# A Guide to International Arbitration

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# A Guide to International Arbitration

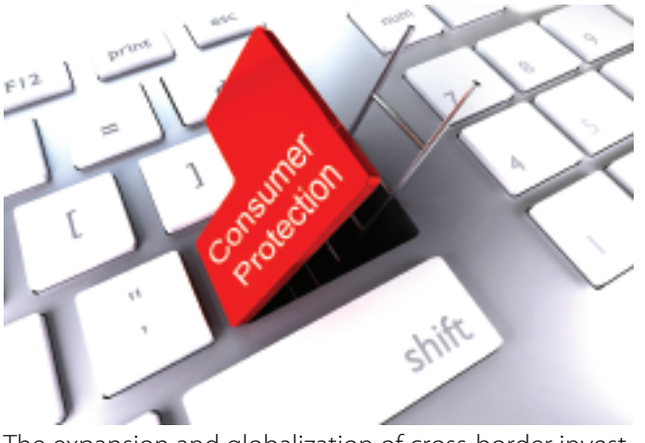
*"When will mankind be convinced and agree to settle their difficulties by arbitration?"*
*- Benjamin Franklin*

A year ago, it seemed as if Brexit was finally about to happen. One year on, they are in the same position again. At one point, it seemed likely that the UK would leave the European Union (EU) without a Withdrawal Agreement (a 'no-deal Brexit'); this was hypothesized to be hugely disruptive, not least concerning the enforcement of English court judgments in Europe. As a result, parties chose to include arbitration in their agreements, and this could lead soon to an increase in London-seated arbitrations. Under the agreement, the UK enters a transition period where it will continue to follow EU rules until 31 December 2020, by which time both sides hope to have agreed on a trade deal. The shift towards London-seated arbitration in international commercial contracts may turn into a long-term trend.

From a global perspective, Brexit is a sideshow compared to China's Belt & Road Initiative (BRI), the most significant investment and construction programme that has been undertaken. Arbitral institutions in APAC are eager to pick up disputes work arising from the many complexes, multi-party projects that makeup BRI.

In April 2019, Beijing and Hong Kong announced an arrangement permitting arbitrations seated in the island to be supported by interim or protective measures issued by courts in the mainland. The critical point is that the arbitration can be administered by any institution, as long as it appears on the official list of permitted bodies. The International Chamber of Commerce (ICC) along with the Hong Kong International Arbitration Centre (HKIAC) and a handful of other institutions appears on the list. Sadly, the difficulties in Hong Kong are affecting business confidence in the island's economy and institutions. Unless the political challenges are fully resolved, it is difficult to judge what their overall effect will be. Still, from an arbitration perspective, there is the potential for disputes to migrate southwards to Hong Kong's main rival in the region, Singapore.

The caseload of the HKIAC has remained constant, and that of the Singapore International Arbitration Centre (SIAC) has more than doubled throughout the current decade. Both have recently permitted third-party funding of arbitrations. Hong Kong's law permits arbitral awards to be appealed on the point of law, provided parties to opt into the arrangement. This is contrary to the position in England, where appeals of this kind are allowed unless parties opt-out as per Section 69 of the *Arbitration Act 1996*.




The expansion and globalization of cross-border investment and trade have led to an increase in more complex relationships between businesses, investors, and States. Inevitably, some of the relationships do break down. Hence the parties need to consider the best means of resolving any dispute which may arise, preferably at the outset of the relationship. Arbitration has been in use since centuries, with Plato writing about arbitration amongst the ancient Greeks. In the new era, arbitration has become the standard method to resolve disputes in specific industry sectors such as construction, shipping, and insurance where the arbitrators' technical expertise is particularly valued. However, over the last 50 years, the international community has increasingly embraced arbitration, with many recognizing its significance as the primary means of resolving complex, transnational, disputes as well as the economic benefits for a State perceived as "arbitration-friendly".

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*"Gentlemen, I fervently trust that before long the principle of arbitration may win such confidence as to justify its extension to a wider field of international differences."*
***– Henry Campbell-Bannerman***

Unlike courts, the arbitral tribunals in commercial disputes have no inherent jurisdiction or power as their authority arises from the parties' contract. However, once it is selected by the parties, arbitration has the backing of statutes and treaties. The essential elements include that the International Arbitration Clause must be in writing to be enforceable as most jurisdictions require the arbitration agreement to be in writing (see, e.g., New York Convention Article II (1)). Also, the International Arbitration must be mandatory. The arbitration clause must make clear that if a dispute arises, it must be arbitrated. Permissive language suggesting arbitration is optional, such as "any dispute may be referred to arbitration," in certain jurisdictions may provide an argument for a non-cooperating party to try to avoid arbitration when a dispute arises. Some parties, in particular lenders, may prefer unilateral option clauses, allowing one party the option to choose between arbitration or court proceedings in the event of a dispute. These clauses are not enforceable in all jurisdictions and should be carefully considered before being included. Therefore, parties should take particular caution in drafting arbitration provisions. In a unanimous decision on 8 January 2019 in Henry Schein, Inc. vs. Archer & White Sales, Inc. (586 U.S., 139 S. Ct. 524 (2019)), the US Supreme Court confirmed that the United States is a pro-arbitration jurisdiction that will honor parties' agreements to arbitrate. Specifically, where an arbitration clause clearly delegates the decision of arbitrability to the arbitrators, courts should have no say in the matter, even if they perceive the argument in favor of arbitration as "wholly groundless." This decision provided clarity for potential disputants and was in line with prior Court precedent that prohibited courts from reviewing the merits of a dispute when delegated adequately to an arbitrator.

The choice of arbitral seat determines the country whose courts will have supervisory jurisdiction over the arbitration. Courts at the seat will have the authority to address specific matters that concern the arbitration, such as ruling on (i) preliminary injunctions in aid of the arbitration; and (ii) any challenges to the arbitral award. Thus, it is highly advisable to select a seat in a country with modern, arbitration-friendly laws in place, with courts that are familiar with principles of international arbitration. The selection of a seat should not be confused with the venue for the arbitration. The arbitral seat is distinct from and does not need to correspond with the venue where hearings physically take place. In the case of A4 vs. B4 ([2019] ADGMCFI 0007), A4, a company registered in Abu Dhabi, brought arbitration proceedings in the Abu Dhabi Global Market Courts under the rules of the *London Court of International Arbitration ("LCIA")* on 8 March 2018 against B4, who had also been incorporated in Abu Dhabi before His Honour Justice Sir Andrew Smith.

The State requires the parties to honor their contractual obligation to arbitrate. The State also provides for limited judicial supervision of arbitral proceedings and supports the enforcement of arbitral awards like that for national court judgments. Under most legal systems, arbitrators are obligated to make their awards according to the applicable law. The procedure is different when the parties have agreed otherwise, for example, by empowering the tribunal to decide by what it identifies to be "fair". The tribunal is obliged to adhere to due process and ensure that each party is allowed to present and defend itself against its opponent. National laws generally recognize and support arbitration as a mutually exclusive alternative to litigation as a means of finally resolving disputes. Some practitioners, particularly in the US, refer to arbitration as a form of alternative dispute resolution (ADR).

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*"Both President Obama and I shared the conviction that territorial and maritime disputes in the Asia Pacific region should be settled peacefully based on international law. We affirm that arbitration is an open, friendly and peaceful approach to seeking a just and durable solution."*

***– Benigno Aquino III***


However, the acronym ADR is often used to illustrate non-binding procedures (such as mediation), distinguishing between litigation and arbitration. Non-binding procedures are not an "alternative" to litigation and arbitration because, unless the parties settle, they must still resort to a binding procedure to resolve their dispute, such as arbitration or litigation. This has caused some to term ADR as "amicable dispute resolution", thereby emphasizing that mediation depends upon the voluntary cooperation as well as the agreement of the parties. Arbitration also differs from binding expert determination. Although the procedures for both can widely be prescribed in the parties' contracts, they often can take very similar forms. On a decision-making level, while the arbitrators are selected for their experience in specific fields, they are often tasked with deciding the dispute primarily upon the basis of the parties' submissions and the applicable law. In contrast, experts use their knowledge to come to their decision. The distinction between arbitration and expert determination is crucial. The national arbitration laws regulate arbitration, while expert determination is virtually unregulated. In the international context, arbitration benefits from enforcement conventions as it allows the direct enforcement of awards. While the decisions of experts only have the force of a contract and the parties are required to bring a new action in the appropriate jurisdiction to enforce them. With the introduction of international conventions, the potential for implementing arbitral awards worldwide is much higher than that for judgments of the court. There is hardly any point in obtaining a court judgment that cannot be enforced against suitable assets. Although there are several enforcement conventions, the most important enforcement convention is the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, popularly known as the New York Convention. Over 150 countries are a party to the New York Convention. Each party broadly agrees to enforce arbitral awards made in other contracting States subject only to limited grounds for objection. No similar wide-ranging convention exists for the enforcement of court judgments, the closest being the Recast Brussels Regulation which is limited to the Member States of the European Union.

Arbitral tribunals are often empowered either by the parties or the applicable law to grant preliminary relief, such as an order freezing assets. Arbitration rules often provide for the appointment of an "emergency arbitrator" to consider an application for interim relief before the arbitral tribunal to determine the substantive dispute has been constituted. No criminal sanctions can be imposed by an arbitral tribunal or emergency arbitrator upon a defaulting party. Arbitration rules or laws commonly permit parties to apply to courts for interim relief to enable the parties to obtain effective relief.

In 2019, the ICC Court administered a total number of 23 Emergency Arbitrator applications. This brought the cumulative of emergency arbitration cases to 117 since ICC first introduced the service as a response to arbitration user needs in 2012.

Appeals in arbitration are uncommon and differ from challenges to the award, which often are based on the improper assumption of jurisdiction or a failure to accord a party due process on the part of the arbitral tribunal. Why is arbitration gaining popularity? It is due to the lack of an appeals mechanism and also the certainty generated by the final award. The English Arbitration Act is anomalous by international arbitration standards. Albeit in limited circumstances, the Act permits parties to appeal points of English law to the English courts. Parties have the flexibility to exclude the right of appeal in their arbitration agreement, and institutional arbitration rules such as those of the London Court of International Arbitration and the ICC do so without requiring further provision.

*"I can imagine no society which does not embody some method of arbitration."*
*- Herbert Read*

Subject to mandatory requisites of the applicable law, parties are free to either agree upon the procedure for their arbitration or accept the default procedure under the country's law. The parties usually adapt and modify as appropriate ready-made arbitration rules rather than drafting a custom-made procedure for each contract. These rules, as modified or supplemented by the parties, are to be interpreted as per the arbitration law of the seat (legal place).

There are several arbitral institutions across the world. While some focus on disputes in particular subject matters or on disputes with a strong tie to the country in which the institution is based, some are fully international in scope and are used by parties throughout the world.

I. International Court of Arbitration of the International Chamber of Commerce (ICC)- The ICC based in Paris, was established in 1923. It is the most widely known international commercial arbitration institution.

II. London Court of International Arbitration (LCIA)- The LCIA based in London, was established in 1892. It is a leading international arbitration institution. The LCIA has affiliated arbitral institutions in Dubai (DIFC-LCIA), and Mauritius (LCIA-MIAC).

III. International Centre for Dispute Resolution (ICDR)- The ICDR is a part of the American Arbitration Association (AAA). The AAA was established in 1926 and is frequently used for arbitrations in the US or by US-based parties. The ICDR administers international arbitrations, according to its International Arbitration Rules.

IV. The Hong Kong International Arbitration Centre (HKIAC)- HKIAC, based in Hong Kong, was established in 1985. The HKIAC is one of the best known international arbitration institutions in Asia, with many of its cases having a China-related element.

V. The Singapore International Arbitration Centre (SIAC)- SIAC, based in Singapore, was established in 1991. SIAC is a highly respected international arbitration institution, particularly in Asia and the Indian subcontinent.

Rules of the aforementioned institutions are appropriate for use around the world and for arbitrations conducted in different languages and under different governing laws. The arbitrators resolve the dispute and the institutions administer the arbitrations. The institutions receive and distribute the parties' initial submissions. They assist with the appointment of the tribunal, with or without party-nominations, and resolve any challenges that are made by the party against the arbitrator. What particularly differentiates these institutions from each other is the degree of administration or supervision that their rules entail, and their fee structure.

Degree of administration- The ICC procedure is the most actively administered as it involves the following two additional steps:

i. Preparation of Terms of Reference- a document defining the scope of the arbitration by setting out the basic claims and defenses, the relief sought, and the issues to be addressed.

ii. Formal scrutiny of draft awards by the ICC Court before the final awards can be issued to the parties, especially as regards issues which might affect their enforceability. Similarly, SIAC also subjects awards to a formal scrutiny process.

Procedures under the LCIA and ICDR are comparatively more lightly administered. The LCIA and the ICDR primarily focus on the appointment of and challenges to the tribunal. There is neither a formal requirement for Terms of Reference nor the scrutiny of draft awards.

*"Great progress was made when arbitration treaties were concluded in which the contracting powers pledge in advance to submit all conflicts to an arbitration court, treaties which not only specify the composition of the court, but also its procedure."*

*- Ludwig Quidde*

**Fee structure-** Fees of the ICC and SIAC are calculated as per the amount in dispute. The ICC requires payment of two "advances" at the start of the process; a provisional advance which covers the period specified in the Terms of Reference, and a full advance which covers the rest of the arbitral process. Similarly, the SIAC fees are also payable by means of advances and are taken at an early stage of the arbitration. In contrast, the LCIA charges the fee for itself and the arbitrators, upon taking into account the time invested in the process. The LCIA agrees a fee rate with the arbitrators which is often lower than the amounts that those same arbitrators would charge, had they been approached by the parties directly. Rather than all at an early stage, advances on costs are requested by the LCIA from the parties incrementally through the arbitration. The intention is that sufficient sums are always held by the LCIA to cover the next step to be taken. The ICDR's and HKIAC's administrative fees are based upon the amount in dispute. While the ICDR's tribunal's fees are calculated according to the time spent, the HKIAC's tribunal's fees provide a choice to the parties between a fee structure based on the amount in dispute or the time actually spent. The latter includes a maximum fee cap on the tribunal's hourly rate which can be avoided if agreed by the parties in writing or in "exceptional circumstances".

**Expedited and summary procedures-** In expedited arbitration procedures, the process is streamlined to enable the final award to be delivered more rapidly. This procedure involves early case management conferences, tight timeframes for every step, and the ability for the tribunal to omit the oral hearing. The ICC Expedited Procedure Provisions apply either if chosen expressly by the parties or if the arbitration agreement is concluded after 1 March 2017 and the dispute is valued at USD 2 million or less. The tribunal appointed by the ICC Court shall hold an early case management conference and render the final award within six months. The HKIAC and SIAC include similar provisions to the ICC Expedited Procedure Provisions. The monetary threshold is higher than that of the ICC, at HK$ 25 million and USD 6 million respectively, however the expedited procedure must be requested by a party and does not apply automatically. The award is rendered within six months from the time the tribunal received its file in case of HKIAC or is constituted in case of SIAC. The ICDR's monetary threshold is USD 250,000. A sole arbitrator hears the proceedings. An award is rendered within 30 days of the oral hearing and the tribunals decide cases worth less than USD 100,000 without any hearing. The LCIA in appropriate cases has express provisions to expedite the formation of the tribunal. The parties or the tribunal must use the flexibility in the Rules to streamline the process. In summary procedures, the parties are not obligated to undertake all the normal procedural steps. Arbitral tribunals have mostly been wary of adopting summary procedures; SIAC is an exception amongst the aforementioned institutions. SIAC contains an express provision in its rules for the early dismissal of claims or defenses in two cases; if they are "manifestly without legal merit" or, "manifestly outside the jurisdiction of the Tribunal".

**Specialist arbitration organizations for particular disputes:**

I. International Centre for the Settlement of Investment Disputes (ICSID) - Based in Washington, D.C., and established in 1965, ICSID is concerned with disputes arising directly out of an investment between a Contracting State to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of the Other States and a national of another Contracting State.

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*"The richest love is that which submits to the arbitration of time."*

***- Lawrence Durrell***

For certain types of other disputes, ICSID operates an Additional Facility. The jurisdiction is established on the basis of consent contained in contracts, local investment legislation, or treaties.

II. World Intellectual Property Organization (WIPO) Arbitration and Mediation Center - Established in Geneva in 1994, the Center provides arbitration as well as mediation services under its own rules for intellectual property disputes.

Arbitration between Foreign Investors and States has been ever increasing as is evidenced by the availability of international arbitration as an aid to resolving investor-State disputes that fall within the scope of bilateral investment treaties (BITs) or multilateral trade and investment agreements. In recent years, the significance of arbitration has grown as the number of BITs has increased with more than 2,900 BITs concluded throughout the world.

By choosing the seat of the arbitration, the parties select the applicable procedural law. For instance, if the parties select London, England, as the seat, 1996 Arbitration Act shall be applicable. London, New York, Paris, Hong Kong, and Singapore are considered as arbitration-friendly centers since they have few mandatory provisions. They permit the parties considerable freedom to agree upon the lawyers to represent them, the procedure, the language, and the tribunal to decide their dispute. The result is that these centers are able to accommodate the diversity of disputes arising in the international arena. In connection with arbitrations in the arbitration-friendly centers, the role of the courts is kept to a minimum; primarily to support the arbitration process and to assist, if necessary, with the enforcement of the award.

However, in less arbitration-friendly countries, the courts have greater powers over disputes within their jurisdiction and tend to intervene more. They also impose other constraints upon the conduct of the arbitration, such as the requirement to use locally qualified lawyers.

**Typical steps in Arbitration:**

Typically, substantial international arbitration includes most of the following steps, although some of the steps may take place simultaneously:

I. Request for Arbitration by the Claimant (summary of the claims).

II. Answer by the Respondent (counterclaims to be made).

III. Claimant's response to Counterclaim, if appropriate.

IV. Appointment of the tribunal.

V. Procedural hearing (steps and timetable for the arbitration).

VI. Claimant's full Statement of Case (if not served with the initial request for Arbitration).

VII. Respondent's full Defense and Counterclaim, if not served with the Answer.

VIII. Claimant's Reply and Defense to Counterclaim.

IX. Disclosure of the documents relied upon.

X. Exchange of witness statements sometimes followed by rebuttal statements.

XI. Exchange of expert reports, sometimes followed by rebuttal reports.

XII. Meeting of experts to narrow issues and a joint-statement of matters agreed or in dispute.

XIII. Exchange of pre-hearing submissions.

XIV. Hearing.

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*"International arbitration may be defined as the substitution of many burning questions for a smoldering one."*

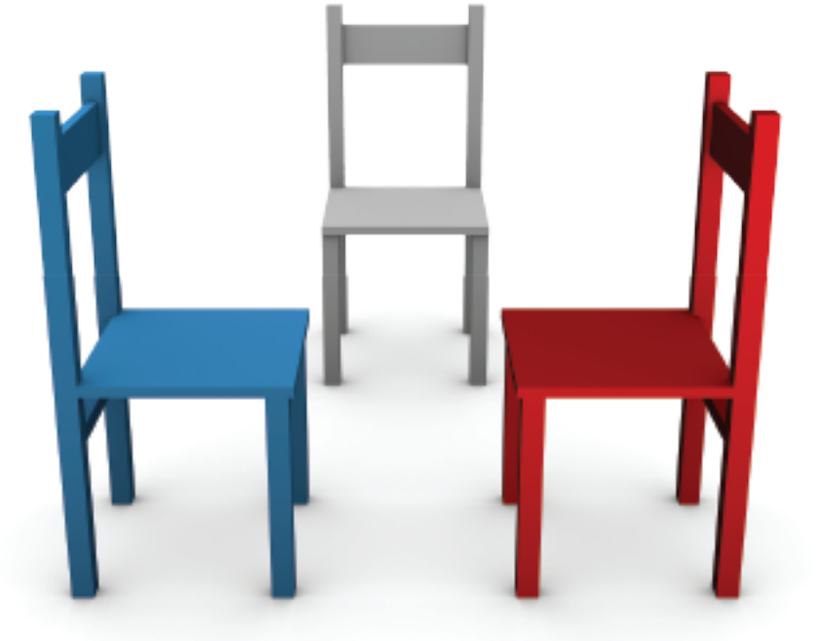
***- Ada Louise***

XV. Post-hearing submissions.

XVI. Award.

### Future of International Arbitration

There have been recent developments in the strengthening of litigation and mediation as alternatives to commercial arbitration. For instance, global regimes have been introduced for cross-border enforcement of court judgments and mediated settlement agreements. The *Hague Convention on Choice of Court Agreements 2005* entered into force in 2015 with the *Singapore Mediation Convention 2019* following shortly afterwards. However, the process is undoubtedly incremental, as there are not many countries acceding to these Conventions, as was the case when the *New York* Convention was launched. However, Mexico, Singapore, Denmark and the rest of the EU acceded to the 2005 Convention. In addition, 46 countries have already signed the *Singapore Mediation Convention*. In a few years' time, the enforcement of court judgments and mediated settlement agreements across borders could be as easy as arbitral awards. Given that arbitration is not generally cheaper than litigation and does not consistently protect confidentiality, an interesting question is raised- is arbitration likely to lose popularity in the long-run? The answer will depend, of course, on whether a neutral court can be found that could be a viable alternative.



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*- Herbert Read*

## STA Law Firm's offices across GCC


**Abu Dhabi Office**

Advocates and Legal Consultants
23 A, Level 23 Tamouh Towers
Marina Square, Reem Island
Abu Dhabi, United Arab Emirates

Tel: +971 2 644 4330
Fax +971 2 644 4919

**ADGM Office**

3517, Al Maqam Tower
Abu Dhabi Global Markets Square
Abu Dhabi
United Arab Emirates

Tel: +971 2 644 4330
Fax +971 2 644 4919

**Dubai Office**

Advocates and Legal Consultants
Office 1904, Level 19, Boulevard Plaza,
Opposite Burj Khalifa
Dubai, United Arab Emirates

Tel: +971 4 368 9727
Fax +971 4 368 5194

**Sharjah Office**

48-1F, Next to Abu Dhabi Islamic Bank
Near Hamriyah Free Zone Headquarters,
Hamriyah
Sharjah, United Arab Emirates

Tel: +971 6 513 4270
Fax: +971 6 526 4027

**Bahrain**

Advocates and Legal Consultants
Level 22, West Tower
Bahrain Financial Harbour
King Faisal Highway
Manama
Kingdom of Bahrain

Tel: +973 1750 3045

**Qatar**

Level 22, Tornado Tower
West Bay, Doha
Qatar
PO Box – 27774

Tel: +974 44294827

**RAK Office**

Office 501-A, Level 5, Building 4
Ras Al Khaimah Free Trade Zone
Ras Al Khaimah,
United Arab Emirates

Tel: +971 7 204 2180

Fax: +971 7 204 2181

**Fujairah Office**

Creative Tower
Creative City - Media free zone
Fujairah,
United Arab Emirates

Tel: +971 7 204 2180

Fax: +971 7 204 2181


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corporate@stalawfirm.com
*with your name and address.*
www.stalawfirm.com


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Office 1904, Level 19,
Boulevard Plaza, Tower 1,
Opp. Burj Khalifa, Dubai
United Arab Emirates

Tel: +971 4 368 9727

corporate@stalawfirm.com
www.stalawfirm.com