Arbitration agreements concluded by agents

3–35 The binding effect of an arbitration agreement concluded by an agent on behalf of a principal involves questions of authority (*i.e.* the agent's ability to bind the principal to such agreements) and allied questions of necessary form.[20] Thus, an ICC tribunal invited to determine whether a principal was bound by an arbitration agreement concluded by its agent distinguished between the law governing the arbitration agreement (in that case, the law of the seat of the arbitration), the laws which governed the agent's capacity to conclude an arbitration agreement on behalf of the principal (the law of the principal's registered office) and the form in which such capacity should have been conferred on the agent (the law of the jurisdiction in which the agreement between the agent and the principal was concluded).[21]

National laws feature substantial differences on questions of necessary form (*i.e.* whether the principal's written authorisation is required) and content (*i.e.* whether the principal's authorisation need expressly envisage the conclusion of an arbitration agreement). For example, both Swiss and Austrian law require the principal expressly to authorise an agent to enter into an arbitration agreement on its behalf in order for a principal to be bound by such an agreement, but only Austrian law requires such express authorisation to be in writing.[22] Under Italian,[23] French[24] and German[25] law no particular form of authorisation is required.

Succession and novation

3–36 Questions of succession in international commercial arbitration arise most often in connection with companies, rather than natural persons.[26] The general

[20] See Andreas Reiner, "The Form of the Agent's power to sign an Arbitration Agreement and Art.II(2) of the New York Convention", ICCA Congress Series No.9 (1999), p.82.

[21] ICC 5832/1988, (1988) 115 Journal du Droit International 1198. Applying Austrian law, which requires authorisation to be given in writing by a principal to an agent in order for the latter validly to conclude an arbitration agreement ("to provide clear and simple evidence and to protect the parties against the waiver of procedural guarantees"), the tribunal refused to regard the principal as bound by the purported arbitration agreement. The conflict of laws rules on these different aspects of agency are notoriously complex. See further Dicey & Morris *The Conflict of Laws* (Lawrence Collins ed., 13th ed., Sweet & Maxwell, 2000), pp.1464 *et seq.*

[22] On Austrian law see s.1008 of the Civil Code and note above; and on Swiss law see Art.396(3) of the Swiss Federal Code of Obligations.

[23] See Corte di Cassazione Judgment No.6915/1982, *Rocco Giuseppe e Fli v Federal Commerce and Navigation Ltd* (1985) 10 Yearbook Commercial Arbitration 464.

[24] See Code civil, Art.1985 and Code de Commerce, Art.L110-3 (formerly Art.109) (in respect of the contract of mandate or mandat); and Corte di Cassazione, Judgment No.361/1977, *Total v Achille Lauro* (1977) 17 Rassegna dell'Arbitrato 94 at 95. However, under Art.1989 of the Code Civil the conclusion of an arbitration agreement requires specific authorisation.

[25] See Landesgericht Hamburg, Judgment December 19, 1967 [1968] Arbitrale Rechtspraak 138 at 140 (in respect of a commercial broker or *Handelsmakler*, under s.75h(2) of the German Commercial Code). Sandrock, in "The Extension of Arbitration Agreements to Non-Signatories: An Enigma Still Unresolved", *op. cit.*, p.467, believes that an arbitration agreement concluded by an agent or representative without the principal's written authorisation would bind that principal only if in the circumstances third parties' legitimate expectations required protection.

[26] On natural persons see s.8(1) of the English Arbitration Act 1996: "Unless otherwise agreed by the parties, an arbitration agreement is not discharged by the death of a party and may be enforced by

rule is that arbitration agreements, like other contracts, enure to the benefit of universal successors of companies[27]; that is, the entities that succeed them as a result, for example, of a voluntary merger,[28] or by operation of law.[29] Such questions involve the status of a company and are thus generally to be resolved by reference to the law of its incorporation (or, in respect of natural persons, by reference to the law of succession).

4. Analysis of an Arbitration Agreement

(a) Scope

3–37 An arbitration agreement confers a mandate upon an arbitral tribunal to decide any and all of the disputes that come within the ambit of that agreement. It is important that an arbitrator should not go beyond this mandate.[30] If he does, there is a risk that his award will be refused recognition and enforcement under the provisions of the New York Convention. Art.V.1(c) provides that recognition and enforcement may be refused:

> "If the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or if it contains decisions on matters beyond the scope of the submission to arbitration . . . "

The Model Law contains an almost identical provision to the effect that an award may be set aside by the competent court, as well as being refused recognition and enforcement, if it:

> ". . . 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."[31]

[27] See ICC 2626/1977, (1977) 2 Yearbook Commercial Arbitration 153, where an Italian limited liability company (SAS) had been succeeded—as was evident on the companies register—by a public limited company (SpA). The SpA was held to be a proper respondent on the basis of universal succession under Italian law.

[28] See ICC 3281/1981, (1982) 109 Journal du Droit International 990; ICC 3742/1983, (1984) 111 Journal du Droit International 910; and *cf.* the ad hoc award in *Starways Ltd v UN*, (1969) 44 I.L.R. 433 (where the claimant had ceased to exist as a separate legal entity).

[29] Mustill & Boyd, *op. cit.*, at 137 observe that in cases of statutory novation "the claimant has replaced the person originally named as a party, who therefore has ceased to have any rights or duties under the contract".

[30] The poet's reflection that "a man's reach should exceed his grasp, or what's a heaven for?" seems not to be apposite for an international arbitrator (Robert Browning, *Andrea del Sarto*, line 97).

[31] Model Law, Arts 34(2)(iii) and 36(i)(a)(iii). The reference to a "submission to arbitration" would include an arbitration clause and, for instance, the Terms of Reference in an ICC arbitration (as to which, see Ch.1). There is a saving provision under both the Convention and the Model Law to the effect that if it is possible to separate the matters which *were* submitted to arbitration from

Forms of wording

3–38 It is important to ensure that the wording adopted in an arbitration agreement is adequate to fulfil the intentions of the parties. Usually, when parties agree to resolve any disputes between them by arbitration, they intend to resolve *all* disputes between them by this method (unless a specific exception is made). Accordingly, the arbitration agreement should be drafted in broad, inclusionary terms, rather than referring only certain categories of dispute to arbitration and leaving others to the jurisdiction of national courts.[32]

Fortunately, most national courts now regard arbitration as an appropriate way of resolving international commercial disputes and accordingly seek to give effect to arbitration agreements wherever possible,[33] rather than seeking to narrow the scope of the agreement so as to preserve the court's jurisdiction. Thus, an English court held that a provision for the arbitration of disputes arising "in connection with" the contract was sufficient to give the arbitral tribunal the power to rectify the contract so as to achieve its true meaning.[34] Similarly, a US court interpreted the same words as giving arbitrators broad powers to rule on disputes, thus enabling the court to stay litigation in favour of a referral to arbitration, even though the claim had been framed in terms of tort (libel, conspiracy and violation of legislation concerning unfair trading practices). The court held:

> "The International Chamber of Commerce recommended clause which provides for arbitration of 'all disputes arising in connection with the present contract' must be construed to encompass a broad scope of arbitrable issues. The recommended clause does not limit arbitration to the literal interpretation or performance of the contract. It embraces every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute."[35]

3–39 Where an issue *does* arise as to the scope of an arbitrator's jurisdiction the issue may fall to be determined by the arbitrator (possibly at the outset of the

[32] See the recommendations of the Final Report of the Working Group on the ICC Standard Arbitration Clause, Document 420/318, October 21, 1991 (hereinafter "Final Report-ICC clause").

[33] A striking illustration of this policy can be seen in the decision of the US Federal District Court in *Warnes SA v Harvic International Ltd*, summarised in (1994) Arbitration and Dispute Resolution Law Journal 65. The arbitration clause referred to the "New York Commercial Arbitration Association", a non-existent association. The court held that it was clear that the parties intended to arbitrate and that an agreement on a non-existent forum was the equivalent of an agreement to arbitrate which does not specify a forum. Accordingly, the parties were directed to arbitrate in the AAA system.

[34] *Ashville Investments Ltd v Elmer Contractors Ltd* (1997) 37 B.L.R. 60 at 81 (CA); see also *Ethiopian Oilseeds & Pulses Export Corp v Rio Del Mar Foods Inc* [1990] 1 Q.B. 86: Hirst J. (at 97) held that "arising out of" should be given a wide interpretation covering a claim for rectification of the contract; and G. Wetter, "The Importance of Having a Connection" (1987) 3 Arbitration International 329.

arbitration) or by a competent court (for instance, where enforcement of the award is sought). There is a chance that the answer will differ, according to the tribunal before which it is raised. In general, arbitrators are likely to take a less restrictive approach than the courts. This is understandable. An arbitrator is likely to consider that as there *are* disputes between the parties, it would be sensible to try, so far as possible, to resolve them all in the same set of proceedings. A national court would no doubt be sympathetic to this approach; but it would nevertheless have it in mind that, unlike an arbitral award, its judgment might set a precedent for the future.[36] Whatever the tribunal, its decision will depend upon its interpretation of the words of the arbitration agreement and the intention of the parties, in the light of the law that governs that agreement.

It has been suggested that the precise wording used in an arbitration agreement is likely to be subjected to closer analysis by common law jurisdictions than by civil law jurisdictions.[37] Be that as it may, the case law raises a number of issues. First, general words such as "claims", "differences", and "disputes" have been held by the English courts to encompass a wide jurisdiction in the context of the particular agreement in question.[38] In the US the words "controversies or claims" have similarly been held to have a wide meaning; and if other words are used, it may be considered that the parties intended some limitation on the kind of disputes referred to arbitration.[39]

Linking words such as "in connection with", "in relation to", "in respect of", "with regard to", "under"[40] and "arising out of"[41] are also important in any dispute as to the scope of an arbitration agreement. For example, English courts have given a wide meaning to the phrase "arising out of", and this form of words will usually embrace all disputes capable of being submitted to arbitration.[42] By contrast, the use of the words "under this contract" may be interpreted as

[35] Or even worse, might be overruled on appeal!

[37] Final Report—ICC clause, see fn.32 above.

[38] See, *e.g.*, *Woolf v Collis Removal Service* [1948] 1 K.B. 11 at 18; *F. & G. Sykes (Wessex) v Fine Fare Ltd* [1967] 1 Lloyds Rep. 53; *The Angelic Grace* [1995] 1 Lloyd's Rep. 87 (CA).

[39] In the case of *Prima Paint Corp v Conklin Mfg Co* 388 US 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), the words "any controversy or claim arising out of or relating to this agreement" were described as a broad arbitration clause, and in the *Scherk* case, above, "any controversy or claim" was held to include statutory claims under the Securities Exchange Act.

[40] *e.g.* in *Onex Corp v Ball Corp*, the Ontario Court of Justice held that a claim for rectification was a dispute arising "under" the contract: summarised in (1996) The Arbitration and Dispute Resolution Law Journal 193 and (1995) XX Yearbook Commercial Arbitration 275.

[41] A similarly wide interpretation was given to the term "concerning" in *Fletamentos Maritimos SA v Effjohn International BV* [1996] 2 Lloyd's Rep. 304.

[42] In *Ethiopian Oilseeds & Pulses Export Corp v Rio Del Mar Foods Inc* [1990] 1 Q.B. 86, Hirst J. (at 97) held that "arising out of" should be given a wide interpretation covering a claim to rectification of the contract. See also *The Angelic Grace* [1995] 1 Lloyd's Rep. 87, (CA). In the US, a decision of the Fifth Circuit Court of Appeals on May 13, 1998 evidenced an equally broad approach to the construction of a clause which referred to arbitration "any dispute, controversy or claim arising out of or in relation to or in connection with 'the agreement' ": *Pennzoil Exploration and Production Co v Ramco Energy Ltd*, Case 96-20497. The approach of the German courts appears to be much the same: see Oberlandesgericht, Frankfurt, September 24, 1985, summarised in (1990) XV Yearbook Commercial Arbitration 666, concerning the expression "arising out

excluding any claims other than those when the cause of action is contractual.[43]

3–40 The model arbitration clause recommended in the UNCITRAL Rules probably owes its origin to a mixture of English and US practice:

> "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Rules as at present in force."

The second point that emerges from the case law is that there are, in general, three categories of claim that are potentially within the scope of an arbitration agreement. These are:

- contractual claims (including claims incidental to the contract, such as *quantum meruit*);
- claims in tort; and
- statutory claims.

The first two are self-explanatory. The third relates to those claims that arise out of legislation which might bind the parties, such as securities and antitrust legislation. In all three categories of claim, it is necessary to determine whether a particular claim or defence has a sufficient connection with the contract to be covered by the arbitration agreement. In a claim for libel, for instance, it is unlikely that the claim would be covered even by a broad arbitration clause, since there is not likely to be any connection between the complaint and the contract. Likewise, in relation to statutory claims, the arbitral tribunal or a judge may need to examine a claim or defence in relation to the wording of the arbitration agreement, in order to decide whether there is a sufficiently close connection.

3–41 In South Africa, New Zealand and Australia the case law is generally consistent with that of the US and England. Thus, a widely drawn arbitration clause will encompass claims for rectification as well as claims such as the alleged existence of a collateral oral agreement, which are outside the written contract.[44]

When considering the scope of the arbitration agreement, the parties, by their conduct in referring a matter to arbitration, may be taken as impliedly agreeing to confer on the arbitrator jurisdiction beyond that which would have existed pursuant to the arbitration clause. Accordingly, a claim in tort that may not be

[43] *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] Q.B. 488, 508. In *Fillite (Runcorn) Ltd v Aqua-lift (a firm)* (1989) 45 B.L.R. 27, it was held that use of the word "under" excluded tortious claims for negligent misstatement from the scope of the arbitration clause. See also *Hi-Fert v Kiukiang Maritime Carriers* [1999] 2 Lloyd's Rep. 782, in which it was held that an arbitration clause referring to "any dispute arising from" the contract excluded claims for negligent misrepresentations that arose from pre-contractual representations.

[44] *Kathmer Investments Pty Ltd v Woolworths Pty Ltd* (1970) 2 S.A. 498; *Roose Industries Ltd v*

within the scope of the arbitration clause, may nevertheless come within an arbitrator's jurisdiction where the parties address that claim in the arbitral proceedings, without reservation as to jurisdiction.[45]

(b) Basic elements

3–42 There is no shortage of learned commentaries on the drafting of an arbitration agreement.[46] They are of very little importance or relevance, except to specialists in arbitration who may be called upon to draft a particularly complicated arbitration clause for use, for example, in a complex long-term contract or in a multi-tiered dispute resolution process,[47] or who may be asked to prepare a detailed submission agreement for use in a major arbitration.[48]

International commercial arbitrations usually take place pursuant to a standard form arbitration clause, recommended either by the arbitral institution to which they refer (such as the ICDR, ICC or the LCIA) or by UNCITRAL. Any subsequent arbitration takes place according to the rules of either the institution concerned or of UNCITRAL and these rules will generally be adequate to guide the process from beginning to end, including (if necessary) the constitution of the arbitral tribunal, the filling of any vacancies, the exchange of written submissions and so on. Where the parties wish to provide for ad hoc arbitration, but not to make use of the UNCITRAL Rules, it will generally be sufficient to adopt a clause that makes it clear that all disputes are to be referred to arbitration. Also, the clause should specify that this is to take place in a state which has a modern law of arbitration which, if necessary, will provide for the appointment of arbitrators, the filling of vacancies and so on. In France, for example, a simple clause such as "Resolution of disputes: arbitration, Paris" whilst not recommended, would be held as a valid submission to arbitration in an international

[45] See, for instance, *The Almare Prima* [1989] 2 Lloyd's Rep. 376.

[46] See, in particular, the report of Gélinas on *The elements of an effective arbitration clause* (hereinafter Gélinas) at the ICCA Congress Series No.14, Paris 1998. An impressive list of articles and talks is cited in this paper, including Stephen R. Bond "How to Draft an Arbitration Clause" in (1989) 6 Journal of International Arbitration 66; revisited in (1990) 1 ICC International Court of Arbitration Bulletin 14; Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (3rd ed., Oceana, 2000), pp.85–126; Ulmer, "Drafting the International Arbitration Clause" (1986) 20 The International Lawyer 4; "Guide de rédaction des clauses d'arbitrage et de droit applicable dans les contrats commerciaux internationaux", Pierre Bienvenue, *Revue du Barreau du Québec* (1996) Tome 56, No.1, Avril-Mai, 39; *The Freshfields Guide to Arbitration and ADR* (Kluwer, 1999); William W. Park, "When and Why Arbitration Matters" in *The Commercial Way to Justice* (1997), pp.73–99, at p.96; and Derains, "Rédaction de la clause d'arbitrage", *Le Droit des Affaires Propriété Intellectuelle* (Henri-Desbois, Librairies Techniques), p.15. Also worth mentioning is Bernadini, "The Arbitration Clause of an International Contract" (1992) 9 Journal of International Arbitration 45; Ball, "Just do it. Drafting the Arbitration Clause in an International Agreement" (1993) 10 Journal of International Arbitration 29, and Debevoise & Plimpton's *Annotated Model Arbitration Clauses for International Contracts* (1996).

[47] See Ch.1.

[48] In one arbitration between a state and a private corporation in which two of the authors took part as counsel, the negotiation and agreement of the detailed submission agreement took 18 months

commercial contract.[49] The French law on international arbitration would then give such support to the arbitral process as required, including appointment of the arbitral tribunal under Art.1493 of the French Code of Civil Procedure.

Arbitration clauses are usually drawn in wide terms, to ensure that all disputes which arise out of or in connection with a particular contract or contractual relationship are referred to arbitration. It is possible to limit arbitration to certain disputes, leaving others to the courts, but this is not generally desirable.[50] If a dispute does arise, there may well be a threshold issue as to whether or not it is a dispute which is covered by the arbitration clause—in other words, a dispute about what kind of dispute it is.

3–43 As already indicated, where parties agree to put an arbitration clause into their contract, they will usually select a standard form or "model" clause, either from one of the arbitral institutions or from an internationally recognised authority such as UNCITRAL. These model clauses are widely drawn. The UNCITRAL model, as has been seen, refers to:

> "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof . . . "

Similar language is used in the ICC and LCIA model forms.

Where a model clause is used it is sensible to supplement it by reference to the number of arbitrators, the place of arbitration, the law or laws governing the arbitration clause and the contract of which it forms part, the language of the arbitration and so on. Otherwise any problems which arise in these respects, and on which the parties cannot agree, will have to be resolved by the relevant arbitral institution or by the arbitral tribunal itself.

3–44 There follows a note of the key elements of an arbitration clause, including those that may usefully supplement a model clause. Since these key elements have already been discussed, either in this chapter or in the preceding chapters, the note is brief.

A valid arbitration agreement

3–45 First, there must be a valid arbitration agreement. In particular it must be made clear, as it is in the model clauses, that the parties intend that any and all disputes between them shall be finally resolved by *arbitration*. Examples of defective clauses, in which such an intention was not made clear, are given later in this chapter.

[49] *Fouchard Gaillard Goldman on International Commercial Arbitration* (E. Gaillard & J. Savage eds, Kluwer Law International, 1999), para.486; *cf.* the decision to similar effect in *Arab African Energy Corp Ltd v Olieprodukten Nederland BV* [1983] 2 Lloyd's Rep. 419.

[50] Gélinas, *op. cit.*, p.15, states: "Unless the parties want to exclude from arbitration certain controversies . . . or to limit the arbitration procedure to precisely identified areas of conflict a broad clause is to be recommended over one that will attempt to list every possible type of dispute". He points out that most modern judges are now prepared to give effect to broad wording such as that found in the standard ICC arbitration clause and adds that "if no limitation is intended

The number of arbitrators

3–46 As already discussed, in an international commercial arbitration[51] there should be an uneven number of arbitrators; and it is suggested that, in general, three at most will be sufficient. The system of appointing only two arbitrators, with an "umpire" or "referee" to adjudicate between them if they cannot agree, may be appropriate for arbitrations within a defined trade or commodity association, but is impracticable for the generality of international commercial arbitrations.[52]

Establishment of the arbitral tribunal

3–47 This is dealt with in Ch.4.

Ad hoc or institutional arbitration

3–48 This is one of the most important decisions that has to be taken; and of course, it has to be taken at the wrong time. In an ideal world, it would be possible to wait until any disputes had arisen and then decide, according to their importance and complexity, how they should best be handled. Would a simple ad hoc agreement, backed by a modern system of arbitration law, be sufficient to dispose of the disputes without involving a national court[53] or an arbitral institution?[54] If not, would it be sensible to enlist the help and support (and the rules) of one of the arbitral institutions and, if so, which institution—the ICC, the LCIA or the ICDR? Or would it be better, given the complexity of the dispute, the amount of money involved, the expertise likely to be required and the importance of the issues to be resolved, to negotiate a detailed submission agreement?

These questions would be best answered when a dispute arises. But the reality is that by this stage the parties, like a divorcing couple, may not be talking to each other—or at most will only be doing so through their lawyers. Accordingly, good sense dictates that the agreement to arbitrate should be negotiated and concluded at the same time as the contract to which it relates. As one commentator has expressed it:

[51] See Ch.1, paras 1–14 *et seq.*

[52] English law, *e.g.*, provides that where there is to be an even number of arbitrators and an umpire, unless the parties agree otherwise the umpire should attend the proceedings and receive all the pleadings and other documents. Any orders or decisions should be made by the arbitrators unless they cannot agree, when the umpire will replace them as the tribunal: Arbitration Act 1996, s.21. This raises certain practical questions such as: how is the umpire to be chosen; which of the arbitrators is to take the lead in organising the proceedings, drawing up orders and so on, until the umpire takes over; what is the point of having the umpire present, if the arbitrators agree upon all matters relating to the arbitration; what is the point of having arbitrators present and taking part in the proceedings, if at some stage they are to be replaced as a tribunal and the decisions, orders and awards are to be made by a single individual? "Umpire" arbitrations may be suitable for a small group of arbitrations in particular trades; but in general the authors do not recommend them.

[53] For instance, to appoint the arbitrator or arbitrators.

"The primary objective, in inserting an arbitration clause in a contract, is to ensure that when the time comes—that is, when a dispute parts the parties—neither one will be able to escape arbitration . . . "[55]

The choice between ad hoc and institutional arbitration has already been considered in Ch.1,[56] and need not be repeated here. The criteria by which an arbitral institution should be judged are also considered in that chapter.[57]

Filling vacancies in the tribunal

3–49 During the course of an arbitration it may sometimes be necessary to replace an arbitrator, whether because his or her appointment has been successfully challenged or because he or she has died or for some other reason, such as incapacity. The rules of the established arbitral institutions contain detailed provisions to cover such contingencies,[58] as do modern laws of arbitration.[59]

It was customary for institutional rules of arbitration to provide for the replacement of an arbitrator by the same method by which he or she was appointed.[60] In the late 1990s, however, both the ICC and the LCIA adopted rules under which their courts have complete discretion as to whether or not to follow the original procedure.[61]

Where there is a submission agreement that is intended, so far as possible, to be self-contained,[62] provisions for filling any vacancies in the tribunal must be spelt out in some detail. One problem that then arises is, how is a "vacancy" to be determined and who is to determine it? Death and resignation are unambiguous. But it would also be sensible to provide for incapacity. And in the absence of an arbitral institution or a national court, who is to determine when an arbitrator is incapacitated? Should incapacity be limited to ill health, or should it extend to refusal to act due to other commitments, which may cause unacceptable delay in the fixing of hearings? For the determination of incapacity, there are no realistic alternatives in the case of ad hoc arbitration, between leaving this to agreement between the parties (which may not be forthcoming) or to a decision by the other members of the arbitral tribunal. Leaving it to the tribunal is not satisfactory since it is undoubtedly difficult, if not invidious, for two members of an arbitral tribunal to declare that their colleague is incapacitated.

3–50 As to failure or refusal to act, the arbitrator concerned should be called upon to withdraw from the arbitration in order that an alternative appointment may be made. If he or she refuses to do so, it may well be necessary to apply to a national court at the place of arbitration for his or her removal.

[55] Gélinas, *op. cit.*, p.4.
[56] paras 1–99 *et seq.* and 1–104 *et seq.*
[57] paras 1–109 *et seq.*
[58] See, for instance, the ICC Arbitration Rules, Art.12; LCIA Arbitration Rules, Arts 10 and 11.
[59] See, for instance, the English Arbitration Act 1996, s.27.
[60] See, for instance, the previous (1988) version of the ICC Arbitration Rules, Art.2.12.
[61] ICC Arbitration Rules, Art.12.4; LCIA Arbitration Rules, Art.11.1; see also the ICSID Arbitration Rules, Art.11.2(a).

Place of arbitration

3–51 This is another decision of major importance. The place of arbitration constitutes the seat of the arbitration and the law of that place governs the arbitral proceedings. This has already been fully considered in Ch.2. It is advisable for the parties themselves to choose a suitable place of arbitration, rather than leaving the choice to others.[63] In doing so, they should take account of practical matters such as distance, availability of adequate hearing rooms, back-up services and so on. However, they should also locate their arbitration in a state whose laws are adapted to the needs of modern international commercial arbitration and which is a party to the New York Convention.

Governing law

3–52 Again, this topic has already been fully discussed.[64] All that need be stated is that the main contract should contain a choice of law clause and, if the arbitration agreement is to be governed by a different law, what law.

Default clauses

3–53 It is important that the failure or refusal of one of the parties to take part should not frustrate an arbitration. The defaulting party usually is the respondent, who sees that it has nothing to win and may have much to lose by taking part in proceedings that are likely to lead to an award against it. Exceptionally, however, a claimant may lose heart in the face of a substantial counterclaim. It may then be the respondent who wishes to proceed. The rules of the arbitral institutions usually contain adequate default provisions; so too do the UNCITRAL Rules which provide:

"1. If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.
2. If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.
3. If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient

[63] The ICC's statistics indicate a growing awareness by the parties to an arbitration agreement of the importance of choosing a suitable place of arbitration. In each of the five years up to and including 2003, the place of arbitration has been chosen by the parties in over 80 per cent of all new cases filed with the ICC.

cause for such failure, the arbitral tribunal may make the award on the evidence before it."[65]

Where there is no default clause in the relevant rules of arbitration, it is sensible to include one in the arbitration clause.

Language

3–54 It is both customary and logical for the language of the arbitration to be the language of the contract. This will be the usual position in an institutional arbitration, although the arbitral tribunal usually has discretion to direct that other languages may be used or that documents may be admitted in their original language without the need for a translation.

Sometimes a contract is made in two languages, each to be of equal authenticity.[66] In such cases, simultaneous translations at the hearing of the arbitration may be unavoidable (although it slows down the proceedings and is not inexpensive).

Entry of judgment and rule of court clauses

3–55 In the US many arbitration agreements contain an express provision to the effect that judgment may be entered upon the award in any court of competent jurisdiction.

Such provision seeks to reinforce arbitration, by making it clear that a national court that has jurisdiction may enforce the arbitration agreement and the award. Although the court may well have this power irrespective of the agreement of the parties, the use of an "entry of judgment" clause is recommended where the arbitration is likely to take place in the US, in order to avoid an argument that its omission indicates that the parties intended to exclude any court procedure on the award.[67]

Other procedural matters

3–56 Other procedural matters need to be covered only in a clause providing for ad hoc arbitration, or where the parties wish to deviate in certain respects from the rules adopted by them in their arbitration clause. An example is where the parties adopt the UNCITRAL Rules, but wish the presiding arbitrator to make an award as if he or she was sole arbitrator, in the event that a majority award is not possible.[68]

The parties may also wish to confer special powers on the arbitral tribunal that do not normally exist under the law governing the arbitration or under the rules

[65] UNCITRAL Arbitration Rules, Art.28. Where the respondent has a counterclaim on which it wishes to proceed, even if the claimant fails to do so, the tribunal would presumably allow this, subject to payment of any advance on fees.

[66] As in the *Channel Tunnel* arbitration, discussed in Ch.2.

[67] Domke, *The Law and Practice of Commercial Arbitration* (revised ed., 1985), p.76.

[68] See the UNCITRAL Arbitration Rules, Art.31; only in relation to questions of procedure may the

of the relevant arbitral institution, if any.[69] These additional powers may enable the arbitral tribunal to grant remedies that otherwise might not be available under the applicable law. For example, power may be given to order a party to provide security in relation to an amount in dispute, either by paying it into a special account established in the name of the arbitral tribunal, or into some other blocked escrow account.[70]

(c) Submission agreements

Generally

3–57 The position of the parties and their advisers in dealing with a submission agreement is radically different from the position that exists when an arbitration clause is being written into a contract. First, a dispute has actually arisen, and usually this means that there will be a hostile element in the relationship. Secondly, from a technical point of view, the legal advisers know what kind of dispute they are facing, and they will wish to structure the arbitration to deal with it efficiently and appropriately. Thirdly, the interests of the parties may conflict, in that the claimant usually wants a speedy resolution, whereas the respondent often considers that it will be to his advantage to create delay.[71] For all these reasons, the negotiation of a submission agreement may be a lengthy process. However, the importance of "getting it right" cannot be overemphasised.[72]

Drafting a submission agreement

3–58 The submission agreement should contain many, if not all of the basic elements of an arbitration agreement as set out above.[73] In addition, it should contain a definition, or at least an outline, of the disputes that are to be arbitrated; provision for a possible site inspection; provision for appointment of experts by the arbitral tribunal; provision for interim awards; provision for the costs of the proceedings; and provisions concerning the award, including a provision covering what is to happen if the arbitrators fail to reach agreement; and, finally, an agreement that the award of the arbitral tribunal is to be final and binding upon the parties.

It is also possible to include in the submission agreement procedural arrangements, such as for production of documents, exchange of written submissions and witness statements, the timetable to be followed and other matters. On

[69] For the powers of an arbitral tribunal, see Ch.5.

[70] Such an express power is contained, *e.g.*, in the LCIA Arbitration Rules, Art.25.1(a).

[71] Although it should of course be borne in mind that the claimant may be compensated for the delay by an award of interest, and that delay is usually only achieved by the expenditure of costs—*e.g.* the determination of a preliminary issue. Ultimately, the respondent may be directed to pay the costs of the arbitration, particularly if it is considered that its conduct has contributed to the delay. See Ch.8.

[72] See, for instance, the discussion of the arbitration between Turriff Construction (Sudan) Ltd and the Government of the Republic of the Sudan, below, para.3–59.

balance, however, it is probably better to deal with such questions in a separate document, once the submission agreement has been concluded.

An illustration

3–59 The importance of ensuring that the submission agreement deals with all these matters emerges clearly from the *Turriff* arbitration, which took place at the Peace Palace in The Hague.[74] During the course of the proceedings two of the three arbitrators originally appointed resigned and the respondent withdrew, leaving the arbitration to proceed as a default arbitration.[75] The resignation of the presiding arbitrator on grounds of ill health was dealt with by agreement; the Canadian chairman was replaced by a Dutch judge. The withdrawal of the Government from the arbitration could *not* be dealt with by agreement, since by then all co-operation between the parties had ceased. However, the arbitral tribunal had express power under the submission agreement to proceed in default (that is to say, in the absence of one of the parties). It decided to do this and a date was fixed for an adjourned hearing. A third crisis prevented this. The Sudanese arbitrator failed to attend the adjourned hearing. One of the arbitrators, who had been delegated by the arbitral tribunal to deal with procedural matters, fixed a new date for the hearing. He ordered that, in the absence of the Sudanese arbitrator, Turriff's oral argument and evidence should be presented before two members of the arbitral tribunal and should be fully recorded, authenticated and preserved.[76]

Under the submission agreement, it was for the Government to appoint a new arbitrator[77] within 60 days. When it failed to do this, Turriff asked the President of the ICJ to make the appointment, which he did. Thereupon, the remaining two arbitrators were deemed to have been reappointed. In this way a new arbitral tribunal was constituted; and the hearing then continued *ex parte* as before, with the new arbitrator reading the transcript of the previous days' proceedings, in order to acquaint himself with the facts. In April 1970, the arbitral tribunal issued an award under which the Government was ordered to pay a sum of over £6 million, together with an additional sum to cover Turriff's legal costs and the costs, fees and expenses of the arbitral tribunal.[78]

[74] See above, para.3–57.

[75] The case is briefly noted in Stuyt, *Survey of International Arbitrations 1794–1970* (1976), App.I, Case No.A31; and more fully by Erades, "The Sudan Arbitration" (1970) N.T.I.R. 2 at 200–222. Dr Erades became presiding arbitrator on the resignation of his predecessor. It is also commented upon by Schwebel in *International Arbitration: three salient problems* (Grotius Publications Ltd, 1987).

[76] Erades, *loc. cit.*, p.209.

[77] Although this was not known at the time, the Government had in fact made an order revoking or purporting to revoke the Sudanese judge's appointment as an arbitrator.

[78] Erades, *loc. cit.*, p.222. To complete the story, negotiations took place between the Government and Turriff after the issue of the award and the company accepted in settlement a substantial part of

(d) Separability

3–60 The concept of the separability of the arbitration clause,[79] is both interesting in theory and useful in practice. It means that the arbitration clause in a contract is considered to be separate from the main contract of which it forms part and, as such, survives the termination of that contract. Indeed, it would be entirely self-defeating if a breach of contract or a claim that the contract was voidable was sufficient to terminate the arbitration clause as well; this is one of the situations in which the arbitration clause is most needed.

As those who drafted the Model Law observed in relation to the principle of separability:

> "The main practical advantage of this principle is that it constitutes a serious bar, for a party who desires delay or wishes to repudiate his arbitration agreement, to subvert the arbitration clause by questioning in court the existence or validity of the arbitration agreement [by questioning the validity of the main contract]."[80]

Separability thus ensures that if, for example, one party claims that there has been a total breach of contract by the other, the contract is not destroyed for all purposes. Instead:

> "It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract."[81]

3–61 Another method of analysing this position is that there are in fact two separate contracts. The primary or main contract concerns the commercial obligations of the parties; the secondary or collateral contract contains the obligation to resolve any disputes arising from the commercial relationship by arbitration. This secondary contract may never come into operation; but if it does, it will form the basis for the appointment of an arbitral tribunal and for the resolution of any dispute arising out of the main contract.

The doctrine of separability is endorsed by institutional and international rules of arbitration, such as those of UNCITRAL, which state in the context of pleas as to the jurisdiction of an arbitral tribunal:

> ". . . an *arbitration clause* which forms part of a contract and which provides for arbitration under the Rules shall be treated as an *agreement independent of the other terms of the contract.*"[82]

[79] This concept is known in some systems of law as the autonomy of the arbitration clause—*l'autonomie de la clause compromissoire.*

[80] Szurski, *op. cit.*, p.76.

[81] *per* Lord MacMillan in *Heyman v Darwins Ltd* [1942] A.C. 356 at 374.

Following the provisions of the UNCITRAL Rules, the Model Law provides that:

> "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause."[83]

3–62 Similarly, the LCIA rules stipulate that for the purpose of a ruling on jurisdiction:

> "[A]n arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail *ipso jure* the non-existence, invalidity or ineffectiveness of the arbitration clause."[84]

In the *Gosset* case, the French Cour de Cassation recognised the doctrine of separability in very broad terms as follows:

> "In international arbitration, the agreement to arbitrate, whether concluded separately or included in the contract to which it relates, is always save in exceptional circumstances . . . completely autonomous in law, which excludes the possibility of it being affected by the possible invalidity of the main contract."[85]

Five years later, the US Supreme Court also recognised the separability of the arbitration clause in the *Prima Paint* case[86]; and modern laws on arbitration confirm the concept. Swiss law, for example, provides that:

> "The validity of an arbitration agreement cannot be contested on the ground that the main contract may not be valid . . . "[87]

3–63 An increasing number of countries[88] have made their position clear by making the separability of the arbitration clause part of their laws on arbitration.[89] The

[83] Model Law, Art.16(1).
[84] LCIA Arbitration Rules, Art.23.1.
[85] Cour de Cassation, 1re Civil Chamber, May 7, 1963 (Dalloz, 1963, p.545).
[86] *Prima Paint Co v Flood & Conklin Manufacturing Corp*, 388 US 395 at 402 (1967).
[87] Swiss Private International Law Act 1987, Art.178(3).
[88] For instance: the Netherlands in the Arbitration Act 1986, Art.1903; England in the Arbitration Act 1996, s.7; and states that either adopt the Model Law or adapt their legislation to it.
[89] See: Marrella "International Business Law and International Commercial Arbitration: the Italian Approach" (1997) Arbitration and Dispute Resolution Law Journal 25; Rogers & Launders, "Separability—The Indestructible Arbitration Clause" (1994) 10 Arbitration International 71; Svernlou "What Isn't, Ain't: The Current Status of the Doctrine of Separability" (1991) 8 Journal

number of states in which the concept has not yet been accepted is steadily diminishing.[90]

An independent (or autonomous) arbitration clause thus gives the arbitral tribunal a basis to decide on its own jurisdiction, even if it is alleged that the main contract has been terminated by performance or by some intervening event. Some laws and rules go further and establish that the arbitration clause will survive even if the main contract that contains it proves to be null and void.[91] However, this must depend on the reason for which the contract is found to be null and void (*i.e.* is it a reason that will also affect the "separate" arbitration agreement?), and whether it is void *ab initio*.

While the doctrine of separability is now accepted in principle in all developed arbitral jurisdictions, application of the doctrine continues to vary—even within jurisdictions—in circumstances in which the main contract is argued never to have come into existence at all.

3–64 In France, the courts will not stay court proceedings in circumstances in which the arbitration agreement is "*manifestement nul*" (manifestly void), although in practice it is very rare for French courts to deny an arbitral tribunal the opportunity to rule on its own jurisdiction.[92] In England, the Arbitration Act 1996 provides that an arbitration agreement contained in another agreement "shall not be regarded as invalid, non-existent or ineffective because that other agreement . . . *did not come into existence*", although recent case law suggests that for some English judges the fate of an arbitration agreement remains inextricably linked to the initial existence of the main contract.[93]

It will be appreciated from what has been said that there is a direct connection between the autonomy of the arbitration clause and the power (or competence) of an arbitral tribunal to decide upon its own jurisdiction (or competence). This power (that of competence/competence, as it is sometimes known) is discussed in Ch.5, which deals with jurisdiction and other issues.

(d) Summary

3–65 As already stated, most arbitrations take place pursuant to an arbitration clause in a "contract". Where the parties decide that any dispute between them will be submitted to arbitration under the rules of a particular arbitral institution, the model clause recommended by that institution should be incorporated into the contract. Where the parties decide that the services of an arbitral institution are unlikely to be required, but that they would nevertheless like to adopt an existing

[90] See Sanders, *Arbitration*, Ch.12, paras 107–112; it should be noted, however, that, as Sanders observes, a "comparative study can only be made on the basis of the current situation" and "situations change rapidly" (*ibid.*, para.102).
[91] The UNCITRAL Arbitration Rules, Art.21.2 state that a decision by the arbitral tribunal that the contract is null and void "shall not entail *ipso jure* the invalidity of the arbitration clause"; and as has been seen, the Model Law itself adopts this terminology, Art.16(1).
[92] See Gaillard "The negative effect of competence-competence", International Arbitration Report, No.1, January 1, 2002.
[93] s.7 of the English Arbitration Act 1996; but see Shackleton, "Arbitration without a Contract",

set of rules, they should incorporate the recommended UNCITRAL arbitration clause into the contract.

Where such arbitration clauses are adopted, most national courts will recognise and give effect to the parties' wishes to arbitrate any disputes between them. These model clauses bring with them a set of rules that are self-sufficient, and which should be enough to guide the arbitral tribunal and the parties from the beginning to the end of the arbitral process.

Nonetheless it would be advisable to add to the model clause at least three of the basic elements of an arbitration agreement, discussed above, namely, the number of arbitrators, the place of arbitration and the governing law of the contract. It may also be—or become—necessary to identify the law governing the arbitration agreement.[94]

3–66 If the parties do not require the services of an arbitral institution and do not wish to adopt the UNCITRAL Rules, a simple submission to arbitration—adapted from one of the model clauses—would be sufficient in theory. In practice however, it is sensible to provide not only for the number of arbitrators, the place of arbitration and the governing law but also to consider such provisions as those relating to the establishment of the arbitral tribunal, the filling of vacancies and the failure or refusal of a party to take part in the arbitration.

The fact that the parties have agreed in their arbitration clause to an arbitration under institutional rules does not prevent them from agreeing, when a dispute has arisen, to a different method of resolving the dispute. Thus they may switch from, say, an ICC arbitration to an ad hoc arbitration or vice versa; but if they do so, a new arbitration agreement should be made, so as to avoid problems. It is not practicable, for example, to conduct an arbitration under the ICC Rules without the involvement of the ICC.

5. Defective Arbitration Clauses

3–67 The principal defects found in arbitration clauses are those of inconsistency, uncertainty and inoperability. The argument as to whether an arbitration clause suffers from one or more of these defects is likely to be raised where, for example, a party takes action in a national court in relation to a dispute and the defendant seeks a stay of the proceedings on the basis of the existence of the arbitration clause. In such circumstances, the application for a stay may be opposed on the basis that the arbitration agreement was "inoperative or incapable of being performed".[95]

[94] See the discussion in Ch.2, para.2–05.

[95] These terms are used in the New York Convention, Art.II.3 and in the Model Law, Art.8(1). For further discussion of defective arbitration clauses see Schmitthoff, "Defective Arbitration

(a) Inconsistency

3–68 Where there is an apparent inconsistency in the clause, most national courts usually attempt to give a meaning to it, in order to give effect to the general intention of the parties, which was to submit disputes to arbitration. This is the case in England where the courts uphold a clause and strike out an inconsistent provision, if it is clear that the "surviving clause" carries into effect the real intention of the parties and the "discarded clause" would defeat the object of the agreement.[96]

(b) Uncertainty

3–69 Similarly, as regards uncertainty, the courts of most countries generally try to uphold an arbitration provision,[97] unless the uncertainty is such that it is difficult to make sense of it. The same is true of institutions. By way of example, the ICC has in the past accepted the following vague and imprecise formulations as references to the ICC International Court of Arbitration: "the official Chamber of Commerce in Paris, France"; "the Arbitration Commission of the Chamber of Commerce and Industry of Paris"; and "a Commission of Arbitration of French Chamber of Commerce, Paris".[98]

From time to time, however, courts and institutions are confronted with clauses which simply fail for lack of certainty. Examples are:

"In the event of any unresolved dispute, the matter will be referred to the International Chamber of Commerce."

"All disputes arising in connection with the present agreement shall be submitted in the first instance to arbitration. The arbitrator shall be a well-known Chamber of Commerce (like the ICC) designated by mutual agreement between both parties."

"Any and all disputes arising under the arrangements contemplated hereunder . . . will be referred to mutually agreed mechanisms or procedures of international arbitration, such as the rules of the London Arbitration Association."

"For both parties is a decision of Lloyd or Vienna stock exchange binding and both will subjugate to the International Chamber of Commerce."

The problem with the first example is that, even if the broad reference to the International Chamber of Commerce is taken to be a reference to the ICC's

[96] See: *Central Meat Products Ltd v J.V. McDaniel Ltd* [1952] 1 Lloyd's Rep. 562 and note *E.J.R. Lovelock Ltd v Exportles* [1968] 1 Lloyd's Rep. 163, where inconsistencies and uncertainties were exposed in the clause itself. See also *Mangistaumunaigoz Oil v United World Trade Inc* [1995] 1 Lloyd's Rep. 617, where the arbitration clause provided that "arbitration, if any, by ICC Rules in London". The words "if any" could be rejected as surplus usage.

[97] See: *Star Shipping AS v China National Foreign Trade Transportation Corp* [1993] 2 Lloyd's Rep. 445 (CA); *Nokia Maillefer SA v Mosser*, Tribunal Cantonal (Court of Appeal) March 30, 1993, (1996) XXI Yearbook Commercial Arbitration 681; and *ASA Bulletin* (1995) No.1, p.64.

International Court of Arbitration in Paris, the clause by itself does not stipulate whether the unresolved dispute is to be settled by arbitration or by conciliation or by some other procedure. The second example provides for arbitration, but fails to provide for the appointment of an arbitral tribunal. Even if the parties agreed upon "a well-known Chamber of Commerce" as arbitrator, this would be of no avail, since arbitrators must be individuals. Moreover, it is unclear in this clause what is meant by "in the first instance". The third example requires the future agreement of the parties on "mutually agreed mechanisms or procedures". The fourth is simply meaningless.

3–70 Further examples of what have been referred to as "pathological arbitration clauses" are to be found in Craig, Park & Paulsson's commentary on ICC Arbitration.[99] Two of the more flagrant examples include:

> "In case of dispute (*contestation*), the parties undertake to submit to arbitration but in case of litigation the Tribunal de la Seine shall have exclusive jurisdiction."[1]

and:

> "Disputes hereunder shall be referred to arbitration, to be carried out by arbitrators named by the International Chamber of Commerce in Geneva in accordance with the arbitration procedure set forth in the Civil Code of Venezuela and in the Civil Code of France, with due regard for the law of the place of arbitration."[2]

The latter clause is given as an example of a "disastrous compromise" which might lead to extensive litigation (unrelated to the merits of the dispute) to sort out any contradictions in the various laws stated to be applicable.[3]

(c) Inoperability

3–71 The New York Convention states:

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[4]

[99] Craig, Park & Paulsson, *International Chamber of Commerce Arbitration* (3rd ed., Oceana, 2000), pp.127–135.
[1] *ibid.*, p.128.
[2] *ibid.*, pp.132–133.
[3] *ibid.*

The reference to the agreement being "null and void" refers to the arbitration agreement itself since, as seen in the discussion of the principle of separability, in most countries the nullity of the main contract does not necessarily affect the validity of the arbitration agreement. At first sight it is difficult to see a distinction between the terms "inoperative" and "incapable of being performed". However, an arbitration clause is inoperative where it has ceased to have effect as a result, for example, of a failure by the parties to comply with a time-limit, or where the parties have by their conduct impliedly revoked the arbitration agreement.[5] By contrast, the expression "incapable of being performed" appears to refer to more practical aspects of the prospective arbitration proceedings. It applies, for example, if for some reason it is impossible to establish the arbitral tribunal.[6]

Lack of the ability to make payment of an award should not mean that an arbitration clause is incapable of being performed.[7] However, in India it has been held that a stay of court proceedings should be refused on the grounds that exchange control regulations would prevent payments in foreign currency to the arbitrators and other overseas expenses of those participating in a foreign arbitration.[8]

(d) Repudiation and waiver of arbitration agreements

3–72 A related question arises where the claimant is said to have abandoned or waived by conduct its right to proceed with arbitration against the respondent. This raises the question of whether an arbitral tribunal has the power to strike out a claim as a result of delay by the claimant in pursuing the arbitration. For this purpose, legislation appears to be required.

In Hong Kong, for instance, the Arbitration Ordinance was amended in 1982 to give the arbitral tribunal or any of the parties an opportunity to apply to the court for an arbitration to be terminated for want of prosecution. In England, legislation provides for the *arbitral tribunal* to have the power to dismiss a claim, on broadly the same grounds as a national court may strike out claims in litigation.[9] The English 1996 Act provides that, unless otherwise agreed by the parties, the tribunal may dismiss the claim if it is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing its claim and that the delay either gives rise, or is likely to give rise, to a "substantial risk" that a fair resolution of the dispute is not possible or that it has caused, or is likely to cause, serious prejudice to the respondent.

[5] *Corcoran v Ardra Insurance Company Ltd* 842 F.2d 31 (2nd Cir. 1988); also reported in (1989) XIV Yearbook Commercial Arbitration 773. For the continuation of the saga, see: (1991) XVI Yearbook Commercial Arbitration 663 and (1992) XVII Yearbook Commercial Arbitration 666.
[6] In *Aminoil v Government of Kuwait* (1982) XXI I.L.M. 976 the original arbitration clause provided that the third arbitrator was to be appointed by the British Political Resident in the Gulf, an official whose post had ceased to exist at the time the dispute arose; this defect was in the event cured by the conclusion of a new submission agreement.
[7] See, *e.g.*, *The Rena K* [1979] Q.B. 377; [1978] 1 Lloyd's Rep. 545.
[8] See van den Berg, *The New York Arbitration Convention of 1958* (1981), p.160.
[9] This provision was incorporated into the Arbitration Act 1950 by the Courts and Legal Services

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