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Law governing the arbitration and role of the seat

1 Introduction

2.1 This chapter examines how, why and on what basis the process of international commercial arbitration is legally permitted. It also covers the main practical functions of the seat of arbitration.

2.2 The seat (or place) of arbitration is the jurisdiction in which an arbitration takes place legally. This must be distinguished from the location of any physical hearings or meetings that are held as part of the arbitration proceedings. The hearings or meetings do not necessarily have to be held at the seat of arbitration.

2.3 It is essential to appreciate the connection between arbitration proceedings and the laws of the seat of arbitration. The different theories relating to this connection arise from the delicate interplay between a state's powers (particularly state judicial powers), an arbitral tribunal's powers and the freedom of parties to choose how their disputes are determined. At times these interests may conflict and there is potential for the law and/or the courts of the seat of arbitration to constrain the flexible and pragmatic qualities of arbitration. To gain a deeper understanding of these conflicting circumstances, recourse to theory and legal doctrine is unavoidable.

2.4 In Section 2 we discuss whether to use the term 'seat' or 'place' referring to the jurisdiction to which the arbitration is legally attached. In this book we mainly use 'seat.' In Section 3 we distinguish between the seat of arbitration and the place or venue of hearings. Section 4 examines the different laws and rules which regulate international arbitration proceedings. They are the *lex arbitri*, arbitral procedural law and arbitration rules. In Section 5 we explore two broad categories of legal theory relating to the connection between arbitration proceedings and the seat

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of arbitration. The first is the traditional or jurisdictional view and the second is the delocalised or contractual view. Each of these theories has many nuances and is worthy of an entire dissertation, but the present discussion is limited to the fundamental aspects of each. We then move to the practical considerations of choosing a seat of arbitration in Section 6. Finally, Section 7 provides an overview of the mandatory aspects of the Model Law.

2 Terminology: Seat or place of arbitration

The phrases 'seat of arbitration' and 'place of arbitration' are often used interchangeably to mean the legal jurisdiction to which an arbitration is attached.[1] It has been suggested that the two terms may have evolved from linguistic differences in English and French.[2] The term 'seat' is sometimes said to reduce confusion with the 'place' where an arbitration hearing might physically occur. There is a variety of arbitration instruments that use the term 'place'[3] but 'seat' is becoming increasingly common, particularly in the Asia-Pacific region.[4] The growing preference for 'seat' is demonstrated by SIAC's switch from using 'place' in the second edition of its Rules to 'seat' in its third edition.[5] The HKIAC Rules also refer to the 'seat' rather than the 'place' of arbitration.[6] The ACICA Rules generally use 'seat', but 'place' has been utilised to refer to the location where the award is made, so as to avoid any potential conflict with the New York Convention, which uses the word 'place'. 2.5

An arbitration will be conducted according to the arbitration law at the seat of arbitration (*lex arbitri*), even if hearings or other meetings are held elsewhere. Under no circumstances should the terms 'seat' or 'place' of arbitration be confused with the venue, location or place of hearings, as explained in the next section. 2.6

3 Distinction between the seat of arbitration and venue of hearings

As noted above, the seat or place of arbitration is the primary legal jurisdiction to which the arbitration is attached. It is the *legal* location of an arbitration 2.7

1 *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 393 at 399 (Singapore Court of Appeal).
2 See e.g. *Union of India v McDonnell Douglas Corporation* [1993] 2 Lloyd's Law Reports 48. Justice Saville's judgment in that English Commercial Court case discusses the submissions made by counsel for both parties on this point.
3 See, e.g. UNCITRAL Arbitration Rules, UNCITRAL Model Law, ICC Rules and SIAC Rules (1997), KCAB International Rules, ICA Rules, PDRCI Arbitration Rules, BAC Rules, Model Law and New York Convention.
4 See e.g. the SIAC Rules (2007), HKIAC Rules, ACICA Rules and Swiss Rules. See also M Hwang and Fong Lee Cheng, 'Relevant Considerations in Choosing the Place of Arbitration', (2008) 4(2) *Asian International Arbitration Journal* 195, at p. 195.
5 The 2010 SIAC Rules also use the word seat.
6 HKIAC Rules Article 15.

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proceeding. This must be distinguished from the *physical* location of any arbitration hearings and meetings.[7] Hearings and meetings may be held at any convenient location. In this regard it is useful to remember that 'an arbitration proceeding does not only comprise of the oral hearing and the submission [to arbitration]. It encompasses an entire process, commencing from the appointment of the arbitrator or arbitrators to the rendering of the final award'.[8] It is possible that during an arbitration none of the participants (arbitrators, lawyers, parties, witnesses etc.) ever travels to the seat of arbitration. In practice, however, hearings and meetings are often held at the seat.

2.8 Virtually all arbitration laws and rules expressly permit arbitration hearings to be held in a location other than the seat of arbitration. For example, Article 20(2) of the Model Law provides that regardless of the seat of arbitration 'the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts of the parties, or for inspection of goods, other property or documents'.

2.9 The Supreme Court of New South Wales, Australia, commented on Article 20(2) of the Model Law in *Angela Raguz v Rebecca Sullivan*.[9] This case involved an arbitration arising from the 2000 Sydney Olympic Games. The seat of arbitration was Geneva (as is the case for all arbitrations under the auspices of the Court of Arbitration for Sport) but the hearings were to be held in Sydney, being the venue of the Olympics that year. The Court of Appeal observed:[10]

> Commentators have pointed out that Article 20 [of the Model Law] makes sense when it is understood that there is a vital distinction between the so-called place (or seat) of arbitration and the place or places where the arbitrators may hold hearings, consultations . . . . The common law recognises this distinction . . .
>
> This legislative history reinforces the propriety of confining the words 'arbitration in a country other than Australia' in s 40(7) of the [New South Wales Commercial Arbitration Act] as connoting the technical meaning of a 'seat' or 'place' of arbitration, a well-established concept in and for the purposes of arbitration with an international aspect. We would therefore reject the plaintiff's submission that the expression refers to the place of hearing of a particular arbitration. If that were correct, the application of ss 38, 39 and 40 could change with a temporary change of hearing venue rather than exist as a statutory framework applicable or not applicable as the case may be to an arbitration agreement from its outset. It is inconceivable that those who drafted s 40 would have contemplated this.

7 These concepts were briefly touched on in the New South Wales Supreme Court case of *American Diagnostica Inc v Gradipore* (1998) 44 NSWLR 312, however that discussion focused on the ability to conduct the arbitration physically at a location other than the seat. See also the English Court of Appeal decision of *Shashoua v Sharma* [2009] EWHC 957 (Comm).

8 *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 393 at 402 (Singapore Court of Appeal).

9 (2000) 50 NSWLR 236. For a discussion of this case and in particular an explanation of how agreements to exclude appeals and other exclusionary agreements operate pursuant to the domestic arbitration regime when applied to international arbitrations in Australia, see S Barrett-White and C Kee, 'Enforcement of Arbitral Awards Where the Seat of the Arbitration is Australia – How the Eisenwerk Decision Might Still Be a Sleeping Assassin' (2007) 24(5) *Journal of International Arbitration* 515.

10 (2000) 50 NSWLR 236, paras 97, 102, 103.

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> In our opinion the legislature was concerned with the legal place of the arbitration, not the physical place of the arbitration. The legislative scheme was primarily concerned with commercial disputes. Such disputes may involve commercial activities that are physically located in different locations. They are the subject of a single arbitration agreement, which is intended to encompass hearings in the various locations at which disputes could arise. Indeed, it may be convenient to conduct hearings in more than one physical location in the course of a particular dispute. It is, in our opinion, likely that the legislature intended to allow parties to commercial agreements to select a single legal place of arbitration and to leave the choice of the physical location of hearings to the felt necessities of a specific dispute.

2.10 Importantly, the fact that an arbitration hearing is held outside the seat of arbitration does not and cannot of itself change the legal seat of arbitration. This was confirmed by the Singapore Court of Appeal in *PT Garuda Indonesia v Birgen Air*. The Court of Appeal observed:[11]

> It should be apparent from art 20 [Model Law] there is a distinction between 'place of arbitration' and the place where the arbitral tribunal carries on hearing witnesses, experts or the parties, namely the 'venue of the hearing'. Where parties have agreed on the place of arbitration, it does not change even though the tribunal may need to hear witnesses or do any other things in relation to the arbitration in a different location.

2.11 The Singapore Court of Appeal rejected an argument by PT Garuda that the parties had changed the place of arbitration from Jakarta to Singapore by holding their hearings in Singapore. Singapore was the venue of the hearings but the place of arbitration remained Jakarta. On this issue the Singaporean judgment cites with approval a passage from Lord Justice Kerr in *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru*.[12] In the cited passage Lord Justice Kerr is in fact quoting from the first edition of Redfern and Hunter's *Law and Practice of International Commercial Arbitration*. That book expanded the explanation of this point in later editions, but the original passage as cited remains succinct and elegant:[13]

> there is only one 'place' of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or 'seat' of the arbitration. This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different nationalities, from many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings – or even hearings – in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses . . . It may be more convenient for an arbitral tribunal sitting in one country to conduct a

11 *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 393, at 399. See also the discussion of changing the seat at Section 6.3.
12 [1988] 1 Lloyd's Rep 116 (English Court of Appeal).
13 A Redfern and M Hunter, *Law and Practice of International Commercial Arbitration*, 1st edn, Sweet & Maxwell, 1986, p. 69, quoted in [1988] 1 Lloyd's Rep 116 at 120.

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hearing in another country – for instance, for the purpose of taking evidence . . . In such circumstances, each move of the arbitral tribunal does not of itself mean that the seat of the arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties.

4 *Lex arbitri*, arbitral procedural law and arbitration rules

2.12 *Lex arbitri*, arbitral procedural law, and arbitration rules are all terms referring to provisions that regulate, among other matters, the procedure of an international arbitration. The differences between them are important to understand but sometimes difficult to grasp. The terms are often used incorrectly or interchangeably. In the following paragraphs we briefly define each, before distinguishing the terms in Sections 4.1–4.3.

2.13 The Latin phrase '*lex arbitri*' means the law of the arbitration.[14] The *lex arbitri* is not directly chosen by the parties. When the parties choose country Y as the seat, the automatic consequence, without the need for express words, is that aspects of country Y's laws and legal framework become the *lex arbitri*.[15] This point was clearly made by the Singapore Court of Appeal in *PT Garuda Indonesia v Birgen Air*,[16] referred to above. In that circumstance the court had been called upon to determine the *lex arbitri* and whether the parties had changed the seat of arbitration from Indonesia to Singapore. The Court of Appeal stated: 'Clearly, if it was established that the parties had agreed to change the "place of arbitration" to Singapore, then it must follow that the curial law would be Singapore law'[17] (emphasis added).

2.14 The *lex arbitri* legitimises and provides a general legal framework for international arbitration. The relevant law itself might be found in an independent statute on international arbitration or it might be a chapter in another law, such as a civil procedure code or a law also governing domestic arbitration. However, the *lex arbitri* of a given jurisdiction can also include other statutes and codes (even those not specifically dealing with arbitration), and case law which relates to the basic legal framework of international arbitrations seated there. If the seat of arbitration is, for example, Hong Kong, then the *lex arbitri* constitutes those provisions of Hong Kong's laws which, among other things, permit the resolution of disputes in Hong Kong by way of arbitration rather than by Hong Kong court litigation. Other general features of the *lex arbitri* are that it gives (with

14 *Lex arbitri* refers to the law of arbitration generally; *lex loci arbitri* can be used once a specific arbitration and or seat has been identified. However, most practitioners simply use *lex arbitri* all the time.
15 A Redfern, M Hunter, N Blackaby and C Partasides, *Law and Practice of International Commercial Arbitration*, 4th edn, Sweet & Maxwell, 2004, at para 2–19; J-F Poudret and S Besson, *Comparative Law of International Arbitration*, 2nd edn, Thomson, 2007, at para 113.
16 [2002] 1 SLR 393.
17 *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 393 at 402. On this point, see also the New Zealand Court of Appeal decision in *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZLR 669.

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certain exceptions) parties the freedom to choose the law and rules to apply and it indicates what types of matters cannot be arbitrated.[18]

2.15 In some ways, the *lex arbitri* is to an arbitration proceeding what the *lex fori* is to a domestic national court. However, although the *lex arbitri* and the *lex fori* perform certain similar functions for arbitration and domestic national courts respectively, they are different and should not be confused. One such difference relates to the application of conflict of laws rules and mandatory rules of law, both of which are discussed in Chapter 3.[19] Arbitration does not have a *lex fori*.[20] It is therefore unfortunate that there are continuing lines of English authority which use the expression *lex fori* when in reality they are referring to the *lex arbitri*. This authority has influenced common law courts in this region.[21]

2.16 The procedural law sets out the parameters of the procedure and support for international arbitration. It provides, for example, mandatory rules about how arbitration can be conducted. These include rules requiring equal treatment, due process and the independence of arbitrators. One way to conceptualise the differences between the *lex arbitri* and procedural law is to consider the *lex arbitri* as governing matters external to the arbitration and the procedural law as governing matters internal to the arbitration procedure (but excluding substantive issues).[22]

2.17 Having explained *lex arbitri* and procedural law, the final category is procedural rules or arbitration rules. These are rules chosen by the parties that relate to the mechanism and processes of arbitration. They typically regulate the conduct of the arbitration from its initiation until a final award is rendered, and can be likened to the civil procedure rules of a court. Arbitration rules comprise the rules of an arbitral institution, ad hoc arbitration rules such as the UNCITRAL Arbitration Rules, and rules that are tailor-made and agreed to by the disputing parties. Arbitration rules generally apply as a matter of contract – not law – although default arbitration rules are usually found in procedural laws. Typical arbitration rules, such as those of arbitration institutions, generally cover the practical aspects of how to commence an arbitration and to see it through until the end. The subject matter of rules include provisions on filing a request for arbitration, answering the request for arbitration, appointing arbitrators, challenging non-neutral arbitrators, removing non-performing arbitrators, the arbitral tribunal's procedural powers and basic rules relating to hearings and the taking of evidence.

18 See the discussion in Chapter 3, Section 3.1.
19 See the discussion in Chapter 3, Section 3.2 (conflict of laws) and Section 4 (mandatory laws).
20 Poudret and Besson, op. cit. fn 15 at para 114.
21 The expression *lex fori* is used to describe the seat of the arbitration in cases such as *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1981] 2 Lloyd's Rep 446 (Queen's Bench, Commercial Court) through to *C v D* [2007] EWCA Civ 1282 (English Court of Appeal). It was also used in the Singaporean decision of *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 393 (Singapore Court of Appeal).
22 This distinction was explained in *Union of India v McDonnell Douglas* [1993] 2 Lloyd's Rep 48 (Queen's Bench, Commercial Court). See also *Channel Tunnel Group v Balfour Beatty Ltd* [1993] 1 All ER 664, 683 (Lord Mustill, House of Lords).

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4.1 *Lex arbitri* v arbitral procedural law

2.18 The arbitral procedural law and the *lex arbitri* are rarely separated.[23] For this reason, many people do not distinguish between *lex arbitri* and procedural law, or alternatively use the terms as synonyms.[24] While this approach is understandable, it is nevertheless problematic and better avoided. Redfern and Hunter observe that 'the lex arbitri is much more than a purely procedural law'.[25] As explained above the *lex arbitri* is the law that gives the arbitration its nationality and legal validity. An example of a non-procedural issue that is determined under the *lex arbitri* is objective arbitrability.[26]

2.19 The potential for confusion and need for a clear distinction arise from the fact that arbitrating parties in some jurisdictions may select an arbitral procedural law that is different from the *lex arbitri*. This means that the parties may seat their arbitration in one jurisdiction and choose the procedural law of a different jurisdiction. It is vital to remember that, as Born explains, 'the [foreign] procedural law will not ordinarily supplant, but rather operate within the arbitration legislation of the arbitral seat'.[27] While theoretically and legally possible,[28] choosing a foreign procedural law can create many practical problems. For example, to which courts would the parties have recourse to seek an interim measure or to set aside an arbitral award? Assuming the proper courts in which to bring these applications are identified, which jurisdiction's procedural laws would those courts apply?

2.20 There is English authority on point that may be instructive, at least for common law jurisdictions. Lord Justice Kerr clearly recognised in *Naviera Amazonica Peruana SA v Compania Internacional de Seguros del Peru* as early as 1988 that 'there is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y'.[29] In *Union of India v McDonnell Douglas Corporation*[30] the

23 *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZLR 669 (New Zealand Court of Appeal); *American Diagnostica Inc v Gradipore Ltd* (1998) 44 NSWLR 312 (New South Wales Supreme Court); *John Holland Pty Ltd v Toyo Engineering Corp* [2001] 2 SLR 262 (Singapore High Court); *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd* [2002] 2 SLR 164 (Singapore High Court); *PT Garuda Indonesia v Birgen Air* [2002] 1 SLR 393 (Singapore Court of Appeal).

24 For example, Justice Burrell in the Hong Kong High Court decision of *Karaha Bodas Co Llc v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (also known as Pertamina)* [2003] 380 HKCU 1, at p. 8 stated that 'A variety of expressions are used to describe this such as lex arbitri, curial law and procedural law. For consistency I shall use the expression lex arbitri'.

25 Redfern, Hunter et al, op. cit. fn 15, at para 2–19.

26 See the discussion in Chapter 4 Section 8.2.

27 G Born, *International Commercial Arbitration*, Kluwer, 2009, at p. 1315. Born devotes considerable effort to explaining the need to distinguish between the arbitral procedural law and the law of the place of the arbitration. His analysis is well reasoned. It would therefore be unfortunate if he were interpreted as suggesting that parties could choose their *lex arbitri*. At p. 1346, Born states that the suggestion that parties could not choose two *lex arbitri* is incorrect. It is apparent from his following discussion that he is referring to the selection of procedural laws, and not the law of the seat of the arbitration (i.e. *lex arbitri*).

28 Whether it is legally possible depends on the *lex arbitri*, the ultimate framework law regulating all arbitrations seated in the jurisdiction. See Redfern, Hunter et al, op. cit. fn 15, at para 2–20; see also L Nottage and R Garnett (eds), *International Arbitration in Australia*, Federation Press, forthcoming 2010, Chapter 2.

29 [1988] 1 Lloyd's Rep. 116, at p. 120 (English Court of Appeal).

30 [1993] 2 Lloyd's Rep 48.

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Queen's Bench Division of the Commercial Court was asked to determine the *lex arbitri* where the arbitration clause selected London as the seat of arbitration but expressly identified the Indian Arbitration Act 1940 as applicable. Justice Saville noted that English law admitted the theoretical possibility of parties choosing the procedural law notwithstanding a contradictory choice of seat:[31]

> It is clear from the authorities cited above that English law does admit of at least the theoretical possibility that the parties are free to choose to hold their arbitration in one country but subject to the procedural laws of another, but against this is the undoubted fact that such agreement is calculated to give rise to great difficulties and complexities.

2.21 This situation highlights some of the complexities in trying to choose a different procedural law from the *lex arbitri*. Justice Saville, having referred to a variety of significant legal authorities, was concerned by the 'great difficulties and complexities'[32] of such an approach and the 'potentially unsatisfactory method of regulating . . . arbitration procedures'.[33] Nonetheless, he held that 'if the Court were convinced that the parties had chosen the procedural law of another country, then it might well be slow to interfere with the arbitral process'.[34] Given the grave dangers, however, Justice Saville ultimately concluded that choosing a foreign procedural law could not have been the parties' intentions. He held that in this particular case the parties must have intended the Indian Arbitration Act to regulate only the internal conduct of the arbitration (i.e. to apply like arbitration rules and not as procedural law), and English law to govern the external supervision of the arbitration by the courts.

2.22 The decision implies that if parties desire a foreign procedural law to govern their arbitration, they should say so in very clear language. But, as noted above, it is difficult to imagine why parties would want to choose foreign procedural law given the risks and complexities. Nowadays, there is far less need to take such risks because so many countries have modern arbitration legal systems, whether based on the Model Law or otherwise.

2.23 There are perhaps two scenarios where the choice of a foreign procedural law might be warranted. The first is when the award will need to be enforced in a specific and known non-New York Convention signatory country. Choosing that jurisdiction's procedural law to govern the conduct of a foreign arbitration might (though with no guarantee) provide recourse to the enforcement procedures in that law, without the need to seat the arbitration in that jurisdiction. The second is when the chosen arbitral seat has a less than modern arbitration legal system but is chosen nevertheless to avoid award enforcement problems based on a 'reciprocity reservation' that a state has made when concluding in the New York

31 Ibid., at 50.
32 Ibid., at 50–51.
33 Ibid., at 51.
34 Ibid.

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Convention[35]. Even in these scenarios, choosing a foreign procedural law would raise complex legal issues and is ill-advised.[36]

2.24 Very few courts in the Asia-Pacific appear to have directly considered the possibility of parties choosing a foreign arbitral procedural law to apply in their arbitration. The Hong Kong High Court decision of *Karaha Bodas Co Llc v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (also known as Pertamina)*[37] should be interpreted as addressing this possibility, although a literal reading of the decision might at first be confusing. This decision is particularly relevant to a number of the issues discussed in this chapter but requires some interpretation. The case is a classic example of the confusion that can arise when the terms *lex arbitri* and procedural law are used incorrectly or synonymously.

2.25 In the *Pertamina* case, Justice Burrell had been faced with an application resisting enforcement of an arbitral award. One of the grounds on which enforcement could be refused was Section 44(2)(f) of the Hong Kong Arbitration Ordinance; this section corresponds directly with Article V(1)(e) of the New York Convention. Pursuant to these provisions enforcement can be refused if the party resisting enforcement establishes 'that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made' (Emphasis added).

2.26 In the extracted passages of Justice Burrell's judgment below, he appears to suggest that it is possible for parties to seat their arbitration in one jurisdiction and then to choose a different *lex arbitri* to govern their arbitration. Notwithstanding that Justice Burrell cites from English authorities, for the reasons we explained above, it is in our view, as a matter of definition, not possible to choose a different *lex arbitri*. We respectfully submit that the decision should be understood as confirming that parties can choose a foreign procedural law, i.e. other than the procedural law of the *lex arbitri*. This interpretation would not have affected the outcome of the decision in this particular case. Furthermore this interpretation is consistent with Article V(1)(e) of the New York Convention, which many authors such as Lew, Mistelis and Kröll note may be seen as 'manifesting the potential for challenging an award in a place other than the place of arbitration'.[38]

2.27 When read as if concerning the application of a different procedural law, as we suggest it should be, Justice Burrell's analysis provides very useful and practical guidance:[39]

35 See the discussion in Chapter 9, Section 5.4.2.
36 Hwang and Fong Lee Cheng, op. cit. fn 4, at p. 216.
37 [2003] 380 HKCU 1.
38 JD Lew, LA Mistelis and SM Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, para 25–16; see also Born, op. cit. fn 27, at pp. 1339–1341. In his discussion of this issue, Born refers to a number of cases from India, Pakistan and Indonesia (including the *Pertamina* case discussed here), where courts have purported to set aside awards even though those jurisdictions were not the seat of arbitration (certain of these decisions and others are discussed in Chapter 9, Section 3.2.2). Born criticises those particular decisions but concludes that 'it should in principle be for the parties . . . to determine whether they wish a particular national court to consider annulment applications', at p. 1340.
39 *Karaha Bodas Co Llc v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (also known as Pertamina)* [2003] 380 HKCU 1, at p. 15.

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> From the wealth of authority cited by both counsel on this issue can be gleaned the following starting point: 'The curial law' (lex arbitri) is normally, but not necessarily, the law of the place where the arbitration proceedings are held' . . . 'The place' plainly refers to the legal seat of the arbitration (here Geneva) not a random city of convenience for the arbitrators (here Paris). For the normal situation not to apply there must be strong pointers to the contrary. Such pointers as there may be in this case cannot, in my view, be regarded as strong when put in context and balanced against the following factors.
>
> (1) Had the parties wanted to, expressly, depart from the norm they could have said so in the contracts but they did not. The contracts are specific as to the substantive law (Indonesian) but silent as to the lex arbitri [procedural law].
>
> (2) The drafters of the contracts were explicit on many matters such as the choice of a neutral place (Geneva), the adoption of the UNCITRAL rules in the arbitration and the choice of Indonesian law as the law of the contracts. It is not a difficult inference to draw that had Pertamina insisted on an express provision stating that the lex arbitri [procedural law] was to be Indonesian law, the contracts would not have been signed. I find it irresistible that the choice of Geneva as the 'place' was also a choice that it was the formal 'seat' in the legal sense. By the same token it is plain that the choice of an independent neutral seat of arbitration carried with it an intention to be bound by the lex arbitri of that place.
>
> . . .
>
> (4) Pertamina, as evidence of 'strong pointers' to rebut the presumption rely, inter alia, on the fact that the contracts themselves are 'replete with references to the provisions of Indonesian law'. The expression 'replete with' somewhat overstates the position but they point out that the contracts expressly provide for the modification of, in particular, four Articles of the Indonesian Code of Civil Procedure. Article 650.2 (appointment of arbitrators) and 620.1 (time limit on arbitrations) have been modified, Article 631 (authority to arbitrators to decide on 'amiables compositeurs') has been invoked and Article 641 (rights of appeal) has been waived.

4.2 Arbitral procedural law v arbitration rules

2.28 There is usually an overlap between procedural laws and arbitration rules. As noted above, the former will also provide default procedural rules, in case the parties have not otherwise agreed. Normally arbitration rules specifically chosen by the parties will override those provided in a procedural law, except to the extent that the latter are mandatory.

2.29 Pryles explains the difference between procedural law and arbitration rules as follows:[40]

> It is true that the arbitral procedural law may deal with many matters concerning the conduct of an arbitration which can be addressed in procedural rules selected by the parties to apply to the arbitration. In a sense, therefore, the arbitral procedural law may deal with matters which the parties have failed to address, either by not selecting any arbitration rules (institutional or otherwise) or because those rules are deficient. Where the parties do select arbitral rules, they are likely to prevail over the 'fall-back' [default] provisions made by the law governing the arbitral procedure. This is because

40 M Pryles, 'Exclusion of the Model Law', (2001) 4(6) *International Arbitration Law Review* 175, at p. 177.

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the latter will be regarded as non-mandatory and liable to be displaced by the parties' express provision to the contrary. But, some provisions of the arbitral procedural law will be different in nature to those contained in arbitral rules selected by the parties, be they institutional or ad hoc. For example, the arbitral procedural law may prescribe the degree of judicial supervision of the arbitration, including appeals and applications to set-aside an award. The arbitral procedural law may also provide for judicial assistance in aid of an arbitration, for example, the issue of a subpoena requiring a witness to attend the hearing. Plainly, these are matters which cannot be the subject of contractual rules agreed by the parties and incorporated into the arbitration clause.

2.30 *Australian Granites v Eisenwerk Hensel Beyreuth GmbH*[41] is a decision of the Queensland Court of Appeal in Australia that found an express choice by parties of ICC arbitration demonstrated an intention to exclude the Model Law under Section 21 of the Australian International Arbitration Act.[42] Singapore legislation has similar Model Law opt-out provisions and a similar decision was subsequently made in the Singapore High Court – *John Holland Ltd v Toyo Engineering Ltd*[43] which essentially adopted the Queensland Court of Appeal position.

2.31 Both of these decisions were incorrect because it is not inconsistent with the Model Law to choose a set of institutional arbitration rules to apply in an arbitration. Choosing institutional rules is permitted within the scope of Article 19(1) of the Model Law.[44] To the extent any inconsistencies exist between the Model Law and the chosen rules, the latter will apply, so long as they do not conflict with mandatory provisions of either the Model Law or of the law of the seat.

2.32 Following the Singaporean case mentioned above, the Singapore Government moved quickly to amend Section 15 of the Singapore International Arbitration Act as well as shortly thereafter introducing Section 15A:

(1) It is hereby declared for the avoidance of doubt that a provision of rules of arbitration agreed to or adopted by the parties, whether before or after the commencement of the arbitration, shall apply and be given effect to the extent that such provision is not inconsistent with a provision of the Model Law or this Part from which the parties cannot derogate.
(2) Without prejudice to subsection (1), subsections (3) to (6) shall apply for the purposes of determining whether a provision of rules of arbitration is inconsistent with the Model Law or this Part.

41 [2001] Qd R 461, but overruling see *Cargill International SA v Peabody Australian Mining Ltd* [2010] NSWSC 887.
42 Section 21 of the Australian International Arbitration Act will be amended in 2010, however prior to that amendment it provided:

Settlement of dispute otherwise than in accordance with Model Law
If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.

43 [2001] 2 SLR 262. See also *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd* [2002] 2 SLR 164 (Singapore High Court).
44 For a discussion of this see Pryles, op. cit. fn 40. See also S Greenberg, 'ACICA's New International Arbitration Rules', (2006) 23(2) *Journal of International Arbitration* 189, at p. 192; Barrett-White and Kee, op. cit. fn 9.

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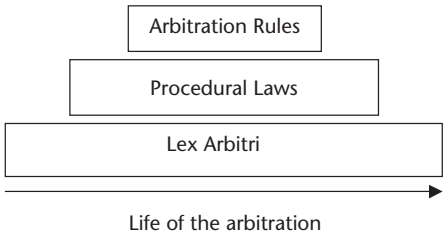
(3) A provision of rules of arbitration is not inconsistent with the Model Law or this Part merely because it provides for a matter on which the Model Law and this Part is silent.
(4) Rules of arbitration are not inconsistent with the Model Law or this Part merely because the rules are silent on a matter covered by any provision of the Model Law or this Part.
(5) A provision of rules of arbitration is not inconsistent with the Model Law or this Part merely because it provides for a matter which is covered by a provision of the Model Law or this Part which allows the parties to make their own arrangements by agreement but which applies in the absence of such agreement.
(6) The parties may make the arrangements referred to in subsection (5) by agreeing to the application or adoption of rules of arbitration or by providing any other means by which a matter may be decided.
(7) In this section and section 15, 'rules of arbitration' means the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation.

2.33 This section makes clear that a choice of arbitral rules is not tantamount to excluding the Model Law. In late 2009, the Australian government introduced a bill to amend Australia's international arbitration laws.[45] As part of those amendments Section 21 has been revised. Despite this likely amendment, it remains advisable that parties arbitrating in Australia include in their arbitration agreement an indication that the Model Law is still to apply despite the choice of institutional rules. The ACICA Rules have adopted this approach in Article 2(3).[46]

4.3 Procedural pyramid

2.34 As the differences between the *lex arbitri*, arbitral procedural laws and arbitration rules can be conceptually difficult it may be useful to visualise their relationship as a pyramid.



2.35 This pyramid shows that the *lex arbitri* is the foundation on which the arbitration is built. Procedural laws are the next layer, and then finally arbitration rules. To the extent that any layer overlaps with one that is below it in the pyramid, it will normally take precedence over the lower layer except where relevant provisions of the lower layer are mandatory.

45 Australian International Arbitration Amendment Bill 2009. See also *Cargill International SA v Peabody Australia Mining Ltd* [2010] NSWSC 887 at para 91 which found the *Eisenwerk* decision 'plainly wrong'.
46 ACICA Rules Article 2.3 reads 'By selecting these Rules the parties do not intend to exclude the operation of the UNCITRAL Model Law on International Commercial Arbitration'.

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2.36 As an illustration of the order of this hierarchy, assume that the *lex arbitri*'s own arbitral procedural law may contain provisions regarding the default appointment of arbitrators. Assume that the parties choose a foreign arbitral procedural law which contains different default procedures and the parties also choose arbitration rules which have a third default method. In this situation, it is the default mechanism in the chosen arbitration rules that will apply. However, mandatory provisions of the *lex arbitri* or procedural law will displace the chosen arbitration rules if those arbitration rules conflict with the mandatory provisions.

5 Diverging views on link between arbitration proceedings and seat of arbitration

2.37 Lively theoretical debate has ensued about the extent to which arbitration proceedings are linked to and constrained by the seat of arbitration's laws and courts. We briefly introduce two broad legal theories explaining this link, the traditional and delocalised theories, before developing them from the perspective of international relations theory. We then consider the legal and practical reality of delocalisation based on international norms and laws, before finally discussing where these theories leave us today.

5.1 Traditional view

2.38 The traditional or jurisdictional view is that every private, commercial arbitration must be attached to a legal seat of arbitration. That is, it must be attached to some existing legal jurisdiction. According to this view, the seat of arbitration is the jurisdiction that gives legitimacy and legality to the arbitration proceedings and the resulting award. Consequently, without the international arbitration law of the seat (i.e. the *lex arbitri*), which permits arbitration to take place, any arbitration proceeding would not exist legally.

2.39 The traditional view is based on accepted legal theories that date back at least as far as the 1600s in Western cultures. In Eastern cultures these debates are even older.[47] The Peace of Westphalia (1648) is widely considered to represent the birth of the nation-state system that exists today. Decades of religious conflict in Europe were put to an end by the signing of two peace treaties that comprised the Peace of Westphalia. This divided Europe into various states and emphasised the supreme power of the sovereign ruler over the territory of his or her respective state. Accordingly, each state was obliged, under the principle of state sovereignty, to respect the independence and integrity of other

47 Arguments of this kind have been espoused in Eastern cultures as far back as Mencius (also known as Meng Zi) whose works collectively known as The Mencius were published after his death in c289 BCE.

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states. A vital and central feature of state sovereignty was said to be jurisdiction, which 'concerns the power of a state to affect people, property and circumstances . . . [and] is an exercise of authority which may alter or create or terminate legal relationships and obligations'.[48]

2.40 A consequence of this particular conception of sovereignty is that states are the highest authority regulating the lives and activities of private individuals and companies. In other words, states are exclusively empowered to regulate anything and everything that occurs within their boundaries.[49]

2.41 With this background, quite early in the development of international arbitration as a discipline of law, Francis Mann suggested that in reality there was no such thing as an *international* arbitration – arbitration had to be connected to and controlled by a domestic legal system. Two quotes from Mann illustrate his views particularly well:[50]

> It would be intolerable if the country of the seat could not override whatever arrangements the parties may have made. The local sovereign does not yield to them except as a result of the freedoms granted by himself.
>
> Is not every activity occurring on the territory of a State necessarily subject to its jurisdiction? Is it not for such State to say whether and in what manner arbitrators are assimilated to judges and, like them, subject to the law? Various States may give various answers to the question, but that each of them has the right to, and does, answer it according to its own discretion cannot be doubted.

2.42 His arguments and reasoning at first appear both logical and plausible. If the sovereign state is the highest authority and it has exclusive power to make and enforce laws relating to persons, property or events within its territory, it stands to reason that it is only because of the laws of the seat that the arbitration agreement (and ultimately the arbitration award) gains legal recognition. According to the traditional view, an arbitration agreement, like any contract, has no legal effect unless some domestic law gives it effect. The *lex arbitri* thus regulates and limits the arbitration proceedings in any way its lawmakers wish. Markham Ball explains this as follows:[51]

> Arbitration is not a separate, free-standing system of justice. It is a system established and regulated pursuant to law, and it necessarily bears a close relationship to a nation's courts and judicial system.

However, as we will see below, this is not the only view.

48 MN Shaw, *International Law*, 5th edn, Cambridge University Press, 2003, at p. 572.
49 The rise of international organisations like the World Trade Organization and groupings like the European Union now challenge this conception.
50 FA Mann, 'Lex Facit Arbitrum' in P Sanders (ed), *International Arbitration: Liber Amicorum for Martin Domke*, Martinus Nijhoff, 1967, pp. 161–162. Mann's arguments are reflected in more recent commentaries. See generally R Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration', (2001) 17(1) *Arbitration International* 19.
51 M Ball, 'The Essential Judge: the Role of the Courts in a System of National and International Commercial Arbitration', (2006) 22 *Arbitration International* 73.

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5.2 Delocalised view

5.2.1 Definition

2.43 The delocalised or contractual conception of arbitration is that no link need exist between the seat of arbitration and arbitration proceedings taking place in that jurisdiction. Arbitration proceedings are said to gain their legitimacy and existence from the parties' contract. The principal consequence of this is that arbitration proceedings should be free from any interference from local courts and local laws at the seat of arbitration. The only domestic courts that can interfere are those asked to enforce a resulting arbitral award. It is only these enforcement courts that need to give the arbitral award state recognition because that is required before state-backed mechanisms can be deployed to enforce and execute the award. Before an award is enforced, it exists simply as an extension of the parties' contract.

2.44 In 1983, Jan Paulsson wrote an article entitled 'Delocalisation of International Commercial Arbitration: When and Why it Matters'.[52] It has become one of the most cited articles in the debates on delocalisation. The article was a defence of a series of papers Paulsson had written previously which developed the idea of delocalised arbitration. His earlier papers had evoked a range of responses, including the description 'dangerous heresy'.[53] In defence to this description, Paulsson explained:[54]

> What this critique misses is that the delocalised award is not thought to be independent of any legal order. Rather, the point is that a delocalised award may be accepted by the legal order of an enforcement jurisdiction although it is independent from the legal order of its country of origin.

2.45 Paulsson accordingly clarified that delocalisation does not mean that arbitration proceedings exist on their own and outside any domestic legal order. Rather, they are attached to a domestic legal order but only to the jurisdiction (or jurisdictions) where enforcement of the award is sought. They are not attached to the legal order of the seat of arbitration and should not be subjected to its laws or courts.

2.46 The focus on the enforcement jurisdiction made considerable practical sense, as at that time the only truly harmonised aspect of international arbitration was enforcement – thanks mainly to the New York Convention. This was a time before the Model Law and its adoption into national legal systems. Although today there is still no single unified system of international arbitration law, there is a considerably greater degree of consistency. Arguably, there is less need for the delocalisation debate today than there was back in the 1980s when international arbitration laws had not yet begun to converge.

52 J Paulsson, 'Delocalisation of International Commercial Arbitration: When and Why it Matters', (1983) 32 *International and Comparative Law Quarterly* 53.
53 As Paulsson notes, this was a description used by W Park in his paper 'The Lex Loci Arbitri and International Commercial Arbitration', (1983) 32 *International and Comparative Law Quarterly* 21.
54 Paulsson, op. cit. fn 52, at p. 57.

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2.47 The delocalisation thesis is well illustrated with regard to mandatory laws, which may be described as a catalyst for the development of the delocalisation theory. Mandatory laws are laws that have public policy characteristics that contracting parties cannot exclude by agreement. They can apply whenever there is a strong link between the facts of a case and the jurisdiction in which the mandatory laws exist, even if that jurisdiction's law is not ordinarily the applicable law in the case.[55]

2.48 There would be no particular difficulty with mandatory laws if every state's mandatory laws were the same. But since they are not, conflicts inevitably arise from the application of peculiar domestic mandatory laws. One such conflict arises where a certain mandatory law exists in the *lex arbitri* but does not exist in the jurisdiction of the law governing the contract. From the perspective of the traditional view of arbitration (discussed above), it might be argued that a mandatory law of the seat should be applied by virtue of the simple fact that it is a law of the seat. From a delocalised viewpoint, however, the mere fact that arbitration is seated in a given jurisdiction should not of itself be sufficient for its mandatory laws to apply. There would have to be a strong factual nexus between the potentially applicable law and the underlying dispute itself.

2.49 After a flurry of largely academic activity in the early 1980s the delocalisation debate was enlivened in the mid-1990s by several cases. The best known are *Hilmarton v OTV*[56] and *Chromalloy v Egypt*.[57] Both of these cases involved arbitral awards that had been set aside by courts at the seat of arbitration but which were still enforced in other countries. They illustrate the practical attraction of a delocalised approach because the reasons for the awards being set aside at the seats of arbitration were not considered relevant in the jurisdictions where enforcement was granted.

2.50 In the first case, Hilmarton sought recovery of commissions it claimed to have earned by securing business for OTV in Algeria. The seat of arbitration was in Switzerland. The arbitral tribunal found the contract unenforceable because it contravened Algerian laws relating to bribery and corruption. It accordingly rejected Hilmarton's claims. Upon Hilmarton's application, the Swiss Federal Supreme Court set aside the award, finding that the arbitrators ought not to have considered Algerian law. But French courts – in decisions ultimately appealed to and confirmed by France's highest court – nonetheless recognised the award. The Cour de Cassation controversially observed:[58]

> the award made in Switzerland was an international award which was not integrated into the legal system of that State, meaning that the award's existence remained established despite its having been set aside and that its recognition was not contrary to international public policy

55 Mandatory laws are addressed and explained in Chapter 3, Section 4.
56 Cass. le civ., Mar. 23, 1994, 1994 *Revue de L'Arbitrage*. 327 (French Cour de Cassation).
57 939 F Supp 907 (DDC 1996) (US District Court of the District of Columbia).
58 Authors' translation from French. Cour de Cassation decision of 23 March 1993. See *Revue de L'Arbitrage*, 1994.327, note Ch. Jarrosson; *Bull civ*, I, no. 104, p. 79; *Journal du droit international (Clunet)*, 1994.701, note E Gaillard.

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2.51 The Cour de Cassation later refused enforcement of subsequent (contradictory) awards in the same case. These subsequent awards had been rendered by the arbitrators as a consequence of their first award having been set aside by the Swiss courts.

2.52 In *Chromalloy*, courts in both France and the District of Columbia, USA, enforced an international arbitral award that had been set aside by the courts of the seat of arbitration – in this instance Cairo, Egypt. Chromalloy had been successful in the arbitration and sought to enforce the award in the District of Columbia. At the same time the Government of Egypt, having lost the arbitration, managed to set aside the award in Cairo on the basis that the arbitrators had applied Egyptian administrative law rather than civil law. Courts in both the District of Columbia and France enforced the award despite Egypt's argument that the award no longer existed under Egyptian law. The District of Columbia court noted that the parties had agreed to exclude all forms of recourse against the arbitral tribunal's awards and that error of law was not a basis to refuse enforcement of a foreign arbitral award.[59]

2.53 Both decisions were based on the notion that where an award contravenes the public policy of the seat of arbitration but not that of the enforcement country, the award can still be enforced. These cases, and others taking the same approach, show a tendency to favour the law of the state in which enforcement is sought over that of the seat of arbitration. They thus lend support to a delocalised conception of international arbitration. However, while French case law continues to support the *Hilmarton* approach,[60] subsequent US cases have retreated towards the traditional line, refusing to enforce awards set aside at the seat of arbitration.[61]

2.54 Delocalisation supporters say that the only role courts at the seat of arbitration should have is to assist the arbitration with the procedural tasks that arbitrators cannot undertake. These include, for example, issuing urgent interim protection orders, subpoenas for witnesses or discovery orders in respect of third parties, appointing arbitrators where the parties have not done so, or removing non-performing arbitrators.[62]

59 *Chromalloy Aeroservices Inc (US) v The Arab Republic of Egypt* 939 F Supp 907 (DDC 1996) (US District Court of the District of Columbia).

60 Cass. 1ère civ., *PT Putrabali Adayamulia v Rena Holding*, 29 June 2007, case No. 06-13.293; see also M Haravon, 'Enforcement of Annulled Foreign Arbitral Awards: The French Supreme Court Confirms the Hilmarton Trend', (2007) 22(9) *Mealey's International Arbitration Report* 1.

61 US cases which supported the *Chromalloy* approach include *Karaha Bodas Co v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F 3d 357, 367 (5th Cir 2003) (US Court of Appeals); *Baker Marine Ltd v Chevron Ltd*, 191 F 3d 194, 197 n. 3 (2d Cir 1999) (US Court of Appeals); more recent authority has adopted a different view; see e.g. *Termorio SA v Eltranta SP*, 487 F 3d 928 (D.C: Cir 2007). In his extensive discussion of this issue, Born is very critical of the *Termorio* decision; see Born, op. cit. fn 27, p. 2685. See also for discussion D Freyer, 'United States Recognition and Enforcement of Annulled Foreign Arbitral Awards: The Aftermath of the Chromalloy Case', (2000) 17(2) *Journal of International Arbitration* 1. For further references to other countries, see Nottage and Garnett, op. cit. fn 28, Chapter 10.

62 If the parties have opted for institutional arbitration, tasks in connection with arbitrator appointment and removal are typically performed by the chosen institution, so courts may not be needed for those purposes. However, institutions cannot subpoena witnesses, issue interim protective relief, or perform similar functions.

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5.2.2 International relations theory and delocalisation

2.55 Without expressly addressing it, the delocalisation debate in international arbitration contains numerous parallels with the discipline known as international relations theory. Yet the relationship between international arbitration and international relations theory has remained relatively unexplored. Some basic principles of international relations are reviewed below because this helps to understand delocalisation and contribute to the debate.[63]

2.56 Theories of international relations attempt to explain and predict the way humans and society interact on an international level. The main focus of most of the various theories is the actions of nation states, however the relative importance of nation states differs according to different theories. International relations theory emerged as a discipline in its own right in the second half of the 20th century. The study of modern international arbitration began in earnest at about the same time – although both international relations and international arbitration can claim histories spanning hundreds of years. In a very general sense the various theories of international relations can be grouped into categories. This discussion will only examine two: Realism and Liberal Internationalism.

2.57 Realism (or variations of it) has dominated international relations scholarship over the years. The essential premise of Realism is that nation states exist in an anarchical system with no guarantees of survival. As a result, the pursuit of power is an inevitable and crucial part of international relations. Originally this was manifested by a quest for military might. However, with the spread of capitalism it has also come to mean the attainment of economic power. Realism seeks to draw its strength from looking at what is actually happening; its focus is on reality or at least a reflection of it.

2.58 Partly as a consequence of basing itself on 'reality', Realism completely embraces the notion that states are sovereign. Sovereign states are also accepted by the majority of the other significant theories of international relations such that it can safely be said that traditional international relations theory confirms the theory of state sovereignty. A consequence of pure sovereignty is the absence of an overarching authority to control the actions or interactions of states.[64] Because each state is sovereign, none has the right to interfere with the domestic laws and policies of another. Domestic laws and policies are made by the state and followed by those within it. Therefore citizens of a state can do only what is either expressly permitted by the laws of the state or not otherwise prohibited by

63 For the purposes of this book, we provide no more than a very brief introduction to international relations. We make a number of generalisations that do no justice to the intellectual endeavours of international relations theorists.

64 International conventions and treaties might be seen as impinging on the traditional notion of sovereignty. Traditional supporters of sovereignty dismiss this by arguing that a state's decision to sign a treaty is a consensual one, and therefore a nation state does not lose sovereign power by signing a treaty. Such an interpretation may have been previously true, however it must now be questioned in light of the emergence of genuine international organisations such the World Trade Organization, to name but one example.

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those laws. Realism's emphasis on sovereignty therefore supports the traditional or jurisdictional view.

2.59 Thus when delocalisation advocates argue against the traditional view that international arbitration is attached to the seat of arbitration, they are not just arguing against it in the context of arbitration, but also against the Realism school's understanding of how the world interacts. To battle with any level of success, the delocalised view must itself have an equally developed theoretical analogy. That analogy can be found in the international relations theory of Liberal Internationalism.

2.60 Liberal internationalism is a term used to encompass a wide variety of thought within the field of international relations theory. However, fundamental to all brands of liberal thought is the primacy of the individual. Nation states exist and have power, but they do so because that is the collective will of the individuals who band together to form that state.

2.61 Characterisation of the delocalisation view strongly reflects a liberal internationalist perspective. The legitimacy of the parties' decision to resolve their dispute by arbitration comes from their agreement to do so. They as individuals have the power to make that decision. Whether a state – embodying the view of the collective society – subsequently decides to enforce the outcome of the arbitration is a different matter. It may be that the subject matter of the dispute is considered illegal or immoral in the enforcing state, and thus the award should not be enforced. However that is a different issue; the main point is that the contracting parties should not be required to integrate their arbitration and resulting award into a state's legal system until such time as they want to use a legal system to assist them by enforcing a resulting award. Liberal internationalist theories therefore support the delocalisation view.

2.62 Today, nation states are increasingly acting in ways that challenge the traditionally accepted understanding of state sovereignty. A decline in the sociopolitical acceptance of sovereignty is likely to lead to a greater willingness to accept the idea of delocalised arbitration.

5.2.3 Delocalisation in practice: Relevant legal provisions

2.63 The proposition that no link is needed between the seat of arbitration and arbitration proceedings is initially attractive. It is also attractive to consider that arbitration relies on a national court only at the place of award enforcement and during enforcement proceedings. These propositions imply that international arbitration is truly international.

2.64 Despite the theoretical attractions of delocalisation, it is important to keep in mind what the laws say and what domestic courts will do. The legal effectiveness of international arbitration depends principally on laws that facilitate the enforcement of international arbitration agreements and awards, that is mainly the New York Convention, and subsidiarily the various domestic *lex arbitri* which permit, legitimise and positively support international arbitration. It is the combination of those legal sources which has elevated international arbitration to

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a superior and preferred mechanism for resolving international business disputes. Both the New York Convention and domestic international arbitration laws should therefore be considered.

2.65 Article V of the New York Convention provides some support for delocalisation but simultaneously throws it into doubt. Article V(2) provides:

> recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

2.66 The reference to 'that country' is of course the country where enforcement is sought. Thus the New York Convention expressly recognises that a court asked to enforce an award applies its own laws in deciding whether the subject matter was capable of settlement by arbitration and applies its own views on (international) public policy.[65]

2.67 This simultaneously appears to promote both a traditional and a delocalised view. From the delocalisation perspective, the article allows one state (the enforcing state) to prefer its own laws over those of the seat. This runs contrary to the traditional view of sovereignty, which is based, among other things, on mutual recognition of a foreign state's power and sovereign rights. From a traditionalist's perspective, however, there is nothing unusual about a sovereign state limiting the kinds of arbitration awards that it is willing to enforce.

2.68 Article V(1) of the New York Convention provides some support for delocalisation but more for the traditional conception of international arbitration. It states in relevant part:

> Recognition and enforcement of the award may be refused [upon] proof that:
> (a) ... the [arbitration] agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or ...
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or ...
> (e) The award has ... been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made;

2.69 Article V(1)(a) and (d) thus give primacy to the parties' agreement, at first appearing to support delocalisation. Yet in the absence of agreement on the matters dealt with in Articles V(1)(a) and (d), the enforcing court must refer to (a) 'the law of the country where the award was made' or (d) 'the law of the country where the arbitration took place', both meaning in practice the law of the seat of arbitration, rather than its own law. As a matter of treaty law under the New York Convention, these references back to the law of the seat

65 A distinction should be drawn between domestic and international public policy. See the discussion in Chapter 9, Section 6.3.2.

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provide support for the proposition that there is a legal link between the seat of arbitration and the arbitrations that take place there. However, the mere fact that the legal link can be displaced by party agreement on a different law reduces its significance. Article V(1)(e) can be read to lend support to either view. On the one hand it empowers a court to refuse enforcement of an award which has been set aside or suspended at the seat of arbitration, regardless of the reasons for that setting aside or suspension. This creates a link to the seat of arbitration. On the other hand, the fact that the enforcement court has a discretion[66] (rather than an obligation) to refuse enforcement in these circumstances means that that link with the seat is tenuous.

2.70 The fact that proponents of both sides of the delocalisation debate refer to Article V is therefore unsurprising. As Hong-Lin Yu has noted, Article V(1)(e) can be read in conjunction with Article VII to find support for delocalisation:[67]

> [The] Hilmarton and Chromalloy cases make a substantial link between Article V(1)(e) and Article VII of the [New York] Convention. Not only do they endorse the concept of delocalisation theory applied in [other cases], but also stress the significance of the 'more favourable right principle' established in Article VII of the Convention and its interplay with Article V(1)(e). They believe that the language used in Article VII was intended to facilitate the development of international commercial arbitration, rather than placing obstacles in its path. Furthermore, due to the lack of negative language in Article VII, they believe that the draftsmen did not exclude the possibility of using Article VII as the basis for recognising or enforcing an award which has been set aside in its country of origin on the ground that this particular provision allows a party to rely on more favourable domestic law as far as recognition or enforcement of arbitral awards are concerned.

2.71 The use of Article VII in this way also finds support in UNCITRAL's 2006 recommendation, which provides that this article 'should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement'.[68]

2.72 The most significant barrier to the pure delocalisation view is found in Article I of the New York Convention:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought. (Emphasis added)

2.73 Thus in order to be enforced under the New York Convention an award must have been made in the *territory of a state* and not in some supranational space.

66 All of the grounds for refusing recognition under Article V are discretionary.
67 Hong-Lin Yu, 'Is the Territorial Link Between Arbitration and the Country of Origin Established by Articles I and V(1)(e) Being Distorted by the Application of Article VII of the New York Convention?', (2002) 5 *International Arbitration Law Review* 196, at p. 203.
68 Recommendation regarding the interpretation of Article II, para 2, and Article VII, para 1 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session. UN Doc A/6/17.

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Hong-Lin Yu accordingly notes:[69] 2.74

> By linking Article I and V(1)(e) of the Convention, the arguments emphasising the territorial link between arbitration and the place of arbitration have won the support of most academics and practitioners involved in international commercial arbitration who have been using Article V(1)(e) of the Convention as the shield against any movement towards the concept of 'delocalisation' or 'denationalisation' of international commercial arbitration.

It is not particularly surprising that arguments supporting both sides of the debate can be grounded in the provisions of the New York Convention. The fact that both sides of the debate rely heavily on the New York Convention confirms the importance of referring to laws to resolve the debate in the first place. 2.75

As noted above, the other laws to consider are the various domestically enacted *lex arbitri*. One of the most pure forms of delocalised international commercial arbitration in the Asia-Pacific region, and indeed the world, was found in Malaysia's former arbitration law. Prior to the 2005 Malaysian Arbitration Act, where the seat of arbitration was in Malaysia and the parties had chosen to adopt the Arbitration Rules of the Kuala Lumpur Regional Centre for Arbitration, the law did not permit any recourse at all from arbitral awards.[70] This extraordinary provision meant, in effect, that Malaysia permitted purely delocalised arbitration in which the Malaysian courts had no power to review international arbitral awards even if the seat of arbitration was in Malaysia. The only means of recourse for a party dissatisfied with the award was to wait for the successful party to try to enforce it and in response resist that enforcement attempt.[71] 2.76

Apart from the old Malaysian law, no other Asia-Pacific country's laws support pure delocalisation. Malaysia's 2005 Arbitration Act is based on the Model Law, similar to most arbitration laws in the Asia-Pacific. Drafting of the Model Law was completed by UNCITRAL in 1985, some 27 years after the conclusion of the New York Convention. Its provisions relating to enforcement of awards (Article 36) mirror those of the New York Convention (Article V) so that the same comments explained above concerning recognition of delocalisation in Article V of the New York Convention apply more or less mutatis mutandis to the Model Law. 2.77

Apart from those similarities with the New York Convention, the Model Law provides for a highly unsupervised or delocalised form of international arbitration with minimal intervention from courts. As Kaufmann-Kohler has noted, one of the Model Law's 'main purposes was to free the proceedings from the 2.78

69 Hong-Lin Yu, op. cit. fn 67, at p. 197.

70 Section 34(1) of the Malaysian Arbitration Act 1952 reads:

> Notwithstanding anything to the contrary in this Act or in any other written law but subject to subsection (2) in so far as it relates to the enforcement of an award, the provisions of this Act or other written law shall not apply to any arbitration held under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 or under the United Nations Commission on International trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration at Kuala Lumpur.

71 For commentary on this section, see H Arfazadeh 'New Perspectives in South East Asia and Delocalised Arbitration in Kuala Lumpur', (1991) 8(4) *Journal of International Arbitration* 103.

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constraints of local law, so as to avoid the parties' expectations from being frustrated by conflicting provisions of such law'.[72] This is also reflected in UNCITRAL reports leading up to the establishment of the Model Law:[73]

> 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. It would also enable them to take full advantage of rules and policies geared to modern international arbitration practice as, for example, embodied in the UNCITRAL Arbitration Rules.

2.79 However, it is clear that the Model Law does not support fully delocalised arbitration. The best example is Article 34 of the Model Law, which empowers a court at the seat of arbitration to set aside an arbitral award made in that seat if certain conditions are met. If the Model Law recognised fully delocalised arbitration, it would not permit applications to set aside an award. Moreover, Article 34(2)(b) of the Model Law provides additional grounds for setting aside an award if the dispute was not capable of settlement by arbitration under the law of the seat of arbitration or is in conflict with the public policy of the seat of arbitration. This directly links an award to the local laws on arbitrability and public policy, and again casts doubt on the acceptance of delocalisation (although the concepts of arbitrability and public policy should be interpreted from an international and not domestic perspective).[74]

2.80 In the Asia-Pacific, the Model Law has not been adopted by all states without modification. We can find – to use Matthew Secomb's phrase – 'shades of delocalisation';[75] that is differences in the adoption and modification of the Model Law and differences in the attitudes of courts, mainly relating to the level of court intervention. On the one hand, states may have increased the role of courts beyond what is permitted in the Model Law. In this vein there is criticism from one commentator regarding the 2003 Japanese Arbitration Law. Although that enactment is based on the Model Law:

> Japanese district courts have a wider jurisdiction than most. Whilst the leer of the Model Law is clearly set out in art 4 of the New Law – 'No court shall intervene with respect to any arbitral proceedings except where so provided in this Law' – its spirit is perhaps less faithfully observed by the provisions which follow.[76]

72 G Kaufmann-Kohler, 'Identifying and Applying the Law Governing the Arbitration Procedure – The Role of the Law of the Place of Arbitration', (1998) 9 *ICCA Congress Series* 336, at p. 355.
73 'Report of the Secretary-General: possible features of a model law on international commercial arbitration' UN Doc A/CN.9/207, at para 17.
74 In relation to arbitrability see Chapter 4, Section 8 and in relation to public policy see Chapter 9, Section 6.3.2.
75 M Secomb, 'Shades of Delocalisation – Diversity in the Adoption of the UNCITRAL Model Law in Australia, Hong Kong and Singapore', (2000) 17(5) *Journal of International Arbitration* 123.
76 D Roughton, 'A Brief Review of the Japanese Arbitration Law', (2005) 1(2) *Asian International Arbitration Journal* 127, at p. 131. It should be noted that Roughton appears to be in the minority with this characterisation of Japan's Arbitration Law; see, e.g. L Nottage, 'Japan's New Arbitration law: Domestication Reinforcing Internationalisation?', (2004) 7(2) *International Arbitration Law Review* 54.

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On the other hand, domestic courts can decide to restrict the freedom of international arbitration and thereby restrict the delocalised character of the Model Law. Examples of this kind of restriction are usually found in those cases where an attempt is made to set aside an award.

2.81 Several Indian Supreme Court decisions have attracted considerable attention and commentary in this general regard. Often cited cases are *Oil and Natural Gas Corp v Saw Pipes Ltd,*[77] *Bhatia International v Bulk Trading S.A.*,[78] and *Venture Global Engineering v Satyam Computer Services Ltd*.[79] In the *Saw Pipes* decision, the Supreme Court had been called on to consider and apply Section 34 of the Indian Arbitration and Conciliation Act 1996. This section, except for two aspects, mirrors Article 34 of the Model Law.[80] Section 34 of the Indian legislation and Article 34 of the Model Law limit the grounds on which an award may be set aside. Critics of the *Saw Pipes* decision have described it as adding 'a new "judge-made" ground'[81] by allowing a court to consider whether the decision was patently illegal. The decisions in *Bhatia* and *Venture Global* suggest that the Indian Supreme Court has the power to set aside foreign awards, that is awards made in seats of arbitration outside India. In the *Venture Global* decision, enforcement was not even sought in India so the link with that jurisdiction was very tenuous.[82]

2.82 An understanding (albeit limited) about general attitudes to delocalisation can be found in Asia-Pacific court decisions. One example is the High Court of Hong Kong judgment in *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (also known as Pertamina)*.[83] We referred to this case earlier in the chapter.[84] Enforcement of the award in Hong Kong was resisted by Pertamina on the basis that Indonesian courts had already set aside the award. Justice Burrell found as both a matter of fact and law that the seat of arbitration had been Geneva, Switzerland. Since an award can only be set aside at the seat of arbitration (or by a court pursuant to whose laws the award was made), he held that the Indonesian decision was irrelevant and did not allow Pertamina to invoke Section 44(2)(f) of the Hong Kong Arbitration Act (the equivalent of Article V(1)(e) of the New York Convention). In the course of his reasoning, by

77 2003 (5) SCC 705. For commentary on the decision see FS Nariman, 'Judicial Supervision and Intervention' in M Pryles and M Moser (eds), *Asia's Leading Arbitrators' Guide to International Arbitration*, JurisNet, 2007, at p. 353; S Kachwaha, 'Enforcement of Arbitration Awards in India', (2008) 4 *Asian International Arbitration Journal* 64; S Sharma, 'Public Policy Under the Indian Arbitration Act In Defence of the Indian Supreme Court's Judgment in ONGC v Saw Pipes', (2009) 26(1) *Journal of International Arbitration* 133; P Nair, 'Surveying a Decade of the "New" Law of Arbitration In India', (2007) 23(4) *Arbitration International* 699.
78 (2002) 4 SCC 105. See also the discussion in Chapter 9, Section 3.2.2 of this book.
79 (2008) SCALE 214. See also the discussion in Chapter 9, Section 3.2.2 of this book.
80 Unlike the Model Law, pursuant to Section 13(5) of the Arbitration and Conciliation Act 1996, where parties have unsuccessfully challenged an arbitrator, they must wait until the award has been delivered before they can pursue that challenge by way of an action to set aside. Similarly, pursuant to Section 16(6), a party objecting to an arbitration agreement must also bring a setting aside action.
81 Kachwaha, op. cit. fn 77, at p. 68.
82 See generally S Sattar, 'National Courts and International Arbitration: A Double-edged Sword?', (2010) 27 *Journal of International Arbitration* 51.
83 [2003] 380 HKCU 1.
84 See discussion in Section 4.1.

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way of obiter dictum, Justice Burrell referred to the Hong Kong courts' discretion to enforce an award despite its having been set aside at the seat:[85]

> Secondly, had Pertamina come within [Section 44] (2)(f) or (3), KBC's task in persuading the court to exercise its discretion [to grant enforcement] would have been more difficult. The issues under (2)(f) and (3) are more fundamental and more important in nature. Normally, a court would be inclined not to exercise the discretion in such circumstances. In this case, however, the balance would have been tipped against the norm for just one reason. That reason being the lateness of the emergence of Pertamina's contentions. The argument that the lex arbitri arbitration [sic] is Indonesian law and the complaint that the political risk policy was not disclosed, can both be described as '11th hour' challenges. Such lateness would, in my judgment, dilute the strength of the arguments to the extent that it would have been appropriate to exercise the discretion to, nonetheless, enforce the award.

2.83 Hong Kong judges therefore seem to be at least open to the possibility of a delocalised, *Chromalloy*,[86] approach to enforcing arbitration awards set aside at the seat of arbitration in certain cases. It was not necessary for the court in *Pertamina* to decide the issue in this case, since it had rejected Pertamina's argument that the *lex arbitri* was Indonesian law. Even if Indonesian law applied as the *lex arbitri*, the circumstances of this case were peculiar given Pertamina's delay in raising the argument that the award had been set aside.

2.84 More specific guidance for common law jurisdictions can also be found in powerful statements of English courts in *Coppee-Lavalin v Ken-Ren*.[87] Lord Mustill made very clear that delocalisation was inconsistent with the arbitration law of England. He was following the decision in *Bank Mellat v Helliniki Techniki*, where Justice Kerr explained:

> despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with a municipal system of law.[88]

2.85 Finally, although no delocalised system exists for international commercial arbitration, a delocalised approach has been adopted by the ICSID Convention for arbitrations between foreign investors and states.[89] That Convention excludes any review of ICSID arbitral awards by domestic courts and does not allow domestic courts to employ grounds (such as in Article V of the New York Convention) as a basis for refusing the enforcement of ICSID awards.

5.2.4 Conclusions on delocalisation

2.86 In its purest form, delocalisation means independence and complete disassociation of international arbitration proceedings from the jurisdiction and control

85 [2003] 380 HKCU 1, at para 69.
86 See the discussion of this case in Section 5.2.1.
87 *Coppee-Lavalin SA/NV v Ken-Ren Chemicals & Fertilizers Ltd (in liq)* [1994] 2 All ER 449 (House of Lords).
88 *Bank Mellat v Helliniki Techniki SA* [1984] QB 291, at p. 301 (English Court of Appeals, Civil).
89 See the discussion in Chapter 10, Section 5.3.2. A form of purely delocalised arbitration also existed in Malaysia before 2005. See Section 34(1) of the Malaysian Arbitration Act 1952.

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of courts until such time as an award needs to be enforced. The previous section demonstrates that pure delocalisation does not exist (except in ICSID arbitrations) because it is inconsistent with the international instruments that constitute the legal framework for international arbitration.

2.87 But the delocalisation debate has certainly influenced aspects of international arbitration practice. It has fuelled a movement away from control by the courts at the seat of arbitration, away from the application of peculiar mandatory substantive laws of the seat, and away from overly strict or rigid arbitration laws that constrain party autonomy and the flexibility of the arbitral process. A good example of delocalisation's influence on the enactment of laws is the Model Law, which as explained above and elsewhere throughout this book,[90] provides for very limited court interference and a very high degree of party autonomy.

2.88 It may therefore be concluded that while pure delocalisation does not exist, a more diluted and pragmatic form does. In this diluted form, domestic laws and courts have bowed to legislative and/or practitioner pressure to take a more hands-off approach to arbitrations seated in their jurisdiction. The effect is that delocalised (or nearly delocalised) arbitration can be practised in certain jurisdictions if the law and courts of those jurisdictions so permit. Take as an example the former Malaysian arbitration law, referred to above, which expressly permitted purely delocalised arbitration. It is sometimes argued that this amounts to a combination of the delocalised and traditionalist conception of arbitration or a 'hybrid' approach because the law of the seat effectively permits delocalisation.[91]

2.89 In this diluted or hybrid form, delocalisation must still depend on the level of interference permitted by the laws and courts of the seat of arbitration. It may consequently be said that the control over delocalisation by the laws of the seat of arbitration is consistent with the traditionalist or jurisdictional reasoning but fundamentally inconsistent with delocalisation. As long as there is a provision in the *lex arbitri* which permits something, then that provision is itself a form of attachment to the seat of arbitration and displaces truly delocalised arbitration.

2.90 In other words, when analysing the hybrid approach from a theoretical perspective, a fundamental problem emerges. The hybrid approach is not a hybrid at all but rather a more or less modified restatement of the traditional view. Even on the basis of the so-called hybrid there is an essential link to the seat of the arbitration. We can conclude from a traditional line of reasoning that delocalisation is not a phenomenon in its own right, but rather permitted by the state.

2.91 Notwithstanding these theoretical conclusions, we consider the delocalisation debate to have had a very positive effect on the success of international arbitration by decreasing the level of court interference at the seat of arbitration and reducing the application of otherwise irrelevant local mandatory laws. Although

90 See Chapters 7 and 9 generally.
91 A Barraclough and J Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration', (2005) 6 *Melbourne Journal of International Law* 205, at p. 210.

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the increasingly widespread use of the Model Law and similar arbitral laws have removed the perceived need for delocalisation, it is likely that the debate will continue.

6 Choosing the seat of arbitration

6.1 General principles

2.92 The parties to an arbitration are free to agree on the seat at any time. Usually, it is agreed in the arbitration agreement. If not, it might be agreed later. The freedom to choose the seat of arbitration is widely recognised by institutional arbitration rules.[92] Such rules simply restate a fundamental right that parties have been granted by virtually all *lex arbitri*.[93]

2.93 It is very rare that arbitration rules deny the parties any freedom to choose the seat. Rule 12 of the Rules of Arbitration of the Bangladesh Council of Arbitration appears to be an exception.[94] The seat of arbitration must be in Bangladesh, with the precise location determined by the Council. The seat can be outside Bangladesh only if international parties are involved. Rule 42 of the Rules of Arbitration of the Indian Council of Arbitration is similar. While the approach adopted by both these sets of rules is uncommon, it is not itself a restriction on party autonomy nor particularly surprising. Usually, the parties will have acted autonomously by choosing the arbitral rules in the first instance, and it can be expected that they were familiar with the contents of their chosen rules. The parties can thus be said to have chosen the seat of arbitration, albeit indirectly by choosing those rules.

2.94 The best way to record an agreed seat of arbitration is to state simply that 'the seat of arbitration will be x' or 'the place of arbitration will be x', specifying both the city and country. However, there is no mandatory form of wording necessary to indicate a choice of seat. For example, if an arbitration agreement states words to the effect 'the arbitration will be held in x' or 'the arbitration shall take place at x' or 'the dispute shall be decided by arbitration in x' or even 'the arbitrators shall convene in x', etc., it should be presumed that x was the intended seat of arbitration rather than simply the intended place where the meetings or hearings will be held.

2.95 An issue of this kind was considered in the Singapore High Court decision of *Philippines v Philippine International Air Terminals Co Inc*.[95] The court decision

92 For example: ACICA Rules Article 19; KCAB International Rules Article 17; SIAC Rules, Rule 18; PDRCI Rules Article 18; LCIA Rules Article 16; ICC Rules Article 14.
93 For example, Article 20(1) of the Model Law provides that 'The parties are free to agree on the place of arbitration'.
94 Rule 12.1: 'The place or venue of arbitration shall be Bangladesh. The Arbitration proceedings shall be held at such place or places in Bangladesh as the Council may determine having regard to the convenience of the Arbitrators and the parties. In a case in which one or both the parties are from overseas, the arbitration proceedings may also be held at any place outside Bangladesh at the discretion of the Council.'
95 [2007] 1 SLR 278.

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relates to an action to set aside a partial award. This case involved a construction contract between a private company and the Government of the Philippines. The arbitration agreement specifically distinguished between disputes regarding actual construction works issues (which were to be resolved by domestic arbitration in the Philippines) and all other disputes (which were to be resolved by ICC arbitration in Singapore).[96] The partial award dealt with the law governing the arbitration procedure and the proper law of the arbitration agreement. In the partial award, the arbitration agreement's reference to Singapore as the place of arbitration was considered. To the arbitral tribunal, it appeared that Singapore was designated as the place of arbitration because it was a neutral venue for the resolution of disputes given one of the parties was the Government of the Philippines. As such, Singapore was not simply a more convenient venue to hold hearings than the Philippines. The arbitral tribunal ultimately determined that both the law governing the procedure of the arbitration and the law governing the arbitration agreement was the law of Singapore rather than the law of the Philippines.

2.96 Failing party agreement, the seat may be determined by an arbitral institution, by a court or by the arbitral tribunal itself. Arbitration laws and rules provide default mechanisms for determining the seat. For example, Article 20 of the Model Law provides:

> The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

2.97 Institutional rules generally follow one of three approaches where the parties have not agreed on the seat. The first approach prescribes a default seat which can be changed by party agreement. The second approach empowers the arbitral tribunal to decide where the parties have not otherwise agreed and the third gives that power to the institution. Most institutional rules in the Asia-Pacific create a presumption in favour of the jurisdiction where the institution is situated.

2.98 The first approach identified can be seen in both the HKIAC Rules and the ACICA Rules. HKIAC Rules Article 15 states:

> The seat of all arbitrations conducted under these Rules shall be the Hong Kong Special Administrative Region of the People's Republic of China, unless the parties have expressly agreed otherwise.

2.99 ACICA Rules Article 19.1 provides that if the parties cannot agree on the seat, it will be Sydney, Australia. The PDRCI Rules in the Philippines provide for the arbitral tribunal to decide in the absence of party choice, but with a presumption in favour of Manila. Similarly, Article 18 of the KCAB International Rules provides

96 The arbitration agreement provided that 'All disputes, controversies or claims arising from or relating to the construction of the Terminal and/or Terminal Complex or in general relating to the prosecution of the Works shall be finally settled by arbitration in the Republic of the Philippines following the Philippine Arbitration Law or other relevant procedures. All disputes, controversies or claims arising in connection with this Agreement except as indicated above shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with the said Rules. The place of arbitration shall be Singapore and the language of the arbitration shall be English.'

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that if the parties fail to agree the seat will be Seoul unless the arbitral tribunal decides that another place is more appropriate.

2.100 Among those that provide for the institution to decide are the SIAC Rules. Absent party agreement, SIAC Rule 18 designates Singapore unless the SIAC Registrar determines that another seat is more appropriate. In contrast, Article 14(1) of the ICC Rules provides for the ICC Court to decide in the absence of party choice, with no presumption in favour of a particular place. ICC arbitrations take place literally all over the world. In 2009, they took place in 101 cities across 53 different countries.

2.101 Having the institution decide the seat has several advantages over giving the task to the arbitral tribunal. First, the seat is quickly determined without much fuss. Second, the seat may be determined before the arbitral tribunal is constituted, meaning that the seat can be taken into consideration when choosing, in particular, the presiding arbitrator or sole arbitrator to ensure that he or she is geographically proximate and familiar with its laws.

6.2 Factors to consider in choosing a seat of arbitration

2.102 Some might cynically suggest that the most important factors when choosing a seat of arbitration depend on whom you ask. The parties' lawyers will probably want a seat the location of which is easily accessible and which has an arbitration law with which they are familiar. The parties themselves may be interested in the neutrality of the venue and the financial costs of arbitrating there. Everybody involved might consider it important that the seat of arbitration be the place of residence of the chairperson of the arbitral tribunal or the sole arbitrator. This may reduce costs and ensure that the chairperson has a good knowledge of the local arbitration law.

2.103 Realistically, the most important factor is the presence of laws and courts that are favourable to international arbitration.[97] First, the seat should be a party to the New York Convention. This is important for enforcement of any resulting award in other New York Convention countries because many jurisdictions have adopted the New York Convention with reciprocity reservations.[98] Second, the seat's arbitration law should provide for the desired level of judicial interference and control (that is, the desired level of delocalisation). The trend in modern international arbitration laws such as Model Law jurisdictions is for a very limited degree of judicial control, or highly delocalised arbitration proceedings. Further, the quality of the judiciary and the court system should be considered. If it becomes necessary during arbitration proceedings to approach a court for assistance, will that court be able to deal with the matter quickly, efficiently and predictably?

97 Hwang and Fong Lee Cheng op. cit. fn 4, at p. 201; JB Tieder Jr., 'Factors to Consider in the Choice of Procedural and Substantive Law in International Arbitration', (2003) *Journal of International Arbitration* 393.
98 For further explanation of these reservations see Chapter 9, Section 5.4.2.

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2.104 Geographic and infrastructure convenience should be the second main criteria after the quality of the legal system and courts. The seat of arbitration should be geographically convenient for most people who will be involved in an arbitration; that is parties, witnesses, arbitrators and lawyers. Also important is that there are international flights and facilities such as appropriate hotels and rooms for conducting the arbitration hearings.

2.105 The third consideration concerns the neutrality of the seat. Usually contracting parties will prefer a seat that is outside the jurisdictions of any contracting party. The ability to choose a totally neutral seat – that is a seat with no connection whatsoever to the parties or the underlying dispute – is one of the many advantages of international arbitration over litigation. In international litigation it is rarely possible for parties simply to select any court that they want to resolve their dispute. Depending on the rules of that particular court, there usually has to be a connection between the court and the parties or the dispute in order for the court to accept jurisdiction. This is not true for arbitration. There is often no requirement that the chosen seat of arbitration be in any way linked to one of the parties or the underlying transaction.

6.3 Changing the seat of arbitration

2.106 Once the seat of arbitration has been agreed or decided, as a general rule it can be changed only by agreement of all of the parties. If the arbitration has already begun, such an agreement would in practice need to be made in consultation with the arbitral tribunal itself.

2.107 The decision to change the seat of arbitration can be a complex one and should not be taken lightly. The arbitral tribunal and parties should take care to ensure that no unexpected legal consequences of a changed seat inadvertently occur. For example, a party may subsequently attempt to derail the newly seated arbitration by raising issues of *res judicata* or a similar principle. It might be argued that by moving to a new seat, a new and legally distinct arbitration has commenced. To avoid this sort of argument, measures could be taken by both the parties and the arbitral tribunal. The parties may enter into an agreement clearly indicating their intent to move the seat but otherwise to preserve their respective rights and positions. The arbitral tribunal might decide to close formally the first arbitration with an award that expressly preserves the status quo.

2.108 The question of whether parties had decided to change the seat of their arbitration arose in the Singaporean Court of Appeal decision of *PT Garuda Indonesia v Birgen Air*.[99] As was noted above, in this case one party argued that the seat of arbitration had been moved from Indonesia to Singapore. The court acknowledged that in theory the parties could make such an agreement but found in that particular instance that they had not.[100]

99 [2002] 1 SLR 393.
100 Ibid., at paras 23–95.

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> The place of arbitration is a matter to be agreed by the parties. Where they have so agreed, the place of arbitration does not change even though the tribunal may meet to hear witnesses or do any other things in relation to the arbitration at a location other than the place of arbitration. . . .
>
> Thus the place of arbitration does not change merely because the tribunal holds its hearing at a different place or places. It only changes where the parties so agree. . . .
>
> While the agreement to change the place of arbitration may be implied, it must be clear. This is in the interest of certainty.

2.109 Importantly, and as emphasised in the second paragraph quoted above, the fact that hearings were held in Singapore rather than Indonesia was not in and of itself sufficient evidence of an agreement to move the seat of arbitration.

2.110 If there is no party agreement to change the seat, it is nearly impossible to have it changed. In order to determine the mechanism for changing it, consideration would need to be given to how the seat was initially fixed. If initially fixed by an arbitral institution, such as ICC or SIAC, or by the arbitral tribunal itself, changing the seat may be possible by making a very well-reasoned request to that body.

2.111 However, if the seat of arbitration was initially agreed by the parties, attempting to change it would be very difficult should one party disagree. As Justice Allsop, then of the Australian Federal Court, observed: '[g]enerally speaking, a party, having bargained for a place of dispute resolution, should not have to go into its private reasons for agreeing to that place and for not wanting to litigate elsewhere'.[101]

2.112 Indeed the chosen seat could be considered a condition of the consent to arbitrate. A court order to change the seat would give rise to an argument that the arbitration proceedings were not conducted in accordance with the parties' agreement. Failing to follow the parties' agreement exposes a resulting arbitral award to attack. For example, Article 34(2) of the Model Law provides that an award can be set aside if 'the arbitral procedure was not in accordance with the agreement of the parties'. The same rule is found in Article V(1)(d) of the New York Convention, providing a ground on which to resist enforcement of an award.

2.113 The only circumstance in which an agreed seat of arbitration could be changed under protest of one party is when the agreement on the initial seat has become frustrated or impossible. A sufficient ground would appear to be that subsequent to the agreement on the seat of arbitration some legal or physical impediment had arisen which prevented the parties from seating their arbitration at the chosen location. For example, there could be a significant political or legal change in the chosen jurisdiction which makes arbitrating there unworkable or impossible. If the legal or physical impediment were strong enough, changing the seat should not invalidate the fundamental consent to arbitrate and thus invalidate the entire arbitration agreement. It may rather be considered that the parties, at

101 *Incitec Ltd v Alkimos Shipping* (2006) ALR 558, at p. 566.

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the time of agreeing on a certain seat, could not have contemplated the changed circumstances and that the fundamental agreement to arbitrate disputes prevails over the agreed seat.

2.114 Determining which courts would have jurisdiction to hear an application to change a previously agreed seat of arbitration is not straightforward. A court at the initial seat would appear the most competent. However, if the initially chosen seat were frustrated by some legal or physical impediment, it is likely that reference to its courts would be complicated if not also impossible. One would therefore have to try the courts of the proposed new seat.

2.115 We are not aware of any examples where a court has changed the seat of an arbitration. A former justice of the Supreme Court of New South Wales Court of Appeal in Australia, Andrew Rogers, has discussed a number of cases in which courts from around the world have refused applications to change the seats of arbitrations on alleged *forum non conveniens* bases. He states in relation to *M/s V/O Tractoroexport Moscow v M/s Tarapore and Co* ('*Tractoroexport*')[102] that 'India is the only country in which successful applications have been made to secure arbitral hearings away from the agreed forum'.[103] We are, with respect, unable to agree with his interpretation of *Tractoroexport*.

2.116 The factual circumstances of *Tractoroexport* demonstrate in part why we disagree. The contract involved an Indian and a Russian company. An arbitration agreement called for arbitration under the auspices of the Foreign Trade Arbitration Commission of the USSR Chamber of Commerce, Moscow. The Indian company commenced proceedings in the Madras High Court alleging breach of contract. Very soon after, the Russian company initiated arbitral proceedings in Moscow, entered an appearance under protest in the Madras High Court, and sought a stay of those proceedings on the basis of the arbitration agreement. The Indian company countered by seeking an injunction preventing the Russian company from continuing the arbitration in Moscow. Through each level of appeal the Indian company was successful. The stay of proceedings was refused and the Russian company was injuncted from proceeding with arbitration in Moscow.[104] On a majority decision of the Indian Supreme Court, the Russian company's appeal was finally dismissed.

2.117 That is where the judgment ends. The court did not compel the parties to arbitrate in India. Indeed the judgment appears simply to allow the Indian party to continue its breach of contract claim in the Indian courts.

2.118 Rogers refers to obiter dicta made by the majority to support his interpretation:[105]

102 AIR 1971 SC 1.
103 A Rogers, 'Forum Non-conveniens in Arbitration', (1988) *Arbitration International* 240, at p. 253.
104 The stay was refused on the basis that the arbitration proceedings had begun after the court proceedings. It involved a very narrow interpretation of the then Indian statute that enacted the New York Convention. That statute has since been repealed and the matter would be one for the Arbitration and Conciliation Act 1996. It is also curious that the court's ability to injunct the Russian company does not appear to have been addressed until the ultimate appeal before the Supreme Court.
105 As quoted in Rogers, op. cit. fn 103, at p. 253.

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> The current restrictions imposed by the Government of India on the availability of foreign exchange of which judicial notice can be taken will make it virtually impossible for the Indian Firm to take its witnesses to Moscow for examination before the Arbitral tribunal and to otherwise properly conduct the proceedings there. Thus, the proceedings before that Tribunal are likely to be in effect ex parte. The High Court was, therefore, right in exercising discretion in the matter of granting an interim injunction in favour of the Indian Firm.

2.119 Rogers notes that:[106]

> It seems harsh indeed that meeting the test of impossibility should be insufficient to avoid the forum selection clause on the basis of the principle of forum non conveniens.

2.120 However, the reality is that the Indian courts did not change the seat of arbitration: they merely refused to stay their own court proceedings. They refused the stay mainly because of an erroneous interpretation of Article II of the New York Convention, and not on what Rogers describes as *forum non conveniens* grounds.

2.121 We do not consider the Indian company's arguments to have been *forum non conveniens* related in any event. An argument that the agreed seat is no longer appropriate or possible affects the validity and enforceability of the agreement on that seat of arbitration. That is why we have suggested above that the only circumstance in which a seat of arbitration could be changed is where the agreement on the initial seat has become practically, physically or legally frustrated or impossible to perform.

7 The Model Law as *lex arbitri*

7.1 Asia-Pacific and the Model Law

2.122 We now turn to consider the Model Law and the role it has played in the Asia-Pacific. This discussion focuses principally on mandatory law issues, and relates to a general level. Other texts and journal articles can be consulted for individual country analysis.[107] Many Asian jurisdictions have separate laws dealing

106 Ibid., p. 254.

107 See, e.g.: Asia-Pacific generally – M Pryles (ed), *Dispute Resolution in Asia*, 3rd edn, Kluwer Law, 2006; PJ McConnaughay (ed), *International Commercial Arbitration In Asia*, JurisNet, 2004; D Jones, 'Recent Developments in International Commercial Arbitration', (2008) 11 *International Trade and Business Law Review* 83; Australia – Nottage and Garnett, op. cit. fn 28; China – Jingzhou Tao, *Arbitration Law and Practice in China*, 2nd edn, Kluwer Law, 2008; JA Cohen, DR Fung, N Kaplan, P Malanczuk and SH Wang, *Arbitration in China: A Practical Guide*, Sweet & Maxwell Asia, 2004; Hong Kong – MJ Moser and Teresa YW Cheng, *Hong Kong Arbitration: A User's Guide*, Kluwer Law International, 2004; K Sanger, B Segorbe and J Niu, 'Arbitration in Greater China: Hong Kong, Macau and Taiwan', (2007) 24(6) *Journal of International Arbitration* 651; India – Nair, op. cit. fn 77; Japan – T Nakamura 'Arbitration' in L Nottage (ed), *Japan Business Law Guide*, CCH, 2009; Malaysia – S Rajoo and WSW Davidson, *The Arbitration Act 2005: UNCITRAL Model Law as applied in Malaysia*, Sweet & Maxwell Asia, 2007; New Zealand – T Kennedy-Grant 'The New Zealand Experience of the UNCITRAL Model Law: A Review of the Position as at 31 December 2007', (2008) 4(1) *Asian International Arbitration Journal* 1; Vietnam – Hop X Dang, 'Towards a Stronger Arbitration Regime for Vietnam', (2007) 3(1) *Asian International Arbitration Journal* 80.

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with international arbitration,[108] or arbitration in general with special provisions for international arbitration.[109] These statutes mainly regulate issues that include:

(i) questions concerning the formal validity of an arbitration agreement;
(ii) basic, default structure concerning the nomination and removal of arbitrators;
(iii) fundamental (often mandatory) procedural rules, such as the requirements of arbitrator independence, natural justice and procedural fairness;
(iv) formal and substantive requirements for arbitral awards;
(v) the mode of recourse against arbitral awards; and
(vi) the recognition and enforcement of arbitration agreements and arbitral awards.

This is by no means an exhaustive list and it is important that each country be considered individually.

2.123 Globalisation, increased international trade and the substantial growth of international arbitration have led to numerous jurisdictions adopting international arbitration laws. This in turn has led to international scrutiny and discussion of those laws and increasing uniformity among arbitration laws. This process has been greatly assisted by the Model Law. As noted in Chapter 1, the Model Law text has no independent legal status whatsoever.[110] It is simply a suggested model of an international arbitration law recommended by UNCITRAL. Any jurisdiction can adopt the Model Law partially or entirely and with any modifications it chooses.

2.124 The Model Law was prepared in 1985 and covers broadly the elements listed above as typical to arbitration laws. At the time of writing, it had been used as a basis for the arbitration laws of about 60 jurisdictions around the world. It is particularly prominent in the Asia-Pacific. Within this region most jurisdictions have based their legislation on the Model Law.[111]

2.125 UNCITRAL revised the Model Law in 2006. The revisions do not affect in any way the laws in force in the jurisdictions that have already adopted the 1985 text, or any part of it. At the time of writing only Australia, (Florida, USA), Ireland, Mauritius, New Zealand, Peru, Rwanda, Singapore and Slovenia have adopted all or some of the 2006 amendments. Hong Kong is understood to be in the process of passing legislative amendments.[112]

108 For example Australia, Hong Kong (although it is expected consolidation into a single system will occur in 2010), Singapore and Pakistan.
109 Brunei, China, India, Indonesia, Japan, Korea, the Philippines, Malaysia and New Zealand. Sri Lanka has one Act which makes very little distinction between domestic and international arbitration.
110 See the discussion in Chapter 1, Section 2.3.5.
111 A list of countries whose arbitration laws are based on the Model Law is provided at Appendix 3.
112 The arbitration law reforms currently before the Hong Kong Legislative Council, if adopted, will mean that both domestic and international arbitration will be governed by a single system.

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7.2 Mandatory provisions of the Model Law (1985 text)

2.126 The principle of party autonomy in international arbitration dictates that parties should be free to agree on the procedure of their arbitrations. However, like all laws the Model Law contains mandatory provisions. Mandatory provisions of arbitral procedural law apply irrespective of party choice when an arbitration is seated in a particular jurisdiction.

2.127 Despite early proposals to do so the Model Law does not contain a list of mandatory provisions.[113] The UNCITRAL Working Group that formulated the Model Law reported that the group considered it 'desirable to express the non-mandatory character in all provisions of the final text which were intended to be non-mandatory'.[114] By implication therefore one could assume that unless an article of the Model Law contains the phrase 'unless otherwise agreed by the parties', or something similar, then the article will be mandatory. However, as explained in the quote from Holtzmann and Neuhaus below, this would be a dangerous assumption, and making a determination on that basis alone would be unwise.

2.128 The issue is certainly difficult, as can be evidenced by the significant deliberations of the UNCITRAL Working Group on this topic alone. In their commentary on the development of the Model Law, Holtzmann and Neuhaus say of mandatory provisions:[115]

> The proposal for an Article listing such mandatory provisions was initially made during the Working Group's second session on the Model Law[116] and was subsequently adopted by the Group.[117] The Secretariat then raised some doubts as to the wisdom of such an Article, on the ground that such a provision was not needed and was subject to drafting difficulties.[118] It noted that the great majority of Articles that were intended to be nonmandatory had been drafted so as to indicate their nonmandotry [sic] nature, and suggested that words such as 'unless otherwise agreed by the parties' be added to the few remaining articles that were thought to be nonmandatory.[119] The Working Group adopted this approach, but with a significant caveat: it stated in its Report that '[i]t was understood' that the decision to express the nonmandatory character of those provisions 'did not mean that all those provisions of the model law which did not express their non-mandatory character were necessarily of a mandatory nature.'[120] The proposal for an Article listing the mandatory Articles of the Law was not revived during the Commission's session.

113 In the report of the working group on its seventh session, it is noted that the working group agreed that an article listing mandatory provisions should not be included, despite its appearance in earlier drafts, UN Doc A/CN 9/246–6 (March 1984) at para 176.
114 UN Doc A/CN 9/246–6 (March 1984) at para 177.
115 H Holtzmann and J Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer, 1989, p. 1120, (original footnotes included).
116 See Second Working Group Report, A/CN 9/232, paras 77, 181, p. 1150 infra. (Original footnote.)
117 Fourth Working Group Report, A/CN.9/245, para 175, p. 1151 infra. (Original footnote.)
118 See Fourth Secretariat Note, A/CN.9/WG.II/WP.50, para 9, pp. 1151–52 infra. One example of the drafting difficulties was that a number of the provisions of the Law granted a freedom to the parties, accompanied by supplementary rules to apply in the absence of agreement. Here, the Secretariat said, 'the question of mandatory nature seems to be a philosophical one and . . . redundant'. Ibid. (Original footnote.)
119 Ibid. (Original footnote.)
120 Fifth Working Group Report, A/CN.9/246, para 177, pp. 1152–53 infra. At the same time, the Working Group suggested that the Commission might wish to express the nonmandatory character of other provisions,

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2.129 Perhaps the best test as to whether a Model Law provision is mandatory is to ask whether to alter it would in some way alter a fundamental and innate quality of international arbitration. This test is appropriate only for the Model Law and would not be suited to determine mandatory procedural laws imposed by the various applicable laws at the seat of an arbitration. In a domestic environment, mandatory laws usually deal with matters of public policy – an area the Model Law drafters intentionally avoided.[121]

2.130 A benefit of the proposed test is that it allows for degrees of autonomy or varying flexibility within the actual articles of the Model Law. It may be possible to vary some otherwise mandatory articles in such a way as to preserve the fundamental or innate nature of arbitration. An example of this can be found in Article 11(4) and is indeed contemplated by that article. The mandatory feature of the provision is a process designed to prevent one party from stalling or frustrating the arbitration. The article provides for recourse to the courts if necessary but also acknowledges that the parties may have determined an alternative procedure that achieves the same result. Therefore, even though the parties are free to alter the appointment process, they cannot do so to the extent that the resulting change enables a party to block all means to appoint an arbitrator. Such a change would bestow upon a recalcitrant party the power to stall the arbitration completely.

2.131 On the basis of the proposed test, we examine a number of specific articles in the Model Law to determine whether they were intended to be mandatory. Of course circumstances or modifications of the Model Law in specific jurisdictions mean that this discussion may not apply in the same way to all jurisdictions:

Article 1 Scope of application

(1) This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States.
(2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.
(3) An arbitration is international if:
  (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
  (b) one of the following places is situated outside the State in which the parties have their places of business:
    (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
    (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

since it was 'the prevailing view, adopted by the Working Group ... that it was desirable to express the non-mandatory character in all provisions of the final text which were intended to be nonmandatory'. Ibid. (Original footnote.)

121 Although Articles 34 and 36 of the Model Law refer to public policy, they do not make any attempt to characterise what constitutes matters of public policy.

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(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:
(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

2.132 This article is not typically included in a list of mandatory provisions. However it must, at least in part, be mandatory. Article 1 states when the Model Law applies. Although parties may subsequently derogate from particular articles, they cannot prevent the application of the Model Law under Article 1 as to do so would create a paradox. If the Model Law itself gives the parties the power to amend non-mandatory terms, logically it must apply before any amendment is legally possible.

2.133 As a matter of practice this is a largely unnecessary theoretical question, but it does point to a real conflict of laws issue. It is important always to identify properly the actual source of a power to act. Commonly in arbitration the power to amend – or even exclude altogether – the Model Law is found in the legislation that introduces it. As the source of the power is the Act and not the Model Law itself the paradox does not arise.

Article 7 Definition and form of arbitration agreement (1985 version)

1. 'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
2. The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

2.134 In the 1985 version of the Model Law Article 7 provides a definition and stipulates form requirements for an arbitration agreement. Although Article 7(2) is couched in the language of a mandatory term, it fails the test proposed above, and consequently is not strictly mandatory. This view is supported by the fact that in the 2006 revision of the Model Law, Article 7 Option II does not refer to writing at all. Whether or not the agreement is in writing has no impact on the

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very nature of arbitration, that is to say that the arbitral process will not be fundamentally changed if it arises out of an oral agreement. However, it is included in this list because, as a matter of practice, it would generally be advantageous for an arbitration agreement to be in writing or evidenced in writing. While some jurisdictions permit oral arbitration agreements,[122] the New York Convention requires an arbitration agreement to be in writing in order to have the award enforced.

Article 8(1) Arbitration agreement and substantive claim before court

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

Article 8(1) of the Model Law imposes a mandatory stay of court proceedings where a valid arbitration agreement exists. Other commentators have suggested that this is a mandatory article.[123] Applying the test proposed above, an innate aspect of arbitration is that arbitration agreements must be enforceable. A party should not be permitted to renege on its initial promise to arbitrate. It is of course different if both parties subsequently agree not to arbitrate their dispute, in which case neither Article 8 nor the entire Model Law apply at all. 2.135

Articles 11(4) and (5) Appointment of arbitrators

4. Where, under an appointment procedure agreed upon by the parties,
   (a) a party fails to act as required under such procedure, or
   (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
   (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

   any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
5. A decision on a matter entrusted by paragraph (3) and (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

122 For example, New Zealand Arbitration Act 2006, Article 7, Schedule 1.
123 See, e.g. A Broches, 'UNCITRAL – Commentary On The Model Law' in J Paulsson (ed), *International Handbook on Commercial Arbitration*, Suppl 11, Kluwer, 1990. It is possible innocently to misinterpret Broches on this point. At p. 92 he states 'I submit that the only mandatory provisions concerning the conduct of the proceedings, other than Article 18, are Article 24(2) and (3) and Article 27 (g.v.)'. In this statement he is only referring to those articles concerning the conduct of the proceedings and not to the Model Law as a whole.

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2.136 As noted above[124] Article 11(4) is mandatory in so far as its purpose is to ensure that the arbitration proceeds, and cannot be frustrated by an unwilling participant. Broches confirms that, notwithstanding the wording of the last sentence of Article 11(4), parties cannot contract out of the court specified by Article 6 as an appointing authority of last resort.[125]

2.137 Article 11(5) refers to the mandatory requirements that arbitrators be impartial and independent.[126] These are fundamental to the prospect of the parties receiving equal treatment and a fair hearing – both essential characteristics of arbitration. However, where parties have agreed on institutional arbitration rules which contain a test for securing an arbitrator's independence or impartiality, any domestic court considering a challenge should take into consideration, when applying its own rules on impartiality and independence, that the parties have expressed a view on the appropriate test.

Article 12(1) Grounds for challenge

1. When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

2.138 Article 12(1) is not mandatory, however it is identified in this list because it might at first sight be considered such.[127] The problem lies in the different subject obliged to act under that article – the arbitrator as opposed to the parties.

2.139 The article places an obligation of disclosure on the arbitrator and not on either of the parties to the arbitration agreement. If the parties agreed that the arbitrator need not make any disclosures, this would not relieve the arbitrator of the obligation, but may prevent the parties from later objecting to that failure to disclose. Thus in a practical sense the effect of the article can be avoided. This should not be understood, however, as a waiver of the right to object to an arbitrator who is not independent. It is very unlikely that parties would be permitted to waive that right in advance of receiving the relevant information.[128] If a party came into information regarding a lack of independence, by a means other than an arbitrator disclosure, then a challenge could be brought.

124 See para 2.130.
125 Broches op. cit. fn 123, at p. 56.
126 However an interesting view of the independence of an arbitrator requirement was taken in the Supreme Court of India decision *Ace Pipeline Contracts Private Ltd v Bharat Petroleum Corporation Ltd*, (2007) 5 SCC 304. In that case, an arbitration clause which named a representative of one party as the arbitrator was upheld. This case is explored further in Chapter 6, Section 2.2.
127 Broches takes the view that this is a mandatory provision, see Broches, op. cit. fn 123, at p. 59.
128 However, see the Supreme Court of India decision *Ace Pipeline Contracts Private Ltd v Bharat Petroleum Corporation Ltd*, (2007) 5 SCC 304 discussed in Chapter 6, Section 2.2.

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Article 18 Equal treatment of parties

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

2.140 Article 18 can be described as a true cornerstone of arbitration. As an illustration of the importance of this provision, in the New Zealand decision of *Methanex Motunui Ltd v Spellman*,[129] the Court of Appeal in Wellington found that a clause purporting to exclude a right of review for a breach of natural justice would be an impermissible attempt to derogate from Article 18.

Article 24(2) and (3) Hearings and written proceedings

> 2. The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.
> 3. All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

2.141 Article 24(2) relates to giving the parties sufficient notice of hearings and meetings. It is simply an extension of the principle embodied in Article 18. Without due notice a party will not be in a position to present its case properly.

2.142 It has been suggested by Aron Broches[130] that Article 24(3) is also mandatory. The basic obligation in this article is that '[a]ll statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party'.

Article 34 Application for setting aside as exclusive recourse against arbitral award

> 1. Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
> 2. An arbitral award may be set aside by the court specified in article 6 only if:
> (a) the party making the application furnishes proof that:
> (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those

129 [2004] 3 NZLR 454.
130 Broches, op. cit. fn 123, at p. 92.

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not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

3. An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received that award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.
4. The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

2.143 Article 34 of the Model Law deals with applications to set aside awards. Lew, Mistelis and Kröll state that '[i]n principle, court control over an arbitration award in challenge proceedings can never be excluded'.[131] Some jurisdictions do, however, allow parties to limit the power of courts to set aside awards.[132] Those exceptions aside, Article 34 can be considered mandatory. Additionally, it is uncertain whether parties would be permitted to add further grounds upon which courts could review or set aside an award, such as error of law. In a 2008 US Supreme Court decision *Hall Street Associates LLC v Mattel Inc*,[133] it was held that parties could not add grounds to those stated in the Federal Arbitration Act. How countries in this region would react when faced with the same issue is not clear, especially as the domestic arbitration laws of several jurisdictions (which international parties can opt into) generally permit expanded grounds of judicial review and/or appeals.

Article 35 Recognition and enforcement

1. An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.
2. The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the

131 Lew, Mistelis and Kröll, op. cit. fn 38, at para 25–67.
132 For example, Article 1717(4) of the Belgium Judicial Code. See also Article 192 of the Swiss Statute on Private International Law and the decision of the Swiss Federal Tribunal (ATF 133 III 235, 240/241/242).
133 128 S Ct 1396, 2008 (US Supreme Court).

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award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.

2.144 Article 35 sets out one of the fundamental tenets of arbitration, its binding and enforceable nature. As discussed in the context of Article 34, parties are not able to undermine this principle by permitting the courts to review awards on grounds other than those provided by the law. It is therefore mandatory.