As way of illustration, the ICC framed the most popular places of arbitration between 2006 and 2013 in a chart.

****

**Question 1 : Comment on whether the parties have agreed on the place of arbitration.**

*“All disputes relating to this contract shall be resolved by the ICC Court in Paris under its Rules of Arbitration.”*

*“All disputes arising out of or relating to this contract shall be resolved by arbitration under the ICC Rules of Arbitration utilizing the hearing facilities in Times Square, New York.”*

*“Any disputes arising from the interpretation of this contract shall be resolved by ICC arbitration in Paris. Language: English. Number of arbitrators: 3. Venue: to be agreed by the parties or, failing agreement, London.”*

*Guideline 4: The parties should select the place of arbitration. This selection should be based on both practical and juridical considerations.*

*Comments:*

1. The selection of the place (or ‘seat’) of arbitration involves obvious practical considerations: neutrality, availability of hearing facilities, proximity to the witnesses and evidence, the parties’ familiarity with the language and culture, willingness of qualified arbitrators to participate in proceedings in that place. The place of arbitration may also influence the profile of the arbitrators, especially if not appointed by the parties. Convenience should not be the decisive factor, however, as under most rules the tribunal is free to meet and hold hearings in places other than the designated place of arbitration.
2. The place of arbitration is the juridical home of the arbitration. **Close attention must be paid to the legal regime of the chosen place of arbitration because this choice has important legal consequences under most national arbitration legislations as well as under some arbitration rules.** While the place of arbitration does not determine the law governing the contract and the merits (see paragraphs 42-46 below), it does determine the law (arbitration law or *lex arbitri*) that governs certain procedural aspects of the arbitration, eg, the powers of arbitrators and the judicial oversight of the arbitral process. Moreover, the courts at the place of arbitration can be called upon to provide assistance (eg, by appointing or replacing arbitrators, by ordering provisional and conservatory measures, or by assisting with the taking of evidence), and may also interfere with the conduct of the arbitration (eg, by ordering a stay of the arbitral proceedings). Further, these courts have jurisdiction to hear challenges against the award at the end of the arbitration; awards set aside at the place of arbitration may not be enforceable elsewhere. Even if the award is not set aside, the place of arbitration may affect the enforceability of the award under applicable international treaties.
3. **As a general rule, the parties should set the place of arbitration in a jurisdiction (i) that is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention), (ii) whose law is supportive of arbitration and permits arbitration of the subject matter of the contract, and (iii) whose courts have a track record of issuing unbiased decisions that are supportive of the arbitral process.**
4. An arbitration clause that fails to specify the place of arbitration will be effective, though undesirable. The arbitral institution, if there is one, or the arbitrators, will choose for the parties **if they cannot agree** on a place of arbitration after a dispute has arisen. (In *ad hoc* arbitration, however, if difficulties arise with the appointment of the arbitrators and no place of arbitration is selected, the parties may be unable to proceed with the arbitration unless courts in some country are willing to assist.) The parties should not leave such a critical decision to others.
5. **The parties should specify in their arbitration clause the ‘place of arbitration’, rather than the place of the ‘hearing’. By designating only the place of the hearing, the parties leave it uncertain whether they have designated the ‘place of arbitration’ for the purposes of applicable laws and treaties. Moreover, by designating the place of the hearing in the arbitration clause, the parties deprive the arbitrators of desired flexibility to hold hearings in other places, as may be convenient.**
6. *Recommended Clause:*  The place of arbitration shall be [city, country]
7. The place of arbitration is one of the most important matters to be addressed and specified in an arbitration clause in an international transaction. This determines *“*the rules of the game*”.* There are two concepts involved here. This is not only a geographical issue but also raises a critical legal issue with serious consequences for any future arbitration. First, it should be appreciated by the parties that in choosing a geographical location as the venue for the arbitration then that will carry with it the applicability of the laws of that jurisdiction to the extent that any mandatory laws will always apply to arbitrations conducted at that place and it may include laws relating to such critical matters as the removal of arbitrators.
8. Apart from the geographical considerations, the question of the legal situs of the arbitration needs to be considered. Where is the international arbitration taking place as a matter of legal theory? An international arbitration may take place physically in more than one location or jurisdiction at the same time. An international arbitration frequently takes place by videoconferencing involving people in a range of different jurisdictions. It is necessary in such circumstances for the parties to choose which arbitration law will regulate the procedural aspects of the arbitration as the common law “*does not recognize the concept of arbitral procedures floating in the transnational firmament unconnected with any municipal system of law.”*

This choice of the place of the arbitration is generally expressed as the choice of the “seat” of the arbitration. It is the parties’ agreement of the juridical home of the arbitration. The choice of the seat will have a major effect on any enforcement as the award is generally regarded as being made at the seat of the arbitration and the courts of that place as having primary supervisory responsibility for the arbitration and any award. The law of the seat selected by the parties may be a different law to that chosen by the parties as the law governing the merits of their dispute. The seat identifies *“the country whose job it is to administer, control or decide what control there is to be over an arbitration.”* There is an implied term in the parties agreement of the seat of the arbitration, that the courts of that place have exclusive supervisory jurisdiction. Accordingly an attempt to invoke the courts of another jurisdiction to set aside the award is in breach of the parties’ contractual rights and may be restrained by an anti-suit injunction.

1. Thus the choice of the seat *“is akin to an exclusive jurisdiction clause [n]ot only is there agreement to the arbitration itself but also to the courts of the seat having supervisory jurisdiction over [the] arbitration”* Any challenge to the award is likely to be made under the laws of the seat except where the challenge arises on an application for enforcement of the award under the New York Convention. *“It is the curial law which governs the validity of the award and challenges to it.”*
2. Apart from the general amenity and neutrality of a prospective venue of the arbitration, when selecting the location in which the arbitration is to take place, it is necessary to consider whether or not that place:
   1. (i)  has a modern, national legislation dealing with arbitration;
   2. (ii)  provides for minimal interference by domestic laws and the courts;
   3. (iii)  recognises a broad interpretation of what disputes can be arbitrated;
   4. (iv)  recognises the validity of the arbitration clause52;
   5. (v)  respects the parties’ autonomy to allow the parties the flexibility to vary  the arbitral process as the need arises. ;
   6. (vi)  allows the parties the freedom to use lawyers of choice who may not be admitted in that jurisdiction, eg s 29(2) of the International Arbitration Act 1974 confers this freedom; it states that a person *“while acting on behalf of a party to an arbitral proceeding ..., including appearing before an arbitral tribunal, shall not thereby be taken to have breached any law regulating admission to, or the practice of, the profession of the law within the legal jurisdiction in which the arbitral proceedings are conducted”;*
   7. (vii)  provides the parties with assistance from the local courts in aid of the arbitration e.g. on substantive matters such as granting and assisting with interim measures, and on procedural matters such as compelling the attendance of third persons to attend as witnesses and produce documents,53
   8. (viii)  ensures as far as is possible the enforceability of the award outside the country of origin.54

43. Once the seat has been chosen, additional care should be taken to express this choice precisely where the place or seat is in a country which does not have a unitary system of law such as a federation. In such a case it requires the specification of a particular city such as Melbourne or Sydney and not the federal state. If the parties were to choose Australia as the seat of the arbitration then the law of the seat would be uncertain as the law will depend on which state within Australia was intended by the parties.

* Hearings and meetings may be held at any convenient location (see ICC Art 18(2); ML Art 20(2)):

“*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*”.

* In practice, hearings and meetings are usually held at the seat.
* *Angela Raguz v Rebecca Sullivan*. 2000 Sydney Olympic Games. Seat Geneva, hearings in Sydney. Court of Appeal:

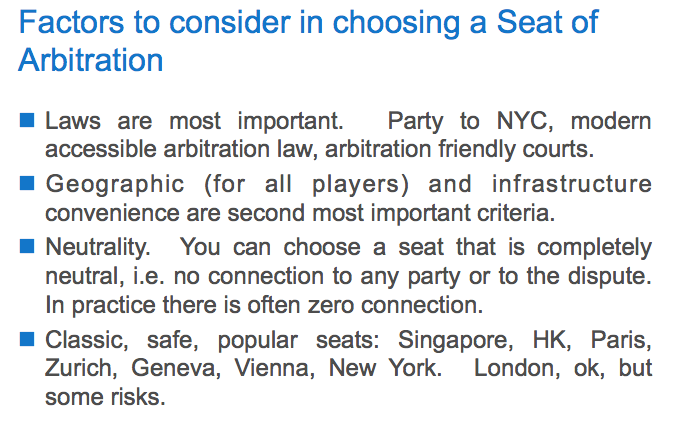
“*Commentators have pointed out that Article 20 [of the Model Law] makes sense when it is understood that there is a vital distinction between the so-called place (or seat) of arbitration and the place or places where the arbitrators may hold hearings, consultations… The common law recognises this distinction…*

* Holding the hearings elsewhere cannot change the legal seat.
* Singapore Court of Appeal in *PT Garuda Indonesia v Birgen Air.* Court of Appeal observed3:

“*It should be apparent from art 20* [Model Law] *that 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.*”

3 PT Garuda Indonesia v Birgen Air [2002] 1 SLR 393, at 399. See also the discussion of changing the seat at Section 6.3.

* By agreement. Any words indicating choice. Eg ‘the seat of arbitration will be X’.
* Other language, even vague, will usually suffice unless there is conflicting locations in the clause. Careful not to confuse with the location or venue for hearings
* Failing agreement, default mechanism under rules or procedural law. Eg ICC Art 18(1); ML Art 20.
* ICC: seats of arbitration 2013 - literally all over the world:
  + Places of arbitration 2013: 63 countries, 104 different cities
    - European cities: 79 % (Paris 118, London 70, Geneva 56)
    - Asian cities: 11,84% (Hong Kong 14)
  + 11.5% of places fixed by the Court and the rest (88.5%) by the parties



**9.1.4 Certainty of the seat if designated**

**Question 2**: A Canadian construction company asks your advice on whether to choose Modelania as the place of arbitration for a deal it is negotiating with a Turkish governmental authority specifically set up for the project in question. The deal involves the Canadian company building a state run cement factory in Southern Turkey.

The Canadian company asks you (i) whether Modelville is a suitable place of arbitration for this deal, (ii) whether it is necessary to choose an arbitral institution for an arbitration seated in Modelville and the advantages/disadvantages of doing so, (iii) which arbitration institution(s) can be chosen for an arbitration seated in Modelville, indicating which one you recommend and why, (iv) whether it is possible to opt out of all recourse against the award in Modelania and, if so/if not, what recourse there will be against the award, (v) what would be a suitable alternative seat of arbitration for this deal and what advantages might such place have over Modelville, (vi) any tips you have for what the arbitration clause for this specific deal might include, and (vii) any other comments or advice you have arising out of the facts provided.

1. **whether Modelville is a suitable place of arbitration for this deal**

* IBA Guidelines – Guideline 4
  + As a general rule, the parties should set the place of arbitration in a jurisdiction

1. that is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention),
2. whose law is supportive of arbitration and permits arbitration of the subject matter of the contract, and
3. whose courts have a track record of issuing unbiased decisions that are supportive of the arbitral process.

* First criteria: we don’t know whether or not Modelania is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards
  + <http://www.uncitral.org/uncitral/fr/uncitral_texts/arbitration/NYConvention_status.html> : no mention so probably not
* Second : no information as with regards to whether Modelania is supportive or not of arbitration and permits arbitration of the subject matter of the contract
  + Arbitration Act 2000
  + updated so to include the 2006 amendments
    - in this regards adoption of the most favorable close to arbitration : Article 7 option II
  + in 2000 as well Modelania established its own arbitration administering institution called the Modelania Association For International Arbitration : UNCITRAL rules with some amendments

However, one could argue as well that Modelania has adopted arbitration regulation quite lately

* Third : no information regarding Modelania : we cannot answer to the question as to whether Modelania’s courts issue unbiased decisions that are supportive of the arbitral process
  + We just know that local lawyers claim that there are about 5-8 international arbitrations setaed there per year : very few
* Discorage from choosing Modelania

**6.2 Factorstoconsiderinchoosingaseatofarbitration**

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.

**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?

**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.

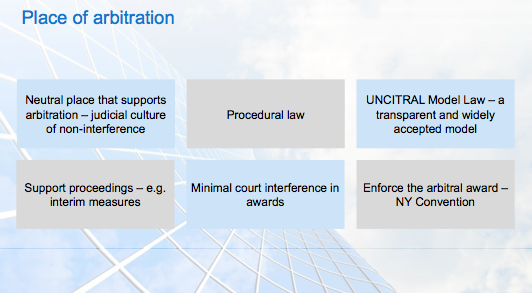
**The third consideration concerns the neutrality of the seat.**

* 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.

HOLMES

1. Thus the choice of the seat *“is akin to an exclusive jurisdiction clause [n]ot only is there agreement to the arbitration itself but also to the courts of the seat having supervisory jurisdiction over [the] arbitration”* Any challenge to the award is likely to be made under the laws of the seat except where the challenge arises on an application for enforcement of the award under the New York Convention. *“It is the curial law which governs the validity of the award and challenges to it.”*
2. Apart from the general amenity and neutrality of a prospective venue of the arbitration, when selecting the location in which the arbitration is to take place, it is necessary to consider whether or not that place:
   1. (i)  has a modern, national legislation dealing with arbitration;
   2. (ii)  provides for minimal interference by domestic laws and the courts;
   3. (iii)  recognises a broad interpretation of what disputes can be arbitrated;
   4. (iv)  recognises the validity of the arbitration clause52;
   5. (v)  respects the parties’ autonomy to allow the parties the flexibility to vary  the arbitral process as the need arises. ;
   6. (vi)  allows the parties the freedom to use lawyers of choice who may not be admitted in that jurisdiction, eg s 29(2) of the International Arbitration Act 1974 confers this freedom; it states that a person *“while acting on behalf of a party to an arbitral proceeding ..., including appearing before an arbitral tribunal, shall not thereby be taken to have breached any law regulating admission to, or the practice of, the profession of the law within the legal jurisdiction in which the arbitral proceedings are conducted”;*
   7. (vii)  provides the parties with assistance from the local courts in aid of the arbitration e.g. on substantive matters such as granting and assisting with interim measures, and on procedural matters such as compelling the attendance of third persons to attend as witnesses and produce documents,53
   8. (viii)  ensures as far as is possible the enforceability of the award outside the country of origin.54

43. Once the seat has been chosen, additional care should be taken to express this choice precisely where the place or seat is in a country which does not have a unitary system of law such as a federation.



**(ii) whether it is necessary to choose an arbitral institution for an arbitration seated in Modelville and the advantages/disadvantages of doing so,**

1. **Guideline 1: The parties should decide between institutional and *ad hoc* arbitration.**

*Guideline 1: The parties should decide between institutional and ad hoc arbitration.*

*Comments:*

1. The first choice facing parties drafting an arbitration clause is whether to opt for institutional or *ad hoc* arbitration.
2. In institutional (or administered) arbitration, an arbitral institution provides assistance in running the arbitral proceedings in exchange for a fee. The institution can assist with practical matters such as organizing hearings and handling communications with and payments to the arbitrators. The institution can also provide services such as appointing an arbitrator if a party defaults, deciding a challenge against an arbitrator and scrutinizing the award. The institution does not decide the merits of the parties’ dispute, however. This is left entirely to the arbitrators.
3. Institutional arbitration may be beneficial for parties with little experience in international arbitration. The institution may contribute significant procedural ‘know how’ that helps the arbitration run effectively, and may even be able to assist when the parties have failed to anticipate something when drafting their arbitration clause. The services provided by an arbitral institution are often worth the relatively low administrative fee charged.
4. If parties choose administered arbitration, they should seek a reputable institution, usually one with an established track record of administering international cases. The major arbitral institutions can administer arbitrations around the world, and the arbitral proceedings do not need to take place in the city where the institution is headquartered.
5. In *ad hoc* (or non-administered) arbitration, the burden of running the arbitral proceedings falls entirely on the parties and, once they have been appointed, the arbitrators. As explained below (Guideline 2), the parties can facilitate their task by selecting a set of arbitration rules designed for use in *ad hoc* arbitration. Although no arbitral institution is involved in running the arbitral proceedings, as explained below (Guideline 6), there still is a need to designate a neutral third party (known as an ‘appointing authority’) to select arbitrators and deal with possible vacancies if the parties cannot agree.

* choice between ad hoc or institutional: not necessary however
  + if choice of an institutional arbitration : need to be careful regarding the choice of the institution
  + if choice of an ad hoc arbitration : adoption of rules such as the UNCITRAL Arbitration rules and choice of a neutral authority (Guideline 6)

**Powerpoint :**

International Arbitral Institutions

􏰂Do not need one (except mainland China)

􏰂Matter of choice whether and which

􏰂Great variation in size, approach, quality

􏰂Be very cautious about choosing smaller ones

􏰂Larger ones (especially ICC) are also important industry players organising publications, conferences and training, producing notes and guidelines etc.

As Thomas Carbonneau explains:

“[Ad hoc arbitration*] places a substantial burden upon the parties to cooperate in the circumstances of dispute. The expectation of cooperation is likely to be unrealistic. Moreover, arbitral institutions have a good professional track record and have significant experience in the administrative aspects of arbitrations. Unless the parties themselves have substantial expertise in the arbitration process, institutional arbitration becomes a virtual necessity. Also, an award rendered under the auspices of a recognized arbitral institution may have a greater likelihood of enforcement for reasons of institutional reputation. The real question involves choosing among the arbitral institutions.*”

International Arbitral Institutions

􏰂PWC/ QM study mentioned earlier found:

􏰃86% of awards that were rendered over the last ten years were under the rules of an arbitration institution, while 14% were under ad hoc arbitrations’.

􏰃ICC is the preferred institution, with 45% of participating corporations preferring the ICC. This was followed by the AAA-ICDR (16%) and the LCIA (11%)

􏰃In the 2010 survey, the preference for ICC increased to 50% of all participants

Services offered by institutions at the higher supervised end may include:

􏰃  checking that there is a prima facie arbitration agreement (certain institutions only)

􏰃  (appointing arbitrators if a party fails to appoint one, or if the two party-appointed arbitrators(or the parties themselves) cannot agree on the chair-person (or sole arbitrator)

􏰃  removing and replacing an arbitrator who has become unable to complete his or her role for any reason

􏰃  deciding challenges as to the independence and/or impartiality of an arbitrator;

􏰃  keeping an up-to-date file on the arbitration proceedings

􏰃  scrutinising the arbitration award before it is finalised (certain  institutions only)

􏰃  managing the administrative and financial aspects of the arbitration.

**Texte Malcolm Holmes**

1. Those arguing in favour of institutional arbitration point to the procedures and practices embodied in the institution’s arbitration rules, which have been developed over time and have benefited from first hand experience accumulated over time. Nevertheless, the rules of the newer arbitral institutions such as ACICA have incorporated the lessons and practices from the more established institutions and reflect current best practice.
2. Arbitration institutions justifiably claim an advantage over ad hoc arbitration through the institutional support and administrative services, which are provided to the parties and the arbitrator. Some proudly refer to their practice of independent scrutinizing or checking the awards before they are made and issued to the parties. A more persuasive argument in support of institutional arbitration is unspoken advantage gained when it comes to enforcing the award from the enhanced integrity and imprimatur of an award which emanates from the processes of a well known arbitral institution as compared to an award emanating from an ad hoc arbitration process.

On the other hand, an ad hoc arbitration agreement ostensibly allows the parties to draft an arbitration clause which may be tailored to the meet the needs of the parties and their particular transaction. The difficulty with this however is that, as the needs of the parties sometimes only become manifest when the disputes subsequently arise, the drafting of an arbitration clause appears to require the benefit of hindsight.

15. The reality is that most arbitration clauses are somewhere in between an ad hoc agreement and an arbitral institution’s recommended clause. Even in the case of institutional arbitration, parties tend to vary or modify the template clause in an effort to customise the clause to meet their particular needs and circumstances.19 Although it may seem unnecessary, if an arbitration institution is involved, care should be taken to ensure that matters of detail are attended to such as ensuring that the institution exists and that the correct name of the arbitration institution mentioned in the clause is used.

**(iii) which arbitration institution(s) can be chosen for an arbitration seated in Modelville, indicating which one you recommend and why,,**

* MAFIA:
  + Applying the MAFIA Rules: UNCITRAL Arbitration rules
* ICC:
* ICSID:

If institutional arbitration is desired, the parties must choose a particular arbitral institution and refer to it in their arbitration clause. Parties ordinarily rely on one of a few established international arbitral institutions. This avoid the confusion and uncertainty that comes from inexperienced arbitral institutions or appointment and administrative efforts.

All leading international arbitral institutions are prepared to, and routinely do, administer arbitrations seated almost anywhere in the world, and not merely in the place where the institutions itself is located. There is therefore no need to select an arbitral institution headquarters in the parties’ desired arbitral seat.

The service rendered by professional arbitration institutions comes at a price, which is in addition to the fees and expenses of the arbitrators. Every arbitral institution has a fee schedule that specifies what that price is. The amounts charged by institutions for particular matter vary significantly, as does the basis for calculating such fees.

All leading arbitral institutions periodically revise their institutional arbitration rules.

* International Chamber of Commerce International Court of Arbitration

Established in Paris in 1923, the ICC remains the world’s leading international commercial arbitration institution and has less of a national character than any other leading arbitral institution

The ICC’s annual caseload exceeds XXX cases per year.

Most of these disputes are international disputes, involving very substantial sums.

The ICC has promulgated a set of ICC Rules of Arbitration (revised in 2012). Under the ICC Rules, the ICC (through the International Court of Arbitration (“ICC Court”)) is extensively involved in the administration of individual arbitrations. Among other things, the ICC Court and its Secretariat are responsible for service of the initial Request for Arbitration, fixing and receiving payment of advances on costs of the arbitration by the parties, confirming the parties’ nomination of arbitrators, appointing arbitrators if a Party defaults or if the parties are unable to agree upon a presiding arbitrator or sole arbitrator, considering challenges to the arbitrators including on the basis of lack of independence and impartiality, reviewing and approving the so called “Terms of Reference”, which define the issues and procedures for the arbitration, reviewing tribunal’s draft award for formal and other defects, and fixing the arbitrators’ compensation.

The ICC Court is an administrative body that acts in a supervisory and appointing capacity under the ICC Rules.

ICC arbitration can be and are seated almost anywhere in the world.

In XXX, ICC arbitration were conducted in XX different countries.

The ICC rules are broadly similar to the UNCITRAL Rules in providing a broad procedural framework for the arbitral proceedings.

As with most other institutional rules, only a procedural framework is provided, with the parties and arbitrators being accorded substantial freedom to adopt procedures tailored to particular disputes.

Unusually, the ICC Rules require both a Terms of Reference and procedural timetable to be adopted by the Tribunal at the outset of the proceedings and that an award be rendered within six months (absent extensions which are freely granted). Also unusually, the ICC Rules provide for the ICC Court to review draft awards before they are finalized and executed by the arbitrators.

The ICC administrative fees are based on the amount in dispute between the parties. With respect to arbitrators’ fees, the ICC Rules fix both a minimum and a maximum amount in dispute between the parties.? The ICC Rules require that the parties pay an advance on the costs of the arbitration calculated by the ICC Court. The advance in costs is equally divided between, the claimant and the respondent, although one party may pay the full amount in order to enable the arbitration to proceed if the other party defaults.

* London Court of International Arbitration

Second most popular European institution in the field of international commercial arbitration.

* American Arbitration Association and International Center for Dispute Resolution

The AAA is the leading US arbitral institution and reportedly handles one of the largest numbers of arbitral disputes in the world.

* ICSID:

The International Center for the Settlement of Investment Disputes is a specialized arbitration institution, established pursuant to the so-called ICSID Convention of 1965. The ICSID is designed to facilitate the settlement of investment disputes ie legal dispute[s] arising directly out of investment[s]

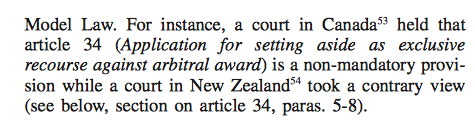
* MAFIA





**Parties’ autonomy—paragraphs *(d)* and *(e) Non-mandatory provisions—paragraph* (d)**

6. Party’s autonomy is an important principle of the Model Law, illustrated by the high number of provisions in the Model Law referring to the agreement of the par- ties.52 Autonomy of the parties in determining the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules accord- ing to their specific wishes and needs, unimpeded by tra- ditional and possibly conflicting domestic concepts, thus obviating the risk of frustration or surprise. Courts may have adopted differing approaches in the determination of the non-mandatory character of certain provisions of the



**(iv) whether it is possible to opt out of all recourse against the award in Modelania and, if so/if not, what recourse there will be against the award,**

*Chapter VII. Recourse against award . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .* 19

Article 34. Application for setting aside as exclusive recourse against arbitral award . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 19

CHAPTER VII. RECOURSE AGAINST AWARD

*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

1. (ii)  the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceed- ings or was otherwise unable to present his case; or
2. (iii)  the award deals with a dispute not contemplated by or not fall- ing 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 not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
3. (iv)  the composition of the arbitral tribunal or the arbitral proce- dure 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:

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

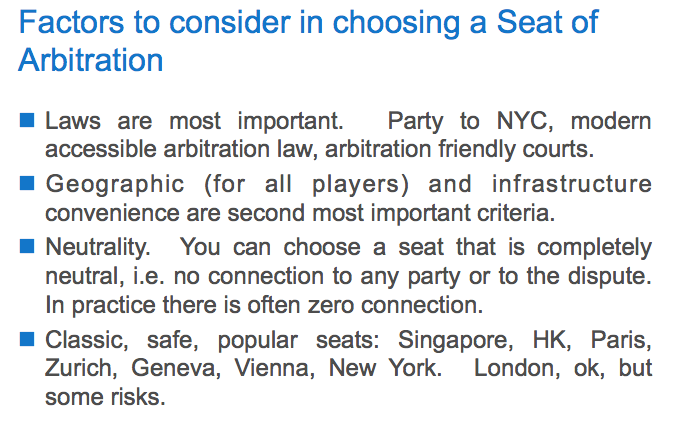
**Modelania:** “may agree that the award shall be subject to appeal in case there is a fundamental mistake in applying the law” => possible to agree on an appeal if wrongful application of the law

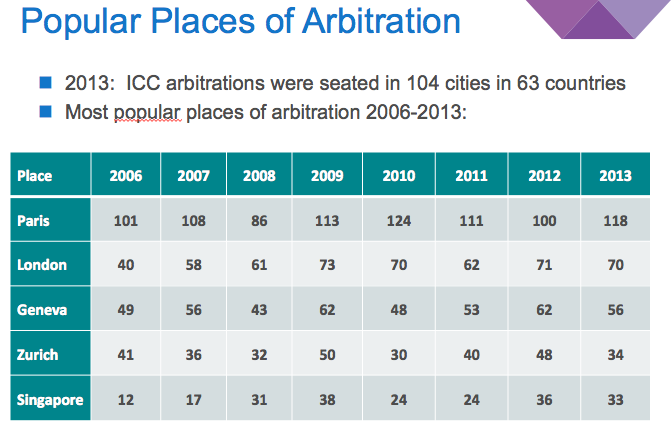
However, in the absence of agreement, the award shall be final

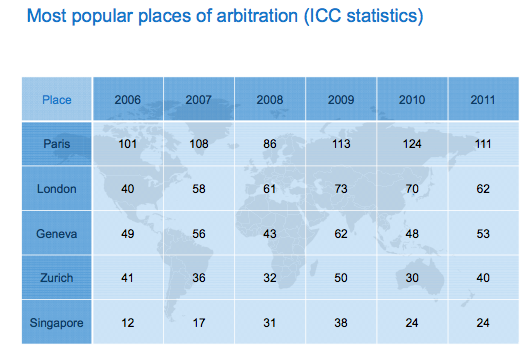
If opt out: procedure for setting aside the award as contained in Article 34 of the Model Law

**(v) what would be a suitable alternative seat of arbitration for this deal and what advantages might such place have over Modelville,**

Paris, Ldn, NY,…



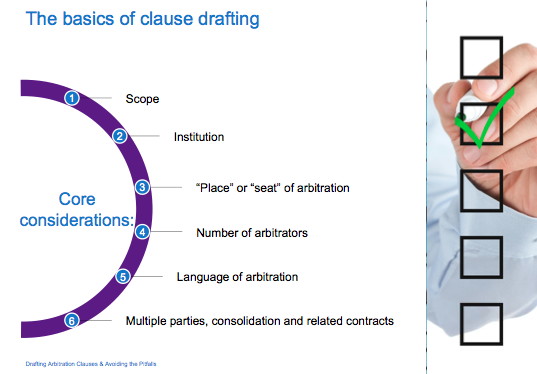
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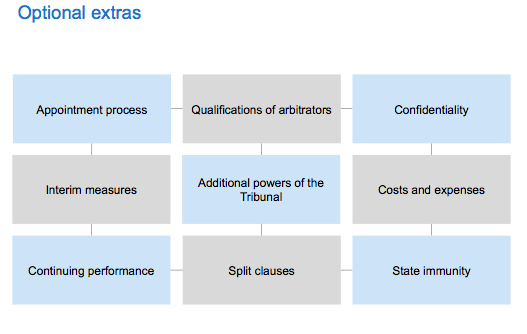
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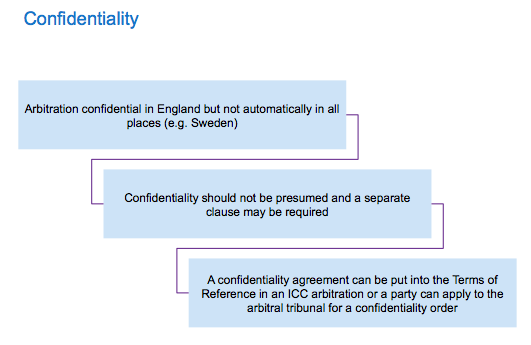
Article 34 of the Model Law deals with applications to set aside awards. Lew, Mistelis and Kro ̈ll state that ‘[i]n principle, court control over an arbitration award in challenge proceedings can never be excluded’.131 Some jurisdictions do, however, allow parties to limit the power of courts to set 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.

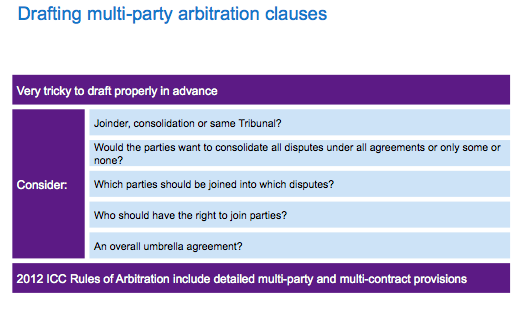
**(vi) any tips you have for what the arbitration clause for this specific deal might include, and**

* IBA guidelines => elements that must be contained
  + Don’t forget the language
  + ?...
* Therefore Use of ICC or UNCITRAL model clauses
* + Confidentiality









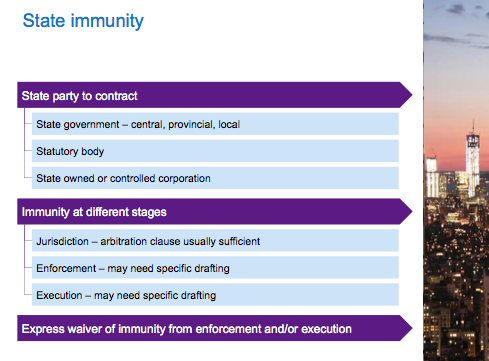
**(vii) any other comments or advice you have arising out of the facts provided.**

* turkey : joinder ?
  + provide a way to attract the state to the Arbitration
  + icsid?

**SOVEREIGN STATE PARTY TO THE CONTRACT**

1. Where a sovereign state or a state instrumentality is a party to the arbitration agreement, the nationality of the arbitrators is a relevant consideration. One of the advantages of arbitration is that “*arbitration is part of no State’s judicial system*”.40 Arbitration is a creature that owes its existence to the will of the parties alone. One of its advantages is that the parties voluntarily choose the arbitrator either directly or indirectly through their arbitration agreement. Where a state or a state entity is a party it is advisable to adopt a negative qualification for any arbitrator, i.e. an arbitrator may not be of the same nationality as any party to the contract.

By agreeing to arbitration, a sovereign state is thereby taken to have waived any sovereign immunity which would prevent the state being bound by that process, however another issue which arises where a state is a party to a contract, is the question of waiver of any sovereign immunity in relation to the assets which may be involved in the enforcement of any resulting arbitral award. Written consent by a state to a dispute being arbitrated does not also amount to consent to the enforcement of any award or waiver of state immunity on the execution of the award against particular state owned assets41. Accordingly, if possible and practical, a waiver of immunity against execution should also be obtained at the time of contracting and obtaining the consent of the state to submit any dispute to arbitration.



**Question 3**: Article 25 of a fictitious country's Arbitration Law provides as follows:

*“Unless otherwise agreed between the parties to the dispute, the award shall be in the Arabic language; otherwise, the award, shall at the time of filing, be accompanied by a legalized translation thereof.”*

In an arbitration being administered under the ICC Rules, the parties have not agreed on the language of arbitration (either in their arbitration agreement or subsequently, following prompts by the Arbitral Tribunal). The contract containing the arbitration agreement is in English. The Claimant is German and the Respondent is from Qatar. The dispute concerns a sale of commercial properties in Modelania. The Claimant requests that English be the language of the arbitration, whereas the Respondent insists on Arabic, referring to Article 25 of the Arbitration Law.

Comment on whether the Arbitral Tribunal is empowered to rule on the question of language, and if so whether it may and should rule that English, Arabic or another language shall apply.

ARTICLE 20 of the ICC Rules

Language of the Arbitration

In the absence of an agreement by the parties, **the arbitral tribunal shall determine the language or languages of the arbitration**, due regard being given to all relevant circumstances, including the language of the contract.

* not only empowered but required to rule on the question of language
* take into account all the relevant circumstances:
  + including the language of the contract
    - English
    - + on peut presuppose que les correspondances entre les deux parties ont été faites en anglais
  + therefore laws of the place of enforcement
    - on presuppose que le fictious country is Modelania
      * Art 25: “unless otherwise agreed by the parties” => parties failed to reach an agreement
      * “the award shall at the time of filing be accompanied by a legalized translation thereof”
  + translation in Arabic of the award

*Guideline 7: The parties should specify the language of arbitration.*

*Comments:*

1. Arbitration clauses in contracts between parties whose languages differ, or whose shared language differs from that of the place of arbitration, should ordinarily specify the language of arbitration. In making this choice, the parties should consider not only the language of the contract and of the related documentation, but also the likely effect of their choice on the pool of qualified arbitrators and counsel. Absent a choice in the arbitration clause, it is for the arbitrators to determine the language of arbitration. **It is likely that the arbitrators will choose the language of the contract or, if different, of the correspondence exchanged by the parties. Leaving this decision to the arbitrators could cause unnecessary cost and delay.**
2. Contract drafters are often tempted to provide for more than one language of arbitration. The parties should carefully consider whether to do so. Multi-lingual arbitration, while workable (there are numerous examples of proceedings conducted in both English and Spanish, for example), may present challenges depending on the languages chosen. There may be difficulties in finding arbitrators who are able to conduct arbitration proceedings in two languages, and the required translation and interpretation may add to the costs and delays of the proceedings. A solution may be to specify one language of arbitration, but to provide that documents may be submitted in another language (without translation).
3. *Recommended Clause:*

The language of the arbitration shall be [...].

**Gaillard Fouchard Goldman : pp678 et 679**

« the arbitration will take place in the language or languages chosen by the parties or, if the parties fail to make such a choice, by the arbitral tribunal. Where there is no indication to the contrary, the languages chosen by the arbitrators will usually be that of the contract containing the arbitration agreement. »

In ICC arbitration, Article XX….

« In some cases, arbitrations are held in several languages simultaneously. Given the considerable expense involved –an expense that is often underestimated by the parties- caution should be exercised before choosing that option »

pp.760-761

« In principle the award is made in the language of the arbitral proceedings. The parties could of course agree other wise and ask for the award be made in a different language.

If and when enforcement is sought, the award may have to be translated into the language of the country where it is to be enforced under Article IV paragraph 2 d the 1958 NYC »

**Gary Born :** p2450

« typically, parties will specify (through their arbitration agreement) the language of the arbitration, which will impliedly extend to the arbitral award. Where the parties have not selected the language of the arbitration, the tribunal will do so, again generally impliedly encompassing the language of the award. In both instances, failure to make the award in the requisite language may well constitute a defect of form and a basis for annulment or non recognition of the award. It is possible that national law in the arbitral seat would impose language requirements on the award. If this is the case, the award would be exposed to annulment or non recognition if it were not in the required language (subject to arguments that, where the parties had otherwise agreed, national law was contrary to article II and V(1)(d) of the NYC)

Gary B. Born , *International Arbitration: Cases and Materials*,

***2° States and State-Owned Entities***

507.  – The determination of which state or state-owned parties(214) are bound by an arbitration agreement can be problematic in state contracts.(215) For example, the question may arise as to whether a state is bound by an arbitration agreement signed by a public entity that it owns. It may even be the case that several states contract using another entity as a vehicle, a scenario which will often give rise to difficulties in identifying which entities should be party to the arbitration.

By analogy with groups of companies, some authors have presented these issues under the heading “groups of states,”thereby covering not only “the vertical relationship”between a state and the entities it owns, but also “the horizontal relationship”between several states.(216) However, the terminology “groups of states”is only relevant in the rare situations where several states are involved. The question of whether a state is bound by an arbitration agreement signed by one of the entities it owns is the same, irrespective of whether that entity is owned by one or several states. We shall therefore confine our discussion to the two difficult issues: first, whether and under which conditions a state can be bound by an arbitration agreement concluded by one of the entities it owns; and, second, whether a state-owned entity can be bound by an arbitration agreement which only the state itself has actually signed.

In both cases, difficulties will only arise if the entity concerned has its own legal personality. In the absence of its own legal personality, the entity is assimilated with the state, so that a clause signed by the state will bind the entity and vice-versa.(217) This is illustrated by the *Westland* case.(218) A dispute arose between the English company Westland *page "290"*Helicopters Limited and the Arab Organization for Industrialization (AOI), which was set up in 1975 by Egypt, Saudi Arabia, the United Arab Emirates and Qatar to promote the defense industry interests of those countries. AOI signed a contract with Westland creating a joint venture–The Arab British Helicopter Company (ABH)–70% of which was owned by AOI and 30% by Westland, with a view to manufacturing and selling a particular type of helicopter designed by Westland. Westland signed a series of contracts with ABH to enable the latter to fulfil its corporate objectives. A dispute arose between the parties, and the arbitral tribunal was required to decide whether the ICC arbitration clause in the contract between AOI and Westland bound AOI alone, or whether it also bound the governments which established AOI. The arbitral tribunal examined certain elements relevant to determining whether or not AOI had its own legal personality and ultimately held that the governments were bound by the arbitration agreement, together with AOI and not in lieu of AOI. The tribunal considered the documents founding the organization and noted their similarity to the concepts of partnership recognized under French, Swiss, German, English and American law, in which the partners are jointly liable for the group's obligations. However, the tribunal simply concluded from this that:

the legal status of such a joint inter-state enterprise [‘*entreprise commune interétatique*’]–to the extent that it can exist at all–cannot be relied upon in order to eliminate the liability of the States which are partners therein.(219)

In deciding that the four states were bound by the arbitration agreement, the tribunal, which noted that “Westland would not have entered into the transaction” without the “guarantees”of the states,(220) thus did not clearly distinguish the issue of separate legal personality from that of the scope of the arbitration agreement concluded by that person. It would certainly have been preferable to have begun by considering the existence of a distinct legal personality, leaving aside the issue of the scope of the clause. The existence of a separate legal personality does not depend upon the intention of the parties to the arbitration agreement, except perhaps in order to determine the point in time at which the existence of a separate legal person should be assessed. The relevant time can only be that of the signature of the arbitration agreement, as any subsequent attribution of legal personality cannot affect the rights of the party which contracted with an entity with no legal personality.(221) *page "291"*

When deciding the action to set aside the initial award, the Swiss courts took a more direct approach to the issue of separate legal personality. They established the existence of AOI's separate personality from its by-laws and its legal, financial and procedural autonomy, particularly the fact that it was authorized to sign arbitration clauses and submission agreements. The court considered these elements to “show plainly and unequivocally the total juridical independence of that organization from the founding States.”(222) This enabled the Swiss courts to go on to address the issue of the scope of the arbitration agreement.(223)

This demonstrates that it is only where the state-controlled entity has its own legal personality that difficulties can arise as to which parties are bound by the clause signed by the state or state-owned entity. We have seen that this is also the case with groups of companies, where the question of the extension of the arbitration agreement will only arise where each of the group companies is a distinct legal entity.(224) In the case of states, the scope of a clause signed by a legally independent state-owned entity has sometimes been extended to the state, and vice versa. We shall examine each of these situations in turn.

***a) Extension of an Arbitration Agreement Signed by a State-Owned Entity to the State***

508.  – One of the most important decisions to date addressing the issue of whether an arbitration agreement signed by a legally independent state-owned entity can be extended to the state was made in the *Pyramids* case.(225) A company incorporated in Hong Kong (SPP) had signed a contract (the Supplemental Agreement) with an Egyptian state-owned entity responsible for tourism (EGOTH). This contract referred to a pre-existing framework contract (the Heads of Agreement) between the same parties and the Egyptian government, concerning the construction of two tourist centers, one of which was located near the Pyramids. Unlike the Heads of Agreement, the Supplemental Agreement contained an ICC arbitration clause with Paris as the seat, and the last page of that agreement contained the words “approved, agreed and ratified,”followed by the signature of the Egyptian minister for tourism.

The Egyptian authorities subsequently canceled the project, whereupon SPP initiated arbitration proceedings against both EGOTH and the Arab Republic of Egypt. The Egyptian state contested the jurisdiction of the arbitral tribunal, principally on the grounds that it had *page "292"*not agreed to be personally bound by the arbitration agreement. The arbitral tribunal nevertheless ruled that it had jurisdiction over the Egyptian state. The tribunal's grounds were that, although there is a principle whereby “acceptance of an arbitration clause should be clear and unequivocal,”there was no ambiguity in that case as “[t]he Government, in becoming a party to that agreement, could not have reasonably doubted that it would be bound by the arbitration clause contained in it.”(226)

The Egyptian government then brought an action to set the award aside, relying in particular on Article 1502 1° of the French New Code of Civil Procedure (which concerns the absence of an arbitration agreement).(227) The Paris Court of Appeals allowed the government's claim, refusing to consider that the “approval, agreement and ratification”of the arbitration clause implied an intention to become a party thereto. However, in reaching its decision, the Court stated that the words “approved, agreed and ratified”should be interpreted in the light of Egyptian legislation, which empowered the minister for tourism to approve the construction, operation and management of tourist centers and hotels, and in the light of a declaration by EGOTH and SPP that the obligations assumed by EGOTH under the Supplemental Agreement would be subject to approval by the relevant government authorities.(228) The Court's ruling was thus based on the particular facts of the case, rather than on a literal interpretation of the terminology used. When the case came before the *Cour de cassation*, it simply declared that:

the ambiguity of the terms preceding the signature of the Minister called for an interpretation [which the *Cour de cassation* understandably considered as being within the discretion of the Court of Appeals], which the Court of Appeals gave in ruling that it only involved the intervention of a supervisory authority.(229)

Consequently, it may be that under different circumstances the same terms (especially the word “agreed”) could be interpreted as indicating that a person not signing the arbitration agreement did in fact intend to be bound by that agreement. However, in a 1995 award in an ICC case involving Libya, the arbitral tribunal followed the precedent set in the *Pyramids* case. It held, in the context of a contract between a state-owned company and a foreign company, that the terms “approved and endorsed”followed by a signature given on behalf of a state did not necessarily constitute consent by the state to be bound by the obligations contained in the contract, including, in particular, the arbitration clause. The wording was *page "293"*again construed as an authorization given by the company's supervising body.(230) Thus, to avoid any difficulty, the intention that a state be bound by an arbitration agreement signed primarily by a state-owned entity should be expressed in unequivocal terms.(231)

509.  – The *Westland* case–an ICC arbitration held in Switzerland–raised similar problems. The arbitral tribunal ought, as we have seen, to have distinguished more clearly between the existence of separate legal personality and the effect on the states involved of the signing of the arbitration agreement by an entity under their control.(232) Having decided that AOI was an entity with a legal personality separate from that of the four states, the tribunal should have ruled on the issue of whether the arbitration clause in the shareholders' agreement between Westland and AOI revealed an intention on the part of the four states to be bound by the arbitration agreement. The first arbitral tribunal seemed to favor that result. It held that the provisions of the shareholders' agreement, as well as the guarantees given by the states to the British government that the companies controlled by AOI would fulfil their obligations towards the English companies involved in the project, were evidence of “Westland's desire to be protected by the States' guarantees and the latter could not help but be aware of the implications of their actions.”(233)

As with the French courts in the *Pyramids* case, the Swiss courts, initially at least, were not convinced that the facts set forth in the tribunal's award were sufficient to establish an intention on the part of the four states to be bound by the arbitration agreement. In particular, the Swiss Federal Tribunal, referring to the decision of the French *Cour de cassation* in the *Pyramids* case, reiterated the principles applicable to the issue, observing that:

[t]he strict control of a legal entity by the State, or the close relationship between that entity and the State is not sufficiently pertinent to overcome the presumption that, when the State has not signed the arbitration clause, the entity which signed it should be regarded as the sole party to the arbitration.

The Federal Tribunal also held that: *page "294"*

if the State is not a party to the instrument containing the arbitration agreement, the approval of that instrument by a Minister–i.e. a representative of the State–is not sufficient to imply the intention of the State to be a party to that instrument and to waive its immunity from suit.

It then concluded that:

by letting the AOI alone subscribe the ‘Shareholders Agreement’ with [Westland], the founding States (which furthermore have expressly conferred upon AOI authority to sue and to determine with its partners the means to settle disputes) have manifestly shown that they did not want to be bound by the arbitration agreement.(234)

However, in 1993, the second arbitral tribunal constituted in the case made an award against AOI primarily, but also against Egypt, Qatar and Saudi Arabia.(235) In 1994, the Swiss Federal Tribunal rejected an action to set the award aside on the grounds that:

the idea that economic interdependence can create legal ties, or that economic reality makes legal independence a relative matter, is not contrary to any fundamental legal principle. It follows that the theory of the emanation of the state whereby the state can be liable for obligations contracted by companies which are legally independent of it but entirely under its control (cf. Chapelle, *loc. cit.*, with numerous references),(236) complies with negative public policy. This conclusion applies *a fortiori* where the legally independent economic entity created by the state is not subject to national regulations which are familiar, or at least available, to its co-contractor, but instead takes the form of an international corporation, unattached to any one national legal system.(237)

The Federal Tribunal added that: *page "295"*it is ... not contrary to fundamental principles of international law to recognize that contractual ties can arise in situations where that is not the intention of a party internally, if that party displays an attitude such that the other party may legitimately believe, in good faith, that such intention does exist.(238)

The Federal Tribunal's 1994 ruling goes considerably further than the French decision in the *Pyramids* case. Economic interdependence is presented as being the basis on which the arbitration agreement is extended. That basis is simply reinforced by the subjective factor consisting of the parties' legitimate expectations.

However far-reaching this terminology may appear, the mere control exercised by the state (or states in this case) over the legally independent public entity was not sufficient to justify extending the effects of the arbitration agreement signed by the state-owned entity. That control is evidence of the fact that the party exercising it has an interest in the performance of the contract concluded by its signatory. It provides the backdrop against which the true intentions of the parties, whether implied or express, can be understood. Contrary to what has been suggested by some commentators, the rules applicable to states and state-owned entities are thus no different to those applicable to groups of companies,(239) where the mere existence of a group is not sufficient for the entire group to be bound.(240) In both cases, the intention of the parties is the essential criterion determining the existence and scope of the arbitration agreement.

510.  – The same principle applies to the issue of whether an arbitration agreement signed by a state can be extended to a company under its control.

***b) Extension of an Arbitration Agreement Signed by a State to a State-Owned Entity***

511.  – The question of the extension to a state-owned company of an arbitration agreement signed by a state alone arose in ICC Case No. 4727, between the Swiss Oil Corporation, Petrogab and the Republic of Gabon. Swiss Oil, a company incorporated in the Cayman Islands, had signed an oil purchasing agreement with the Republic of Gabon containing an arbitration clause providing for dispute resolution by ICC arbitration in Paris. The Deputy General Manager of Petrogab–a company owned by the Gabonese government–had signed at the bottom of an amendment to the agreement, indicating his position in the company and adding the words “on behalf of the Republic of Gabon.”When a dispute arose, Swiss Oil attempted to include Petrogab in the arbitration, arguing that Petrogab had become a party to the agreement by having one of its directors sign the *page "296"*amendment. The arbitral tribunal rejected this claim. It held instead that the facts that the words “on behalf of the Republic of Gabon”accompanied the signature of Petrogab's director, and that the amendment did not refer to Petrogab as a party, demonstrated that the amendment had been entered into not in the name of Petrogab, but in the name of the Republic. The arbitral tribunal also rejected the argument that the mere fact that the contract contained a stipulation in favor of Petrogab was sufficient to make the latter a party to the arbitration agreement.(241) The Paris Court of Appeals rejected an action to set aside the award on the grounds that:

Petrogab's intervention in the negotiations for a new oil price, following a worldwide decrease in oil prices, did not result in the common intention of Petrogab and SOC to conclude a contract between them, and in the substitution of Gabon by Petrogab. According to the uncontested parts of the award, SOC always meant to deal with Gabon and refused to sign a standard contract presented in November 1981 by Petrogab.

The Addendum of 1982, which amended and supplemented the contract of 1979, was signed by Mr. Bangolé, Deputy General Manager of Petrogab, only in his capacity as the representative of Gabon.

...

The arbitrators correctly assessed the relations between SOC and Petrogab on the one hand, and Gabon and Petrogab on the other, and legitimately held that Petrogab was not bound by the arbitration clause contained in the contract of 15 November 1979.(242)

Once again, the decision aims to establish the parties' true intention despite the lack of clarity of the terms used.

***B. – What Subject-Matter Is Covered by the Parties' Consent?***

512.  – Determining the exact scope of an arbitration agreement will often entail considering not only the parties thereto but also the subject-matter that those parties agreed to refer to arbitration. The parties to a submission agreement are under no obligation to have all aspects of their dispute resolved by arbitration, just as the parties to a contract containing an arbitration clause need not agree to submit all disputes which might arise between them *page "297"*to arbitration. Because the basis for arbitration is the will of the parties, arbitrators can only hear disputes over issues which the parties have agreed to put before them.

In some cases, the parties specify that particular questions are not to be submitted to arbitration. More commonly, however, they provide for separate dispute resolution methods for different aspects of their relationship. For example, disputes concerning protective measures may be excluded from the arbitrators' jurisdiction and put exclusively before the courts. In ICSID arbitration, this is now the only way in which the courts have any jurisdiction. In other forms of arbitration, such clauses merely prevent the concurrent jurisdiction of arbitrators and the courts.(243) Similarly, in a series of contracts, or even in a single contract, the parties can choose to resort to various different forms of arbitration, or to submit some issues to arbitration and others to the courts.(244) In view of the delicate questions to which they often give rise in the event of a dispute, such exclusions or distinctions are not to be recommended.(245) However, they are generally permitted by law and in such cases the arbitrators, and subsequently the courts, must determine the parties' true intention.

These questions of interpretation usually arise in three situations: where it appears that the parties have not agreed to submit all disputes arising out of a particular contract to arbitration (1°); where the parties have signed several contracts so closely linked that they constitute a group of contracts (2°); and where the dispute which a party intends to submit to arbitration is not contractual in nature (3°).

***1° Diversity of Disputes Arising from a Single Contract***

513.  – A well-drafted arbitration clause will be wide enough to embrace all disputes which could conceivably arise from the main contract between the parties.(246) That is the aim *page "298"*of the model clauses contained in the major institutional arbitration rules. The clause recommended by the UNCITRAL Rules covers “[a]ny dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof.”Similarly, since the revision of its Arbitration Rules on January 1, 1998, the ICC's standard clause covers “all disputes arising out of or in connection with the present contract,”whereas the previous standard clause referred to “any disputes arising in connection with the present contract.”Most arbitral institutions now favor the broadest possible model clauses.(247) When interpreting such clauses, no distinction should be drawn between the terms “dispute”and “difference,”which are used interchangeably in arbitration agreements.(248)

Where the parties elect to specify the types of dispute they intend to submit to arbitration, it is always preferable for them to do so only by way of illustration. In that way they will avoid excluding any aspect of the differences which may arise between them. Thus, having submitted “all disputes arising out of or in connection with the present contract”to arbitration, the parties sometimes add the phrase “including those disputes concerning the validity, interpretation and performance thereof.”This clarification raises no particular difficulties. However, clauses of this type will often be pathological(249) where there is no general “catch-all”language and where the clause omits various types of issues liable to arise in a contractual dispute. For instance, some such clauses do not refer to disputes concerning the validity or the interpretation of the contract (a). More rarely, certain clauses cover only disputes concerning a contract's interpretation (b).

***a) Omission of Disputes Concerning the Validity or Interpretation of the Contract***

514.  – All too frequently parties only refer “disputes concerning the interpretation and performance of the present contract”to arbitration. The parties clearly have in mind that these two aspects of the contract may give rise to litigation, but never imagine that the contract they are about to sign might, for some reason, be void or voidable or that one party may allege that to be so. Consequently, when a dispute arises, a party may attempt to delay the arbitration proceedings by claiming that the contract is in some way invalid and that the arbitrators therefore have no jurisdiction to rule on the issue. If such an argument were to *page "299"*prevail, it would seriously impair the conduct of the arbitration, even where the arbitrators are in fact dealing with a question of interpretation or performance, because the party making that claim will naturally argue that the validity of the contract is a preliminary issue which can only be decided by the competent courts. This can often lead to a side-debate before the arbitrators and before courts asked to rule on the issue and, later, before courts reviewing the award. Such clauses should therefore be carefully avoided.