Chapter 6

International arbitration and alternative dispute resolution

6.1. Alternative (or amicable) dispute resolution: a definition

Alternative or Amicable Dispute Resolution – abbreviated as "ADR" – generally refers to all those means whereby individuals and/or entities strive to settle their disputes not in seeking formal adjudication by a court of justice but rather with the assistance of a neutral third party. ADR methods include mediation, conciliation and neutral evaluation. Due to the quasi-judicial nature of arbitration awards that can, as further explained below, be enforced by the successful party through a recognition and enforcement procedure before a court of justice, it is debated whether arbitration is to be included in the definition of ADR.

Whilst in the past the "A" in ADR was generally recognised as standing for "Alternative" and including arbitration in the definition of ADR, more recently the reading has switched to "Amicable" so as to indicate all dispute resolution methods other than litigation and arbitration. The International Chamber of Commerce (ICC), in particular, has chosen to distinguish arbitration from other dispute resolution systems like the mediation/conciliation and to refer to ADR as "amicable dispute resolution" rather than "alternative dispute resolution", thus restricting the definition of ADR to proceedings which do not result in a decision or award issued by a third party which can be directly enforced at law.

The European Commission has adopted a similar approach by defining alternative methods of dispute resolution as "out-of-court dispute resolution processes conducted by a neutral third party, excluding arbitration proper" because "arbitration is closer to a quasi-judicial procedure than to an ADR as arbitrators' awards replace judicial decisions". [1]

In this perspective, it may be said that were ADR to be understood as "alter-

[1] Commission of the European Communities, Green Paper on Alternative Dispute Resolution on civil and commercial disputes, COM(2002)196, p. 6.

native" dispute resolution it would certainly include arbitration, whereas were it to be understood as "amicable" dispute resolution, it would not.

Mediation

Mediation is an ADR method whereby a neutral and impartial third party, the mediator, facilitates dialogue between the litigating parties in a structured process to help them reach an amicable, conclusive and mutually satisfactory settlement. Mediators can be either private persons trusted by the parties or professionals working within private organisations (*e.g.* local chambers of commerce) specialised in providing dispute resolution services. Although the mediator does not impose his will, he or she makes use of negotiation and communication techniques to help litigating factions arrive at a peaceable resolution of their dispute.

A written agreement (mediation agreement) constitutes the point of arrival of the mediation process. The agreement is neither a judicial decision nor an arbitration award and, generally speaking, cannot be immediately and directly enforced: it binds the parties contractually, in the sense that in the event of disputes concerning its interpretation or implementation it will be enforceable as a contract, as would be the case with respect to non-fulfilment of any ordinary contractual provision.

Conciliation is a term used in civil law countries to define an ADR method mainly employed in labour or family disputes and is similar to mediation, but the conciliator is usually an official (in some cases even judges act as conciliators), the procedure is more formalised and its outcome, drafted in the form of minutes, can be directly enforced by State authorities.

In recent years there has been a dramatic increase in Europe in the use of both mediation and conciliation, as these ADRs are considered an effective way of saving much of the time and money usually required in court or arbitration proceedings.

6.2. Arbitration

Arbitration can be generally defined as a private system constituting an alternative to courts of justice for the resolution of civil and commercial disputes. Arbitration is the most important and widespread ADR mechanism chosen by parties to international commercial contracts, and is very often preferred over litigation (for the reasons described below) for the resolution of disputes arising from a contract and/or connected to its execution. During arbitration proceedings the parties argue their case before a neutral third party chosen by them, called the arbitrator, who is then bound to issue a decision, called "award", of either monetary (*e.g.* compensation for losses or damage) or non-monetary nature (*e.g.* obligations and/or remedies to be discharged and/or effected by a party). The arbitrator's authority derives from the law of the states and his jurisdiction is based on the will of the parties, either as expressed in a contract in a so-called "arbitration clause" governing the resolution of possible future disputes arising from such contract or as expressed in a separate agreement (so-called "arbitration agreement") covering an existing dispute.

The arbitration clause or the arbitration agreement will also state whether or

not the award is to be deemed final and binding for the parties. If both sides agree to be bound by the award, the latter becomes a binding judgment similar to a court ruling.

As a general rule in commercial contract practice, the award is considered final and legally binding upon the parties, meaning that the award will be enforced on the parties just as a court ruling would be. The losing party may have a very limited right of appeal against the decision issued by the arbitration body and, in a limited number of cases, the relevant arbitration rules may provide an internal appeal procedure. Furthermore, some national rules applicable in the seat of arbitration, may – exceptionally – grant an appeal before a court of justice against decisions taken through arbitration proceedings. Challenging an award means that a party applies to a court of justice for a modification in its favour or for a ruling either voiding the award or setting it aside in whole or in part. As a consequence of such ruling, the award in question is usually treated as invalid and unenforceable not only by the other courts of the seat of arbitration but also by courts in other countries. As to the procedural rules to be followed in arbitration proceedings, the parties may opt for the arbitration to be governed either by a given country's arbitration laws or by private arbitration rules like those codified by the ICC [2] and described below.

The parties can decide either to set forth autonomously the rules governing their arbitration (***ad hoc* arbitration**) or else refer to an existing arbitral institution and submit to its rules (**institutional arbitration**).

Ad hoc arbitration entails the parties' obligation directly to agree upon the rules to be followed in the conducting of the arbitration proceedings, such those regarding appointment of arbitrators and the scope of their powers, the time limit for the issuing of a decision, the finality thereof etc. This type of arbitration clearly leaves a maximum of flexibility to the parties, who can tailor the arbitration to their specific needs.

Conversely, institutional arbitration entails the parties' obligation to submit their case to an institution specialised in conducting arbitration procedures and to abide by the rules established by such institution. Institutional arbitration is by far the most common form of dispute resolution used in international transactions.

As opposed to *ad hoc* arbitration, institutional arbitration provides a comprehensive and proved set of arbitration rules tested over time, of crucial im-

[2] The arbitration of the ICC, based in Paris, can be considered the most widely used in international trade. ICC arbitration is managed by the ICC International Court of Arbitration, which is not a court in the judicial sense of the term, since its decisions are taken by arbitrators appointed by the parties. It is rather in charge – with the assistance of a Secretariat – of, for example, the appointing and replacing of arbitrators, the monitoring of the arbitration process and the scrutinising and approving of all arbitration awards.

portance in addressing the specific issues liable to arise during the procedure. Furthermore, institutional arbitration affords the parties specialised assistance during the several phases of the procedure (such as aid in setting up the tribunal, monitoring the procedure etc.), and also estimates the possible costs of a case on the basis of pre-established criteria developed over time.

Alternatively, the parties can decide to set forth certain rules autonomously and to rely on institutional arbitration rules for the governing of certain other aspects, for example, applying the UNCITRAL Arbitration Rules adopted in 1976 (and revised in 2010) to their dispute in order to govern merely the procedural aspects of the arbitration. Thus, if the parties choose this solution, they will dispose of a set of rules governing most problems that may arise during proceedings.

6.3. Legal framework and international arbitration institutions

International arbitration is the subject of several international conventions that attempt to provide a standard legal framework to the business community so that it may effectively deal with cross-border disputes.

The principal, most comprehensive instrument available worldwide is the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, ratified by 157 of the world's 195 sovereign States. [3]

The New York Convention is based on two fundamental principles:

– respect for arbitration clauses/agreements;
– recognition and enforcement of foreign arbitral awards.

The first principle implies that, should a claim be brought before them, national courts must, in the presence of a valid arbitration clause or agreement, refuse to exercise jurisdiction.

The second principle is subject to the award's fulfilment of the conditions set forth in Article V of the New York Convention (as described below).

Another important convention, specifically regarding investment disputes **between foreign investors and States**, is the Washington Convention of 18 March 1965 on international investment disputes. This convention establishes an international arbitration system managed by the Washington-based International Centre for the Settlement of Investments Disputes (ICSID).

The United Nations Commission on International Trade Law (UNCITRAL) has also drafted a Model law, standard that all States can follow when making

[3] *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, also known as the *New York Convention*, was adopted by a United Nations diplomatic conference on 10 June 1958, and entered into force on 7 June 1959.

national laws and regulations on arbitration. The main purpose of the Model law is, therefore, to facilitate harmonisation of domestic legislations.

Among the main international arbitration institutes the following deserve to be mentioned: the aforementioned International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the American Arbitration Association (AAA), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute), the International Arbitral Centre of the Federal Economic Chamber in Vienna, the Milan Chamber of Arbitration (CAM), the Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKIAC), the China International Economic and Trade Arbitration Commission (CIETAC) and the Cairo Regional Centre for International Commercial Arbitration (CRCICA).

In almost all cases these institutions are established within local chambers of commerce, industrialists' associations or other public or semi-public agencies connected with international business.

The selection of the most appropriate arbitration institution with a view to forming a specific agreement should be made by the prospective parties only after taking into consideration several aspects, and in particular the locality and organisation of the institution, the professional standing and independence of arbitrators, the foreseeable quality of the procedure and the costs involved.

6.4. Arbitration *versus* litigation

Why should arbitration be preferred over litigation? Arbitration is generally regarded as a mechanism with which to avoid drawbacks of litigation such as: delay in the issuing of a decision, low degree of flexibility in procedural rules, undesired publicity and – in certain jurisdictions – courts' lack of impartiality and discrimination against foreigners.

However, even arbitration bears pros and cons that should be taken into consideration when deciding whether or not to resort to this dispute resolution mechanism.

6.4.1. The pros

Neutrality, expertise, confidentiality, flexibility, as well as finality and enforceability of the award, can be regarded as some of the main advantages in choosing arbitration over litigation.

– Neutrality

In arbitration procedures the parties are free to constitute their arbitration tribunal, which usually consists either of a sole arbitrator or of three arbitrators

(See below: Paragraph 6.7). In the former case, the arbitrator will decide alone, whilst in the latter the arbitration tribunal will be composed of (a) two arbitrators, one appointed by each party, and (b) a third arbitrator – who generally acts as Chairman – appointed either jointly by the parties or by the arbitration institution itself. Both arbitration panel and sole arbitrator are required to be strictly impartial and independent from the litigating parties, and all institutional arbitration rules include strict norms on arbitrators' duty of independence, including independence from the party appointing them.

With an international viewpoint, the arbitration tribunal is required to be strictly impartial and independent, since it is regarded as a neutral body rather than the national court of one of the parties. Conversely, judicial litigation relies on national courts, an especially important fact when international contract issues are involved. In fact, although, generally speaking and with some limitations, the parties may stipulate that the court of a specific country will have jurisdiction over any dispute, a problem arises with respect to the choice of the court: should it be that of one of the parties? Or should it be the court of a neutral third country?

A neutral court is supposed to be most likely impartial, however, it may not be the best option, as it will be foreign to both parties, with its own specific formalities and rules that have been developed to deal with national matters rather than with international commercial cases and that are unknown to them.

– Expertise

Arbitration allows the parties to select arbitrators on the basis of the latters' specific expertise in certain fields. Typically, industrialists' associations and similar institutions have their own arbitration institutions, where specialised arbitrators are experts of the sector and of its specifications. This is an unquestionable advantage when arbitration involves highly technical matters. Conversely, the same is not possible in formal litigation, as the judge presiding over the case at hand is assigned thereto on the basis of the country's specific procedural rules and – in transnational disputes – on the basis of rules governing conflict between the laws and jurisdictions of different States.

A typical characteristic of international arbitration is the possibility of selecting arbitrators who know the language chosen by the parties for the proceedings and/or for the contract. On the contrary, in national courts the parties are always required to use the official local language and are thus may be compelled not only to attend hearings held in a foreign language but also to translate all the documents submitted throughout the procedure.

– Confidentiality

Confidentiality is also an important and attractive feature of arbitration procedure. Confidentiality means that information disclosed between parties dur-

ing arbitration proceedings must remain private, thus not subject to the publicity that judicial proceedings – usually open to the public – entail. Therefore, the confidentiality of arbitral proceedings is quite attractive for companies and institutions involved in international transactions and desirous not to divulge the matters disputed or any details of the transactions concerned.

– Procedural flexibility

The flexibility of arbitration proceedings can be set forth in three different aspects, *i.e.* with regard to the procedure, the language and the place where the arbitration takes place. Flexibility of proceedings means that, when choosing arbitration, the parties are neither bound by procedures established by national rules nor subjected to the delays associated with generally expensive judicial proceedings: they can choose the procedure most suitable with respect both to the requirements of the case at issue and to their needs. Flexibility of language means that the parties can choose the language in which the arbitration will be conducted, *i.e.* the language of the hearings and of the documents to be filed, and in which the award will be rendered. Flexibility of the place of arbitration means that the parties are not subject to rules governing conflict between the laws of different States, thus to the jurisdiction of a given national court, but are free to agree upon a neutral or otherwise convenient place in which the proceedings will be conducted.

– Finality of the award

As already observed, subject to certain provisions of national law or specific agreement between the parties, the arbitral award is final. This means that, contrary to the case of court decisions in litigation, the award admits of no appeal, thus ensuring that the winning party is not at risk of facing a challenge to the ruling in its favour.

Generally speaking, and irrespective of specific laws governing arbitration in each country, one may identify three main grounds of challenge to an arbitral award: (i) jurisdictional, for example when, according to applicable law, the matter cannot be settled by arbitration, or when the arbitration clause of the contract in question is null and void; (ii) procedural, *i.e.* when certain procedural requirements, such as the giving of proper notice of an arbitrator's appointment, are not fulfilled; (iii) substantive, *i.e.* a serious mistake of law or of fact made by the arbitral tribunal. Challenges based on the last type of ground are allowed by national courts only in very limited cases.

– Enforceability

A judgment of a local court is, in principle, enforceable only in the country where it has been handed down – (for judgments delivered in European Union

countries, within the territory of the European Union). Enforcement in other countries is possible by virtue of provisions of international treaties, but in practice it is difficult, time-consuming and costly. On the contrary, an arbitral award will been force able in at least 157 countries, pursuant to the New York convention of 1958.

6.4.2. The cons

Arbitration can also entail certain drawbacks, amongst which are the cost of procedure and the limited powers of the arbitrators, features that may favour the economically stronger party to a dispute.

– Delays and costs

Arbitration can entail certain delays at both the beginning and end of the procedure.

Delays at the beginning of the procedure may be due to the time needed to resolve certain preliminary issues and to carry out formalities required to establish the panel.[4] A certain degree of cooperation between the parties is also required to launch the procedure, for instance in appointing the arbitrator(s) and scheduling hearings. A party's refusal to cooperate can, therefore, compromise both the economical nature and the swiftness of arbitration proceedings, possibly resulting in a need to resort to litigation. In general, when a party wishes to avoid arbitration, there will be means with which to obstruct the process, for instance by resorting to the courts and thus delaying the process for months if not years. Also, at the end of the procedure, delay may occur due to the time needed by the tribunal to make its decision. It goes without saying that delays will entail further expense and administrative charges to be borne by the parties.

With respect to this last aspect, arbitration is generally much more expensive than litigation. Not only must the parties pay counsel's fees as in litigation, but they are also required to pay arbitrators' fees and institutional administration fees, and to cover other expenses such as that for the use of the facilities in which the hearings are held, along with translators' fees and costs of transcripts. Moreover, expenses will tend to increase in proportion to the complexity of the case, due to the need to gather and examine greater volumes of evidence.

The aforementioned costs may represent a real financial burden for a party having already sustained substantial loss due to the counterparty's contractual

[4] For instance, under the ICC Rules of Arbitration (Articles 4 and 5), the claimant must submit a request for arbitration to the ICC Secretariat supplying information about the parties and their dispute, together with proof of payment of the filing fee. The respondent must then, within 30 days from the ICC Secretariat's receipt of the arbitration request, submit a reply, together with all information and evidence regarding the dispute, and any counter-claim.

breach, a fact that may well influence its decision whether or not to resort to arbitration.

– A procedure not suitable for multi-party disputes

The aforementioned delays and costs grow when a dispute involves more than two parties, as does the complexity of the dispute. Generally speaking, conducting proceedings involving only two parties is easier, in view of the fact that the attaining of a certain degree of consensus and cooperation amongst those concerned is essential.

Moreover, the procedural rules of most arbitral institutions are designed mainly for two-party cases (*e.g.* the typical composition of a panel of three arbitrators, two of whom being appointed by the parties and one by the institution).

Thus it can be argued that arbitration is not, in principle, an efficient procedure for multi-party disputes, particularly when several parties pursue conflicting interests and have different approaches as to how to manage the case.

– A procedure that may favour the stronger party

Arbitrators are not professional judges. They are professionals (often lawyers well connected in the local business environment) who provide private "dispute resolution services" within or outside of specialised institutions.

It is arguable that the financially stronger party to the dispute is favoured in arbitration proceedings not only because it is better equipped to cope with technicalities, delays and costs, but also because stronger parties are usually large and influential corporations playing a major role in their local business environment, and the arbitrators – who are private professionals working in the same environment – might be consciously or unconsciously sensitive to such role. Furthermore, the financially stronger party may take advantage of its position in order to stall the procedure and exercise greater bargaining power on the weaker party, which may thus be hurried into accepting a compromise particularly favourable to the adversary.

Geopolitical issues may also affect the reliability of arbitration for the parties. The fact that the main venues for arbitration are in Western metropolises such as New York, London, Geneva and Paris implies that parties from developing countries may face issues regarding procedure fees, expenses for consultants and other associated costs. Conversely, in venues in developing countries arbitrators are often quite closely connected with local political authorities and economic powerhouses, and therefore may in some cases be less independent than should reasonably be expected.

– Limited powers of the arbitrators

Compared with the powers of court judges, those of arbitrators are limited, since they derive from an agreement between two private parties and not direct-

ly from the law of a State. Thus their powers will be only those expressly stated in the parties' agreement and their authority can by no means be broader than as expressly provided either by the relevant contract's arbitration clause or by said agreement.

Many countries' laws, for example Italian law, reserve exclusively to judges the power to enforce the law and to issue mandatory in-court orders and injunctions, since judges alone represent the executor power of the State. This means that if party A urgently needs a preliminary injunction in order, for example, to prevent party B from selling its most valuable asset (thus compromising party A's ability to receive damages), it cannot resort to arbitrators but only to judges. In many legal systems, arbitrators cannot even order a witness to appear before the panel, or order evidence to be disclosed in the course of proceedings. Certain other jurisdictions enable arbitrators to issue urgent preliminary injunctions and conservative rulings in certain conditions to be ascertained by the courts when recognising an arbitral award. This means that either because of the parties' agreement or due to restrictions set by national laws, parties to arbitration proceedings may have fewer remedies at their disposal than parties to litigation.

6.5. The arbitration clause

6.5.1. Arbitration clause *versus* arbitration agreement

As stated above, arbitration is a choice expressed by parties either, on the one hand, in a clause included in an original agreement or, on the other hand, in a separate agreement entered into by parties to an existing dispute in order to resolve the same through arbitration.

Therefore, the arbitration clause can be defined as a clause in a contract whereby the parties agree, in general terms, to resolve possible future disputes arising from such contract through an arbitration process. The arbitration agreement can be defined as an agreement to submit an existing dispute to arbitration. Thus the key difference between the two is that the latter consists in an agreement to arbitrate made after the dispute has arisen, whilst the arbitration clause is agreed beforehand.

Arbitration clauses should be simple, clear and effectual, but in international business practice it is not uncommon to come across clauses that are barely intelligible and quite often end up being invalidated. It should be noted that standard clauses may already be provided by arbitration institutions, and that these can also include the parties' wish to stipulate within said clause the law governing the contract as well as the number of arbitrators, the place and/or the language of the arbitration. The easiest and most efficient way to draft an arbi-

tration clause is to copy such standard clauses proposed by the arbitration institution chosen for the dispute resolution.

For instance, the standard clause provided for by the ICC, which may either be used by parties without modification or modified as required by applicable law or in line with the parties' preferences: *All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules*.

(For another example, see article 17.1, Chapter 11).

Parties are free to adapt the clause to their particular circumstances. For instance, they may wish to stipulate the number of arbitrators, given that the ICC Arbitration Rules contain a presumption in favour of having a sole arbitrator. Also, it may be desirable (and it is actually advisable) for parties to stipulate the place and language of the arbitration and the law applicable to the merits of the case. The ICC Arbitration Rules limit neither the parties' free choice of the place and language of the arbitration nor the law governing their contract.

However, in order to be recognised, both arbitration clause and arbitration agreement must satisfy the requisites specified in international conventions. The most relevant international convention in this respect is the aforementioned New York Convention of 1958. Each State party thereto (Contracting State) has undertaken to recognise and give full effect to an arbitration agreement when the following requisites are met:

a. the agreement must be in written form;
b. the agreement must address existing or future disputes;
c. the disputes concerned must have arisen with respect to a determinate legal relationship, whether contractual or not;
d. such disputes concern a subject-matter admitting of settlement by arbitration. [5]

6.5.2. "Arbitrability" of the dispute

The question as to "Arbitrability" essentially asks whether a dispute may be resolved through arbitration under applicable law. In fact, a dispute may be

[5] Article II (paragraphs 1 and 2) of the New York Convention reads as follows:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractua1 or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams".

within the scope of the arbitration agreement but nevertheless be non-arbitrable because, under applicable law, the specific issue under dispute cannot be decided by arbitrators but only by a court of justice.

In this respect there may be several situations involving problems of arbitrability and depending mainly upon the law of the country concerned. Generally, arbitration is a dispute resolution system used only for economic (*i.e.* not personal or family) civil matters, but here as well there may be sensitive areas that the national legislator decides to reserve to his national courts in order to protect certain interests, typically related to public policy (*e.g.* laws concerning the protection of weaker parties to commercial contracts, labour law issues, competition issues, etc.) Therefore, a precise in-depth check is advisable before submitting a given subject matter to arbitration.

6.6. The place of arbitration

The choice of place of arbitration is a crucial one, and when making it there are certain factors to be considered, such as the law governing the procedure and whether the country where it will be conducted is party to the New York Convention and/or follows the UNCITRAL Model Law.

The law governing the arbitration procedure (*lex arbitri*) is often different from the law applicable to the contract and covers, for example, matters like arbitrability, grounds for challenging the arbitrators, assistance by the courts, validity of awards.

As remarked above, the parties may see fit to avoid locating the arbitration in countries that are not party to the New York Convention, as the convention forbids the courts of a Contracting State from hearing any claim in a matter legally subject to an arbitration agreement.

Moreover, in the choice of place of arbitration, some legal specificities related to the country of the selected venue will have to be considered.

International arbitration in China and India

In China all arbitrations are institutional, as Chinese law does not allow ad hoc arbitrations (but generally admits the recognition of foreign ad hoc arbitration awards). Foreign entities intending to conduct arbitration proceedings in China must therefore abide either by the rules of the CIETAC (i.e. China International Economic and Trade Arbitration Commission) or by the very similar rules of the other institutions authorised to admit foreign-related cases, like the Beijing Arbitration Commission (BAC), the Shanghai Arbitration Commission or the Guangzhou Arbitration Commission. [6]

[6] CIETAC rules were established in 1956 under the China Council for the Promotion of International Trade (CCPIT) in accordance with the Decision Concerning the Establishment of a

One peculiar aspect of the CIETAC Rules, as well as those of the other Chinese arbitration institutions is that several of their elements constitute a departure from accepted global standards, and reflect rather typical "inquisitorial" traits of the Chinese legal system. For example, the arbitration panel may carry out its own investigation without the parties' request, and is expected, in order to make its decision, also to make use of mixed elements of mediation-conciliation and arbitration, amongst which a preliminary mediation attempt carried out by the panel and a resumption of the arbitration proceedings if mediation fails. CIETAC rules show also some major diversions from the most widespread global standards in some sensitive issues like the selection of arbitrators, conflict of interests and confidentiality of the procedure. Finally, the CIETAC internal governing committee (composed, directly or indirectly, of government appointees) has very broad power to review the arbitral awards and even to intervene in the merits of cases examined by the arbitration panels. As for the New York Convention, China ratified it on 22 January 1987 under the reservation that the Convention would apply only to disputes considered by its own domestic law as commercial in character.

Some of China's international arbitration characteristics have made Hong Kong very attractive as a phase for arbitration. In the Special Administrative Region of Hong Kong, on the other hand, worthy of mention in this regard is the agreement reached by the Mainland Chinese and Hong Kong authorities after the 1997 Chinese handover in 1998, establishing reciprocal recognition and enforcement of arbitral awards. The scope of this agreement was clarified only in 2009, thanks to a notice published by the Supreme People's Court stating that both *ad hoc* and institutional arbitrations awards made in Hong Kong were enforceable in China. The most prominent arbitration organization in Hong Kong is the Hong Kong International Arbitration Centre (HKIAC). The New York Convention applies also to the Hong Kong Special Administrative Region, subject to the aforementioned reservation imposed by China.

In India the Indian Arbitration and Conciliation Act 1996 (the Act) sets, for the purposes of enforcement under it, more stringent requisites for defining a "foreign award" than those envisaged by the New York Convention. Technical applications and challenges to arbitration clauses or awards before the Indian courts have led to long delays, a phenomenon that has unfortunately become common in the context of enforcement of arbitral awards in that country. Moreover, the manner in which the Indian Supreme Court has interpreted the Act effectively puts foreign arbitration awards at risk of being set aside. The most prominent international arbitration organization in India is probably the Mumbai Centre for International Arbitration (MCIA).

6.7. The arbitrators: one or more?

It is generally difficult to know, before a dispute arises, whether it is preferable to have one or more arbitrators. Also, in choosing an arbitrator, one should be mindful of his expertise in the area of law concerned. In this respect, Article 12 of the ICC rules states that "where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of

Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade.

three arbitrators". Thus there is maximum flexibility with regard to preference for having either one or more arbitrators.

However, paragraphs 3, 4 and 5 of said Article 12 stipulate the possibility of appointing either one or more arbitrators, and state the procedure to follow, depending on what the parties have agreed:

> *Sole Arbitrator*
> *3) Where the parties have agreed that the dispute shall be resolved by a sole arbitrator, they may, by agreement, nominate the sole arbitrator for confirmation. If the parties fail to nominate a sole arbitrator within 30 days from the date when the claimant's Request for Arbitration has been received by the other party, or within such additional time as may be allowed by the Secretariat, the sole arbitrator shall be appointed by the Court.*
> *Three Arbitrators*
> *4) Where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall nominate in the Request and the Answer, respectively, one arbitrator for confirmation. If a party fails to nominate an arbitrator, the appointment shall be made by the Court.*
> *5) Where the dispute is to be referred to three arbitrators, the third arbitrator, who will act as president of the arbitral tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such appointment, in which case the nomination will be subject to confirmation pursuant to Article 13. Should such procedure not result in a nomination within 30 days from the confirmation or appointment of the co-arbitrators or any other time limit agreed by the parties or fixed by the Court, the third arbitrator shall be appointed by the Court.*

Several factors need to be taken into considerations when deciding whether to have one arbitrator or more. The composition of a panel of arbitrators entails the ability of each party to designate at least one arbitrator whom it trusts to be competent to decide on the specific matter at issue. Nevertheless, proceedings with a three-member tribunal are also more expensive than those conducted by a sole arbitrator. In addition to the foregoing, although having more than one arbitrator may entail a need for more time for the award to be delivered (since a panel will have to reach a consensus before coming to a final decision), it is also likely that all aspects of the case and submissions of the parties will be carefully pondered and thoroughly discussed before the award is handed down, thus lessening the risk of an error of law or fact and providing the parties with a more satisfactory solution.

The ICC rules provide the possibility to challenge an arbitration procedure, as set forth at paragraphs 1 and 2 of Article 14:

> *1) A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.*
> *2) For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.*

6.8. Recognition and enforcement of the arbitral award

The losing party in an arbitration procedure is required to comply with the award. However, as arbitrators have no direct enforcement power, when said party fails to do so the only option for the winning party is to try to have compliance imposed by a court ruling, through litigation. In an international perspective, in order for this to occur the award must be recognised by a court of the country in which the winning party needs the award to be enforced.

Recognising an award means that the courts of a given country attribute to the award the same status as that of their own rulings, after ascertaining that it fulfils certain requisites. Enforcing an award means that a court gives concrete effect to the decision contained in the award by compelling the losing party to compensate the winning party and/or discharge the obligations prescribed. The two are, in practice, closely intertwined, since the winning party normally seeks enforcement of the award, a fact implying that the court must first recognise it as having the same value as a judicial decision.

International treaties – and in particular the New York Convention – contain provisions setting forth requisites for enforcement and specifying cases wherein enforcement is not admissible. In this respect, articles IV and V of the New York Convention stipulate as follows:

> Article IV:
>
> *1. **To obtain the recognition and enforcement** […] the party applying for recognition and enforcement shall, at the time of the application, supply:*
> *(a) the duly authenticated original award or a duly certified copy thereof;*
> *(b) the original agreement referred to in article II or a duly certified copy thereof.*
> *2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.*
> Article V:
> *1. **Recognition and enforcement of the award may be refused**, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*
> *(a) The parties to the agreement referred to in article II were, under the law applicable to them, 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 the country where the award was made; or*
> *(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or*
> *(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it 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, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or*

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

Thus, the New York Convention facilitates the recognition and enforcement of foreign arbitral awards within the territory of a Contracting State, irrespective of the arbitration rules under which the arbitral proceedings were conducted, setting forth simple requisites to be fulfilled and documentation to be submitted before the relevant court, as follows:

- the party must supply a duly authenticated original of the award in question or a duly certified copy thereof;
- the original agreement referred to in Article II or a duly certified copy thereof;
- if needed, a certified translation.

The grounds for refusal of enforcement and recognition of an award, as set forth in Article V, may be summarised as follows:

- the arbitration agreement is not valid under the law to which the parties have subjected it;
- the party against whom the award is invoked did not receive proper notice of the appointment of the arbitrator(s) or of the arbitration proceedings;
- the award deals with matters beyond the scope of the submission to arbitration;
- the composition of the tribunal, or the arbitral procedure, was not in accordance with the parties' agreement;
- the award has not yet become binding on the parties.