

CHAPTER 11

HARMONISATION OF ARBITRATION LAWS IN THE ASIA-PACIFIC: TRENDY OR NECESSARY?

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I ARBITRATION AS THE STANDARD MECHANISM FOR INTERNATIONAL DISPUTE RESOLUTION

In the last decades arbitration has become the most popular mechanism for settling international disputes. In a world subject to increasing globalisation there is a clear tendency to resolve business disagreements by means of arbitration. International arbitration has become the foremost technique for resolving disputes between States, individuals, and corporations in almost every aspect of international trade, commerce, and investment.¹ It is now considered the 'normal' method to resolve international business disputes, and practically all international agreements contain arbitration clauses. This trend can be explained by the increased globalisation of business and expansion of international trade which have led to a change in the way international business disputes are solved.²

International arbitration has acquired a central importance in the global economy, particularly regarding commercial activities. With the globalisation of trade, companies and investors want to select a neutral forum and a reliable legal mechanism for the settlement of their disputes. There are several reasons why arbitration is especially suited for resolving international disputes. First, international arbitration promotes neutrality. National courts are commonly considered to have an inherent national prejudice when called to resolve

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1 Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter *Redfern and Hunter on International Arbitration* 1.01 (5th ed., Oxford University Press 2009) at 1.

2 David J. McLean "Toward a New International Dispute Resolution Paradigm: Assessing the Congruent Evolution of Globalization and International Arbitration" (2009) 30 *University of Pennsylvania Journal of International Law* 1087.

international disputes. Differently, international arbitration gives the parties an opportunity to choose a 'neutral' place for the resolution of their disagreement and to choose a 'neutral' tribunal, providing a level playing field for the disputants. Therefore, neither party feels compelled to submit to the courts in the other party's home country. Furthermore, the arbitral tribunal may be composed of arbitrators reflecting the parties' different cultural and legal backgrounds. The proceedings may be shaped in such a way to take account of the international character of a dispute, for example by allowing submissions in different languages, letting witnesses testify in their mother tongue, or facilitating service of documents.³

In addition, arbitration is considered to be more suitable for international controversies. There is often a mistrust of national courts not only when they are foreign, but also because judges are normally not familiar with some types of international contracts which have their own characteristics and technical language. The development of international arbitration in the last decades is deeply related with its fittingness for transnational contracts. Parties are free to select arbitrators for their expertise in the particular areas of trade and law involved in the dispute. In some cases it may even be appropriate to appoint non-lawyers who have specific technical knowledge on the type of contract that gave rise to the controversy.

A third – and decisive – advantage of international arbitration over judicial proceedings is its enforceability. Arbitration proceedings normally result in a decision (arbitral award) which is enforceable against the losing party not only in the jurisdiction where it was rendered but also internationally, under the rules of international treaties that offer a global framework for arbitration. Compared to the mechanisms available in most judicial proceedings, international arbitration enjoys an 'enforceability premium', at both the agreement stage and the decision stage.⁴

International commercial arbitration plays an increasingly important role in the Asia-Pacific region. As several countries expand their economies, the number of companies involved in import and export trade is growing accordingly. A rising number of companies worldwide are engaging in contracts with counterparts from the Asia-Pacific. These contracts may naturally result in disputes, creating a need for adequate dispute resolution mechanisms. Decisions rendered by national courts are not recognisable and enforceable in many countries due to lack of reciprocity. In fact, there is presently no system of international treaties in force to guarantee the enforcement of national judgements abroad. Differently, international

3 Stefan M. Kroll "Arbitration" in Jan M. Smits (ed.) *Elgar Encyclopedia of Comparative Law* (Edgar Elgar Publishing 2006) 80.

4 Gary B. Born "Arbitration And The Freedom To Associate" (2009-2010) 38 *Georgia Journal of International and Comparative Law* 7 at 12.

arbitration offers participants in contracts involving parties from the Asia-Pacific region an effective mechanism for dispute resolution. Almost all countries from the region are signatories to the 1958 Convention on Recognition and Enforcement of International Arbitral Awards (the New York Convention).⁵ As a result, arbitral awards can generally be enforced abroad. In this context, arbitration provides parties to an international contract with an important alternative to national courts.

II THE IMPORTANCE OF NATIONAL ARBITRATION LAWS

International arbitration only functions effectively thanks to a complex system of legal instruments providing a regulatory framework which controls its legal status and effectiveness. This framework must give effect to the agreement to arbitrate, the organisation of the proceedings, and the recognition and enforcement of the arbitral award.⁶ This legal framework is composed of three separate yet integrated bodies of law: international treaties, rules enacted by arbitral institutions, and national domestic laws.⁷ Each of these is integrated with one another and works to form the body of law that governs international arbitrations. The bodies of laws present in international arbitration have all worked to promote harmonisation and effective enforcement.⁸ These essential characteristics of international arbitration have combined to make it a useful tool in resolving international disputes.⁹

For arbitration to function it is necessary to have a modern and supportive legal infrastructure in place. Arbitration proceedings are governed by the so-called *lex arbitri*. This law regulates the actual arbitration proceedings themselves, not the substantive matters under discussion. It is therefore necessary to distinguish between substantive issues and procedural issues. The former are those which underpin the decision on the case and the reasoning behind it; while the latter refer to the process by which that decision is achieved. The parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Failing such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. If the parties have not made use of their ability

5 Available at <www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf>.

6 Julian D. M. Lew, Loukas A. Mistelis & Stefan M. Kroll *Comparative International Commercial Arbitration* (Kluwer Law International 2003) at 17.

7 See Margaret L. Moses *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) at 5-9.

8 Mark D. Wasco "When Less is More: the International Split over Expanded Judicial Review in Arbitration" (2009-2010) 62 Rutgers Law Review 602 at 606.

9 See Albert Jan van den Berg *Striving for Uniform Interpretation in Enforcing Arbitration Awards under the New York Convention: Experience and Prospects* (UN 1999) at 41-44.

to choose the law to be applied to the arbitration procedure, the *lex arbitri* is typically considered to be the law of the jurisdiction where the proceedings are held.¹⁰ Unless the parties fully understand the implications of that law, they can be submitting themselves to the procedural complexities of a legal system that is unfamiliar to them.¹¹

The local law will, first of all, provide for the procedural rules to be followed during the arbitration proceedings. This law may also be relevant for gap-filling, when the choice of rules of arbitral procedure by the parties is not comprehensive. In this case the local law may provide some guidance.¹² The *lex arbitri* will also determine the supervisory powers that local courts have over the arbitral proceedings. In fact, national courts are indispensable to the effectiveness of the arbitral process. Under any legal system the variety of the courts' powers encompasses issues ranging from the validity of arbitration agreements to the effect of arbitration awards. Within this range the powers of the courts can be categorised as powers of assistance, powers of intervention, powers of supervision or control, and powers of recognition and enforcement.¹³ The arbitral tribunal may need, for example, to request assistance from local courts during the arbitration proceedings. The local law will control the opportunities for the court to assist with – or potentially interfere with – the arbitration. This law will govern important questions such as the rules on taking evidence, the existence (or not) of interim measures, the arbitration's relationship to parallel proceedings, the appointment or removal of arbitrators, mechanisms to secure the attendance of witnesses or the disclosure of documents, etc. Local arbitration law might also affect aspects such as the minimum number and qualifications of arbitrators.

Furthermore, the courts of the seat of arbitration also have exclusive jurisdiction to hear an action to set aside the arbitral award.¹⁴ The local court will assess the validity of the award according to its own law. Parties to an arbitration agreement should examine the extent of court interference in, or court assistance to,

10 Michael Reisman, William Laurence Craig, William Park & Jan Paulsson *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes* (Foundation Press 1997) at 172.

11 Greg Reid & Mark Deem "Seating Plan" (30 October 2006) 20(42) *The Lawyer* 35.

12 Loukas Mistelis "Arbitration Fundamental: the Arbitral Seat: Important Features and the Relevance of Law" (2012) 23 *American Review of International Arbitration* 407 at 413.

13 Michael Kerr "Arbitration and the Courts: the UNCITRAL Model Law" (1985) 34 *International and Comparative Law Quarterly* 1-3.

14 Gary B. Born *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (4th ed., Kluwer Law International 2013) at 67-68.

international arbitration. For arbitration to accomplish its purpose it should lead to an award that is binding and enforceable. Parties should study thoroughly whether review or appeal of awards is possible and what are the grounds for setting aside or modifying awards under the local law. It is important to choose a seat whose courts are not predisposed towards trivial or obstructive intervention. This requires an assessment of the past experience of local courts with international arbitration. Parties should question whether the local judiciary has a tradition of consistent support in the conduct of the arbitration proceedings. The approach of local courts to questions such as the enforcement of arbitration agreements, the support they provide to arbitral proceedings, and their record of enforcement of arbitral awards are of utmost importance in the choice of a seat for arbitration.¹⁵

III THE MODEL LAW AND THE 'HARMONISATION ERA'

Bearing in mind the critical consequences that derive from the *lex arbitri*, parties to an arbitration agreement should choose wisely which law to apply. Failing such agreement, the arbitrators will probably decide to apply the law of the seat of arbitration. If the law of the seat is underdeveloped or raises too many difficulties the outcome of the arbitral proceedings may be affected. The parties should therefore choose a seat equipped with domestic legislation that understands and supports the logic of international arbitration.

Aware of the importance of the legal environment to the parties' choice of the place of arbitration, numerous countries have in the last years enacted or revised their arbitration laws so as to accommodate the specific demands of the international business community. The quality and predictability of the legal environment is essential for a country to catch the attention of users of arbitration services. As a result, jurisdictions use their legal regimes to compete for international arbitration proceedings. Governments strive to adjust and improve their legal frameworks aiming for simplicity, flexibility, and pragmatism. The adoption of a new arbitration law is seen as a 'marketing strategy' intended to send a signalling effect to the international arbitration community of the user-friendliness of a certain legal system.

The UNCITRAL Model Law on International Commercial Arbitration has played a decisive role in this process.¹⁶ This legal instrument was purposely conceived to assist states in reforming and modernising their laws on arbitral

¹⁵ Id., at 71.

¹⁶ UNCITRAL *UNCITRAL Model Law on International Commercial Arbitration 1985. With amendments as adopted in 2006* available at <www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>.

procedure so as to take into consideration the specific features and needs of international commercial arbitration. It was promulgated in 1985 and revised in 2006 to better adjust to international practices. It encompasses all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, and the extent of court intervention through to the recognition and enforcement of the arbitral award. This legislative model reflects worldwide consensus on essential aspects of international arbitration practice having been recognised by members of different legal traditions and states from all parts of the world. It is recognised worldwide as a legal point of reference that grants parties maximum autonomy while limiting the intervention of local courts to extreme cases. Adoption of the Model Law is frequently considered as one of the most important steps for any jurisdiction interested in establishing a modern legal framework for arbitration. It offers countries a low-cost standard to upgrade their arbitration laws. Accordingly, it has been implemented by many countries, frequently with small changes from the original text. Countries that make use of the Model Law are not burdened by minimum adoption criteria. Consequently, they are free to vary texts according to their own legal culture or interests regarding the drafting of new or modified arbitration provisions.¹⁷

The Model Law has been used as an archetype for a number of countries' domestic laws as well as a statement of the international arbitration community's favoured rules for arbitration.¹⁸ It was elaborated with the purpose of unifying the rules of international commercial arbitration, to be adopted by the different states or territories with or without changes. It offers lawmakers a guide with which to customise their own domestic law concerning international arbitration disputes. It is considered as a good example of 'soft law', i.e., an instrument of normative nature with no legally binding force and which is applied only through voluntary acceptance.¹⁹ It provides lawmakers with a text that they can easily incorporate into their domestic legislation on arbitration. It was designed to be adopted by states without the need for substantial additional effort. When jurisdictions incorporate the provisions of the Model Law they are modernising their legal frameworks according to a prototype which is the result of much study and discussion. The Model Law is the successful product of a long and gradual process of harmonisation of arbitration laws: its provisions are a selective and inventive

17 Eva Horvath "A Handy Tool for the Settlement of International Commercial Disputes" (2008-2009) 27 *Penn State International Law Review* 783 at 787.

18 Wasco, above n 8, at 602.

19 Michael Joachim Bonell "Soft Law and Party Autonomy: the Case of the UNIDROIT Principles" (2005) 51 *Loyola Law Review* 229.

synthesis of features inspired by numerous influences. This legislative archetype has also been the direct source of many laws which, while not replicating it entirely, have been evidently inspired by its spirit and textual approach.²⁰ Until July 2015, legislation based on the Model Law had been adopted in 69 States in a total of 99 jurisdictions.²¹ UNCITRAL has not established minimum requirements for ascertaining when a country can be said to have enacted the Model Law. Generally domestic arbitration legislation is considered to be an enactment of the Model Law when it is evident that the legislator took the Model Law as a basis and made certain amendments and additions, but did not simply use the Model Law as one amongst other legislative models or simply follow 'its principles'. This generally means that the greater part of the provisions of the Model Law has been enacted and that the domestic legislation does not contain any rules conflicting with the fundamental philosophy of the Model Law.²²

The Model Law has contributed decisively to harmonise the laws of many countries. Due to the pervasive use of this legislative model, it is seen as a strong indicator of international preference in regards to the laws applicable in international arbitration. The Model Law also contributes in a different manner to the harmonisation of international arbitration practice. A more or less uniform interpretation of the Model Law is possible thanks to the collection and publication of case law. In 1988 UNCITRAL established the 'CLOUT system': Case Law on UNCITRAL Texts.²³ This tool includes both a summary and the full text of decisions relating to both the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention) and the UNCITRAL Model Law. CLOUT makes available decisions rendered by state courts and arbitral tribunals. UNCITRAL also publishes digests of case law reporting trends on the

20 Jack J. Coe Jr. "The Serviceable Texts of International Commercial Arbitration: an Embarrassment of Riches" (2002) 10 *Willamette Journal of International Law and Dispute Resolution* 147-148.

21 When listing the states that have adopted the Model Law the UNCITRAL introduces an important disclaimer: 'A model law is created as a suggested pattern for law-makers to consider adopting as part of their domestic legislation. Since States enacting legislation based upon a model law have the flexibility to depart from the text, the above list is only indicative of the enactments that were made known to the UNCITRAL Secretariat. The legislation of each State should be considered in order to identify the exact nature of any possible deviation from the model in the legislative text that was adopted'. Naturally, not all countries follow the Model Law with the same degree of proximity – UNCITRAL, *Status* <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.

22 José Angelo Estrella Faria "Legal Harmonization through Model Laws: the Experience of the United Nations Commission on International Trade Law (UNCITRAL)" 19-20, available at <www.justice.gov.za/alraesa/conferences/2005sa/papers/s5_faria2.pdf>.

23 <www.uncitral.org/uncitral/en/case_law.html>.

interpretation of the Model Law.²⁴ Naturally, the analysis of this piece of legislation is influenced by the fact that it is a model law (soft law), not a binding convention (hard law). The approach followed by each state in the enactment of the Model Law will, therefore, have a bearing on its interpretation. Differences in interpretation may also result from divergences in understanding between state courts and arbitral tribunals.²⁵

Now seems to be the time of what an author called the 'flu of modernisation' of arbitration.²⁶ By adopting the Model Law legislators favour a legal framework that is easily recognisable by the arbitration community and perceived as an accepted international standard. Some argue that this movement towards harmonisation is motivated by the suspicion that the international arbitration community would not feel comfortable with too many peculiarities in national arbitration laws and would end up avoiding such jurisdictions.²⁷ Furthermore, several arbitral institutions are following the same trend by revising their arbitration rules within the spirit of the Model Law.

The Asia-Pacific stands out as the region of the globe with the highest concentration of Model Law countries.²⁸ A remarkable number of countries have modernised their legislation on arbitration in the last years in harmony with the Model Law. Australia (1989, with amendments in 2010); Hong Kong (1990, with amendments in 2010); Singapore (in 1994, with amendments in 2001, 2003, 2005, 2009, and 2012); Sri Lanka (1995); India (1996); New Zealand (1996, with amendments in 2007); Macau (1998); South Korea (1999); Bangladesh (2001); Thailand (2002), Japan (2003), The Philippines (2004), Malaysia (2005), Cambodia (2006); and Brunei (2009) have all adopted the Model Law. As a consequence of this great propagation of the Model Law, more jurisdictions are expected to follow suit in the near future. Indonesia, Laos, Myanmar, Vietnam, Mongolia, and Timor-Leste, all emerging markets with good prospects of

24 UNCITRAL *2012 Digest of Case Law on the Model Law on International Commercial Arbitration* available at <www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf>.

25 Horvath, above n 17, at 790.

26 A. F. M. Maniruzzaman "Modernisation of International Arbitration Law in the Age of Globalisation: a Bangladesh Perspective" (2004) 5 *International Company and Commercial Law Review* 132.

27 Stephan Wilske "The Global Competition for the 'Best' Place of Arbitration for International Arbitrations – a More or Less Biased Review of the Usual Suspects and Recent Newcomers" (2008) 1 *Contemporary Asia Arbitration Journal* 52-53.

28 Simon Greenberg, Christopher Kee & J. Romesh Weeramantry *International Commercial Arbitration: An Asia Pacific Perspective* (Cambridge University Press 2011) at 36.

development, may consider the adoption of this legislative model of reference as an instrument to boost their arbitration market.

IV HARMONISATION IS NOT A MAGIC POTION

The Model Law's purpose is to harmonise the law and practice of international commercial arbitration on a global scale. The modernisation of national arbitration laws according to this archetype results in the synchronisation of legal frameworks across borders. Harmonised national laws on international commercial arbitration bring about clear advantages for the effectiveness and efficiency of international arbitration practice. The harmonisation of different national laws prevents an arbitration clause from being considered as valid in one state but void in another, or the recognition and enforcement of an arbitral award in one state but its refusal elsewhere. Orderly and coherent exercise of adjudicatory and enforcement authority is desirable in a plural and globalised world.²⁹ However, the harmonisation of national arbitration laws should not become an obsession. The Model Law is not a magic potion that instantaneously solves all problems or turns a jurisdiction into an arbitration paradise.

First of all, it would be misleading to suggest that jurisdictions that enacted the Model Law have, as a result, perfectly identical arbitration laws. Different countries have adopted the Model Law with diverse degrees of closeness and following dissimilar approaches. Harmonisation does not mean uniformity: it promotes similarity and correspondence but a certain measure of disunity still remains.³⁰

Second, even though it is frequently said that the UNCITRAL Model Law represents a legal standard recognised worldwide, it is not the only legal standard available, or even the most efficient or sophisticated. In fact, around two-thirds of arbitration proceedings take place in jurisdictions that have not enacted the Model Law. Interestingly, almost all of the 'arbitration superpowers' (in terms of numbers of cases) have designed their own laws. Amongst them are England, France, Switzerland, Sweden, the United States, and China. Therefore, it seems that the Model Law may set relevant regulatory standards but it alone is not sufficient to establish a jurisdiction as a popular seat of arbitration.³¹ This assertion is confirmed

29 Christa Roodt "Conflicts of Procedure between Courts and Arbitral Tribunals in Africa: an Argument for Harmonization" (2010) 25 *Tulane European and Civil Law Forum* 65-66.

30 Coe Jr., above n 20, at 149.

31 Loukas A. Mistelis "International Arbitration – Corporate Attitudes and Practices. 12 Perceptions Tested: Myths, Data and Analysis Research Report" (2004) 15 *American Review of International Arbitration* 529-530.

by the fact that many countries that have adopted the Model Law are not popular arbitration venues.

Furthermore, the *lex arbitri* may have more impact in some cases than in others. If both parties are willing to take part in the proceedings without useless confrontation and are prepared to accept the award voluntarily, the *lex arbitri* is fairly irrelevant. If, inversely, one of the parties raises procedural objections during the proceedings or is unwilling to comply with the award voluntarily, the other party will need to request support from national courts, either during or after the arbitral proceedings.³² It has been argued that, in those instances where there is no need for support by local courts, the seat of arbitration may be merely fictitious.³³ As a matter of fact, in the vast majority of the cases there is no need for the arbitration proceedings to interact with the local law or the local courts. In addition, arbitration laws are increasingly harmonised. As a result, they tend to become fairly compatible. Even though most national laws have not yet reached this stage, the overall trend is undeniable. If arbitration laws are becoming truly interchangeable, which one applies becomes irrelevant. In this sense, the impact of individual national laws decreases.³⁴

Fourth, it should be taken into account that the law of the place of arbitration is not necessarily decisive in all international arbitration proceedings. In fact, quite frequently such laws have only marginal relevance. Many disputes are determined by arbitral tribunals with no more than a passing reference to the law of the place of arbitration. In such cases arbitrators focus on matters of fact: what the parties said, what the parties did, etc. Just as a national court frequently reaches its decision on the merits of a dispute without detailed reference to the applicable law, so an arbitral tribunal may well pay little or no attention to the law that governs its own existence and proceedings as an arbitral tribunal.³⁵ It is expected, however, that local laws will provide adequate support to the arbitration, respecting, recognising, and enforcing its proceedings and outcomes.³⁶

32 Alain Hirsch "The Place of Arbitration and the *Lex Arbitri*" (1979) 34 *Arbitration Journal* 44.

33 Tetsuya Nakamura "The Place of Arbitration – its Fictitious Nature and *Lex Arbitri*" (2000) 15(10) *Mealey's International Arbitration Report* 23-29.

34 Gabrielle Kaufmann-Kohler "Globalization of Arbitral Procedure" (2003) 36 *Vanderbilt Journal of Transnational Law* 1320.

35 Blackaby et al., above n 1, 3.01-3.02, at 163.

36 Julian D. M. Lew "Achieving the Dream: Autonomous Arbitration" (2006) 22 *Arbitration International* 202.

One should also take into account the fact that arbitration proceedings are not exclusively regulated by the *lex arbitri*. In fact, all arbitration proceedings are subject to different legal and regulatory systems. This framework is composed by elements of party autonomy, the chosen arbitration rules, the applicable arbitration laws, and the relevant international arbitration conventions. First of all, arbitration proceedings will be governed by what the parties have agreed, subject to the limits provided by mandatory rules. The agreement of the parties will prevail over the provisions in the chosen arbitration rules which in turn prevail over the applicable law. This regulatory web is, naturally, constrained by relevant mandatory rules. However, most arbitration laws are quite permissive, granting the parties a wide degree of freedom in deciding how their arbitration proceedings are going to be governed and carried out. Indeed, legislatures' support for international arbitration has traditionally taken the form of policies of non-interference.³⁷

Most arbitration proceedings nowadays correspond to institutional arbitration – the parties submit their disputes to an arbitration procedure which is conducted under the auspices of an arbitral institution. This institution generally makes available to parties its own arbitration rules. These rules are devised for arbitrations that are to be administered by the institution concerned; they are usually incorporated into the main contract between the parties by means of an arbitration clause and modified as they see fit. These rules constitute a private source of international arbitration law because their binding nature does not result from the acts of one or more public authorities.³⁸ Parties who identify in an arbitration clause a specific arbitral institution thereby adopt its rules as a standard form subject to any variations agreed to by the parties. The benefits resulting from the incorporation of institutional rules are substantial: it injects an element of certainty and predictability into the dispute resolution process. The rules of arbitral institutions tend to follow a broadly similar pattern. Most of them are based on the UNCITRAL Arbitration Rules. These rules were enacted in 1976 and were reformed for the first time in 2010.³⁹ Although they were originally planned to provide a procedural framework for non-administered commercial arbitration, they may be adjusted without difficulty to operate as the rules for arbitration conducted under the auspices of arbitral institutions. The arbitration rules of each institution are frequently set out in a small booklet or made available online. Rules laid down

37 Catherine A. Rogers "The Vocation of the International Arbitrator" (2005) 20 *American University International Law Review* 970-971.

38 Emmanuel Gaillard & John Savage *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) 321 at 157.

39 UNCITRAL *UNCITRAL Arbitration Rules (as revised in 2010)* available at <www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>.

by arbitral institutions have as a rule proved to operate well in practice; and go through periodic revision in consultation with experienced practitioners, to incorporate new developments in the law and practice of international arbitration.⁴⁰ Arbitral institutions compete with each other by reviewing their arbitration rules to make them more attuned to their clients' needs. Many arbitral institutions have been insistently promoting their services by keeping their institutional rules on the cutting edge of market changes and needs. As these institutions are devoted specifically to the arbitration business, they compete ferociously to attract more and more arbitration proceedings. In this global battle, success is measured by how effective arbitral institutions are in transforming their jurisdiction into a hub for arbitration, where parties are willing to go in case any dispute arises.

In addition to general institutional rules there are also a growing number of subject-specific guidelines promulgated by institutional bodies with an interest in arbitration. Examples include the UNCITRAL Notes on Organising Arbitral Proceedings⁴¹; the Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules⁴²; the IBA Rules on the Taking of Evidence in International Commercial Arbitration⁴³; the IBA Guidelines on Conflicts of Interest in International Arbitration⁴⁴; and the IBA Guidelines on Party Representation in International Arbitration⁴⁵. Of relevance is also the International Chamber of Commerce's Commission Report 'Controlling Time and costs in arbitration'.⁴⁶ Although few parties explicitly choose to have these or similar guidelines apply in a dispute, an arbitral tribunal may decide to make these or analogous rules applicable, either in their entirety or as general principles.⁴⁷

40 Blackaby et al., above n 1, 1.61, at 55.

41 <www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>.

42 <www.uncitral.org/pdf/english/texts/arbitration/arb-recommendation-2012/13-80327-Recommendations-Arbitral-Institutions-e.pdf>.

43 <www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC>.

44 <www.ibanet.org/Document/Default.aspx?DocumentUid=21D27F55-134B-4791-A01C-F8B6658BAB24>.

45 <www.ibanet.org/Document/Default.aspx?DocumentUid=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F>.

46 <www.iccwbo.org/Data/Policies/2012/ICC-Arbitration-Commission-Report-on-Techniques-for-Controlling-Time-and-Costs-in-Arbitration,-2012/>.

47 Stacie I. Strong "Research in International Commercial Arbitration: Special Skills, Special Sources" (2009) 20 *American Review of International Arbitration* 140.

Finally, and even though the choice of the seat of arbitration is a key decision from a legal perspective, it also has a factual component. This choice involves not only legal but also sociological, political, and psychological factors.⁴⁸ Repeatedly, practitioners and scholars have insisted upon the fact that practical considerations also determine the choice of the place of arbitration.⁴⁹ Put simply, the seat of arbitration is the physical location where the arbitration proceedings take place (even though hearings and deliberations may be conducted elsewhere). Hence, when selecting a proper seat of arbitration parties also need to consider its geographical and material convenience. There are several practical factors affecting the choice of a seat of arbitration. Basically, the seat should be conveniently located and have the proper physical amenities and human resources. A seat with inadequate infrastructures may have a negative impact on the arbitral proceedings.

One of the main considerations that influence the choice of a seat of arbitration is its accessibility. The existence of means of communication is essential, as sometimes parties, arbitrators, and potential witnesses come from distant countries or the subject matter in dispute is located far away from the seat of arbitration. The location should be easily accessible to all participants with good and affordable international travel services. The existence of proper facilities is also significant. For the arbitration proceedings to run smoothly it is essential to have suitable hearing rooms, conference rooms, and meeting places. These venues should be equipped with internet, telephone, fax and telex communications, and audio-visual and videoconference facilities. It is important, of course, to provide all participants with decent accommodation. The existence of good legal libraries nearby may be a plus.

The availability of qualified human resources in the seat on arbitration or nearby is also fundamental. The existence of reputable arbitral institutions capable of administering the arbitration or provide support and of a pool of qualified and experienced arbitrators are of the essence. Depending on the nature of the dispute, the availability of lawyers able to give advice on matters relevant to the conduct of the arbitration, or from other professionals (engineers, economists, etc.) to provide expert witness assistance may be decisive. The availability of support services such as translators, interpreters, stenographers, secretaries, and court reporters is also important. Language ability and cultural familiarity ease communication between all involved parties.

48 Aleksandar Goldstajn "Choice of International Arbitrators, Arbitral Tribunals and Centres: Legal and Sociological Aspects" in Petar Sarcevic (Ed.) *Essays on International Commercial Arbitration* (Graham & Trotman/Martinus Nijhoff 1989) 27 at 30.

49 Kazuo Iwasaki "Selection of Situs: Criteria and Priorities" (1986) 2 *Arbitration International* 57.

Yet, the availability of certain services at the place of arbitration is not as decisive as it might seem thanks to the general principle according to which some proceedings may take place in a location other than that of the arbitral seat.⁵⁰ Furthermore, there appears to be an intimate association between the relevance of some services and the nature of the arbitration proceedings. For instance, quality arbitration proceedings usually require fewer services than extensive arbitral proceedings involving complex factual and legal disputes. The particular circumstances of each case will determine to what extent each of these services might be needed. Translation services, for example, will be important when the arbitration proceedings involve many documents which have to be translated. Differently, these services are irrelevant when all documents are written in languages with which all parties are familiar.⁵¹ Apparently trivial questions like visa policies and tax considerations may also be pertinent. Parties should consider questions regarding immigration, customs duties, currency exchange, and tax provisions.

All of these practical questions should be given full consideration when choosing the seat of arbitration. At the end of the day, many of these reflections will be highly dependent on the overall costs associated with a certain seat of arbitration. The parties' costs, including the travel expenses for the parties and witnesses, as well as the arbitrators' fees, will be impacted by the parties' choice of the place of arbitration. Affordability may be a decisive aspect in cases involving small claims or parties with limited resources. An expensive arbitral seat may inhibit the parties from pursuing their claims. The importance of these factors may explain the migration of arbitration cases from traditional seats to less popular venues which allow the parties to reduce some of the costs incurred in international arbitration proceedings.

According to a survey conducted in 2010 by Queen Mary University of London⁵², the most important factor affecting the decision on the seat of arbitration is the seat's 'formal legal infrastructure'. This concept includes the national arbitration law, the track record in enforcing agreements to arbitrate and arbitral awards in that jurisdiction, its neutrality, and impartiality. Respondents considered the law governing the substance of the dispute to be the second most important

50 Filip De Ly "The Place of Arbitration in the Conflict of Laws of International Commercial Arbitration: an Exercise in Arbitration Planning" (1991) 12 *Northwestern Journal of International Law and Business* 51.

51 *Ibid.*

52 Queen Mary University of London 2010 *International Arbitration Survey: Choices in International Arbitration* available at <www.arbitration.qmul.ac.uk/docs/123290.pdf> at 17.

factor influencing the choice of seat. Parties include in legal considerations not only the local law and its application to the arbitration proceedings but also the quality of the legal services provided by lawyers and judges at the seat of arbitration.⁵³ While legal considerations pertaining to the legal framework and the posture of national courts are relevant and important (and include, for instance, the fact that the country has ratified the New York Convention, and that the local law and courts are supportive of arbitration), most parties seem to take them for granted. Apparently most parties choose a seat for its convenience, its perceived neutrality, and the local attitude towards arbitration. There is no evidence that the parties expect that the law of the place of arbitration would necessarily apply, but when they know that it may apply they seem to be prepared to take the risk.⁵⁴ According to the same survey,⁵⁵ convenience is the third most important factor influencing the choice of a seat of arbitration, including location, industry specific usage, prior use by the organisation, established contacts with lawyers in the jurisdiction, language and culture, and the efficiency of court proceedings. While legal considerations such as the applicable law and the approach of courts are relevant and important, it seems that most parties choose a venue for convenience and its perceived neutrality and local attitudes towards arbitration.⁵⁶

Normally countries strive to attract international arbitration proceedings by updating their domestic arbitration laws. Modernisation of the current laws or the creation of a brand new legal framework undoubtedly marks an important milestone in the promotion of arbitration as a method of dispute resolution and, in particular, in the establishment of a jurisdiction as a suitable seat of international arbitration. However, this is only the first step – and probably the easiest and cheapest of all. For a country to become a reliable seat of arbitration a multifaceted strategy is needed, and long-term planning and effective acting is vital. Law in books is of no use if it cannot meet the needs of the everyday business world.

53 Mistelis, above n 12, at 411.

54 *Id.*, at 411-412.

55 Queen Mary University of London, above n 52.

56 Mistelis, above n 12.

