the procedure into several phases. Bifurcation and trifurcation, respectively, divide the proceedings into two or three phases, for example, one dealing with jurisdictional issues,¹¹³ one dealing with liability and a final one with quantum or costs.¹¹⁴ Partial arbitral awards may be issued for each phase before the following one begins. This division can save costs and time. For example, if the arbitral tribunal determines that it lacks jurisdiction over the matter, the division dispenses with the parties' need to expend time, effort and legal fees to produce detailed written pleadings on the merits.¹¹⁵ And if the case fails on liability grounds, pleadings and expert opinions as to the quantification of the damages will be rendered unnecessary. The proceedings may also be broken down into further phases, such as to enable the arbitral tribunal to dispose of different arguments separately. A decision or partial award by an arbitral tribunal on a distinct issue may also prompt parties to settle the dispute.¹¹⁶

6.10 Party default and non-participating parties

- 7.79 Some international arbitrations involve a respondent that decides not to participate in the arbitration. Less often, a claimant may file a notice of arbitration but thereafter it may fail to submit a statement of claim. The arbitration's procedural laws and rules usually stipulate the consequences in these situations of party default.
- 7.80 In the context of ICC arbitration, in 2009 there was at least one non-participating party in 6.4% of ICC arbitration cases.¹¹⁷ Non-participation raises

¹¹² See also, Article 20(2) of the Model Law.

¹¹³ Section 3.4 of Chapter 5 addresses situations where it might not be suitable to split the proceedings.

¹¹⁴ Institutional rules of procedure do not usually make specific reference to bifurcation or trifurcation. But it is well accepted that the power to bifurcate or trifurcate lies within the arbitral tribunal's discretion to conduct the proceedings in a manner it considers appropriate. A rare instance of a set of rules that makes specific reference to bifurcation is KCAB International Rules Article 20(3).

¹¹⁵ See the discussion on whether to decide jurisdiction separately at Section 3.4 of Chapter 5.

¹¹⁶ See H Heilbron, 'Assessing Damages in International Arbitration: Practical Considerations', in Newman and Hill, *op. cit.* fn 5, p. 445.

¹¹⁷ This figure is based on failure to participate, not necessarily from the very outset of the arbitration but from the time the ICC Court took its initial decisions in connection with constituting the arbitral tribunal and other preliminary matters, i.e. the Secretariat's 'first submission' of the case to the ICC Court.

the question whether the arbitration should proceed *ex parte* (i.e. without the respondent's participation).¹¹⁸ In a domestic court in both civil law and common law systems, non-participation by the defendant will normally invest the plaintiff with a right to a default judgment against the defendant. In arbitration, however, refusal by the respondent to participate does not override the arbitral tribunal's duty to examine and question the claimant's position. Importantly, the claimant is still required to prove its case. According to Article 25(b) of the Model Law, if:

the respondent fails to communicate his statement of defence . . . the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations.

Once an arbitral tribunal is satisfied that a well-founded case is made out, it must issue an award that is accompanied by reasons for its decisions and detailing the circumstances of the respondent's failure to participate. To ensure that the respondent has been given an opportunity to present its case, the arbitral tribunal usually allocates periods of time for the respondent to file a defence, etc. When a hearing is called, time is allocated to hear the respondent and the respondent is given due notice.¹¹⁹ It is essential that all communications between the arbitral tribunal and the participating parties are sent to any non-participating party.¹²⁰ 7.81

Most institutional arbitral rules expressly address the situation where a respondent has failed to file written submissions or appear at the hearing.¹²¹ They empower the arbitral tribunal to proceed with the arbitration as outlined above. The non-participating respondent may seek to set aside or resist enforcement of the resulting award. In considering such applications, a domestic court seized of the matter should not, absent exceptional circumstances, hold that a party's refusal to participate equated to an inability to present its case.¹²² 7.82

*Hainan Machinery Import & Export Corporation v Donald & McCarthy Pte Ltd*¹²³ 7.83 illustrates this point. Hainan initiated CIETAC arbitration proceedings but some of the documents it relied on were in Chinese. Donald wrote twice to CIETAC requesting a translation of those documents and stating that it did not agree

¹¹⁸ See, generally, Redfern, Hunter, et al., op. cit. fn 45, paras 6–119 to 6–122; and B Beaumont, 'Ex Parte or Default Proceedings in International Arbitration', (2004) *Asian Dispute Review* 76.

¹¹⁹ Under Article 44 of Indonesia's Arbitration and Dispute Resolution Act 1999, if a respondent does not appear at a hearing, the arbitral tribunal is required to call a second hearing. It is only if the respondent fails to attend this second hearing that the arbitral tribunal may determine the claim in favour of the claimant 'unless the claim is unfounded or contrary to law.'

¹²⁰ See, e.g. Beaumont, op. cit. fn 118, p. 77 (commenting that in a case where the respondent fails to participate in the arbitral proceedings, the arbitral tribunal has a duty 'to require the claimant to fill the gaps, all the while adhering to the rules of natural justice, by copying all such requests, or demands, to the defaulting party . . . the defaulting party must be kept supplied with copies of all correspondence, pleadings, evidence and submissions up to and including the issuance of the award').

¹²¹ See, e.g. ACICA Rules Article 29; CIETAC Rules Article 34; HKIAC Rules Article 26; ICA Rules, Rules 46 and 54(ii); ICC Rules Article 25; JCAA Rules, Rule 35; KCAB International Rules Article 29; SIAC Rules, Rule 21.3; and UNCITRAL Arbitration Rules Article 28. See also the Model Law Articles 25 and 28; and the Japanese Arbitration Law 2003 Article 33.

¹²² In this regard, Redfern, Hunter et al., identify two situations in which a 'refusal' to participate is not altogether clear: where the party creates a delay so unreasonable that it amounts to abandoning its right to present its case; and where the party disrupts the hearing to such an extent that it is impossible to conduct it and as such the party's conduct is equivalent to a refusal to participate. Redfern, Hunter, et al., op. cit. fn 45, para 6–120.

¹²³ [1996] 1 SLR 34 (Singapore High Court).

to the institution of arbitration proceedings. Although informed of the hearing Donald did not attend. After the hearing, Donald was informed that it had taken place and was given an opportunity to submit materials. Donald simply replied stating that it did not agree to the arbitration. An award was rendered in favour of Hainan. Enforcement of the award was sought and granted in Singapore. The decision of the Singapore High Court in granting enforcement noted that there were no errors of procedure made in the arbitration.¹²⁴

- 7.84 Not all laws or rules address a claimant's failure to submit a statement of claim after it has made a request for arbitration. The procedural laws or the arbitral rules that deal with such a circumstance generally require termination of the arbitral proceedings.¹²⁵ If the claimant fails to appear at the hearing without sufficient cause, institutional rules ordinarily provide the arbitral tribunal with the discretion to continue with the proceedings.¹²⁶

6.11 Expedited arbitration procedures

- 7.85 In certain circumstances, the parties to arbitration may desire a swift resolution of their dispute. The principle of party autonomy allows them to agree on an expedited or fast-track procedure.¹²⁷ Parties may prefer faster dispute resolution at the possible sacrifice of a better quality decision. A more cost effective process is an important feature of expedited arbitration, particularly where the amount in dispute is relatively small.¹²⁸ The rapid determination of legal rights has also been considered positive in the sense that it reduces prolonged uncertainty.¹²⁹
- 7.86 Expedited rules may be contained within the standard arbitration rules of an institution,¹³⁰ they may take the form of a separate body of self-contained rules on expedited procedure,¹³¹ or they might be specifically formulated by the parties themselves. Fast-track rules may include:

¹²⁴ *Hainan Machinery Import & Export Corporation v Donald & McArthur Pte Ltd*, [1996] 1 SLR 34 at para 15. See also *Texaco Overseas Tankship Ltd v Okada Kaiun KK* (1985) 10 *Yearbook of Commercial Arbitration* 483, (Osaka District Court), 22 April 1983.

¹²⁵ See, e.g. Model Law Article 25(b); ACICA Rules Article 29.1; HKIAC Rules Article 26; UNCITRAL Arbitration Rules Article 28.

¹²⁶ See, e.g. ACICA Rules Article 29.2; ICA Rules, Rules 46 and 54(i); JCAA Rules, Rule 35; KCAB International Rules Article 29; SIAC Rules, Rule 21.3; UNCITRAL Arbitration Rules Article 28(2); and 2010 UNCITRAL Arbitration Rules Article 30(2). The CIETAC Rules Article 34(1) states that this conduct may be deemed as a withdrawal of the claimant's request for arbitration.

¹²⁷ See generally, M Silverman, 'The Fast-Track Arbitration of the International Chamber of Commerce – The User's Point of View', (1993) 10(4) *Journal of International Arbitration* 113; B Davis, O Lagacé Glain and M Volkovitch, 'When Doctrines Meet – Fast-Track Arbitration and the ICC Experience', (1993) 10(4) *Journal of International Arbitration* 69; S Smid, 'The Expedited Procedure in Maritime and Commodity Arbitrations', (1993) 10(4) *Journal of International Arbitration* 59; PY Tschanz, 'The Chamber of Commerce and Industry of Geneva's Arbitration Rules and their Expedited Procedure', (1993) 10(4) *Journal of International Arbitration* 51.

¹²⁸ See, e.g. M Mustill, 'Comments on Fast-Track Arbitration', (1993) 10(4) *Journal of International Arbitration* 121, at p. 123.

¹²⁹ See B Davis, 'Fast Track Arbitration and Fast-Tracking Your Arbitration', (1992) 9(4) *Journal of International Arbitration* 43, at p. 43.

¹³⁰ See, e.g. CIETAC Rules Articles 50–58; JCAA Rules, Rules 59–67; HKIAC Rules Article 38; 2010 SIAC Rules, Rule 5.

¹³¹ See, e.g. ACICA Expedited Arbitration Rules (2008); HKIAC Documents-only Procedure (2000); HKIAC Small Claims Procedure (2003); WIPO Expedited Arbitration Rules (2002).

- (i) expedited constitution of the arbitral tribunal;¹³²
 - (ii) a requirement that the proceedings be conducted by a sole arbitrator;¹³³
 - (iii) shortened time limits for submission of briefs;¹³⁴
 - (iv) 'documents-only' determinations without oral hearings;¹³⁵ and/or
 - (v) a relatively short period within which the award must be issued.¹³⁶
- Some arbitration rules specifically provide for expedited proceedings in cases involving less than a specified disputed amount.¹³⁷ 7.87

6.12 Arb-med

As its name suggests, arb-med is a fusion of arbitration and mediation. Under this process, arbitrating parties agree that their arbitrator may act as a mediator in the same dispute at some point during the arbitral proceedings.¹³⁸ The essential difference between arbitration and mediation is that the latter is facilitative. It involves an impartial third party mediator who assists the parties to arrive at a settlement.¹³⁹ Unlike an arbitrator, a mediator lacks the power to impose a decision on the parties. Conciliation is a term that is commonly used to denote mediation,¹⁴⁰ although to some the two terms have distinct meanings.¹⁴¹ Unless otherwise indicated, we use conciliation as a synonym for mediation. 7.88

While the Model Law does not address whether an arbitrator may become a mediator in the same dispute, many of this region's Model Law countries have 7.89

¹³² See, e.g. ACICA Expedited Arbitration Rules Article 8(2); HKIAC Rules Article 38.2(a); LCIA Rules Article 9.

¹³³ See, e.g. CIETAC Rules Article 52; HKIAC Rules Article 38.1(b).

¹³⁴ See, e.g. ACICA Expedited Arbitration Rules Article 22; CIETAC Rules Article 53.

¹³⁵ See, e.g. ACICA Expedited Arbitration Rules Article 13.2; HKIAC Rules Article 38.2(c).

¹³⁶ See, e.g. ACICA Expedited Arbitration Rules Article 27; CIETAC Rules Article 56; HKIAC Rules Article 38.2(d). Rule 5.2(e) of the 2010 SIAC Rules adds that the arbitral tribunal shall state its reasons in summary form, unless parties agree no reasons are to be given.

¹³⁷ See, e.g. CIETAC Rules Article 50; HKIAC Rules Article 38; the 2010 SIAC Rules, Rule 5.1(a).

¹³⁸ For a wide variety of interesting views on arb-med, including from some Asia-Pacific arbitrators, see (2004) 12 *ICCA Congress Series* 531 et seq. See also L Nottage and R Garnett, 'The Top Twenty Things to Change In or Around Australia's International Arbitration Act' in L Nottage and R Garnett (eds), *International Arbitration in Australia*, Federation Press, forthcoming 2010, ch. 8, pt. IV.E.

¹³⁹ In relation to the particularly long tradition of mediation in China, see Xiaobing Xu and G Wilson, 'One Country, Two-International Commercial Arbitration-Systems', (2000) 17(6) *Journal of International Arbitration* 47, at p. 64 et seq (section VIII(D)); G Kaufmann-Kohler and Fan Kun, 'Integrating Mediation into Arbitration: Why It Works in China', (2008) 25(4) *Journal of International Arbitration* 479, at pp. 480–486; S Hilmer, *Mediation in the People's Republic of China and Hong Kong (SAR)*, Eleven International Publishing, 2009, pp. 8–11 and 69–74; and generally (2009) 17 *Asia Pacific Law Review*, Special Issue on Mediation. See also China's Supreme People's Court opinion entitled 'Several Opinions on Establishing and Improving of a Dispute Resolution System and the Linking of Litigation and Alternative Dispute Resolution Mechanism' (2009) No. 45, issued on 24 July 2009. Prior to this, agreements reached through mediation were enforceable only through mediation conducted under CIETAC auspices or through judges using Chinese civil procedure. Now, according to para 10 of the opinion, such agreements are enforceable if the mediation is carried out by other mediation organisations. See FP Phillips, 'Important Development in Chinese Business Mediation', 8 September 2009, at <http://businessconflictmanagement.com>. In Hong Kong, the High Court's Practice Direction 31, effective from 1 January 2010, requires that parties must consider mediation before they litigate. Some predict that this will increase the use of mediation prior to arbitration.

¹⁴⁰ See, e.g. CIETAC Rules Article 40.

¹⁴¹ Used in its strict sense, conciliation refers to a process whereby a conciliator hears the parties' positions and then proposes terms of settlement that the conciliator believes are a fair compromise which the parties are free to accept or reject. See K Tashiro, 'Conciliation or Mediation during the Arbitral Process: A Japanese View', (1995) 12 *Journal of International Arbitration* 2, at p. 119, n. 1; Hilmer, op. cit. fn 139, pp. 5–6 and Moses, op. cit. fn 22, p. 14.

enacted domestic legislative provisions enabling arb-med procedures.¹⁴² Often, it is observed that there is a preference for non-confrontational dispute settlement methods in the Asia-Pacific.¹⁴³ Whether or not this is correct for the region as a whole, the fact remains that arb-med, in various manifestations, is recognised in many countries in the region.¹⁴⁴

- 7.90 In relation to China in particular, it has been observed by Michael Moser that '[o]ne of the unique characteristics of arbitration in China is that proceedings before the international arbitration bodies frequently involve conciliation'.¹⁴⁵ From a Chinese perspective, the advantages of arb-med have been summarised as follows:¹⁴⁶

Chinese scholars strongly believe that the combination of the two procedures has more advantages than does keeping them apart. First, separate procedures can be avoided and substantial time and money can be saved; second, the Chinese experience shows that more of the successful conciliation cases are conducted by arbitrators during arbitration proceedings than by conciliators in the process of stand-alone conciliation; third the combination of arbitration with conciliation can make good use of the advantages of both. An arbitral award based on a settlement agreement may not only satisfy both parties' needs and thus transform antagonists into friends but may also be enforced in court.

- 7.91 The CIETAC Rules provide for arb-med in Article 40:

2. Where both parties have the desire for conciliation or one party so desires and the other party agrees when approached by the arbitral tribunal, the arbitral tribunal may conciliate the case during the course of the arbitration proceedings.
3. The arbitral tribunal may conciliate the case in the manner it considers appropriate.
4. The arbitral tribunal shall terminate the conciliation and continue the arbitration proceedings if one of the parties requests a termination of the conciliation or if the arbitral tribunal believes that further efforts to conciliate will be futile.

...

142 See, e.g. Section 30(1) of the Indian Arbitration and Conciliation Act 1996; and Article 38(4) of the Japanese Arbitration Law 2003. See generally S Harpole, 'The Role of the Third Party Neutral when Arbitration and Conciliation Procedures are Combined: A Comparative Survey of Asian Jurisdictions', in Pryles and Moser, *op. cit.* fn 8, p. 526.

143 See, Chapter 1, Section 4.2.2, particularly fn 163.

144 A good illustration of the diversity in practice in the region is provided in Harpole, *op. cit.* fn 142, pp. 525–532. In relation to Singapore, see LSYang and L Chew, 'Arbitration in Singapore', in PJ McConaughay and TB Ginsburg (eds), *International Commercial Arbitration in Asia*, 2nd edn, JurisNet, 2006, p. 355 (observing in relation to arbitration in Singapore that 'arbitrators see themselves as having a role in helping the parties to reach a settlement without having to go through an arbitration... It is fair to say that many arbitrators attempt to mediate a settlement before the arbitration begins, although there are no records as to how often this occurs.'). and concerning Japan, Professor Taniguchi has stated in his guest lecture at AFIA's 19th Symposium in Sydney, 7 August 2009, that arb-med is frequently used in JCAA arbitrations, which occurs against a cultural background where judges often mediate in proceedings before them, see report by L Hui and A Lees in (2009) 4 *AFIA News*, September 2009, at p. 7.

145 M Moser, 'People's Republic of China', in M Pryles, *Dispute Resolution in Asia*, 3rd edn, Kluwer Law International, 2006, p. 85, at p. 93.

146 Xiaobing Xu and Wilson, *op. cit.* fn 139, p. 66–67 (footnotes omitted). See also Kaufmann-Kohler and Fan Kun, *op. cit.* fn 139, pp. 490–491. It has been reported that before 1983, most CIETAC cases were settled through a process that combined arbitration and mediation and the settlement rate of CIETAC cases by arbitrators using conciliation during the periods 1983–1988 and since 1989 have been, respectively, 50% and 20–30%. See Hilmer, *op. cit.* fn 139, pp. 104–105, citing Seung Wha Chang, *Resolving Disputes in the PRC: A Practical Guide to Arbitration and Conciliation in China*, China Law Handbook, 1996, p. 52.

7. Where conciliation fails, the arbitral tribunal shall proceed with the arbitration and render an arbitral award.
8. Where conciliation fails, any opinion, view or statement and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of conciliation shall not be invoked as grounds for any claim, defence or counterclaim in the subsequent arbitration proceedings, judicial proceedings or any other proceedings.

One of the important features evident from the above provisions is that parties must consent to the conciliation process. However, there is no requirement that the agreement to conciliate be in writing. In contrast, a writing requirement is found in a number of domestic laws in the region.¹⁴⁷ As an example of such laws, Section 2B of the Hong Kong Arbitration Ordinance provides:¹⁴⁸ 7.92

- (1) If all parties to a reference consent in writing, and for so long as no party withdraws in writing his consent, an arbitrator or umpire may act as a conciliator.
- (2) An arbitrator or umpire acting as conciliator
 - (a) may communicate with the parties to the reference collectively or separately;
 - (b) shall treat information obtained by him from a party to the reference as confidential, unless that party otherwise agrees or unless subsection (3) applies.
- (3) Where confidential information is obtained by an arbitrator or umpire from a party to the reference during conciliation proceedings and those proceedings terminate without the parties reaching agreement in settlement of their dispute, the arbitrator or umpire shall, before resuming the arbitration proceedings, disclose to all other parties to the reference as much of that information as he considers is material to the arbitration proceedings.
- (4) No objection shall be taken to the conduct of arbitration proceedings by an arbitrator or umpire solely on the ground that he had acted previously as a conciliator in accordance with this section.

Section 30(1) of India's Arbitration and Conciliation Act 1996 is more compact:¹⁴⁹ 7.93

It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

147 See, e.g. Singapore International Arbitration Act Section 17(1) and the Philippines Alternative Dispute Resolution Act 2004 Section 36.

148 See similarly the Singapore International Arbitration Act Article 17.

149 Likewise, Article 38(4) of the Japanese Arbitration Law 2003 provides that '[a]n arbitral tribunal or one or more arbitrators designated by it may attempt to settle the civil dispute subject to the arbitral proceedings, if consented to by the parties'. Similar provisions are found in China's Arbitration Law Article 51 and Sri Lanka's Arbitration Act No. 11 of 1995 Section 14(1). In relation to the Japanese Arbitration Law Article 38(4), it has been commented that if the settlement is unsuccessful and the arbitration is resumed, there is no provision on how to avoid challenges against the arbitrator who has served as the mediator. See D Roughton, 'A Brief Review of the Japanese Arbitration Law', (2005) 1 *Asian International Arbitration Journal* 127, at pp. 133–134.

7.94 In Australia, the International Arbitration Act does not provide for arb-med but the process is contemplated for domestic arbitration in the state Commercial Arbitration Acts.¹⁵⁰

7.95 General Standard 4(d) of the IBA Guidelines on Conflicts of Interest in International Arbitration provides that an 'arbitrator may assist parties in reaching a settlement of the dispute at any stage of the proceedings'. However, the arbitrator must obtain 'an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator'. The General Standard concludes that:

notwithstanding such an agreement, the arbitrator shall resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings.

7.96 It has been observed that '[m]any cases show that the party's frank confidential chats with the arbitrator acting as a mediator [do] not make resumption of the arbitrator's work as an adjudicator difficult'.¹⁵¹ However, this may not always reflect the reality of the situation.

7.97 Some of the attractive features of arb-med are reported to be that (1) it provides a 'gentler solution' to arbitration, (2) it facilitates a continuation of commercial relations, and (3) arbitrators have the power to make binding decisions if the mediation attempted during the arbitration fails. As regards the latter feature, it is considered that the decision-making power of arbitrators tends to increase the chances that the parties resolve their differences in the mediation because a failure to settle will result in a binding arbitral award that may not be satisfactory to one or even all of them.¹⁵²

7.98 However, arb-med has to contend with concerns as to certain practical realities. Redfern and Hunter highlight some of the more salient issues, particularly when an arbitrator becomes a mediator but is required to shift back to his role as an arbitrator if the conciliation fails:¹⁵³

how open are the parties likely to be with the mediator . . . if they know that he might be called upon to act as arbitrator in the same dispute? And how can the arbitrator satisfy or appear to satisfy the requirements of 'impartiality' and 'a fair hearing' if he has previously held private discussions with the parties separately and indicated his views to them?

7.99 Enforcement of an award may be jeopardised or the award may be set aside if such requirements are not present. Given the potential risks, caution should be exercised before utilising arb-med procedures if the arbitrator may be expected to resume his or her arbitral role failing successful mediation. Arb-med may, however, be an effective and value-added procedure if an arbitrator changes his

¹⁵⁰ See Section 27 of Australia's uniform Commercial Arbitration Act, which applies in all Australian states.

¹⁵¹ Sawada, *op. cit.* fn 43, p. 309.

¹⁵² T Sawada, 'Hybrid Arb-Med: Will West and East Never Meet?', (2003) 14(2) *ICC International Court of Arbitration Bulletin* 29, at pp. 32–33.

¹⁵³ Redfern, Hunter, et al., *op. cit.* fn 45, at para 1–82.

or her role to that of a mediator and, as a result, facilitates a voluntary settlement of the dispute.

6.13 Termination of the proceedings

Under Article 32(1) of the Model Law a final award terminates the arbitral proceedings.¹⁵⁴ Other circumstances in which proceedings may be terminated include:

- (i) the claimant's withdrawal or discontinuance of a claim, which is not objected to by the respondent;¹⁵⁵
- (ii) an agreement by the parties to terminate or discontinue the proceedings;¹⁵⁶
- (iii) a finding by the arbitral tribunal that continuation of the proceedings has become unnecessary or impossible;¹⁵⁷ or
- (iv) the failure of the parties to act.¹⁵⁸

Once the arbitral tribunal issues an award that leaves no more disputed issues between the parties to be determined, the arbitral proceedings are brought to a close and the arbitral tribunal becomes *functus officio*, i.e. it has discharged its duty.¹⁵⁹ However, this may not terminate the matter between the parties because they may be entitled to challenge the award before domestic courts.

Notwithstanding the above, the mandate of the arbitral tribunal may revive if there is a request by a party (or decision by the arbitral tribunal on its own initiative) to correct or interpret the award,¹⁶⁰ or if a court hearing a setting aside application determines that the arbitral tribunal shall 'resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside'.¹⁶¹

7 Evidence

More than half a century ago, Bin Cheng observed that the 'conviction of the Tribunal as to the truth of the assertions of the parties is secured by means of evidence'.¹⁶² The validity of this elegant statement has not diminished. It has equal relevance today.

¹⁵⁴ See also JCAA Rules, Rule 50(1).

¹⁵⁵ See, e.g. Model Law Article 32(2)(a); ICSID Rules, Rule 44. Under the former provision, the arbitral tribunal must not issue an order for the termination of the proceedings if the respondent objects and the arbitral tribunal recognises that the respondent has 'a legitimate interest . . . in obtaining a final settlement of the dispute'.

¹⁵⁶ Model Law Article 32(2)(b); JCAA Rules, Rule 50(1); ICSID Rules, Rule 43.

¹⁵⁷ Model Law Article 32(2)(c).

¹⁵⁸ See, e.g. ICSID Rules, Rule 45 (parties are deemed to have discontinued with the proceedings if they fail to take any steps during six consecutive months or any other period as may be agreed by the parties and approved by the tribunal).

¹⁵⁹ See, e.g. JCAA Rules, Rule 50(3).

¹⁶⁰ See Chapter 8, Section 7.

¹⁶¹ Model Law Article 34(4).

¹⁶² Bin Cheng, *op. cit.* fn 24, p. 307.

- 7.104 Evidence is largely unregulated in international arbitration. Party autonomy dictates matters of evidence. Failing an agreement between the parties, the arbitral tribunal is usually empowered to decide on the admissibility, relevance, materiality and weight of evidence.¹⁶³ In this regard, the Supreme Court of India in *Municipal Corporation of Delhi v Jagan Nath Ashok Kumar*¹⁶⁴ observed:

Appraisal of evidence by the arbitrator is ordinarily never a matter which the Court questions and considers. The arbitrator in our opinion is the sole judge of the quality as well as the quantity of evidence and it will not be for the Court to take upon itself the task of being a judge of the evidence before the arbitrator.

- 7.105 The three general categories of evidence in international commercial arbitration are: (1) documentary evidence; (2) factual evidence given by witnesses; and (3) expert evidence. These are discussed in turn after a short examination of the burden and standard of proof.

7.1 Burden and standard of proof

- 7.106 Concerning the burden of proof in international commercial arbitration, each party must prove the facts on which it relies.¹⁶⁵ However, the standard or degree of proof required is a matter for the arbitral tribunal to determine. Many broad and flexible formulae are used to address this issue in arbitration rules. For example, Article 23(10) of the HKIAC Rules provides that the ‘arbitral tribunal shall determine the admissibility, relevance, materiality and weight of any matter presented by a party, including as to whether or not to apply strict rules of evidence’.¹⁶⁶ The discretion thus vested in an arbitral tribunal under this provision is broad and unconstrained.¹⁶⁷
- 7.107 Redfern and Hunter, while acknowledging that the standard of proof in international arbitration is not precise, appear to distil generally from arbitral practice a ‘balance of probability’ standard.¹⁶⁸ In *Dadras International v Islamic Republic of Iran*, the Iran-US Claims Tribunal adopted a stricter standard of proof for allegations of forgery, requiring ‘clear and convincing’ evidence.¹⁶⁹ Similarly, a high standard of proof may be required to sustain allegations of serious misfeasance,

¹⁶³ See, e.g. HKIAC Rules Article 23(10); UNCITRAL Arbitration Rules Article 25(6); 2010 UNCITRAL Arbitration Rules Article 27(4); both the 1999 and 2010 IBA Rules of Evidence Article 9(1).

¹⁶⁴ (1987) 4 SCC 497.

¹⁶⁵ See, e.g. ACICA Rules Article 27.1; CIETAC Rules Article 36(1); HKIAC Rules Article 23(1); JCAA Rules, Rule 37(1); KCAB International Rules, Rule 22(3); UNCITRAL Arbitration Rules Article 24(1); the 2010 UNCITRAL Arbitration Rules Article 27(1).

¹⁶⁶ See, e.g. Model Law Article 19(2); the Indian Arbitration and Conciliation Act 1996 Section 19(4); SIAC Rules, Rule 24(p).

¹⁶⁷ See, e.g. Caron, Caplan and Pellonpää, *op. cit.* fn 46, p. 621 et seq.

¹⁶⁸ See Redfern, Hunter, et al., *op. cit.* fn 45, para 6–67. See also *Saipem S.p.A. v Bangladesh*, ICSID Case No. ARB/05/7, Award of 30 June 2009, at para 114.

¹⁶⁹ (1995) 31 Iran-US CTR 127, at 162, para 124. See also the adoption of a ‘clear and convincing’ proof standard by the Eritrea-Ethiopia Claims Commission due to the gravity of the claims asserted. *Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 and 22 (Eritrea v Ethiopia)*, Partial Award (Eritrea Ethiopia Claims Commission, 28 April 2004), para 6, available at www.pca-cpa.org.

such as bribery, fraud or corruption.¹⁷⁰ These standards may be contrasted with the ‘beyond reasonable doubt’ and ‘prima facie’ standards used in some domestic legal systems. Lew, Mistelis and Kröll observe that the standard of proof may be a matter of substantive law and may depend on the subjective views of the arbitrators in each case.¹⁷¹

There may also be exceptional cases, for example, when a claimant produces prima facie evidence in a situation where proof of a fact is extremely difficult and there is an absence of rebuttal by the respondent. In such cases, the arbitral tribunal might shift the burden of proof on relatively little evidence or it may not insist on very rigorous standards of proof.¹⁷²

Proof would not usually be required in the event the fact or proposition is uncontroversial, common knowledge or obvious.¹⁷³ This practice is in harmony with the principle of judicial notice.¹⁷⁴

7.2 Documentary evidence

A particular feature of international arbitration that distinguishes it from proceedings in common law courts is its emphasis on evidence in the form of contemporaneous documents created around the time the transaction or the events giving rise to the dispute took place.¹⁷⁵ This is often considered to be the best evidence because it represents one of the most accurate records of the events that took place. The following passage by Bin Cheng explains this:¹⁷⁶

‘Testimonial evidence’, it has been said, ‘due to the frailty of human contingencies is most liable to arouse distrust.’ On the other hand, documentary evidence stating, recording, or sometimes even incorporating the facts at issue, written or executed either contemporaneously or shortly after the events in question by persons having direct knowledge thereof, and for purposes other than the presentation of a claim or the support of a contention in a suit, is ordinarily free from this distrust and considered of higher probative value.

A party to common law court proceedings is generally required to introduce documents through a witness. By contrast, in international arbitration a party relying on a document might well introduce it by exhibiting it to its pleadings or

¹⁷⁰ See Lau, op. cit. fn 111, p. 259, at p. 261; A Crivellaro, ‘Arbitration Case Law on Bribery: Issues of Arbitrability, Contract Validity, Merits and Evidence’ in K Karsten and A Berkeley (eds), *Arbitration: Money Laundering, Corruption and Fraud*, ICC Publishing, 2003, p. 109, at p. 118.

¹⁷¹ Lew, Mistelis and Kröll, op. cit. fn 22, para 22–26.

¹⁷² See, e.g. *W Jack Buckamier v Islamic Republic of Iran*, (1992) 28 Iran-US CTR 53, at 74–76; Aldrich, op. cit. fn 107, p. 334; and Bin Cheng, op. cit. fn 24, p. 323 et seq.

¹⁷³ See Lew, Mistelis and Kröll, op. cit. fn 22, at para 22–25.

¹⁷⁴ As to judicial notice constituting a general principle of law, see Bin Cheng, op. cit. fn 24, p. 303.

¹⁷⁵ See, e.g. CN Brower, ‘Evidence Before International Tribunals: The Need for Some Standard Rules’, (1994) 28 *The International Lawyer* 47, at p. 54. See also the comparative table in Section 5 above.

¹⁷⁶ Bin Cheng, op. cit. fn 24, pp. 318–319, quoting the *Naomi Russell* case (1931), Mexico-US Special Claims Commission, Opinions of Commissioners under the 10 September 1923 Convention between the US and Mexico, as extended by the Convention concluded on 17 August 1929, Washington, 1931, p. 184.

memorials. The consequence is that in international arbitration, documents are readily admitted without arguments as to whether they are admissible.¹⁷⁷

7.2.1 Document production – Domestic court practice

- 7.112 Domestic court practice as to document production helps understand approaches to document production in international arbitration. Domestic practice varies considerably.¹⁷⁸ At one end of the spectrum must be placed the US document discovery procedure, which is broad and extensive.¹⁷⁹ Next in line are the more temperate discovery procedures of English courts and former British colonies, which view discovery as integral but require or order document disclosure on a less extensive scale than in the US. And on the other end of the spectrum, one finds many civil law jurisdictions.¹⁸⁰ At this end of the spectrum, one may also find some Asia-Pacific countries with civil law systems, such as Korea, which has very limited discovery procedures in its courts.¹⁸¹ This disparity in practice has led Giorgio Bernini to conclude:¹⁸²

the taking of evidence in international arbitrations is likely to present itself as the occasion in which the different approaches characterising the contribution of civil and common law attorneys and arbitrators may give rise to a serious cultural clash. Discovery, in particular, is bound to remain a very controversial issue in arbitration. Nonetheless, the actual practice of arbitration shows signs of adjustment, and, despite theoretical differences, a workable *modus vivendi* has emerged in the reality of arbitration practice at [the] international level.

- 7.113 One comparison between US, other common law jurisdictions and civil law discovery practice, puts it this way:¹⁸³

Broadly speaking, in civil law jurisdictions, parties are relatively immune from orders to produce documents. Instead, disputes are adjudicated on the basis of documents

¹⁷⁷ Admissibility may, however, become an issue when the document's authenticity is challenged. See Lau, op. cit. fn 111, p. 262. Unlawfully obtained documents might not be introduced into evidence. See, e.g. *Methanex Corp v United States of America*, NAFTA Chapter 11 Arbitration, 3 August 2005, at para 54.

¹⁷⁸ See, e.g. G Kaufmann-Kohler, 'Globalization of Arbitral Procedure', (2003) 36 *Vanderbilt Journal of Transnational Law* 1313, p. 1325 et seq; and Lew, Mistelis and Kröll, op. cit. fn 22, at para 22–49.

¹⁷⁹ The legal term 'discovery' as is used in the US is not simply limited to the process of document production. It also refers to the wider process of finding facts and evidence through devices such as interrogatories and witness out-of-court testimony (depositions). See generally Seung Wha Chang, op. cit. fn 35, p. 267. It has been said that discovery in the US 'may be had of facts incidentally relevant to the issues in the pleadings even if the facts do not directly prove or disprove the facts in question', GC Hazard and M Taruffo, *American Civil Procedure: An Introduction*, Yale University Press, 1993, p. 113.

¹⁸⁰ See, e.g. G Bernini, 'The Civil Law Approach to Discovery: A Comparative Overview of the Taking of Evidence in the Anglo-American and Continental Arbitration Systems', in Newman and Hill (eds), op. cit. fn 5, pp. 270–273. Two important principles that influence the civil law approach to document discovery are: (1) the *maxim onus probandi incumbit ei qui affirmat*, meaning 'the burden of proof rests on he who affirms' – put another way, it is not for the respondent to produce evidence that will help the claimant; and (2) the right to privacy. See, e.g. C Reymond, 'Civil Law and Common Law Procedures: Which is the More Inquisitorial? A Civil Lawyer's Response', (1989) 5(4) *Arbitration International* 360.

¹⁸¹ See, e.g. G Kim, 'Eastern Asian Cultural Influences', in Pryles and Moser, op. cit. fn 8, pp. 43–44. He notes that in Korea the judge has powers to request evidence and generally a party has no right to demand production of evidence.

¹⁸² Bernini, op. cit. fn 180, p. 302.

¹⁸³ JL Frank and J Bédard, 'Electronic Discovery in International Arbitration: Where Neither the IBA Rules of Evidence Nor US Litigation Principles are Enough', (Nov 2007–Jan 2008) *Dispute Resolution Journal* 62, at p. 67 (footnotes omitted).

voluntarily submitted by the parties. Thus, civil law attorneys and arbitrators tend to dislike U.S. discovery practices, which they believe can be abusive and wasteful. As a result, they are not easily swayed by arguments that discovery, even less extensive discovery, is vital or indispensable to the proper adjudication in international arbitration. Furthermore, even attorneys and arbitrators from common law jurisdictions such as England and Canada will often distance themselves from U.S.-style discovery.

It is noteworthy that in some common law jurisdictions, there appears to be a developing trend away from extensive document discovery.¹⁸⁴ 7.114

7.2.2 Document production – Arbitral practice

Arbitration rules sometimes contain specific provisions that empower arbitral tribunals to order document production. Article 22(1) of the KCAB International Rules provides, for example, that '[u]nless the parties otherwise agree in writing, the Tribunal may at any time during the proceeding order the parties: (a) to produce documents, exhibits or other evidence it deems necessary or appropriate . . .'.¹⁸⁵ 7.115

Although it is impossible to generalise about the type of document discovery usually permitted by international commercial arbitral tribunals, one thing is clear: extensive US style court discovery is rarely, if ever, practised. In this regard, Seung Wha Chang has examined 15 ICC arbitration cases involving at least one Korean party. Although it is a relatively small sample of cases, the results are revealing and reflect anecdotal evidence. The analysis indicated that 14 of the cases followed more or less the limited document production regime of the IBA Rules of Evidence, even though in most cases these rules were not explicitly relied on by the arbitrators. The one exception in which extensive discovery was permitted involved a Korean party and a US party, two arbitrators who were US judges, representation of both parties by US law firms, California as the place of arbitration, and Californian governing law.¹⁸⁶ 7.116

It is also clear that there is great variation in the extent of discovery or document production that is permitted in international arbitration. It depends on the procedure agreed by the parties, the circumstances surrounding the request and on the preferences of the arbitrator(s), which might in turn depend on their legal background and experience. Lawyers trained in common law systems should not assume that the practice of obtaining evidence through discovery that may be familiar to them will be appropriate or acceptable in an international commercial arbitration. On the other hand, lawyers trained in civil law systems should be ready to accept at least some form of document production. 7.117

¹⁸⁴ See, e.g. Thye and Choong, *op. cit.* fn 34.

¹⁸⁵ While no details of the document production process is provided, it would seem to give broad enough discretion to adopt the procedures in the IBA Rules of Evidence. See Seung Wha Chang, *op. cit.* fn 35, p. 277. See also JCAA Rules, Rule 37(4) and (5); CIETAC Article 37; Beijing Arbitration Commission Rules Articles 30 and 32; SIAC Rules, Rule 24(h); UNCITRAL Arbitration Rules Article 24; China's Arbitration Law Article 43.

¹⁸⁶ Seung Wha Chang, *op. cit.* fn 35, p. 285. Similarly, Gary Born has remarked that 'when parties from common law jurisdictions arbitrate before a common law arbitrator in a common law state, discovery along common law lines is a very distinct possibility.' Born, 2001, *op. cit.* fn 32, p. 485.

7.2.3 Court assistance in document production

- 7.118 The Hong Kong Arbitration Ordinance serves as a good example of a domestic law that allows courts to assist arbitral tribunals in requesting the production of documents. Under Section 2GB, an arbitral tribunal is empowered to make orders or give directions in respect of the discovery of documents. However, the arbitral tribunal cannot compel a party to act. If a party refuses to so act, the assistance of the court may be sought.¹⁸⁷ In such a case, Section 2GG(1) becomes relevant:

An award, order or direction made or given in relation to arbitration proceedings by an arbitral tribunal is enforceable in the same way as a judgment, order or direction of the Court that has the same effect, but only with the leave of the Court or a judge of the Court. If that leave is given, the Court or judge may enter judgment in terms of the award, order or direction.

- 7.119 Section 2GG(2) adds that the above provision may also apply to an award, order or direction made or given whether in or outside Hong Kong. This means that an arbitral tribunal seated in Singapore may make a document production order which may be enforced in Hong Kong. However, section 2GG would not be helpful if an arbitral tribunal in Hong Kong issued an order against a person outside of Hong Kong. That would depend on the laws in force in the state having jurisdiction over that person.
- 7.120 Courts in the region are also empowered to compel the production of documents from a non-party on application by a party or an arbitral tribunal.¹⁸⁸
- 7.121 As regards civil law systems, it has been noted that although the means to compel production exists, its use in litigation is limited.¹⁸⁹ In some Asian jurisdictions based on the civil law tradition, this situation is changing and there is a trend in court civil procedure toward widening the scope of document production. These changes are bringing those systems closer to the IBA Rules of Evidence document production regime.¹⁹⁰ For example, in South Korea the old Korean Civil Procedure Law limited the scope of document production to certain types of documents, whereas its new Civil Procedure Law has, under Article 344(2), expanded its scope to all documents, with certain exceptions for confidentiality or privilege.¹⁹¹ A similar change has taken place in the Japanese Code of Civil Procedure.¹⁹²

¹⁸⁷ See also the Indian Arbitration and Conciliation Act 1996 Section 27.

¹⁸⁸ See, e.g. P Megens, P Starr and P Chow, 'Compulsion of Evidence in International Commercial Arbitration: An Asia-Pacific Perspective', (2006) 2(1) *Asian International Arbitration Journal* 32, p. 47 et seq (providing an analysis of the positions under the laws of Australia, Hong Kong, China, Singapore and Malaysia).

¹⁸⁹ See, e.g. Lew, Mistelis and Kröll, op. cit. fn 22 at para 22–49.

¹⁹⁰ See, generally, Seung Wha Chang, op. cit. fn 35, pp. 279 and 281.

¹⁹¹ Seung Wha Chang comments on these new Korean civil procedure rules that '[a]pparently, the scope of document production is more limited, and requirements for a request are stricter than ones under the IBA Rules of Evidence. Nevertheless, it is important to note that document production under the new KCPA is more liberal than traditional approaches to document production under the civil law system . . . Overall, it is stated that the gap between the KCPA and the IBA Rules of Evidence is not too wide to be reconciled with each other.' Seung Wha Chang, op. cit. fn 35, p. 279.

¹⁹² See generally Nakamura, op. cit. fn 66, para 80–150 and Article 220 of the Japanese Code of Civil Procedure.

While South Korea does not have a provision specifically on court powers to make document production orders, Article 28 of its Arbitration Law (as amended in 1999) provides at a general level for a request from a party or arbitral tribunal for court assistance in taking evidence. It is unclear from that provision what the exact parameters of such assistance may be but under Article 28(1) the arbitral tribunal is expressly permitted to specify the matters to be recorded by the court and other particulars necessary for investigation. Some illumination is also provided in Article 28(3), which refers to examination of witnesses and inspection of property. Article 35(1) of the new Japanese Arbitration Law states that, subject to party agreement, a party or an arbitral tribunal may apply:

to a court for assistance in taking evidence by any means that the arbitral tribunal considers necessary such as entrustment of investigation, examination of witnesses, expert testimony, investigation of documentary evidence . . . or inspection . . . prescribed in the Code of Civil Procedure.

However, in practice Japanese courts are reported to be generally disinclined to grant document production requests.¹⁹³

7.2.4 IBA Rules of Evidence and document production

The IBA Rules of Evidence have attempted to reconcile differences between common law and civil law practices in respect of document production.¹⁹⁴ They are developing a reputation for taking a well-balanced approach to document production, and are frequently used as a guide or are adopted by the parties.¹⁹⁵

A study of Chinese, Japanese and South Korean national civil procedure law and national arbitration law, as well as the arbitration rules of CIETAC, JCAA and KCAB, concluded that these laws and rules should not be an impediment to the application of the IBA Rules of Evidence.¹⁹⁶

The starting point for the IBA Rules of Evidence in respect of document production is Article 3(1): a party must submit all documents on which it relies and which are available to it (except for documents already submitted by another party).¹⁹⁷ In the event a party needs to request another party to the arbitration to produce documents, it must submit a request to the arbitral

¹⁹³ See K Sadaka and N Sawasaki, 'Japan', in *The International Comparative Legal Guide to: Litigation and Dispute Resolution 2008*, Global Legal Group, p. 164, para 7.1, available at www.iclg.co.uk/khadmin/Publications/pdf/1661.pdf.

¹⁹⁴ See the introduction to the IBA Rules of Evidence in Section 3.2 above. Unless indicated otherwise, the current Section is based on the 1999 IBA Rules of Evidence. At the time of writing in 2010, these Rules were revised.

¹⁹⁵ See B Hanotiau, 'Document Production in International Arbitration: A Tentative Definition of "Best Practices"', (2006) *ICC International Court of Arbitration Bulletin*, Special Supplement, p. 113; and Seung Wha Chang, op. cit. fn 35, p. 268. One exception appears to be China: it has been observed that Chinese arbitrators normally follow domestic court procedures rather than methods such as those contained in the IBA Rules of Evidence. Seung Wha Chang, *ibid.*, p. 283, citing an interview with Michael Moser, then Chairman of the Hong Kong International Arbitration Centre.

¹⁹⁶ Seung Wha Chang, op. cit. fn 35, p. 270.

¹⁹⁷ It is worth noting that the 2010 IBA Rules of Evidence have adopted in an extensive definition of a 'Document':

a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means . . .

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tribunal (Article 3(2)).¹⁹⁸ That request must identify each document requested or a 'narrow and specific' category of documents reasonably believed to exist (Article 3(3)(a)). Additionally, the request must state (1) how the documents are relevant and material to the outcome of the case, (2) that the documents are not in the possession, custody or control of the requesting party, and (3) why the requesting party assumes the other party has possession, custody or control of the documents (Article 3(3)(b) and (c)).

7.127 Pursuant to Article 3(5), the party to whom the request is made may object on the basis of the reasons set forth in Article 9(2). These reasons are:

- a) lack of sufficient relevance or materiality;
- b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
- c) unreasonable burden to produce the requested evidence;
- d) loss or destruction of the document that has been reasonably shown to have occurred;
- e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;^[199]
- f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
- g) considerations of fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

7.128 The arbitral tribunal must, in consultation with the parties, consider the request and the objections, if any. Under Article 3(6), if the arbitral tribunal considers that the issues the requesting party seeks to prove are relevant and material and none of the Article 9(2) exceptions applies, the arbitral tribunal may order production of the requested documents. Note here that even if all the conditions in the Rules as to production are satisfied by the requesting party, the presence of the word 'may' in Article 3(6) still gives the arbitral tribunal a discretion to deny the production request.

7.129 One difficulty that has been encountered in practice in the application of the IBA Rules of Evidence relates to the failure of Article 9(2) to refer to the criteria contained in Article 3(3)(a).²⁰⁰ This omission may be interpreted to imply that in cases where the requesting party fails to describe the requested documents in sufficient detail or makes an overly broad request, a basis for denying the request

198 In practice, parties and arbitral tribunals often agree to modify this rule so that requests for production are submitted directly to the opposing party, and only disputed requests are submitted to the arbitral tribunal for decision. Article 2 of the 2010 IBA Rules of Evidence requires the arbitral tribunal to invite the parties to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.

199 A claim that the requested documents are confidential (e.g. they contain commercially sensitive information or trade secrets) is not a ground that would always exempt a party from disclosing. The arbitral tribunal might permit the deletion of confidential information before documents are disclosed or limit access to specified persons such as lawyers or experts but not the parties and their in-house counsel. An additional level of comfort may be provided by the parties' lawyers entering into a confidentiality agreement or the issuance of a protective order by the arbitral tribunal. See generally Yang, *op. cit.* fn 14, p. 193.

200 Article 3(3)(a) of the IBA Rules of Evidence requires that the Request to Produce contain: '(i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist.'

under Article 9(2) may not exist. We do not consider that this interpretation of the IBA Rules of Evidence comports with one of the objectives of the Rules, which is to provide more specificity in document requests. In our experience, the objecting party could simply rely on Article 3(3)(a) and argue that the document request does not comply with that Article.

Based on the foregoing paragraphs, it may be seen that the IBA Rules of Evidence do not allow an automatic right to document production, and much less an entitlement to a full-blown discovery procedure as practised in the US. They have created a hybrid system that attempts to combine the divergent document discovery practices found in the civil law and common law systems. 7.130

If a request to produce is made and a requested party fails without satisfactory explanation to produce any document in contravention of an order to produce, the arbitral tribunal may infer that this document would be adverse to the interests of that party (Article 9(4)).²⁰¹ However, this may be a relatively weak sanction in the event that a critical document is not disclosed, especially given that in practice arbitral tribunals (as discussed below) are generally reticent to rely on adverse inferences. 7.131

In certain jurisdictions, the *lex arbitri* may assist the arbitral tribunal. For example, Section 2GG of the Hong Kong Arbitration Ordinance, discussed above, makes an arbitral tribunal's discovery order enforceable in the same way as a court order. However, while this might be effective against a party situated within the jurisdiction of the courts of the *lex arbitri*, it is unlikely to have any effect on a foreign party situated outside that jurisdiction. In the latter situation, Philip Yang comments that:²⁰² 7.132

If a foreign party irrevocably says that it has no such document to disclose, it is usually the end of the matter in an international arbitration. There is no point in further pursuing the matter as it ultimately will be a waste of time. If the arbitrator does not accept the reason for non-disclosure and is confident of its existence, he or she can of course and should always forewarn the foreign party that an adverse inference may be drawn against him or her.

While arbitral tribunals are empowered to draw an adverse inference, rarely are such inferences made, even if the refusal to produce concerns a document of high relevance.²⁰³ One of the factors that may affect the apparent reticence of arbitral tribunals to draw an adverse inference is doubt that (i) the document exists, (ii) is in the possession of the requested party and (iii) is essential for the disposition of the case. It has been suggested that if an adverse inference is 7.133

201 Similar provisions for domestic courts to draw adverse inferences in cases of non-compliance with a document disclosure order are found in Asia-Pacific civil procedure laws. See, e.g. the Japanese Civil Procedure Law Article 224(1); the South Korean Civil Procedure Law Article 349. Adverse inferences were drawn in a number of Iran-US Claims Tribunal awards. See Aldrich, *op. cit.* fn 107, pp. 339–341. In *William J Levitt v Islamic Republic of Iran*, 27 Iran-US CTR 164, for example, the arbitral tribunal noted that it was an accepted principle that adverse inferences may be drawn if a party fails to submit evidence that was likely to be at its disposal. It added that this failure did not relieve the other party of its 'obligation to muster all the evidentiary support at its disposal.' See also E Gaillard and J Savage (eds), *Fouchard, Gaillard, and Goldman on International Commercial Arbitration*, Kluwer, 1999, at para 2075.

202 Yang, *op. cit.* fn 14, p. 192.

203 See, e.g. Brower, *op. cit.* fn 175, at p. 56.

incorrectly made, the award may be challenged or difficulties in its enforcement may be encountered.²⁰⁴

- 7.134 Other significant document production features of the IBA Rules of Evidence include the appointment of an impartial expert to review documents and report on objections made to their production (Article 3(7)); the production of documents from persons or organisations not a party to the arbitration (Article 3(8)); a request to produce that is initiated by the arbitral tribunal itself (Article 3(9)); and the submission of documents that become relevant and material as a consequence of the documents previously submitted to the arbitral tribunal (Article 3(10)).
- 7.135 The IBA Rules of Evidence are gaining a widespread reputation as ‘the’ standard for document production in international commercial arbitration in the Asia-Pacific region, if not the world. It appears that the international arbitration community is coming to grips with the divergent approaches to document production. Harmonisation in practice, with the assistance of the IBA Rules of Evidence, is gradually starting to emerge. As noted earlier, the IBA Rules of Evidence were revised and updated at the time of writing in 2010 and it is hoped that in this new form they will now even better serve the international arbitration community.²⁰⁵
- 7.136 A future challenge which has been dealt with in the IBA Rules revision relates to discovery of electronic documents, such as emails and, more importantly, purely electronic information such as metadata. This kind of discovery is now possible in the US, at an enormous cost to businesses who might be faced with such an order. It is yet to make its way into the mainstream of international arbitration but attempts will no doubt be made when the stakes are high enough. Concern about the consequences of ‘e-discovery’ on international arbitration has prompted the ICC Commission on Arbitration, the Chartered Institute of Arbitrators and the ICDR to examine ‘e-discovery’ issues.²⁰⁶

7.3 Witness evidence

7.3.1 Witness evidence generally

- 7.137 As stated previously, documentation contemporaneous to the time when the relevant events took place is usually the most favoured type of evidence in

²⁰⁴ See Caron, Caplan and Pellonpää, *op. cit.* fn 46, pp. 578–579. However, regional case law characterises an arbitral tribunal’s error in relation to the drawing of adverse inferences as one in the assessment of evidence and therefore an error of law or fact that is not a ground for setting aside an award. See, e.g., *Dongwoo Mann and Hummel Co Ltd v Mann and Hummel GmbH* [2008] SGHC 67, especially at para 70 (Singapore High Court).

²⁰⁵ See Section 3.2 above.

²⁰⁶ The ICC Commission on Arbitration set up in 2008 a special Task Force to study the potential impact of ‘e-disclosure’. The Chartered Institute of Arbitrators issued on 2 October 2008 a ‘Protocol for E-disclosure in Arbitration’. See www.ciarb.org. A significant topic of the IBA’s review of its 1999 Rules of Evidence was ‘e-disclosure’. ICDR has issued ‘Guidelines for Information Disclosure and Exchange in International Arbitration Proceedings’. On the need for international arbitration to keep pace with domestic litigation trends in electronic production, see RD Hill, ‘The New Reality of Electronic Document Production in International Arbitration: A Catalyst for Convergence?’, (2009) 25 *Arbitration International* 87. See also CS Devey, ‘Electronic Discovery/Disclosure: From Litigation to International Commercial Arbitration’, (2008) 74 *Arbitration* 369; and N Tse and N Peter, ‘Confronting the Matrix: Do the IBA Rules Require Amendment to Deal with the Challenges Posed by Electronically Stored Information?’, (2008) 74 *Arbitration* 28.

international commercial arbitration. This does not mean that witnesses cannot provide important evidence in an arbitration, which evidence may take the form of statements or affidavits written specifically for the purpose of the arbitration, or of oral testimony at the hearing (or a combination of the two). An important point about witness evidence is that its content relates to what the witness observed, did or knew. In other words, witnesses are called to give factual evidence. Their role is generally not to give evidence about their opinions, especially when they are not qualified to do so. That is the role assigned to expert witnesses (addressed in the next section), who are selected on the basis of their qualifications and experience to provide opinions. Arbitral tribunals usually have the discretion to allow, refuse or limit the appearance of witnesses.²⁰⁷

Domestic laws vary considerably as to witness evidence. There is no consistent practice among jurisdictions as to whether a party to the dispute, or one of its employees or officers, may be a witness or whether witnesses may be interviewed and prepared for testimony. In some jurisdictions, it may even be unethical for witnesses to be contacted by a party or its counsel prior to giving testimony.²⁰⁸ Notwithstanding all these differences, it is important to bear in mind that most of these national rules do not apply to international arbitrations. Nonetheless, these differences often mean that different individuals (party representatives, lawyers and arbitrators) involved in an arbitration bring different expectations as to the approach toward witnesses.

The ideal goal in international arbitration is to establish a level playing field for legal representatives. This implies dispensing with local bar or law society rules as to, for example, contact with witnesses. In the absence of common rules of conduct, it is possible that one side's lawyers might want to meet at length with its witnesses to rehearse their answers to questions likely to be asked at the hearing, whereas the other side's lawyers may consider this an ethical violation and may be reluctant to conduct such a rehearsal with their own witnesses.²⁰⁹ The IBA Rules of Evidence, which are discussed below, fill this gap by attempting to provide a neutral standard of universal application.

Whether witnesses may stay in the hearing room before and after their testimony varies considerably depending on the particular case, and the parties' and the arbitral tribunal's preferences. There is generally less concern where experts are involved, it being felt that it is valuable to have each side's expert hear the other's evidence to facilitate better responses to it. However, the situation in relation to witnesses of fact is more difficult. If no consensus can be reached between

²⁰⁷ See, e.g. SIAC Rules, Rule 22.2; and IBA Rules of Evidence Article 8(1).

²⁰⁸ See generally IBA (Committee D) Working Party, 'Commentary on the New [1999] IBA Rules of Evidence', (2000) *Business Law International* 16, pp. 26–27; UNCITRAL Notes on Organizing Arbitral Proceedings, op. cit. fn 91, paras 67 and 68; and Hanotiau, op. cit. fn 35, pp. 375–376.

²⁰⁹ See, e.g. Gaillard and Savage, op. cit. fn 201, pp. 701–2, para 1285. See also UNCITRAL Notes on Organizing Arbitral Proceedings, op. cit. fn 91, para 67. Bernard Hanotiau has commented that 'it is uncommon and in many countries even unethical or illegal to meet a witness in domestic proceedings to prepare with him his statement and to prepare the witness before his examination. What the witness will say must be pure surprise, the exact opposite of what an American lawyer would expect'. B Hanotiau, 'Civil Law and Common Law Procedural Traditions in International Arbitration: Who has Crossed the Bridge?', in *Arbitral Procedure at the Dawn of the New Millennium*, Reports of the International Colloquium of CEPANI, 15 October 2004, Bruylant, 2005, p. 86.

the parties, such witnesses may be required to wait outside the hearing room before and after their testimony.²¹⁰ Numerous issues are raised concerning their presence in the hearing room. For example, if they are present their testimony may be influenced by what they hear other witnesses say;²¹¹ yet the presence of another witness who has knowledge of the relevant facts may deter a testifying witness from making untrue statements. A compromise often adopted is that witnesses are allowed to remain in the hearing room only after they have given evidence.²¹²

- 7.141 A witness who refuses to give evidence may be compelled to do so by the courts at the seat of arbitration. For example, Section 13(2) of the Singapore International Arbitration Act provides that the ‘court may order that a subpoena to testify . . . shall be issued to compel the attendance before an arbitral tribunal of a witness wherever he may be within Singapore’.²¹³ The Indian Arbitration and Conciliation Act expressly states that persons failing to attend or refusing to give evidence shall be subject to the same penalties incurred for like offences in suits before courts.²¹⁴ In Japan, if a witness declines to appear before the arbitral tribunal, courts may examine the witness for the arbitral tribunal.²¹⁵

7.3.2 IBA Rules of Evidence and witnesses

- 7.142 The means by which witnesses provide written evidence under the 1999 IBA Rules of Evidence is by witness statements that contain an affirmation by the witness of its truth. Witness statements may be contrasted with affidavits. The latter is a more formal statement that is sworn and often used in common law litigation.²¹⁶ Article 4(5) of the IBA Rules sets out the written statement’s required contents. One of the more important Article 4(5) requirements is the need to identify the source of the witness’s information as to the facts described. Article 4(1) expresses the common practice that, prior to the hearing, parties give notice as to the identity of the witnesses on whose testimony they will rely and a summary of the subject matter of their testimony.²¹⁷
- 7.143 Under the IBA Rules of Evidence, any person is permitted to present evidence, including a party, a party’s officer, employee or other representative (Article 4(2)). This rule recognises the reality that parties will need to call as

210 Article 23(7) of the HKIAC Rules provides that the ‘arbitral tribunal may require the retirement of any witness or witnesses or expert witnesses during the testimony of other witnesses or expert witnesses’.

211 See Hanotiau, *op. cit.* fn 35, p. 385.

212 See UNCITRAL Notes on Organizing Arbitral Proceedings, *op. cit.* fn 91 para 65.

213 See also Section 14(1) of the Singapore International Arbitration Act. See generally, Megens, Starr and Chow, *op. cit.* fn 188.

214 Indian Arbitration and Conciliation Act Article 27(5). See also the Singapore International Arbitration Act Article 14(1).

215 Nakamura, *op. cit.* fn 66, para 83–720.

216 Even if parties to an arbitration agree that written evidence of witnesses should take the form of affidavits, it has been suggested that the IBA Rules of Evidence provide a useful guide as to the form an affidavit should take. Lau, *op. cit.* fn 111, p. 264.

217 See, e.g. Article 4(1) IBA Rules of Evidence; Article 25(2) UNCITRAL Arbitration Rules.

witnesses the individuals who were involved in the relevant project or the dispute. These people are usually current or former employees of the party.

The Rules also enable a party, its officers, employees, legal advisors or other representatives to ‘interview’ witnesses (Article 4(3)). The meaning of ‘interview’ is not defined.²¹⁸ The Commentary to the IBA Rules of Evidence notes that the arbitral tribunal ‘may consider the scope of any such interview and the effect, if any, on the credibility of the witness’.²¹⁹ It is now generally understood within the field of international commercial arbitration (contrary to the practice in certain domestic jurisdictions) that witnesses may be prepared by counsel or other persons before giving their oral evidence. In this regard, one Asian arbitrator has remarked that ‘[l]awyers’ contact could be beneficial if witnesses receive welcome help to make their statements simple and clear’.²²⁰ But, of course, there are limits. For example, under no circumstances should counsel coach the witness to tell a version of events that both the counsel and witness know to be untrue. Bernard Hanotiau provides some prudent advice in this regard:²²¹

Witness preparation should not become witness manipulation. The starting point for any witness preparation is to remind the witness to tell the truth. Moreover, a witness who has been ‘over-prepared’ may quickly lose credibility in the eyes of the arbitral tribunal.

Witnesses who have submitted witness statements are required to testify at a hearing unless the parties agree otherwise (Article 4(7)). In many cases, the parties agree that some witnesses are not required to give testimony at the oral hearing. On this point, the IBA Rules of Evidence provide that such an agreement is not to be considered as acceptance of the correctness of the witness statement (Article 4(9)).

Concerning witnesses required to attend the hearing, the parties frequently agree that a witnesses’ evidence in chief (also known as ‘direct evidence’) is limited to a witness statement submitted prior to the hearing. At the hearing, those witnesses would affirm the content of their statement and thereafter be subject to cross-examination by opposing counsel. This practice helps to reduce the hearing time required. The alternative is known as ‘direct examination’, where the counsel for the party that has called the witness asks questions intended to draw out the evidence in chief. After direct examination and cross-examination, counsel calling the witness usually conduct a re-examination (also known as

218 The same term, without definition, is also used in SIAC Rules, Rule 22.5; HKIAC Rules Article 23(9) and Article 20(6) of the LCIA Rules.

219 IBA (Committee D) Working Party, *op. cit.* fn 208, p. 12.

220 Sawada, *op. cit.* fn 43, p. 300.

221 Hanotiau, *op. cit.* fn 35, p. 366. A cautionary anecdote told to pupil barristers is one where a seasoned barrister cross-examines a witness, who keeps repeating a certain version of events. The barrister finally asks: ‘And who told you to say this?’ Oblivious to the consequences, the witness responds ‘He did’, simultaneously pointing to the barrister who called the witness.

‘re-direct examination’) as to points raised in the cross-examination.²²² A re-cross examination may be allowed after that.

7.147 As indicated above, a party may insist that a witness who has submitted a witness statement be present for cross-examination at a hearing. Should that witness fail to appear without a valid reason, the arbitral tribunal may be required to disregard that witness statement, unless the circumstances are exceptional (Article 4(8)). Parties wishing to present evidence from a person who refuses to appear voluntarily have the option of requesting the arbitral tribunal ‘to take whatever steps are legally available to obtain the testimony of that person’ if that person’s testimony would seem to be relevant and material (Article 4(10)). This could mean that the arbitral tribunal requests a domestic court to order that person to give testimony. Additionally, the arbitral tribunal by its own motion may order that any person testify (Article 4(11)).

7.148 In addition to written witness statements, Article 8 of the IBA Rules of Evidence addresses oral witness testimony at hearings. This provision gives the arbitral tribunal ‘complete control’ at all times over evidentiary hearings. Article 8(1) also empowers the arbitral tribunals to

limit or exclude any question to, answer by or appearance of a witness (which term includes, for the purposes of this Article, witnesses of fact and any Experts), if it considers such question, answer or appearance to be irrelevant, immaterial, burdensome, duplicative or covered by a reason for objection set forth in Article 9.2.

7.4 Expert evidence

7.149 Arbitrations often require expert evidence to explain on the basis of any discipline, for example engineering, chemistry, accounting or science, why or how certain events took place. Experts are expected to possess specialised professional experience and/or academic credentials in the subject area in which they testify. Expert evidence may be given by party-appointed experts or tribunal-appointed experts. One point to bear in mind about experts is that no matter how grandly qualified or experienced an expert may be, no guarantee exists that his or her opinion will be accepted by the arbitral tribunal.

7.4.1 Party-appointed experts

7.150 Article 5 of the 1999 IBA Rules of Evidence deals with party-appointed experts. They are required to submit an expert report containing, inter alia, the expert’s ‘opinions and conclusions, including a description of the method, evidence and information used in arriving at the conclusions’ (Article 5(2)). Unless otherwise agreed by the parties, the experts must appear for testimony (Article 5(4)), failing which and absent exceptional circumstances, the arbitral tribunal must disregard that expert’s testimony (Article 5(5)). If the parties agree that the

²²² For a practical example of an order stipulating the procedure for the examination of witnesses, see *Saipem SpA v Bangladesh*, ICSID Case No. ARB/05/7, Award of 30 June 2009, at para 75.

expert need not appear for testimony, such an agreement is not to be considered as reflecting acceptance of the expert report's correctness (Article 5(6)). The arbitral tribunal also has the discretion to order any party-appointed experts who have submitted reports on the same or related issues to meet and attempt to reach agreement on those issues in respect of which they expressed differences of opinion (Article 5(3)).²²³

One practice in China is of note here. Some CIETAC arbitrators view testimony of a party-appointed expert as inherently biased (because they consider that such testimony almost invariably favours the party that retained the expert) and may refuse to admit the testimony without any regard to the weight or substance of the evidence.²²⁴ While party-appointed experts may sometimes be treated with suspicion, rejecting their evidence altogether is unnecessary and inappropriate. As Michael Moser and Peter Yuen have commented, an amendment to the CIETAC Rules expressly acknowledging the rights of parties to appoint their own experts and the need for arbitral tribunals to give them due consideration would be welcome.²²⁵ 7.151

7.4.2 Tribunal-appointed experts

An arbitral tribunal may appoint its own expert or experts.²²⁶ But, in practice, party-appointed experts are far more common than arbitral tribunal-appointed experts.²²⁷ If an expert is appointed by the arbitral tribunal, it is prudent for the arbitral tribunal to draft terms of reference for the expert.²²⁸ The appointed expert must be independent. In this regard, the 1999 IBA Rules of Evidence require that, before acceptance, the expert must submit a statement of independence from the arbitral tribunal and the parties (Article 6(2)). Those Rules also authorise arbitral tribunal-appointed experts to request from any party information or access to documents, goods, samples, property or a site for inspection (Article 6(3)). Where a disagreement between the arbitral tribunal-appointed expert and a party arises as to the relevance, materiality or appropriateness of the expert's request, the Rules provide a safeguard: the arbitral tribunal must 7.152

²²³ See Section 7.4.3 below.

²²⁴ M Moser and P Yuen, 'The New CIETAC Arbitration Rules', (2005) 21 (3) *Arbitration International* 391, at 399.

²²⁵ *Ibid.*

²²⁶ See, e.g. Model Law Article 26; Japanese Arbitration Law 2003 Article 34; SIAC Rules, Rule 23; CIETAC Rules Article 38; HKIAC Rules Article 25; UNCITRAL Arbitration Rules Article 27; and 2010 UNCITRAL Arbitration Rules Article 29.

²²⁷ See Hanotiau, *op. cit.* fn 35, p. 386, who suggests experts are appointed by arbitral tribunals only if they are 'absolutely indispensable'. In *CMS Gas Transmission Co v Argentine Republic*, Award, 12 May 2005, (2005) 44 ILM 1205, at para 50, the arbitral tribunal stated that it had retained independent experts 'so as to better understand the underlying assumptions and methodology relied upon in the valuation reports offered by the parties' experts'. At the Iran-US Claims Tribunal, it was initially thought that technical experts would be appointed in a number of cases to analyse complex or voluminous technical or financial evidence. However, in practice, only a small number of experts was appointed. See Aldrich, *op. cit.* fn 107, pp. 343–347. In contrast, the United Nations Compensation Commission – a body set up by the UN Security Council to resolve claims by individuals, corporations and states against Iraq resulting from its invasion and occupation of Kuwait – relied heavily on the work of expert consultants to value and verify compensable damages. This reliance was in large measure due to the enormous numbers of claims required to be determined by the Commission.

²²⁸ For suggestions as to the content of the terms of reference, see UNCITRAL Notes on Organizing Arbitral Proceedings, *op. cit.* fn 91, at para 71.

make a decision in regard to that disagreement (Article 6(3)). Non-compliance by a party with an appropriate request by the expert or decision by the arbitral tribunal is to be recorded in the expert's report, which is required to describe the effects of the non-compliance on the determination of the specific issue (Article 6(3)). The report must describe the method, evidence and information used in arriving at its conclusion (Article 6(4)). Parties have a right to see that report, the correspondence between the arbitral tribunal's appointed expert and the arbitral tribunal, and may examine any other document the expert examined (Article 6(5)). Parties may also respond to the report through a separate report prepared by a party-appointed expert (Article 6(5)).²²⁹ The presence of the arbitral tribunal-appointed expert at the hearing may be requested by a party or the arbitral tribunal. At that hearing, the arbitral tribunal-appointed expert may be questioned by the arbitral tribunal, the parties or by party-appointed experts (Article 6(6)). Finally, the report of the arbitral tribunal's expert does not bind the arbitral tribunal,²³⁰ which must assess the expert's conclusions 'with due regard to all the circumstances of the case' (Article 6(7)).

7.153 In *Luzon Hydro Corp v Transfield Philippines*,²³¹ the applicant challenged an arbitral award on the basis that the tribunal-appointed expert retained to assist it went much further than was agreed by the parties – allegedly the expert was actively involved in assessing the evidence. Additionally, the applicant alleged a breach of natural justice on the basis that the expert's report to the arbitral tribunal was not provided to the parties for comments. The Singapore High Court rejected the application on a number of grounds, which included a finding that the arbitral tribunal adequately set out the expert's tasks in a letter to the parties; that the expert communicated to the parties in his invoices descriptions of his activities; no compelling evidence indicated that the expert exceeded his role; what the expert said to the arbitral tribunal was confidential; and no party objected to the role of the expert until the award was issued.²³²

7.154 This decision differs from the rule in Article 6(5) of the IBA Rules of Evidence, which states that the parties may examine 'any correspondence between the Arbitral Tribunal and the Tribunal-Appointed Expert'. This serves as a reminder that the IBA Rules of Evidence are certainly not used in every case, and even where they are used they are generally utilised only as guidelines rather than binding rules. The decision also underscores the wide degree of discretion arbitral tribunals are granted in determining the procedure in relation to experts.

7.4.3 Witness conferencing

7.155 Arbitral tribunals may create procedures for the assessment of evidence that are conducive to smoother and more efficient arbitrations. One of these is witness

²²⁹ See also UNCITRAL Notes on Organizing Arbitral Proceedings, op. cit. fn 91, at para 72.

²³⁰ See, e.g. IBA Working Party, 'Commentary on the New [1999] IBA Rules of Evidence in International Commercial Arbitration', (2000) *Business Law International* 16, p. 32; and Hanotiau, op. cit. fn 35, p. 386.

²³¹ [2004] 4 SLR 705 (Singapore High Court).

²³² *Ibid.*, at pp. 711–713.

conferencing. A founding father of this technique, Wolfgang Peter, has defined it in the following terms:²³³

Witness conferencing consists of the simultaneous joint hearing of all fact witnesses, expert witnesses, and other experts involved in the arbitration. It is not an occasional confrontation of two fact witnesses or expert witnesses, but involves all witnesses and experts appearing simultaneously throughout the entire hearing. Witness conferencing is therefore not a 'witness-by-witness' hearing, but a team-versus-team hearing.

There are many different approaches to witness conferencing. Bernard Hanotiau has described it as a debate that 'takes place among informed and specialized witnesses; it is expert knowledge versus expert knowledge and no longer the lawyer's questioning technique versus the witnesses' expert knowledge'.²³⁴

Every expert need not be present in the conferencing room at the same time. It does not serve much purpose to bring together all these professionals if their evidence is not relevant to each other. For example, the conferencing may be done issue by issue whereby all the electrical experts gather together to discuss the issues relating to their discipline, and thereafter the mechanical experts gather to go through the same process in relation to their sphere of expertise.

Witness conferencing is said to reduce with relative speed many of the divergences among experts and leaves only a few specific points of disagreement for the arbitral tribunal to determine. Further, Wolfgang Peter concludes from his use of the technique that parties who have adopted it will generally settle during or at the end of the hearings, particularly because the conferencing tends to bring to light the respective strengths and weaknesses of the parties' positions.²³⁵ However, from the perspective of professionals acquainted with traditional arbitral procedure, it might prove a bit disorienting. The lawyers, particularly, may feel that they lose control over 'their' party-appointed expert.²³⁶ It was also observed during a recent AFIA Symposium in Seoul that witness conferencing may be problematic for witnesses of fact where there is a power relationship between two opposing witnesses or a cultural divide. Such circumstances may make witnesses uncomfortable about contradicting the other expert's testimony in his or her presence.²³⁷

In support of witness conferencing, Michael Hwang has asserted that a selling point to sceptical counsel is that²³⁸

[i]t gives them the benefit of using their own witnesses to rebut the testimony of the other side's witnesses at the time when the other witnesses are making assertions which require instant contradiction for maximum impact on the tribunal.

²³³ W Peter, 'Witness 'Conferencing'', (2002) 18 *Arbitration International* 47, at p. 48. See also M Hwang, 'Witness Conferencing', in J McKay (ed), *The 2008 Legal Media Group Guide to the World's Leading Experts in Commercial Arbitration*, 2008, p. 3; and IBA Rules of Evidence Article 5(3).

²³⁴ Hanotiau, op. cit. fn 35, p. 376.

²³⁵ Peter, op. cit. fn 233, p. 47.

²³⁶ Hanotiau, op. cit. fn 35, p. 387.

²³⁷ See S Davis, '18th AFIA Symposium, Seoul 24 June 2009', (2009) 4 *AFIA News*, September, p. 9.

²³⁸ M Hwang, 'Witness Conferencing and Party Autonomy', (2009) October *Transnational Dispute Management* 20.

- 7.160 Article 5(3) of the 1999 IBA Rules of Evidence (Article 5(4) of the 2010 Rules) invests the arbitral tribunal with the discretion to order the party experts to meet and ‘attempt to reach agreement on those issues as to which they had differences of opinion in their Expert Reports, and they shall record in writing any such issues on which they reach agreement’ (Article 5(3)). Recognising its potential benefits, domestic courts are now also starting to permit the use of witness conferencing.²³⁹

8 Hearings

- 7.161 A hearing typically refers to a meeting at which counsel and the arbitrators are physically present for purposes such as the presentation of each party’s oral arguments, examination of witnesses, and for the arbitrators to question the parties’ counsel and/or their witnesses. A general feature of arbitration hearings is that they take place in private.
- 7.162 Hearings in international commercial arbitration usually take place once the written submissions, documentary evidence, witness statements and expert reports have been exchanged. There may well be more than one hearing, and it is not uncommon to have one hearing for each phase in an arbitration (e.g. on jurisdiction, liability, quantum).
- 7.163 As discussed previously, due process rules demand that parties are given adequate advance notice of the hearing.²⁴⁰ In the event that a party duly notified of the hearing fails to appear without showing sufficient cause for the failure, the arbitral tribunal may proceed to hear the party that appears, and ultimately issue a default award.²⁴¹
- 7.164 The power to manage hearings rests with the arbitral tribunal and not the parties. The 1999 IBA Rules of Evidence provide in Article 8(1):²⁴²

The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness (which term includes, for the purposes of this Article, witnesses of fact and any Experts), if it considers such question, answer or appearance to be irrelevant, immaterial, burdensome, duplicative or covered by a reason for objection set forth in Article 9.2. . . .

- 7.165 The IBA Working Party commentary on this provision sheds more light on the rationale of giving such discretion to the arbitral tribunal: ‘These provisions are all designed to give the arbitral tribunal the ability to focus the hearing on issues material to the outcome of the case and thereby make the hearing more efficient.’²⁴³

²³⁹ See, e.g. Order 44.06 of the Rules of the Supreme Court of Victoria, Australia.

²⁴⁰ See Section 4.1 above.

²⁴¹ See Section 6.10 above.

²⁴² See also ICC Rules Article 21(3).

²⁴³ IBA Working Party, op. cit. fn 230; (2000) *Business Law International* 16, at p. 33.

An example of the procedure that may be followed during an evidentiary hearing in an international arbitration is:²⁴⁴ 7.166

- (i) *Opening of the hearing* – The sole arbitrator or chair of the arbitral tribunal will open the hearing. The parties and their representatives will be introduced and organisational matters will be explained. Usually, many of the administrative matters relating to the hearing and the order of proceedings will have been agreed or addressed in a procedural order issued prior to the hearing.
- (ii) *Opening statements* (sometimes omitted) – A summary presentation of each party's case, highlighting the respective merits and strengths and indicating how this is corroborated by the documentary evidence already filed and the oral evidence that is to follow.²⁴⁵
- (iii) *Hearing of witnesses of fact* – Not all witnesses who have provided written statements are called to give oral evidence. If a party disputes the content of a witness' written statement, then that witness should normally be called for cross-examination. If he or she does not appear, the witness statement may be disregarded, save exceptional circumstances.²⁴⁶ Witnesses in international arbitrations rarely testify under oath unless that is mandatory under the law of the seat. However, the witnesses would be expected to affirm that they are telling the truth.²⁴⁷ The three main phases of taking evidence are the examination in chief (or direct examination), the cross-examination and re-examination (or redirect examination).²⁴⁸ Examination in chief often does not take place – for the sake of efficiency, counsel for the parties frequently agree that the witness's written statement constitutes the evidence in chief. The arbitral tribunal is usually free to question a witness at any time during these phases.²⁴⁹ As to the order of appearance of the witnesses, one possibility is for the claimant to have all its witnesses testify first, followed by the respondent's witnesses and thereafter the claimant's rebuttal witnesses, if any.²⁵⁰ However the

244 For a more detailed discussion of the practical issues involved in a hearing, e.g. expenses, order of presentation, whether an oath is administered, etc., see Hanotiau, op. cit. fn 35, pp. 381–388.

245 The length of time to make these statements may vary – one arbitrator has indicated a maximum of approximately 2–3 hours. See Hanotiau, op. cit. fn 35, p. 381. Another has shown a preference for half an hour. See Sawada, op. cit. fn 43, p. 303.

246 See, e.g. IBA Rules of Evidence Article 4(8).

247 See, e.g. IBA Rules of Evidence Article 8(3). In this regard, the ICSID Rules, Rule 35 are more specific than most – they require each witness of fact to declare: 'I solemnly declare upon my honour and conscience that I speak the truth, the whole truth and nothing but the truth.' Those Rules require expert witnesses to declare: 'I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief.' In some jurisdictions, it is illegal for an arbitrator to administer an oath. That power may be reserved for state organs. See, e.g. the Swedish Arbitration Act 1999 Section 25.

248 See Section 7.3 above. Article 8(2) of the IBA Rules of Evidence states in part that '[f]ollowing direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning'. Sometimes, a fourth phase, called re-cross examination is allowed, which enables the respondent to ask questions on additional questions that may have been raised during the re-examination. See Hanotiau, op. cit. fn 35, p. 384.

249 See, e.g. IBA Rules of Evidence Article 8(2).

250 Ibid.

arbitral tribunal may prefer to deal with factual witnesses issue by issue.²⁵¹ The order of witnesses may also be affected by each individual witness's availability to be present at the hearing.

- (iv) *Hearing of expert witnesses* – The presence of expert witnesses will ordinarily be required at the hearing to be examined and cross-examined much like witnesses of fact. Ordinarily, witnesses of fact give their evidence before the expert witnesses, although this is always subject to the particular case and to the arbitral tribunal's preferences.
- (v) *Closing arguments* – This stage is reserved for the parties' lawyers to sum up their case on the basis of all the evidence presented to the arbitral tribunal, usually with a focus on the evidence adduced during the hearing. The approach to closing arguments by common lawyers and civil law lawyers may diverge; the style of the former tends to be short and fact-based and the latter tends to concentrate on legal issues and are generally longer. Oral closing submissions are often dispensed with if written post-hearing briefs are to be filed.
- (vi) *Closing of the hearing* – Before formally closing the hearing, the sole arbitrator or chairperson may address outstanding and/or future procedural issues such as the date when the full transcript of the hearing will be available and when the post-hearing briefs, if any, should be submitted.²⁵² Sometimes, in order to satisfy itself that the parties feel they have been treated fairly, and in an attempt to protect the award, parties may be asked by the arbitral tribunal whether they have been given a reasonable opportunity to be heard.²⁵³

7.167 The closing of the hearing should not be confused with the closing of the proceedings. Written submissions (e.g. post-hearing submissions) may follow after the hearing is closed. Even if no post-hearing briefs are required the arbitral tribunal may raise further questions in writing after the hearing. Once the entire proceedings themselves are closed, it is usually the practice that no further submission or evidence can be made thereafter, unless requested or authorised by the arbitral tribunal.²⁵⁴ Most institutional rules have a provision that enables the hearing or proceedings to be reopened before the award is issued.²⁵⁵

7.168 Like all aspects of arbitration procedure, the venue and nature of a hearing depends on the preferences of the parties and the arbitral tribunal. As mentioned in Chapter 2, the hearing generally need not be held at the seat of arbitration. Hearings usually take place in the conference room of a hotel or in special

²⁵¹ See, e.g. M Hwang, 'Trial by Issues', paper presented at the APRAG Seoul Conference, 22 June 2009, reprinted in 7 *Transnational Dispute Management*, Issue 1, April 2010.

²⁵² See also UNCITRAL Arbitration Rules Article 29(1).

²⁵³ See, e.g. ACICA Rules Article 30.1.

²⁵⁴ See, e.g. HKIAC Rules Article 27.1; ICC Rules Article 22; SIAC Rules, Rule 21.5.

²⁵⁵ Some rules expressly indicate that this is done only in exceptional circumstances, e.g. HKIAC Rules Article 27.2, but others simply state that the decision to reopen lies at the discretion of the arbitral tribunal, e.g. KCAB International Rules Article 27(2). In all cases, the efficiency of the arbitral process must be taken into account. See also ACICA Rules Article 30.2; JCAA Rules, Rule 49(2); SIAC Rules, Rule 21.5.

arbitration hearing room facilities. Sometimes hearings are held in the facilities of one of the law firms involved in the case.

Modern communications technology may be utilised to assist the conduct of the hearing. The parties might agree that there is no point in incurring the expense of flying a witness to the place where the hearing is held. Such witnesses may attend via telephone or video-link. The HKIAC Electronic Transaction Arbitration Rules, for example, provide that '[h]earings may, without limitation, be conducted in person, by video-link, by telephone or on-line (by email or by other electronic or computer communication)'.²⁵⁶ Many international arbitration institutions now provide video-conferencing services. However, some practitioners question whether an effective cross-examination can be conducted via video-link. 7.169

9 Interim measures

Interim measures are court or arbitral tribunal orders designed to protect assets or maintain the status quo pending the outcome of legal proceedings.²⁵⁷ These measures are temporary and usually have effect only up to the time the final award is issued.²⁵⁸ The importance of this topic is increasing due to a discernible rise in the number of arbitrations in which requests for interim measures are made.²⁵⁹ Issues relating to interim measures can arise before an arbitral tribunal or before a competent domestic court. These are discussed in turn in Sections 9.1 and 9.2. 7.170

9.1 Tribunal-ordered interim measures

An international arbitral tribunal's power to order interim measures is derived from the parties' agreement, the applicable procedural rules, the law of the seat, and perhaps even from the arbitral tribunal's inherent power to conduct the proceedings as it sees fit. 7.171

Where an arbitral tribunal is empowered to grant interim measures, careful consideration should be given before exercising that power. Key reasons for this caution were articulated by David Williams as follows:²⁶⁰ 7.172

In considering whether it is appropriate to grant interim relief an arbitral tribunal must remain acutely aware of the situation in which it is placed. It may be being asked to take immediate action, without full knowledge of the facts and at the risk of pre-judging or even rendering irrelevant its final Award in the arbitration.

²⁵⁶ Article 9(1). See also Article 8(1) of the 2010 IBA Rules of Evidence.

²⁵⁷ Interim measures are also known as provisional or conservatory measures. For a detailed examination of the subject (albeit prior to the 2006 Model Law amendments), see A Yeşilirmak, *Provisional Measures in International Commercial Arbitration*, Kluwer Law International, 2005.

²⁵⁸ On the temporary nature of interim measures, see *Firm Ashok Traders v Gurumukh Das Saluja* (2004) 3 SCC 155 (Indian Supreme Ct), at para 17.

²⁵⁹ See, e.g., Report of the UN Secretary General, 'Settlement of Commercial Disputes', UNCITRAL 32nd Session, UN Doc. A/CN.9/WGII/WP.108 (2000), p. 5.

²⁶⁰ D Williams, 'Interim Measures', in Pryles and Moser, op. cit. fn 8, p. 246 (footnotes omitted).

- 7.173 In many cases, parties comply voluntarily with interim measures ordered by the arbitral tribunal. The arbitral tribunal's ruling ends the matter and no further steps on its part are necessary. A party that defies an interim measures order may face a range of negative consequences:²⁶¹
- (i) it may expose itself to an action for breach of the arbitration agreement;
 - (ii) the arbitral tribunal may draw an adverse inference against it;
 - (iii) an award of costs may be made against it; and/or
 - (iv) if national courts are called on to assist in the enforcement process and the defiant party still fails to comply, state-backed sanctions involving contempt proceedings, fines and, perhaps in extreme cases, imprisonment could follow.
- 7.174 The relevant provisions of national laws and of arbitral rules are discussed in turn below, before discussing the controversial issue of applications to arbitral tribunals for *ex parte* interim measures.

9.1.1 National laws

- 7.175 Before discussing some of the region's national laws in relation to interim measures, it is useful to explain some fundamental changes that were made to the Model Law in 2006. Article 17 of the 1985 Model Law provides:

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

- 7.176 This is a very general instruction that provides no guidance as to the scope and effect of interim measures and the conditions that are required for such measures to be granted. The lack of detail in the 1985 version of the Model Law led to the formulation of major amendments by UNCITRAL in 2006.²⁶² The new 2006 Model Law Article 17 elaborates significantly on the meaning of interim measures. It provides:²⁶³

- (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.
- (2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

²⁶¹ On these points, see generally, Williams, *ibid.*, pp. 242–254 and Yang, *op. cit.* fn 14, pp. 214–215.

²⁶² A very similar provision, but very deliberately omitting references to preliminary orders, now appears in the 2010 UNCITRAL Arbitration Rules as Article 26.

²⁶³ The following footnoted examples of circumstances in which the interim measures may be invoked are largely derived from Williams, *op. cit.* fn 260, pp. 228–230.

- (a) Maintain or restore the status quo pending determination of the dispute;^[264]
- (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;^[265]
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied;^[266] or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute.^[267]

The conditions necessary for interim measures to be granted are set out in Article 17A of the 2006 Model Law. Its first paragraph reads: 7.177

The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

- (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
- (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

Different treatment is accorded to an interim measure to preserve evidence under Article 17(2)(d): the requirements under Article 17A(1)(a) and (b) need only be applied 'to the extent the arbitral tribunal considers appropriate'. As a consequence, a less onerous burden of proof may be required by the requesting party for invoking this sub-paragraph.²⁶⁸ A requirement that the measure must be urgent was included in earlier drafts of the Model Law amendments. However, the UNCITRAL Working Group decided that the requirement of urgency was not a general condition for the grant of interim relief under Article 17A.²⁶⁹ 7.178

The 2006 Model Law amendments also contain safeguards to prevent abuse of the interim measures regime: the arbitral tribunal may modify, suspend or terminate the interim measure at any time (Article 17D); it may require appropriate security to be provided (Article 17E); it may require the requesting party to make prompt disclosure of any material change in the basis on which the measure was requested or granted (Article 17F); and the party requesting the 7.179

²⁶⁴ For example, a party may be required to keep performing certain contractual obligations or permit access rights to or use of property that was granted before the dispute arose.

²⁶⁵ For example, the arbitral tribunal may issue an anti-suit injunction or order a party to make available for inspection property that is material to the case.

²⁶⁶ For example, the arbitral tribunal may issue what are described in common law litigation as 'Mareva injunctions' or 'freezing orders' to prevent the dissipation of assets that may be used to satisfy an award.

²⁶⁷ This is necessary because arbitral tribunals must have access to relevant and material evidence, which, if not preserved, could be deleted from computers, destroyed or could significantly deteriorate during the period of the arbitration proceedings.

²⁶⁸ The UNCITRAL Working Group generally felt that the very high threshold was not appropriate for all types of interim measures, such as the preservation of evidence. See Report of the Working Group on Arbitration and Conciliation on the work of its forty-third session (Vienna, 3–7 October 2005), UN Doc. A/CN.9/589, para 32. See also S Menon and E Chao, 'Reforming the Model Law Provisions on Interim Measures of Protection', (2006) 2 *Asian International Arbitration Journal* 1, at pp. 8–9.

²⁶⁹ Report of the Working Group II (Arbitration and Conciliation) on the work of its thirty-seventh session (Vienna, 7–11 October 2002), UN Doc. A/CN.9/523, para 29. See Williams, op. cit. fn 260, p. 248.

measure is to be liable for any costs or damages caused by the interim measure if the arbitral tribunal determines that the measure should not have been granted (Article 17G).

- 7.180 The Singapore International Arbitration Act is a good example of national legislation that grants an arbitral tribunal detailed interim measures powers.²⁷⁰ Section 12(1) of that Act was amended in 2001 to read:

Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for –

- (a) security for costs;
- (b) discovery of documents and interrogatories;
- (c) giving of evidence by affidavit;
- (d) the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;
- (e) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;
- (f) the preservation and interim custody of any evidence for the purposes of the proceedings;
- (g) securing the amount in dispute;
- (h) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
- (i) an interim injunction or any other interim measure.

- 7.181 Certain domestic laws are more constrained in the powers they grant to arbitral tribunals. For example, unless the parties agree otherwise, Article 19 of the Malaysian Arbitration Act 2005 confines an arbitral tribunal's power to make interim orders in relation to (1) security for costs; (2) document discovery and interrogatories; (3) giving of evidence by affidavit; and (4) preservation, interim custody or sale of any property that is the subject matter of the dispute. In contrast, the Malaysian courts are accorded wider powers under Article 11 of that Act, which enables the Malaysian High Court, in addition to the above four categories, (1) to appoint a receiver; (2) to secure the amount in dispute; (3) to ensure that any award made in the proceedings is not made ineffectual by the dissipation of assets; and (4) to grant an interim injunction or other interim measure.

- 7.182 The Singaporean and Malaysian laws may be compared with the corresponding legislation in China, Thailand and Vietnam, which contains far more restrictive provisions. The laws of China, Thailand and Vietnam grant no express power to arbitral tribunals to order interim measures. That power is reserved for their domestic courts.²⁷¹ Moreover, in China parties cannot apply directly to

²⁷⁰ See also Hong Kong Arbitration Ordinance Section 2GB.

²⁷¹ See, e.g. Article 33 of Vietnam's Ordinance on Commercial Arbitration 2003; Article 258 of China's Civil Procedure Law; Articles 28 and 68 of China's Arbitration Law 1995; Section 16 of Thai Arbitration Act 2002. See also MLJ Winckless, 'The History and Current Status of Arbitration in Thailand', (2004) *Asian Dispute Review*, p. 12.

the court for interim measures; the application must be made through an arbitral institution.²⁷²

9.1.2 Arbitral rules

Arbitration procedural rules have adopted three basic approaches to an arbitral tribunal's power to order interim measures. Some have modelled their provisions on Article 17 of the 1985 Model Law and contain a very general description of the arbitral tribunal's powers to order interim measures. Rule 48(1) of the JCAA Rules, for example, provides that '[t]he arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute'.²⁷³

Other arbitration rules include detailed provisions. For example, SIAC Rule 24 and ACICA Rules Article 28 are formulated more along the lines of Article 17 of the 2006 Model Law. The ACICA Rules have made a number of notable modifications or additions to the Model Law. These are set out in Article 28 of those Rules and include:²⁷⁴

- (i) a requirement that the arbitral tribunal give reasons if an interim measure is granted as an order rather than an award;
- (ii) the inclusion of security for legal and other costs in the definition of interim measures;
- (iii) where interim measures are granted and subsequently the arbitral tribunal decides they should not have been, the ability of the arbitral tribunal to decide that the party that requested the measure is liable for the resulting costs or damages;
- (iv) the omission of a power pursuant to which arbitral tribunals may order ex parte interim measures as contained in Article 17B of the 2006 Model Law; and
- (v) an obligation on the part of the arbitral tribunal to endeavour to ensure that its interim measures are enforceable.

A third (minority) approach adopted by arbitral rules is not to empower the arbitral tribunal to order interim measures. Articles 17 and 18 of the CIETAC Rules, for example, provide that where a party requests measures to protect property or evidence, CIETAC will forward that request to the competent court. This is consistent with Chinese law, referred to in the previous section.

9.1.3 Ex parte preliminary orders

One of the most contentious subjects in the Model Law 2006 amendments (discussed above) concerned ex parte 'preliminary orders', which an arbitral tribunal is entitled to grant under Article 17B:

²⁷² See, e.g. CIETAC Rules Articles 17 and 18. See also Ge Liu, 'UNCITRAL Model Law v Chinese Law and Practice – A Discussion on Interim Measures of Protection', (2004) 12 *ICCA Congress Series* 278, at p. 280.

²⁷³ See also KCAB International Rules Article 28(1).

²⁷⁴ See generally, Greenberg, *op. cit.* fn 78, p. 197.

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- (1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.
- (2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.
- (3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a), is the harm likely to result from the order being granted or not.

7.187 The procedure to be adopted subsequent to the granting of a preliminary order is set out in Article 17C. Its main features include providing notice of the order and related information to all parties immediately after the order is made (Article 17C(1)); granting the party against whom the preliminary order is made the opportunity to present its case (Article 17C(2)); and deciding promptly any objection to the order (Article 17C(3)). The order has a life span of 20 days but this may be varied after hearing the party subject to the order (Article 17C(4)). These provisions are an attempt to soften the fact that the order is issued without notifying or hearing submissions from the party against whom it is sought. Further safeguards have been provided for in Articles 17D–G; and unlike interim measures, a preliminary order, while binding on the parties, is not enforceable by a court (Article 17C(5)). This last provision appeared to be essential to maintain the consensus of the UNCITRAL Working Group that formulated the 2006 amendments.²⁷⁵

7.188 There are many arguments for and against the Model Law preliminary orders regime. Advocates in favour of it have said that an arbitral tribunal's power to grant ex parte measures enhances the usefulness and efficiency of international arbitration by increasing its independence from state courts and that the element of surprise may be essential for certain interim measures to be effective. They also assert that because state courts regularly grant ex parte measures, there is no reason for arbitration to be any different.²⁷⁶ Those opposing the regime contend that the granting of ex parte relief by an arbitral tribunal violates fundamental due process principles of international arbitration and it is inconsistent with the consensual nature of arbitration; that the practice may lead arbitrators to prejudge the merits of the dispute without hearing the other party; and that parties always have the option to obtain ex parte interim relief from a court.²⁷⁷ On balance, we consider that the preliminary orders regime in the Model Law, if used very cautiously, will contribute to the effectiveness of international commercial

²⁷⁵ See Menon and Chao, *op. cit.* fn 268, pp. 14–17 (commenting that if the 'sticking point [as to enforcement] was not resolved, the chances of forging consensus on the entire preliminary orders regime would be jeopardised'). See also Williams, *op. cit.* fn 260, p. 252.

²⁷⁶ See K Hobér, 'The Trailblazers v. the Conservative Crusaders, or Why Arbitrators Should Have the Power to Order Ex Parte Interim Relief', (2004) 12 *ICCA Congress Series* 272.

²⁷⁷ See H van Houtte, 'Ten Reasons against a Proposal for Ex Parte Interim Measures of Protection in Arbitration', (2004) 20 *Arbitration International* 20.

arbitration. The regime has already been adopted by New Zealand²⁷⁸ and is likely to be enacted in Hong Kong.²⁷⁹ Singapore amended its International Arbitration Act in 2009 but did not adopt the preliminary orders provisions in Article 17 of the 2006 Model Law.

9.2 Court assistance

There are a number of reasons why an arbitral tribunal might need the assistance of courts in issuing interim measures. Redfern and Hunter usefully identify five situations:²⁸⁰

- (i) The arbitral tribunal may not have the powers, particularly if the national law limits powers of arbitrators to order interim measures.²⁸¹
- (ii) A need for interim measures might arise (often urgently) before the arbitral tribunal is constituted.²⁸²
- (iii) An arbitral tribunal's powers extend only to the parties involved in the arbitration whereas court orders may be enforced against third parties.
- (iv) An interim measure may not be enforceable internationally under the New York Convention²⁸³ and therefore an interim measure may need to be requested directly from a court at the place of execution.
- (v) Arbitrators by and large are not given powers to grant *ex parte* applications to restrain the conduct of another party and therefore the *ex parte* application will usually need to be determined by a court.²⁸⁴

Although the 1985 Model Law addresses the power of arbitral tribunals to order interim measures, it contains no provision that deals with a court's power to do so. In contrast Article 17J of the Model Law 2006 amendments provides:²⁸⁵

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as

278 See Sections 17C-G of the New Zealand Arbitration Act.

279 See Sections 37 and 38 of the Hong Kong Arbitration Bill, which is expected to be passed in early 2011.

280 See Redfern, Hunter, et al., *op. cit.* fn 45, pp. 332–336, paras 7–11 to 7–17. See also DF Donovan, 'The Allocation of Authority between Courts and Arbitral Tribunals to Order Interim Measures: A Survey of Jurisdictions, the Work of UNCITRAL and a Model Proposal', (2004) 12 *ICCA Congress Series* 203, at pp. 238–239.

281 See, e.g. CIETAC Rules Article 23; Arbitration Law of China 1995 Articles 28 and 45; Thai Arbitration Act 2002 Section 16; Vietnam Ordinance on Commercial Arbitration 2003 Article 33.

282 See, e.g. Indian Arbitration and Conciliation Act Section 9 and Model Law Article 9. See also *Sunderam Finance Ltd v NEPC India Ltd* (1999) XXIV *Yearbook of Commercial Arbitration*, pp. 309–316, 13 January 1999 (Supreme Court of India). Some arbitral institutions have attempted to address this problem by enabling the appointment of a pre-arbitral or emergency arbitrator. See, e.g. the 1990 ICC Rules for a Pre-Arbitral Referee Procedure and Rule 26.2 of the 2010 SIAC Rules.

283 See, e.g. *Resort Condominiums Inc v Bolwell* (1993) 118 ALR 655; (1995) XX *Yearbook of Commercial Arbitration* 628, 29 October 1993, (Queensland Supreme Court, Australia). In contrast, Article 17K of Schedule 1 of New Zealand's Arbitration Act 1996 (as amended), adopting the 2006 version of the Model Law, prescribes that interim measures are binding and enforceable in courts.

284 See, however, the new section in the 2006 Model Law, particularly Article 17B and C, entitling arbitral tribunals to make *ex parte* preliminary orders, but these are not enforceable. This is discussed in Section 9.1.3 above. In ICC arbitrations, *ex parte* orders have on rare occasions been made by the arbitral tribunal similar to that which has been contemplated by the 2006 Model Law despite the absence of an express power to do so under the applicable law or in the ICC Rules.

285 This provision of the Model Law amendment should be read in combination with Article 1(2).

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it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

7.191 A key feature of the Model Law 2006 amendments is its provisions on the enforcement of interim measures. Article 17H provides:

- 17H (1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17I.
- (2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.
- (3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

7.192 As is made clear by Article 17H(1), a court may enforce interim measures made by arbitral tribunals sitting within the enforcing state or elsewhere. This provision also contains certain safeguards such as imposing an obligation on the requesting party to inform the enforcing court of any changes to the interim measure and empowers the enforcing court to order appropriate security from the requesting party. The grounds on which a court may refuse to recognise or enforce an interim measure are dealt with in Article 17I, which provides:

- 17I (1) Recognition or enforcement of an interim measure may be refused only:
- (a) At the request of the party against whom it is invoked if the court is satisfied that:
- (i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or
- (ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
- (iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or
- (b) If the court finds that:
- (i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or
- (ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.
- (2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize

and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

The refusal grounds contained in Article 17I explicitly follow some of those contained in Article 36 of the Model Law and in Article V of the New York Convention. Case law on the enforcement refusal provisions in the Model Law or the New York Convention may therefore be of some guidance in determining whether a refusal will be justified. The Article 17I(1) phrase ‘may be refused only’ indicates that the refusal grounds are exhaustive and that the court maintains the discretion to order recognition or enforcement even if one of the Article 17I grounds is present. 7.193

While the above provisions are new and have so far been enacted in few countries, a number of domestic laws already provide for court enforcement of interim measures ordered by an arbitral tribunal. Section 12(6) of Singapore’s International Arbitration Act, for example, provides:²⁸⁶ 7.194

All orders or directions made or given by an arbitral tribunal in the course of an arbitration shall, by leave of the High Court or a Judge thereof, be enforceable in the same manner as if they were orders made by a court and, where leave is so given, judgment may be entered in terms of the order or direction.

The laws of some other Model Law countries simply enable their award enforcement laws to apply equally to interim measures ordered by an arbitral tribunal.²⁸⁷ 7.195

Some laws may specifically allow courts to determine interim measures without the need first to apply to an arbitral tribunal.²⁸⁸ In some jurisdictions, an application may be made to a court even before arbitral proceedings are commenced.²⁸⁹ Article 9(ii) of India’s Arbitration and Conciliation Act is an example of a domestic law that provides detailed rules as to when courts may order interim measures in an arbitration.²⁹⁰ 7.196

286 A similar provision is found in Section 2GG(1) of Hong Kong’s Arbitration Ordinance. In the proposed reform to the Hong Kong legislation this provision is retained but the contemplated new provision further adds that an order or direction in the relevant provisions includes an interim measure. See Section 61(5) of Hong Kong’s current Arbitration Bill, which is expected to be passed in early 2011.

287 See, e.g. Section 23 of the Australian International Arbitration Act 1974 (a provision that requires specific opting in by the parties); and Section 19(3) of the Malaysian Arbitration Act 2005. See also ACICA Rules Article 28(1) (‘The Arbitral Tribunal may order [interim measures of protection] in the form of an award . . .’); and Williams, *op. cit.* fn 260, p. 243. Additionally, see the discussion in Chapter 8, Section 5.3, as to whether an arbitral tribunal’s order for interim measures constitutes an ‘award’ within the meaning of the New York Convention.

288 See, e.g. Hong Kong’s Arbitration Ordinance Section 2GC.

289 See, e.g. *Sundaram Finance Ltd v NEPC India Ltd* (1999) 2 SCC 479, at para 20, in which the Supreme Court of India (in a domestic arbitration) held that under Article 9 of India’s Arbitration and Conciliation Act an application may be made to a national court for interim measures *prior* to the commencement of arbitral proceedings. It added that there must be a ‘manifest intention’ on the part of the applicant to proceed to arbitration. See also *Firm Ashok Traders v Gurumukh Das Saluja* (2004) 3 SCC 155; and P Nair, ‘Surveying the Decade of the “New” Law of Arbitration in India’, (2007) 23 *Arbitration International* 699, at pp. 714–715.

290 An interesting point of comparison is Article 17 of the Indian Arbitration and Conciliation Act, which gives arbitral tribunals the power to order interim measures but provides no detailed enumeration as is the case in Article 9.

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A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court:

...

- (ii) For an interim measure of protection in respect of any of the following matters, namely: –
 - (a) The preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement;
 - (b) Securing the amount in dispute in the arbitration;
 - (c) The detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
 - (d) Interim injunction or the appointment of a receiver;
 - (e) Such other interim measure of protection as may appear to the court to be just and convenient,

And the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

7.197 Interim court orders may be made by courts located outside the seat of arbitration as is indicated by Article 17J of the 2006 Model Law (quoted above). Such orders are particularly important where assets outside the seat need to be protected. In *Bhatia International v Bulk Trading SA*,²⁹¹ even though France was the seat of arbitration, the Indian Supreme Court upheld a lower court's interim order to preserve the subject matter of an ICC arbitration by preventing a party to the foreign arbitration from alienating or otherwise disposing of its business assets located in India. In this case, the Supreme Court controversially used the interim measures provision located in Part I of India's Arbitration and Conciliation Act. Whether Part I actually applies to arbitrations seated outside India is open to some debate because, pursuant to Section 2(2) of the Act, that Part applies 'where the place of arbitration is in India'.²⁹²

7.198 The Delhi High Court more recently has denied an interim measures request relating to a proposed arbitration in Singapore in *Max India Ltd v General Binding Corporation*.²⁹³ A single judge of the court held that by agreeing in their dispute resolution clause to Singapore law, to SIAC arbitration and to Singapore court

²⁹¹ (2002) 4 SCC 105 (Indian Supreme Court).

²⁹² See, e.g. the critique in Nair, op. cit. fn 289, pp. 717–720. See also N Dewan, 'Arbitration in India: An Unenjoyable Litigating Jamboree!', (2007) 3 *Asian International Arbitration Journal* 113; R Sharma, 'Bhatia International v Bulk Trading SA: Ambushing International Commercial Arbitration Outside India?', (2009) 26(3) *Journal of International Arbitration* 357; and Nariman, op. cit. fn 8, pp. 337–338. The reasoning in *Bhatia* was relied on heavily in the highly controversial case of *Venture Global Engineering v Satyam Computer Services* (2008) 4 SCC 190 (Indian Supreme Court), which is discussed in Chapter 9, Section 3.2.2. See also the Hong Kong Court of Appeal case *The Lady Muriel* [1995] 2 HKC 320.

²⁹³ Order of Justice Shiv Narayan Dhingra, 14 May 2009, (High Court of Delhi at New Delhi) OMP No. 136/2009.

jurisdiction, the parties specifically excluded the jurisdiction of Indian courts and Part I of the Indian Arbitration and Conciliation Act. In upholding this decision on appeal, the Division Bench of the Delhi High Court indicated that adequate relief could be provided under the SIAC Rules as well as the Singapore International Arbitration Act.²⁹⁴

In *Swift-Fortune Ltd v Magnifica Marine SA*, the Singapore Court of Appeal 7.199 upheld a first instance decision by Justice Judith Prakash that Singapore courts have no jurisdiction under Section 12(7) of its International Arbitration Act to grant injunctions in aid of a foreign arbitration and that this provision applied only to an arbitration seated in Singapore.²⁹⁵ The court left open the question whether Section 4(10) of the Singapore Civil Law Act could be applicable. That provision states that 'an injunction may be granted . . . in all cases in which it appears to the court to be just or convenient that such order should be made'.²⁹⁶ The International Arbitration Act was amended in 2009 to give Singapore courts the power to issue interim measures in respect of foreign arbitrations.²⁹⁷ The Malaysian Court of Appeal in *Aras Jalinan Sdn Bhd v TIPCO Asphalt Company Ltd* has also ruled that Malaysian courts have no jurisdiction to grant injunctions to assist a foreign seated arbitration.²⁹⁸

Australian courts have displayed a willingness to grant an interim injunction 7.200 in support of a foreign seated arbitration. For example, in a series of Federal Court of Australia decisions in *Clough Engineering Ltd v Oil & Natural Gas Corporation Ltd*,²⁹⁹ the contract was governed by Indian law and included an arbitration clause designating India as the seat of arbitration. Before arbitration was commenced, Clough sought an interim injunction from the Australian Federal Court to prevent certain Australian banks from paying out on an unconditional performance bond valued at 10% of the contract price. From Clough's point of view, the injunction would assist in securing payment for an eventual award issued in its favour by the arbitral tribunal seated in India. Justice Gilmour granted an ex

²⁹⁴ *Max India Ltd v General Binding Corporation*, Division Bench, Delhi High Court, 16 July 2009, (FAO (OS) No.193/2009), at para 40. The decision has been commended for not intervening in the arbitral process and for confirming that it is more appropriate for a party seeking relief to approach the court chosen in their contract, see T Karia, 'Appeal Court Upholds Decision on Jurisdiction to Grant Interim Relief', *ILO Newsletter*, 25 August 2009.

²⁹⁵ See *Swift-Fortune Ltd v Magnifica Marine SA*, [2006] SGCA 42 (Court of Appeal); *Swift-Fortune Ltd v Magnifica Marine SA*, [2006] 2 SLR 323 (High Court). A short time after the High Court judgment in *Swift-Fortune* was handed down, Justice Belinda Ang in *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854 (High Court) held that the court had jurisdiction to grant an injunction in Singapore in respect of an arbitration taking place in London and that Section 12(7) could apply to arbitrations seated outside Singapore. An appeal in this case was withdrawn after the Court of Appeal issued its judgment in *Swift-Fortune*. See Leng Sun Chan, 'Injunctions in Aid of Foreign Arbitration: The Singapore Experience', (2007) 3 *Asian International Arbitration Journal* 142, at p. 148.

²⁹⁶ See Leng Sun Chan, *ibid.*, pp. 148–149 and 154–159.

²⁹⁷ See Section 12A of the International Arbitration Act, which authorises court-ordered interim measures 'irrespective of whether the place of arbitration is in the territory of Singapore'.

²⁹⁸ [2008] 4 AMR 533; ILO Case 15609. See K Shanti Mogan, 'High Court Claims No Inherent Jurisdiction', *ILO Newsletter*, 17 April 2008. Also see *Innotec Asia Pacific Sdn Bhd v Innotec GMBH* [2007] 8 CLJ 304; [2007] 8 AMR 67.

²⁹⁹ [2007] FCA 881 (7 June 2007); [No. 2] [2007] FCA 927 (19 June 2007); [No. 4] [2007] FCA 2110 (21 December 2007); [2008] FCA 191 (29 February 2008); and [2008] FCAFC 136 (22 July 2008).

parte interim injunction in favour of Clough. Subsequently, the injunction was set aside on the basis that the applicant had no arguable case on the merits.³⁰⁰

- 7.201 In relation to overlapping interim measures powers of arbitral tribunals and courts, no settled international practice has developed as to how they should co-exist.³⁰¹ The Article 17 Model Law amendments of 2006 are silent as to the order of priority when similar interim measures issues are to be decided in respect of the same parties by both a court and an arbitral tribunal. A few national laws in the region have addressed (at least partially) this issue. In Hong Kong, Section 2GB(6) of its Arbitration Ordinance provides that an interim measure may be declined by a court or a judge on the ground that the matter is currently the subject of arbitration proceedings and the court or judge considers it more appropriate for the matter to be dealt with by the relevant arbitral tribunal. In interpreting this provision, the Hong Kong Court of First Instance in *Leviathan Shipping Co v Sky Sailing Overseas Co* showed considerable deference to the arbitral process when it held '[t]he legislature has provided for the intervention of the courts, but . . . this jurisdiction should be exercised sparingly, and only where there are special reasons to utilize it'.³⁰²

- 7.202 Section 11(2) of Malaysia's Arbitration Act 2005 states:

Where a party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the application, the High Court shall treat any findings of fact made in the course of such ruling by the arbitral tribunal as conclusive for the purposes of the application.

- 7.203 Article 9(3) of the First Schedule of the New Zealand Arbitration Act 1996 appears to go further than its Malaysian counterpart. It requires that the New Zealand court treat as conclusive any prior 'ruling or any finding of fact' made by the arbitral tribunal. It would thus seem that from a literal reading the Malaysian Act does not apply to rulings that involve issues other than fact finding.

- 7.204 It may be concluded from the jurisprudence referred to above that courts and arbitral tribunals are no longer jurisdictional competitors in connection with interim measures. This position is supported by Justice Baragwanath's view of a court's role in an interim measures application arising out of a dispute subject to arbitration:³⁰³

the purpose of interim measures is to complement and facilitate the arbitration, not to forestall or to substitute for it. The Court's role is ancillary, to be exercised only to the extent that it is possible or practicable for the arbitrator to deal with the issue.

300 *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd* [2008] FCAFC 136 (22 July 2008).

301 See generally Donovan, op. cit. fn 280, p. 203.

302 [1998] 4 HKC 347. See also Donovan, op. cit. fn 280, p. 220.

303 See also *Sensation Yachts Ltd v Darby Maritime Ltd*, Auckland High Court, 16 May 2005 in which a New Zealand court granted interim measures in support of an arbitration in London. This decision referred to a frequently cited observation by Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, at 365 (observing that the purpose of court-ordered interim measures is 'not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute' and that there exists a 'duty of the court to respect the choice of the tribunal which both parties have made, and not to take out of the hands of the arbitrators . . . a power of decision which the parties have entrusted to them alone').

10 Security for costs

A well-formulated definition of 'security for costs' describes them as orders that:³⁰⁴ 7.205

make the right of a claimant or counter-claimant to proceed on his claim conditional on the raising of a bank guarantee or other forms of surety to guarantee, in the case of an unsuccessful claim, any eventual award of legal fees assessed against the claimant or counter-claimant by the arbitral tribunal.

Without security for costs, a respondent to a spurious arbitration claim filed against it by a claimant that has little or no assets finds itself in an undesirable situation. If it does not defend the claim, an adverse award may be issued that is enforceable against it. If it succeeds in defending the claim, it is likely to be left without a remedy for the costs of mounting a defence due to the impecuniosity of the claimant. Security for costs may be granted to cover, for example, fees and expenses of its lawyers, experts, interpreters, the institutional costs etc. 7.206

A number of recent arbitration rules specifically empower an arbitral tribunal to order security for costs.³⁰⁵ While other sets of arbitral rules do not expressly grant this power, it may be implied into their provisions dealing with interim measures.³⁰⁶ The grant of power to the arbitral tribunal to order security for costs in arbitral rules is helpful because the power is non-existent or at least uncertain in many arbitration laws, including the 1985 version of the Model Law.³⁰⁷ 7.207

It is unlikely that Article 17 of the 1985 Model Law on the power of arbitral tribunals to award interim measures (quoted above in Section 9.1.1) could be construed as granting an arbitral tribunal a general power to order security for costs. Of particular significance is the Article 17 phrase 'in respect of the subject-matter of the dispute'. As has been noted elsewhere:³⁰⁸ 7.208

Article 17 therefore empowers the arbitral tribunal to order interim measures as long as those interim measures relate to the merits of the substantive dispute. There is a distinction between substantive and procedural matters. Disputes about costs are procedural rather than substantive because they are subsidiary to, and not part of, the 'subject matter of the dispute.'

...

304 Gu Wexia, 'Security for Costs in International Commercial Arbitration', (2005) *Journal of International Arbitration* 167, at p. 167.

305 ACICA Rules Article 28(2)(e); SIAC Rules, Rule 24(m). Unlike the 1976 UNCITRAL Arbitration Rules, the 2010 version provides for the ordering of security for costs in Article 26(2)(c).

306 For example, it is well known that ICC arbitral tribunals are empowered to order security for costs despite the absence of an express reference thereto in Article 23 of the ICC Rules.

307 See, e.g. the absence of any reference to security for costs in Article 17 of the Model Law. S Greenberg and C Kee, 'Can You Seek Security for Costs in International Arbitration in Australia?', (2005) 26 *Australian Bar Review* 89, at p. 91 et seq; C Kee, 'International Arbitration and Security for Costs – A Brief Report on Two Developments', (2007) 17 *American Review of International Arbitration* 273, at p. 274.

308 Greenberg and Kee, *ibid.*, p. 95.

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Further, the phrase 'appropriate security in connection with such measure' in Article 17 is referring to security for the taking of the interim measure itself, and not security in relation to the cost of defending the substantive dispute.

7.209 The above interpretation is supported by the New Zealand case of *Lindow v Barton McGill Marine Ltd*³⁰⁹ which held that security for costs was not covered by the words 'the subject-matter of the dispute' in the 1985 version of Article 17.

7.210 The 2006 Model Law amendments have revised the relevant parts of Article 17.³¹⁰ But this provision still does not necessarily clarify whether an arbitral tribunal can order security for costs.³¹¹ Schedule 1 of New Zealand's Arbitration Act 1996 has been revised to make it abundantly clear that an arbitral tribunal has the power to order security for costs. In its amended form, Article 17 of Schedule 1 defines an interim measure, in relevant part, as follows:³¹²

interim measure means a temporary measure (whether or not in the form of an award) by which a party is required, at any time before an award is made in relation to a dispute, to do all or any of the following . . . (e) give security for costs . . .

7.211 Nonetheless, the New Zealand amendment should not be relied on as a general indication that security for costs is not already encompassed by Article 17(2)(c) of the 2006 Model Law.³¹³ When UNCITRAL Working Group II came to consider an identical provision in the context of the revision of the UNCITRAL Arbitration Rules it noted:³¹⁴

A proposal was made that paragraph [17](2)(c) should be amended expressly to refer to security for costs through an addition of the words 'or securing funds' after the word 'assets'. Opposition was expressed to that proposal as it could connote that the corresponding provision in the UNCITRAL Arbitration Model Law was insufficient to provide for security for costs. The Working Group agreed that security for costs was encompassed by the words 'preserving assets out of which a subsequent award may be satisfied.'

7.212 An arbitral tribunal has an effective sanction for non-compliance with security for costs orders: it may simply stay the arbitration until compliance occurs. Section 2GB of the Hong Kong Arbitration Ordinance expressly provides that an arbitral tribunal may strike out a claim if the claiming party fails to provide security for costs.

³⁰⁹ (2002) 16 PRNZ 796 (New Zealand High Court).

³¹⁰ This provision is quoted in Section 9.1 above.

³¹¹ See generally Kee, *op. cit.* fn 307, pp. 273–280.

³¹² See also the Singapore International Arbitration Act Section 12(1)(a); and Williams, *op. cit.* fn 260, p. 227, n. 6.

³¹³ Under this provision, an arbitral tribunal is empowered to order a party to '[p]rovide a means of preserving assets out of which a subsequent award may be satisfied'.

³¹⁴ Report of Working Group II (Arbitration and Conciliation) on the work of its forty-seventh session (Vienna, 10–14 September 2007), UN Doc. A/CN.9/641, para 48.

11 Privacy and confidentiality

Arbitration has developed a reputation as offering a higher level of privacy and confidentiality than that afforded by domestic courts. Privacy has not proved an overly controversial concept. On the other hand, considerable debate has taken place as to the precise scope of confidentiality in international commercial arbitration.³¹⁵ The difference between privacy and confidentiality was neatly summed up by Julian Lew:³¹⁶

Privacy is concerned with the right of persons other than the arbitrators, parties and their necessary representatives and witnesses, to attend the arbitration hearing and to know about the arbitration. Confidentiality, by contrast, is concerned with the obligation on the arbitrators and the parties not to divulge or give out information relating to the content of the proceedings, evidence and documents, addresses, transcripts of the hearings or the award.

Privacy and confidentiality in arbitration contrast with the public nature of domestic court proceedings. In most jurisdictions, any person may attend court hearings and documents filed with courts are available for inspection by the public. Of course, in certain cases where confidentiality is required, courts may restrict public rights to attend hearings and view documents.

On the whole, privacy in international commercial arbitration is not the subject of debate. Arbitration rules and laws frequently contain specific provisions stating that hearings are to take place in private.³¹⁷ In *Esso Australia Resources Ltd v Plowman* ('Esso') Chief Justice Mason observed:³¹⁸

Subject to any manifestation of a contrary intention arising from the provisions or the nature of an agreement to submit a dispute to arbitration, the arbitration held pursuant to the agreement is private in the sense that it is not open to the public The arbitrator will exclude strangers from the hearing unless the parties consent to attendance by a stranger. Persons whose presence is necessary for the proper conduct of the arbitration are not strangers in the relevant sense. Thus, persons claiming through or attending on behalf of the parties, those assisting a party in the presentation of the case, and a shorthand writer to take notes may appear.

One of the objectives of privacy in arbitration has long ago been described as keeping 'quarrels from the public eyes'.³¹⁹ A more recent rationale justifying privacy has been that the agreement to arbitrate is 'between [the parties] and

315 A well-written comparative study of confidentiality in several regions, including Singapore, Australia and New Zealand, is contained in Q Loh and E Lee, *Confidentiality in Arbitration: How Far Does It Extend?*, Academy Publishing, 2007.

316 Expert Report of Dr Julian Lew in *Esso v Plowman*, reprinted in (1995) 11 *Arbitration International* 283, p. 285, para 16.

317 See, e.g. ACICA Rules Article 18(1); SIAC Rules, Rule 21(4); JCAA Rules, Rule 40; CIETAC Rule Article 33(1); HKIAC Rules Article 23(7); China's Arbitration Law Article 40.

318 (1995) 183 *Commonwealth Law Reports* 10, at p. 26 (High Court of Australia), reprinted in (1995) 11(3) *Arbitration International* 235.

319 *Russell v Russell* (1880) 14 Ch D 471, at p. 474.

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only between them'.³²⁰ As to the benefits of privacy, it has been said that '[t]he informality attaching to a hearing held in private and the candour to which it may give rise is an essential ingredient of arbitration'.³²¹

7.217 In contrast, the duty of confidentiality in arbitration finds no generally accepted approach.³²² The absence of uniformity has led Yves Fortier to comment that 'with respect to confidentiality in international commercial arbitrations, nothing should be taken for granted'.³²³ Confidentiality issues often arise in parallel arbitrations (but with different parties) where one arbitration may be relevant to and possibly determine the outcome of another. The question therefore arises whether the transcripts, pleadings, witness evidence, submitted documents and award in the first arbitration may be disclosed in the second. The same situation arises between an arbitration and related court proceedings with different parties.

7.218 The English courts on the one hand take the view that there is an implicit duty to maintain confidentiality in arbitration proceedings. Lord Justice Lawrence Collins in *Emmott v Michael Wilson & Partners Ltd* summarised the English position as follows:³²⁴

there is an obligation, implied by law and arising out of the nature of arbitration, on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration. The obligation is not limited to commercially confidential information in the traditional sense.

... this is in reality a substantive rule of arbitration law reached through the device of an implied term.

7.219 Nonetheless, while under English case law the obligation is imposed as a matter of law, English courts still need to determine whether a given case falls within established exceptions.³²⁵ In the earlier English High Court case of *Hassneh Insurance Co of Israel v Mew* it was considered that this duty of confidentiality is derived from the privacy of hearings:³²⁶

³²⁰ *The Eastern Saga* [1984] 2 Lloyd's Rep 373, at p. 379.

³²¹ *Hassneh Insurance Co of Israel v Mew* [1982] 2 Lloyd's Rep 243, pp. 246–247.

³²² For a detailed examination of this issue see M Pryles, 'Confidentiality', in Newman and Hill, op. cit. fn 5, pp. 501–552. As to the secrecy of court proceedings that are ancillary to a confidential arbitration or confidential award, see VV Veeder, 'Transparency of International Arbitration: Process and Substance', in LA Mistelis and JDM Lew (eds), *Pervasive Problems in International Arbitration*, Kluwer Law International, 2006, p. 89.

³²³ LY Fortier, 'The Occasionally Unwarranted Assumption of Confidentiality', (1999) 15(2) *Arbitration International* 131, at p. 138. See also AH Raymond, 'Confidentiality in a Forum of Last Resort: Is the Use of Confidential Arbitration a Good Idea for Business and Society?', (2005) 16 *American Review of International Arbitration* 479, at p. 497 et seq.

³²⁴ [2008] EWCA Civ 184 at para 105. See also *Dolling-Baker v Merrett*, [1991] 2 All ER 890; *Ali Shipping Corporation v Shipyard Trogir* [1998] 2 All ER 136; and *Department of Economics, Policy & Development of the City of Moscow v Bankers Trust Company and International Industrial Bank* [2003] EWHC 1377.

³²⁵ See, e.g. *Ali Shipping Corporation v Shipyard Trogir* [1998] 2 All ER 136 (English Court of Appeal), pp. 147–148.

³²⁶ [1982] 2 Lloyd's Rep 243, at p. 247.

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If it be correct that there is at least an implied term in every agreement to arbitrate that the hearing shall be held in private, the requirement of privacy must in principle extend to documents which are created for the purpose of that hearing. The most obvious example is a note or transcript of the evidence. The disclosure to a third party of such documents would be almost equivalent to opening the door of the arbitration room to that third party. Similarly witness statements, being so closely related to the hearing, must be within the obligation of confidentiality. So also must outline submissions tendered to the arbitrator. If outline submissions, then so must pleadings be included.

Other jurisdictions such as France, Germany and Switzerland also imply a duty of confidentiality of arbitral proceedings and documents submitted during them.³²⁷ 7.220

In this region, the Singapore High court in *Myanma Yaung Chi Oo Co Ltd v Win Win Nu* has followed the English line of authority.³²⁸ Justice Kan Ting Chiu stated that it is 'more in keeping with the parties' expectations to take the position that proceedings are confidential' with the possibility of disclosure in certain circumstances.³²⁹ 7.221

In New Zealand, legislation has gone as far as stating that the parties to an arbitration agreement are deemed to have agreed that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings or to an award made in those proceedings.³³⁰ The New Zealand legislation is quoted below. 7.222

On the other hand, the Australian High Court has famously declined to imply a general duty of confidentiality. In *Esso*,³³¹ Chief Justice Mason's majority judgment discussed the relevant law and concluded that complete confidentiality in arbitration could be achieved only by agreement of the parties. In support of this position, he indicated that (1) no implied obligation of confidence attached to witnesses, who were not bound by the arbitration agreement and could disclose their knowledge of the proceedings to third parties; (2) parties could legitimately disclose the arbitral proceedings or the award in certain court proceedings (e.g. applications to challenge the arbitrator or the award), which proceedings could be published; and (3) parties may in certain circumstances be entitled to disclose to a third party the existence and details of the proceedings and the award (e.g. under an insurance policy or stock exchange disclosure requirements). He concluded on this basis that he did not consider 'that confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration'.³³² For the same reasons, he rejected the argument 7.223

³²⁷ See Gu Wexia, 'Confidentiality Revisited: Blessing or Curse in International Commercial Arbitration?', (2004) 15 *American Review of International Arbitration* 607, at p. 610.

³²⁸ [2003] SGHC 124.

³²⁹ *Ibid.*, at para 17.

³³⁰ See Section 14A(1) of the New Zealand Arbitration Act 1996. This provision was introduced into the Act through the New Zealand Arbitration Amendment Act 2007.

³³¹ (1995) 183 *Commonwealth Law Reports* 10, reprinted in (1995) 11(3) *Arbitration International* 235.

³³² *Esso v Plowman* (1995) 11 *Arbitration International* 235, at p. 246.

that as a matter of law all agreements to arbitrate contained an implied term that each party will not disclose information provided in and for the purposes of the arbitration.³³³ However, the Chief Justice distinguished between documents voluntarily produced by a party and documents that a party is compelled to produce, for example under a document production order. The latter were held to be subject to an implied obligation of confidentiality. Even though *Eso* concerned a domestic arbitration, it has had a substantial effect in the world of international commercial arbitration.

7.224 As Michael Pryles has put it, *Eso* 'is not an antipodean aberration'.³³⁴ Courts from the US³³⁵ and Sweden³³⁶ have also indicated that no general implied obligation of confidentiality exists. Similarly, investment arbitration tribunals have denied that confidentiality automatically applies to arbitral proceedings.³³⁷

7.225 If a document or other material is considered to be confidential (implicitly or by agreement), common law courts have formulated numerous exceptions. Michael Hwang has observed that defining these exceptions is impossible by statute or by judicial formulae and consequently common law courts have introduced exceptions in incremental steps, which he has summarised as follows:³³⁸

- (i) where there is a public interest, e.g. where the public has a legitimate interest to know about health or environmental issues;³³⁹
- (ii) where a court is required to determine matters relating to the arbitration, which means details of the arbitration may be heard in an open court;³⁴⁰
- (iii) where the parties have consented to disclosure – this may be implied, e.g. from an application to court asking for the removal of an arbitrator, which implicitly gives consent to the arbitrator to reveal matters concerning the arbitration to the court;

333 Ibid., pp. 246–247. See also *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2000] UKPC 11, at para 20, (Privy Council), which displayed reservations about characterising confidentiality as an implied term.

334 Pryles, op. cit. fn 322, p. 501 at p. 552.

335 See *United States v Panhandle Eastern Corporation*, 118 FRD 346 (D Del 1988).

336 See *Bulgarian Foreign Trade Bank Ltd v AI Trade Finance Inc*, 27 October 2000 (Swedish Supreme Court), reprinted in (2000) 15 *Int'l Arb Rep* B-1.

337 See, e.g. *Metalclad Corp v United Mexican States*, Award of 20 August 2000, 5 ICSID Reports 209, at para 113 ('unless the agreement between the parties incorporates such a limitation [i.e. the obligation of confidentiality], each of them is still free to speak publicly of the arbitration'); and *Loewen Group v United States*, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001, at para 26. It is of interest to note that Chief Justice Mason, who wrote the main judgment in the *Eso v Plowman* case referred to above, was one of the arbitrators in *Loewen*. See also *Amco Asia v Indonesia*, 24 *International Legal Materials* 365 (1985). See generally J Misra and R Jordans, 'Confidentiality in Arbitration: An Introspection of the Public Interest Exception', (2006) 23 *Journal of International Arbitration* 39; and L Mistelis, 'Confidentiality and Third Party Participation: *UPS v Canada* and *Methanex Corporation v United States*', (2005) 21 *Arbitration International* 205.

338 M Hwang, 'Defining the Indefinable – Practical Problems of Confidentiality in Arbitration', Kaplan Lecture 2008, 17 November 2008, The Hong Kong Club, Hong Kong. See also *Improving the Arbitration Act 1996*, New Zealand Law Commission Report No. 83 (2003), at para 5 ('it is arguable that no statutory implied term [of confidentiality] can ever set out exhaustively all of the exceptions that may arise; these need to be determined on a case-by-case basis.').

339 See, e.g. *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* [1995] 36 NSWLR 662 (NSW Court of Appeal), at 680. See also *TV New Zealand v Langley Productions Ltd* [2000] 2 NZLR 250 (New Zealand Court of Appeal) (holding that the public had a right to know how much a TV personality was paid).

340 See generally Veeder, op. cit. fn 5, p. 89.

- (iv) by compulsion of law, e.g. pursuant to anti-money laundering legislation or a public authority's statutory power to demand information;
- (v) with the leave of court if one party to the arbitration does not consent to disclosure to a third party;
- (vi) to protect the legitimate interests of an arbitrating party, e.g. to enforce rights established by an earlier arbitration award or to evidence a position taken in an earlier arbitration in support of an issue estoppel argument;³⁴¹
- (vii) where the interests of justice require it, e.g. where inconsistent evidence has been given by a party in two separate arbitrations;³⁴²
- (viii) where there is an obligation to disclose, e.g. by corporations to shareholders, during a takeover due diligence, to an insurance company or by listed companies to a stock exchange;
- (ix) everyday situations, e.g. accidentally leaving a document in a public place; and
- (x) where disclosure has been made to professional or other advisers and persons assisting in the conduct of the arbitration, e.g. lawyers, in-house counsel and executives, potential witnesses, investigators, secretaries, transcribers, copy personnel, or interpreters.

At the time of the decision in *Esso*, most national legislation did not address the issue of confidentiality at all.³⁴³ The Model Law does not expressly refer to confidentiality. However, more states are starting to include confidentiality provisions in their arbitration laws.³⁴⁴ New Zealand has extensive legislative provisions on confidentiality.³⁴⁵ In 2007, it introduced the following sections into its Arbitration Act 1996:

- 14A An arbitral tribunal must conduct the arbitral proceedings in private.
- 14B (1) Every arbitration agreement to which this section applies is deemed to provide that the parties and the arbitral tribunal must not disclose confidential information.
- (2) Subsection (1) is subject to section 14C.
- 14C A party or an arbitral tribunal may disclose confidential information—
- (a) to a professional or other adviser of any of the parties;
 - or
 - (b) if both of the following matters apply:
 - (i) the disclosure is necessary—
 - (A) to ensure that a party has a full opportunity to present the party's case, as required under article 18 of Schedule 1; or
 - (B) for the establishment or protection of a party's legal rights in relation to a third party; or

³⁴¹ See, e.g. *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich*, [2000] UKPC 11.

³⁴² See, e.g. *London & Leeds Estates Ltd v Paribas Ltd* (No. 2) [1995] EGLR 102.

³⁴³ See J Paulsson and N Rawding, 'The Trouble with Confidentiality', (1995) 11 *Arbitration International* 303.

³⁴⁴ See, e.g. Section 23 of Philippines Alternative Dispute Resolution Act 2004.

³⁴⁵ See Sections 14A to 14I of the New Zealand Arbitration Act 1996. Hong Kong is likely to enact detailed provisions on confidentiality. Sections 16–18 of its Arbitration Bill (due to be passed in early 2011) are modelled on the New Zealand legislation.

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- (C) for the making and prosecution of an application to a court under this Act; and
- (ii) the disclosure is no more than what is reasonably required to serve any of the purposes referred to in subparagraph (i)(A) to (C); or
- (c) if the disclosure is in accordance with an order made, or a subpoena issued, by a court; or
- (d) if both of the following matters apply:
 - (i) the disclosure is authorised or required by law (except this Act) or required by a competent regulatory body (including New Zealand Exchange Limited); and
 - (ii) the party who, or the arbitral tribunal that, makes the disclosure provides to the other party and the arbitral tribunal or, as the case may be, the parties, written details of the disclosure (including an explanation of the reasons for the disclosure); or
- (e) if the disclosure is in accordance with an order made by—
 - (i) an arbitral tribunal under section 14D; or
 - (ii) the High Court under section 14E.

7.227 A number of other provisions of this Act, namely Articles 14D–14I, deal with disclosure of confidential information and privacy in arbitration-related court proceedings.

7.228 Arbitration procedural rules, much like arbitration laws, are not uniform in their provisions on confidentiality. One of the most detailed in the region is SIAC Rule 34, which provides:³⁴⁶

- 34.1 The parties and the Tribunal shall at all times treat all matters relating to the proceedings, and the award as confidential.
- 34.2 A party or any arbitrator shall not, without the prior written consent of all the parties, disclose to a third party any such matter except:
 - (a) for the purpose of making an application to any competent court of any State under the applicable law governing the arbitration;
 - (b) for the purpose of making an application to the courts of any State to enforce or challenge the award;
 - (c) pursuant to the order of or a subpoena issued by a court of competent jurisdiction;
 - (d) to a party's legal or other professional advisor for the purpose of pursuing or enforcing a legal right or claim;
 - (e) in compliance with the provisions of the laws of any State which is binding on the party making the disclosure; or
 - (f) in compliance with the request or requirement of any regulatory body or other authority.
- 34.3 In this Rule, 'matters relating to the proceedings' means the existence of the proceedings, and the pleadings, evidence and other materials in the arbitration proceeding created for the purpose of the arbitration and all other documents produced by another party in the proceedings or the award arising from the proceedings but excludes any matter that is otherwise in the public domain.

346 For other detailed provisions on confidentiality, see ACICA Rules Article 18 and HKIAC Rules Article 39.

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As was noted by Chief Justice Mason in *Esso*, no obligation of confidentiality attaches to witnesses. Consequently, special provisions are included in arbitral rules that address witness confidentiality. Article 18(4) of the ACICA Rules provides:

To the extent that a witness is given access to evidence or other information obtained in the arbitration, the party calling such witness is responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party.

One way to do this is to require each witness to sign a confidentiality agreement. Article 18(4) of the ACICA Rules should be compared with CIETAC Rule Article 33(2):

For cases heard in camera, the parties, their representatives, witnesses, interpreters, arbitrators, experts consulted by the arbitral tribunal and appraisers appointed by the arbitral tribunal and the relevant staff members of the Secretariat of CIETAC shall not disclose to any outsiders any substantive or procedural matters of the case.

The following table provides a snapshot of the confidentiality provisions in Rules relevant to the region.³⁴⁷

Institution	Confidentiality of existence of arbitration	Confidentiality of documents used/generated	Arbitrator bound by confidentiality	Witness bound by confidentiality	Confidentiality of award
ACICA	Yes	Yes	Yes	Yes	Yes
BANI	?	Yes	Yes		Yes
	('all matters related to the arbitral reference')				
CIETAC			Yes	Yes	
HKIAC	Yes	Yes	Yes		Yes
ICC	Not automatic but arbitral tribunal has the power to so order	Not automatic but arbitral tribunal has the power to so order	ICC Court and Secretariat bound	Not automatic but arbitral tribunal has the power to so order	Not automatic but arbitral tribunal has the power to so order
ICSID			Yes		Yes
JCAA		Yes	Yes		
KCAB		Yes	Yes		
KLRCA	?		Yes		Yes
	('all matters related to the arbitration proceedings')				
SIAC	Yes	Yes	Yes		Yes
WIPO	Yes	Yes	Yes	Yes	Yes

Some general observations may be made from this table. The ACICA, HKIAC and SIAC Rules offer significant protection in terms of confidentiality. Wide protections of confidentiality are also granted by the WIPO Rules particularly because of the sensitivity associated with the intellectual property disputes WIPO is called on to decide. On the other end of the spectrum is ICSID, which requires the publication of excerpts from ICSID awards.

³⁴⁷ The format of this table and much of its information has been based on Michael Hwang's PowerPoint slides used during his Kaplan Lecture. Hwang, op. cit. fn 338.

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7.233 In contrast, the ICC Rules do not explicitly address the issue of confidentiality. They grant, however, the right to privacy in hearings, enable the arbitral tribunal to take measures to protect trade secrets and confidential information, and to make any other orders as to confidentiality.³⁴⁸ In addition, the Statutes and Internal Rules of the ICC International Court of Arbitration ensure that its work remains confidential.³⁴⁹

7.234 By way of conclusion to this section, the UNCITRAL Notes on Organizing Arbitral Proceedings provide sound advice regarding confidentiality:³⁵⁰

It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Nevertheless, there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case. Moreover, parties that have agreed on arbitration rules or other provisions that do not expressly address the issues of confidentiality cannot assume that all jurisdictions would recognise an implied commitment to confidentiality. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected. Therefore, the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality.

348 ICC Rules Articles 20(7) and 21(3).

349 ICC Rules Appendix I Article 6 and Appendix II Articles 1 and 3.

350 UNCITRAL Notes on Organizing Arbitral Proceedings, op. cit. fn 91, at para 31.