TRANSLATING ARBITRATION TERMINOLOGIES

DEFINITIONS,EXPLANATORY NOTES & EXAMPLES

Compiled by
Nania Owusu-Ankomah Sackey, FCIArb

TRANSLATING

ARBITRATION

TERMINOLOGIES

(Definitions, Explanatory Notes and Examples)

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Translating Arbitration Terminologies is a compilation of definitions, explanatory notes and illustrations/examples of terminologies used within the context of arbitration proceedings. The contents of this handbook are meant to provide an introduction to these terms to enable the user understand and apply them in arbitration proceedings. It is to be used as a practical reference guide with the sole purpose of providing a very general discussion of the various terminologies. This document is for information purposes only and does not constitute legal advice. The information contained in this handbook reflect the state of the law as at 1 August 2020.

For Papa and Nana

My entire world wrapped up in two miracle beings.

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PREFACE

Arbitration, like many other specialized fields, utilises specific terminologies and jargons as part of its language for resolving disputes. These terminologies, which include legal terms, standard expressions, slang, acronyms, international conventions, rules and practice in arbitration, are often unfamiliar, requiring explanation and guidance on how to apply them. This handbook seeks to demystify the terminologies and jargons used in domestic and international arbitration. The terminologies are introduced and presented in an easy-to-read, user-friendly manner and translated into everyday language for the reader to gain in-depth understanding of them and how they are used or applied in the context of arbitration proceedings.

Readers can expect this handbook to:

1. introduce them to various terminologies used in domestic and international arbitration;

2. assist them to understand the globally accepted specific meanings of the terminologies when used in arbitration; and

3. enable them apply these terminologies in the context of arbitration proceedings.

This handbook has mainly been sourced from various glossaries of arbitration terminologies and then adapted, where appropriate, for the Ghanaian context. It is not intended to be a prescriptive guide to how the terminologies should be used, but only to reflect the globally accepted meanings given to the terms, thereby ensuring consistent use and understanding.

My sincerest gratitude to the Ghana ADR Hub, without whose platform this handbook would not have been conceived.

Nania Owusu-Ankomah Sackey
1 September 2020

Administered/Institutional Arbitration

These are arbitrations administered by specialized arbitral institutions.[1] They are conducted with the support of an arbitral institution. These institutions, which usually have professional staff, assist the parties in fixing arbitrator's fees, appointment and challenging arbitrators etc.[2]

Advantages of institutional arbitration are:

- Conducted under standard set of rules
- Professional staff to supervise arbitration
- Reduces risk of procedural breakdown
- Reduce technical defects in arbitration proceedings and award.[3]

Example:

a. Any dispute arising out of or relating to this contract, or the breach thereof, shall be resolved by final and binding arbitration administered by the Ghana ADR Hub in accordance with its Arbitration Rules currently in force on the date of the execution of this agreement by (one or more) arbitrators appointed in accordance with the said Rules.
b. The seat of the arbitration shall be ……. (city, country).
c. The arbitration shall be conducted in the …… (language)
d. The law applicable to the substance of the dispute shall be the law of (country).[4]

Example:

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC Rules) for the time being in force, which rules are deemed to be incorporated by reference to this clause. [5]

Ad Hoc Arbitration

Arbitration that is not administered by an arbitral institution or not conducted under the auspices or supervision of an arbitral institution.[6] Parties usually agree to arbitrate without designating any institution to administer their arbitration. Ad hoc arbitration agreements often select an arbitrator or arbitrators to resolve the dispute without institutional supervision. Flexibility, more confidential.[7] The parties and/or the

1 Born, G., International Arbitration: Law and Practice (2nd Ed., Wolters Kluwer, 2016), at page 26.
[2] The Book of Jargon, Latham & Watkins Glossary of International Arbitration Terminology and Acronyms, 1st Ed., Latham & Watkins LLP), at page 4.
[3] Born, G., at page 27.
[4] Model Arbitration Clause, Ghana ADR Hub Arbitration Rules, at page 97.
[5] Model SIAC Arbitration Clause.
[6] Born, G., at page 26.
[7] Id.

Tribunal independently determine the procedure that should apply to the arbitration, which may, if the parties agree, be the procedure contained in a national law.

Any arbitration agreement which cites the UNCITRAL Rules will constitute an ad hoc arbitration unless they also agree to the involvement of an arbitral institution to administer their arbitration.[8]

Advantages, as compared to institutional arbitration are that they are more flexible and more confidential.

> *Example:*
>
> *Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Accra in accordance with the UNCITRAL Rules, which rules are deemed to be incorporated by reference to this clause. The Tribunal shall consist of a sole arbitrator. The language of the arbitration shall be English.*

Additional Award

A further arbitration award made by an Arbitral Tribunal (either of its own volition or upon the request of a party) in respect of a matter which was referred to the Arbitral Tribunal but was not dealt with in the Final Award. National laws and Arbitration Rules often provide for Additional Awards when appropriate and subject to time limits.[9]

> *Example:*
>
> *A dispute arises between parties to a contract involving a determination as to whether there has been a breach of the contract by the respondent, if so, what quantum of damages is payable to the claimant and a determination as to whether certain expenses incurred by the claimant is recoverable from the respondent as special damages. The arbitral award has been issued after hearing the matter, which determines that the respondent indeed breached the contract and awarded a specified sum as damages in favour of the claimant. The arbitral award is silent on whether the claimant's expenses are recoverable from the respondent and the quantum that can be recovered. The claimant informs the tribunal about the oversight. The Tribunal subsequently issues a second award determining that the claimant's expenses cannot be recovered from the respondent because it was not reasonably foreseeable and too remote. This award is an additional award.*

Adverse Inference

A presumption by an Arbitral Tribunal of a fact which is contrary to the interests of a party due to the conduct of that party. See also IBA Rules on the Taking of Evidence.

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[8] Id

[9] Id

Example:

An arbitration Tribunal orders the disclosure of specified documents that are relevant to the proceedings. If a party destroys, conceals or fails without good reason to produce evidence subject to its control an Arbitral Tribunal may infer that the evidence in question was adverse to that party's case.

Amiable Compositeur (***Ex Aequo et Bono***):

An arbitral tribunal empowered to decide a dispute in accordance with its notions of fairness, *Ex Aequo et Bono* - according to "equity", rather than being bound to decide according to the parties' strict legal rights.[10] *Ex aequo et bono* is a Latin term meaning "according to the right and good," used to describe the concept according to which parties grant an arbitral tribunal the power to depart from the strict application of legal rules and decide the Dispute based on what it considers to be fair and equitable in the case at hand.[11] If an arbitrator is sitting as an *amiable compositeur*, the arbitrator not obliged to decide the dispute in accordance with legal rules; rather the arbitration is to be decided in light of general notion of fairness, equity and justice. It may mean, for instance, that the arbitral tribunal:

- Should apply relevant rules of law to the dispute, but may ignore any rules that are purely formalistic (for example a requirement that the contract should have been made in some particular form);[12]
- Should apply relevant rules of law to the dispute, but may ignore any rules that appear to operate harshly or unfairly in the particular case before it;[13] or
- Should decide according to general principles of law.[14]

The effect of empowering an Arbitral Tribunal to decide the Dispute in this way differs depending upon the Applicable Law. However, commentators agree that even an arbitral tribunal that decides in equity must act in accordance with some general principles of law.

Example:

Any dispute, controversy, claim or interpretation arising out of or relating to this contract, or the breach of this contract, shall be finally settled by arbitration. The seat of the arbitration shall be London. The tribunal shall decide the dispute in accordance with equitable rather than strictly legal interpretation. or The tribunal shall decide the dispute as amiables compositeurs.

[10] The Book of Jargon, at page 8.
[11] Id.
[12] Blackaby, N., and Partisides, C., Redfern and Hunter on International Arbitration, (6th Ed, Oxford University Press, 2015), at para. 3.193.
[13] Id.
[14] Id.

Annulment of Award

An instance in which an Award is nullified or set aside after a successful challenge to its validity.[15] It is a decision by a national court to vacate an award, which is only possible in exceptional circumstances.

An Award may be annulled in whole or in part. The grounds for Annulment vary between jurisdictions but common bases include that there is no valid arbitration agreement, a party has been denied procedural fairness, the Arbitral Tribunal has exceeded its authority or the Award is contrary to public policy.[16]

> *Example:*
>
> *An arbitration agreement stipulates that the tribunal shall consist of three arbitrators, one appointed by each party and the Chairperson appointed by the two party-appointed arbitrators. The arbitration is an institutional arbitration conducted under the auspices of the Ghana ADR Hub. The parties each appoint an arbitrator but before the two arbitrators can appoint a chairperson the Centre notifies the parties that it has appointed a third arbitrator to chair the tribunal.*
>
> *During the arbitration hearing, each party is given four hours to present its case. The proceedings commence at 1pm and the claimant closes its case at 5pm. The respondent is instructed by the Tribunal to open its case immediately and at 8:15pm, indicates that the respondent should wrap up its case. At 8:30pm when the respondent is still presenting its case, the tribunal indicates that it will only give the respondent ten more minute to close its case. The respondent is therefore compelled to close its case at 8:45pm.*
>
> *The Tribunal arranges three deliberation sessions to discuss the contents of the award. They agree and determine three out of the four issues and agree to discuss the fourth issue at the final deliberation session. The arbitrator appointed by the respondent falls ill and notifies the others that he cannot attend the final deliberation. The two arbitrators have a discussion at the final deliberation session and two days later, issue an award to the parties.*
>
> *The award is subject to annulment at the seat of arbitration for the mode of appointment of the chairperson, the inadequate opportunity given to the respondent to present its case (time of the day and amount of time), the inability to the respondent's arbitrator to participate in deliberating from of the issues and the fact that he did not see the award before it is published.*

Anti-Arbitration Injunction

An order a court or arbitral tribunal grants that prohibits a party from commencing or continuing arbitration proceedings. Anti-arbitration Injunctions are typically sought

[15] The Book of Jargon, at page 9
[16] Id.

from courts on the basis that there is no valid arbitration agreement or the parties have not agreed to submit the particular claims to arbitration.[17]

This type of interim relief is usually seen in a typical fact pattern where a dispute arises between a foreign party and state or state-owned entity which has signed an arbitration agreement. The state entity wishes to sabotage the arbitral proceedings by having the matter remitted to its national courts for judicial determination and therefore seeks an anti-arbitration injunction in its own courts seeking to challenge the jurisdiction of the tribunal and an order requiring the tribunal and the other party to suspend or abandon the arbitral proceedings.[18]

> *Example:*
>
> *In the Balkan Energy v. Government of Ghana arbitration dispute, the Government obtained an injunction order from the High Court to restrain Balkan Energy from proceeding with international arbitration in the matter. The basis for the injunction was that in the court's view, the arbitration involved the interpretation of Article 181(5) of the 1992 Constitution. Under section 1 of the Alternative Dispute Resolution Act 2010, (Act 798), matters involving constitutional interpretation are not arbitrable (it is the exclusive reserve of the Ghanaian Supreme Court).*

Anti-Suit Injunction

An order a court or Arbitral Tribunal grants that prohibits a party from commencing or continuing court proceedings in another forum in breach of, or otherwise inconsistent with, the Arbitration Agreement.

> *Example:*
>
> *In a case concerning to insurance policies covering various risks arising in connection with the construction o a hydroelectric generating plant in Brazil, a dispute arose between the parties. The dispute was over one party's (Sulamerica's) liability for certain claims made by the other party (Enesa) under the policies. Sulamerica gave Notice of Arbitration to Enesa. In response, Enesa commenced proceedings in the Brazilian courts where it obtained an anti-arbitration injunction restraining Sulamerica from pursuing the arbitration. Sulamerica, in turn, obtained an anti-suit injunction in the English Commercial Court, restraining Enesa from pursuing the action in the Brazilian court.*[19]

Applicable Law

A widely used, general and convenient term which means the law which applies. International Arbitrations may require the application of more than one law.[20] The

[17] The Book of Jargon, at page 9.
[18] Redfern and Hunter, at para 7.52
[19] *Sulamerica Cia Nacional de Seguros SA and Ors v. Enesa Engenharia SA and* Ors [2012] EWCA Civ 638.
[20] Book of Jargon, at page 10.

applicable laws may include the law of the contract, law of the seat, the law applicable to the substance and public international law.

Example:

The law applicable to the arbitration agreement and the arbitration shall be the law applicable to the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the seat of arbitration.[21]

Appointing Authority

A neutral authority, usually an arbitral institution or individual/officer within an institution, designated by the parties, or having the power under the Arbitration Rules, to select/appoint an Arbitrator (s) who will hear the matter.[22] The appointing authority may select the arbitrator(s) in the for instance or only after the failure of one or more parties to nominate an arbitrator within a timeframe.

Example

The UNCITRAL Arbitration Rules entrust the Secretary-General of the PCA the role of designating an "appointing authority" upon request of a party to arbitration proceedings:

- *in the event that the parties have not reached agreement on an appointing authority within 30 days following a proposal of one or more institutions or persons, one of whom would serve as appointing authority (Art. 6, para. 2); or*

- *except as referred to in Art. 41, para. 4(b), if the appointing authority refuses to act, or if the appointing authority fails to appoint an arbitrator within 30 days after receiving a party's request to do so, fails to act within any other period provided by the Rules, or fails to decide on a challenge to an arbitrator within a reasonable time after receiving a party's request to do so (Art. 6, para. 4).*

Arbitrability

The question of whether a particular dispute can be resolved through arbitration.[23] An otherwise valid arbitration agreement may be denied enforcement because the parties' dispute is "not capable of settlement by arbitration".[24] The term arbitrability denotes which matters may be arbitrated and is a question of national law, so that what is arbitrable in one jurisdiction might not be capable of being settled by arbitration in another. An issue which is not arbitrable under the applicable law cannot be "cured", even by party agreement; the tribunal simply does not have jurisdiction to

[21] LCIA Rules, Article 16(4).
[22] Book of Jargon, at page 10.
[23] Book of Jargon, at page 11.
[24] Born, G., at page 87.

decide it. Even if both parties request it, an arbitrator cannot sit on those issues because they are in the exclusive jurisdiction of the competent state courts. It is usually a matter of public policy in the relevant State, and which types of dispute (for example, bankruptcy, matrimonial and criminal matters) it wishes to reserve to the jurisdiction of its national Courts.[25]

The types of disputes that are not arbitrable differ from nation to nation and usually, such disputes or claims are deemed non-arbitrable because of their public importance or a perceived need for judicial protection.[26] If a dispute is not arbitrable under an Applicable Law (for example, the law of the agreement, the place of arbitration or the place of Enforcement) any award might be unenforceable.[27]

If a party raises a question as to whether an issue is arbitrable, the tribunal must decide and then justify that decision in the award, either positively as the foundation for the decision, or negatively, in which case it would not decide that issue at all.

Example:

In Ghana, section 1 of the ADR Act sets out matters that cannot be resolved under arbitration (matters of national/public interest, environmental issues, matters relating to the enforcement and interpretation of the Constitution and "any other matters that cannot be resolved by an alternative dispute resolution method") has been interpreted to constitute matters that are not arbitrable in Ghana.

Arbitral Institution

An arbitral institution is an organization which administers arbitrations, usually dealing with matters such as the appointment of arbitrators, challenges to arbitrators, and the fixing and payment of their remuneration. The arbitral institution generally does not decide the merits of the dispute, which is a matter for the arbitral tribunal.[28]

Example:

Notable examples of Arbitral Institutions are:

- ***GAH**: Ghana ADR Hub*
- ***LCIA**: London Court of International Arbitration*
- ***ICC**: International Chamber of Commerce*
- ***ICSID**: International Centre for the Settlement of Investment Dispute*
- ***SIAC**: Singapore international Arbitration Centre*
- ***PCA**: Permanent Court of Arbitration*
- ***ICDR**: International Centre for Dispute Resolution*
- ***SCC**: Stockholm Chamber of Commerce*
- ***DIS**: German Institution of Arbitration*

[25] Book of Jargon, at page 11.
[26] Born, G., at p. 87
[27] Book of Jargon, at page 11.
[28] Id

- ***GAC**: Ghana Arbitration Centre*
- ***CIETAC**: China International Economic and Trade Arbitration Commission*
- ***HKIAC**: Hong Kong International Arbitration Centre*
- ***KIAC**: Kigali International Arbitration Centre*
- ***LCIAC**: Lagos Court of Arbitration International Centre for Arbitration and ADR*
- ***RCICAL**: Regional Centre for International Commercial Arbitration, Lagos*
- ***CRCICA**: Cairo Regional Centre for International Commercial Arbitration*

Specialised Arbitration institutions include:

- ***LMAA**: London Maritime Arbitration Association*
- ***CAS**: Court of Arbitration for Sport*
- ***NGFA**: National Grain and Feed Association*

Arbitral Tribunal

This refers to the arbitrator(s) (usually one or three) appointed to resolve the disputes between the parties.[29] It is the panel of individuals appointed to decide on a dispute. Arbitral tribunals have the power to issue binding awards that may be enforced like a domestic court judgment.

Arbitration

A process by which "parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving the dispute in accordance with a neutral, adjudicatory procedures affording each party the opportunity to present its case".[30] It has also been defined as a process by which "two or more specific or determinable parties agree in a binding way to submit one or several existing or future disputes to an arbitral tribunal, to the exclusion of the original competence pf state courts ad subject to a (directly or indirectly) determinable legal system".[31] It has also been defined as a private form of final and binding dispute resolution by an impartial arbitral tribunal, based upon the agreement of the parties but regulated and enforced by the State.[32]

An arbitration is international when the parties to the arbitration agreement reside in different countries or are of different nationalities. Domestic arbitration, on the other hand, refers to arbitrations where both parties are nationals of one state or reside in one state.

[29] Book of Jargon, at page 11.
[30] Born, G., at page 2.
[31] Judgment of 21 November 2003, DFT 130 III 66, cons. 3.1 (Swiss Fed. Trib.).
[32] Book of Jargon, at page 11.

Arbitration Agreement

Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.[33] It is a contract between parties to submit their disputes (existing and/or future) to arbitration.[34] Whilst such agreement usually consists of a clause(s) within another contract, it is generally deemed by the applicable law to be a separate agreement which will, for example, survive the termination of the contract of which it forms a part.

The critical elements of an arbitration agreement are:

- the agreement to arbitrate;
- The scope of disputes submitted to arbitration;
- The use of an arbitral institution and its rules;
- The seat of the arbitration;
- The method of appointment of the arbitrator, number and qualifications of the arbitrators;
- The language of the arbitration; and
- Choice of law clause.[35]

The UNCITRAL Model Law has defined what constitutes an agreement in writing. Firstly, under Article 7(3) of the UNCITRAL Law, an arbitration agreement is in writing if its contents are recorded in any form, whether or not the arbitration agreement has been concluded orally, by conduct or by other means. This includes electronic communications (communications by data messages, i.e. information generated, sent, received by electronic, magnetic, optical or similar means), as long as the information is accessible for subsequent reference. Consequently, letters, emails, telegrams, telex or other means of telecommunication which provide a record of the agreement will qualify as arbitration agreements.

Secondly, Article 7(5) of the UNCITRAL Model Law provides that an agreement is also in writing if it is contained in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. This principle is based on the general legal principle whereby consent can be validly assumed when a party "does what he would not have done, or does not do what he would have done if he did not intend to accept the proposal." The plaintiff's decision

[33] UNCITRAL Model Law, Article 7 (Option I)
[34] Id., Option II.
[35] Born, G., page 106

to submit the case to arbitration, consented to by the defendant, may validly be considered a tacit agreement to arbitrate.[36]

Thirdly, Article 7(5) of UNCITRAL Model Law recognises a third form equivalent to a written arbitration agreement where there is a reference in a contract to a document containing an arbitration clause, provided that the contract is in writing and the reference is such as to make that clause part of the contract. The provision does not require the existence of a specific reference to the arbitration clause.[37] Once the other two requirements are fulfilled (i.e., the contract has been made in writing and the reference unequivocally states that the clause is part of it), it is enough for the clause to make a general reference to the document. Consequently, an internal email which records the terms of what had been agreed orally between the parties would be satisfactory.[38]

An arbitration agreement may be in the form of a clause in a contract or a separate/stand-alone agreement.

Arbitration Rules

The Procedural Rules pursuant to which the Arbitration is conducted. Different arbitral Institutions have formulated rules that apply once the arbitration is conducted under the auspices of that intuition.

Examples:

- *LCIA Rules*
- *ICC Rules*
- *Ghana ADR Hub Arbitration Rules*
- *Ghana Arbitration Centre Rules*

Arbitrator

A private person appointed to decide a dispute, as opposed to a national judge, typically for his or her competence and expertise. It is an independent person appointed by or on behalf of the parties to resolve their dispute through arbitration.[39] In practice, almost all international commercial arbitration tribunals consist of either one or three arbitrators. The tribunal consisting of three arbitrators has the advantage of allowing each party to appoint an arbitrator, and also allows for a combination of individuals with different specialities, linguistic and cultural backgrounds that can enhance the quality of the award.

[36] Id.
[37] Id.
[38] Id.
[39] Book of Jargon, at page 13.

Audi Alteram Partem

A legal principle that all parties to a dispute are entitled to a fair hearing and should be given the opportunity to respond to the evidence against them.[40] Referred to as the hearing rule, the principle holds that each party must be given the opportunity to be heard. It encompasses:

1. Prior adequate notice of allegation against a party, so that it may make representations for a defence or counterclaim.
2. Proper and prior adequate notice of the proceedings/hearing, so that a party may effectively prepare its own case and may reasonably be expected to appear at the hearing to answer the case against it.
3. Right to be heard and the opportunity to present their case fully, so that the decision is based on all information.
4. Right to call witnesses and cross-examine the witnesses called by the others, so that parties may contradict or correct all allegations and adduce evidence in support of their own case (i.e. opportunity to deal with the cases of their opponents and challenge opponent's evidence).
5. Right to legal representation, so that parties may effectively put their cases and challenge the evidence put up by the others.
6. Rule of evidence: only admissible evidence and arguments adduced should be relied on and arbitrators should not use their special knowledge to introduce new evidence to the proceedings.
7. Opportunity to have evidence properly considered by the tribunal before reaching its decision.

   Example:

   Arbitration proceedings have commenced in a matter. The Claimant has been cross-examined by the Respondent's lawyer for three hours but the arbitrator only allows the Claimant's lawyer to cross-examine the Respondent for an hour and a half, although the lawyer indicates that he has several areas of questioning yet to be covered. The Respondent's second witness, who is due to be cross-examined on the third day of hearing, falls ill on the day of his cross-examination and is therefore unable to stay for the whole of his cross-examination session. Although the claimant's lawyer indicates that several portions of the witness' testimony is crucial for the Claimant to rebut, the arbitrator decides that he cannot extend the hearing dates and therefore expunges the witness's evidence. The arbitrator also decides that it is not necessary for the parties to call their own expert witnesses on a crucial part of the case but instead invites a tribunal-appointed expert to give evidence on that aspect of the case.

[40] Id.

Several aspects of the audi alteram partem rule have been breached as the parties were not given sufficient opportunity to be heard or to present their case.

Arbitration Award

An award is a written instrument, drafted and signed by the arbitrator(s) stating the tribunal's final decision on particular claims or disputes.[41] The purpose of an award is to resolve in a final and binding manner, all issues of the dispute submitted to the arbitral tribunal for determination. The arbitration award is therefore the decision of an arbitral tribunal on the substantive issues (as distinct from the procedural orders or directions given as part of the process leading to the award).[42] The award is both the intellectual decision and the formal record of that decision. A conciliator's recommendation, an expert determination or a national court judgment which are not the result of arbitration are therefore not arbitration awards.[43]

Awards are "interim," "partial," and/or "final", although the term "interim" is also sometimes used to mean "partial." In its true sense, interim awards have only temporary effect and do not finally decide an issue (which can, accordingly, be revisited by the arbitral tribunal at a later stage of the arbitration).[44]

A partial award finally decides one or more (but not all) of the issues before the Arbitral Tribunal.[45]

A final award decides all the issues (or all the remaining issues) and, subject to any corrections, essentially ends the arbitration.[46]

A fundamental difference between an arbitration award and a court judgment is that an award is not subject to public scrutiny or appeal in the same way as a court judgment.

Bifurcated Proceeding

An arbitration which has been divided so that some issues (such as those relating to jurisdiction, liability, or quantum) are determined separately from the other issues. It is the division of the arbitral proceedings into two phases for separate determination, each dealing with a different issue[47], such as jurisdiction and liability, or liability and quantum.

[41] Born, G., at page 287.
[42] Book of Jargon, at page 13.
[43] Born, G., at page 286.
[44] Book of Jargon, at page 13.
[45] Id.
[46] Id.
[47] Id., at page 16.

Example:

An arbitration has been commenced arising out of an alleged breach of the power purchase agreement. The Claimant is seeking several reliefs, including ten million dollars for breach of contract, eighty million for equipment and machinery purchased for the contract, six million for loss of profits, and several other claims for special damages. A tribunal may decide to bifurcate proceedings, and first deal with the issue of liability for breach of contract. It is only after the Respondent is determined to have indeed breached the contract that the tribunal will pursue the second stage of proceedings to determine the quantum of damages that the Respondent should be liable for for the breach.

Bilateral Investment Treaty

It is the term given to a treaty between two States granting protections for investments, such as fair and equitable treatment, the right to prompt and adequate relief in the case of expropriation, and the States' consent to resolve disputes with investors through binding arbitration, often before the ICSID. They are international agreements establishing the terms and conditions for private investments by nationals and companies of one state in another state.

Most BITs grant investments made by an investor of one contracting state in the territory of the other a number of guarantees, which typically include fair and equitable treatment, protection from expropriation, free transfer of means and full protection and security.

Example:

- *EU-Japan Economic Partnership Agreement (2018) between the European Union and China.*

- *USCMA (2018): between United States of America, Mexico and Canada.*

Cautio Judicatum Solvi

The provision of security for costs by a foreign Claimant to ensure recourse in the event that the claim does not succeed.[48]

Chairman/Chair

Also known as President/Chairperson, the chairman is an arbitrator who is usually appointed by two party-appointed arbitrators or by an appointing authority to chair the proceedings. In international arbitration, the Chair has a lot of power and responsibility. For instance, under the ICC Rules, the chairperson has the right to make determinations on the merits if there is disagreement between the two other

[48] Id., at page 18.

arbitrators.[49] Even where those powers are not definitively given, a chair ultimately has de facto authority to determine the outcome of the case by ruling in favour of one side over the other. By custom and practice, the chairperson also has virtual sole control over the procedural aspects of the case (subject to revision by the tribunal), meaning that he/she has influence in this way as well as over the outcome of the dispute.[50] Consequently, the chair generally governs proceedings, both from a planning point of view and on a day-to day basis.

Challenge to Arbitrators

The process by which a party seeks to remove an arbitrator from the arbitral tribunal. The grounds for challenge and the procedure to be followed are often set out in arbitration rules and applicable law. [51] Challenges may be raised against ay arbitrator, whether selected by an appointing authority, by another party or sometimes, by the challenging party itself.

> *Example:*
>
> *A three-member tribunal has been set up to hear a contractual dispute. Each party appointed an arbitrator and the two party appointees then appointed the third arbitrator to chair the panel. In the course of arbitral hearing, the Claimant discovered that a major shareholder of the respondent company is a close friend of the chair of the arbitral tribunal. The chair was aware at the time of his appointment of the connection between the dispute and his friend but did not make that disclosure before he accepted the appointment. The Claimant can successfully challenge the appointment of the arbitrator and his continued sitting on the matter.*

Challenge to Award

The procedures, other than an appeal on the merits, by which awards can be set aside or annulled in the courts of the seat of arbitration under the provisions of its arbitration law(s).[52] Challenges are usually concerned with the jurisdiction of the arbitral tribunal or the procedure followed. In contrast to rights of appeal, most major jurisdictions provide rights to challenge awards and, in many cases, the parties cannot waive such rights.[53]

Chess-clock arbitration

Arbitral proceedings where parties are allocated exactly the same amount of time to present their cases. Time equality is ensured with chess clocks, hence the name.

[49] Article 25(1) of the ICC Rules.
[50] Article 26(2) of the International Rules of the American Arbitration Association.
[51] The Book of Jargon, at page 19.
[52] The Book of Jargon, at page 20.
[53] Id

Choice of Forum

The selection of the type of dispute resolution (for example, arbitration or litigation) and, in litigation, usually also the jurisdiction in which the dispute is to be resolved.[54]

> *Example*:
>
> *Parties to a contract may agree to confer exclusive Jurisdiction on the National Courts of a particular State.*

Choice of Law

The selection of a law to apply, usually as the Governing Law for an agreement. Arbitration agreements are accompanied by choice-of-law clause specifying the substantive law applicable to the parties' contract and related disputes.[55] The law may be designated by the parties in their agreement or it may be determined by applying conflict of laws rules or by *voie directe*.

Four choice of law issues can arise in relation to international arbitration:

1. The substantive law governing the merits of the dispute (including the underlying contract) i.e. law applicable to substance of parties' dispute;
2. Substantive law governing arbitration agreement;
3. Procedural law applicable to arbitral proceedings; and
4. Conflict of law rules.[56]

In addition to national and institutional rules, there are also a number of international guidelines or codes of best practice regarding the conduct of international arbitration which are a source of guidance for parties and tribunals, such as the IBA Rules on the Taking of Evidence in International Arbitration, IBA Rules of Ethics and IBA Guidelines on Conflicts of Interest in International Arbitration and IBA Guidelines on Party Representation.

Choice of Law Clause

A clause of a contract which designates the law to apply, usually as the governing law of the contract.[57]

> *Example:*
>
> *This Agreement will be governed by, and all disputes relating to or arising in connection with this agreement shall be resolved in accordance with the laws of the Republic of Ghana.*

[54] Id., at page 19.
[55] Born, G., at page 38.
[56] Id., at page 39.
[57] The Book of Jargon, at page 21.

Claimant

The party initiating the arbitration.

Co-arbitrator

An arbitrator who is not the chairman and is appointed by a party.

Conciliation

It is a form of alternate dispute resolution where a neutral third-party is appointed to hear both sides of a dispute and then draft a non-binding document suggesting how to resolve the dispute. Conciliation is similar to mediation, but more structured.

Commercial Arbitration

Arbitration that arises out of commercial transactions, normally between private parties but sometimes also involving States or State-controlled entities (as distinct from Investor– State Arbitration).

Competence-Competence (Kompetenz-Kompetenz)

The legal doctrine by which an arbitral tribunal can decide upon its own jurisdiction, even if the contract containing the arbitration agreement is invalid or has been terminated.[58] The aim of the "Kompetenz-Kompetenz" principle is to avoid paralyzing the proceeding when the competence of the arbitral tribunal is questioned by one of the parties.

> *Example:*
>
> *A bank has purchased two plots of prime land to build their head office. They engage a reputable construction firm to construct an 8-floor office complex for use as their head office. The construction contract signed by the parties include a dispute resolution clause under which they are first required to attempt amicable settlement of any dispute relating to latent defects for 30-days. The discussions towards amicable settlement should be facilitated by the CEOs and Project Managers of the two companies. If the parties are unable to reach a settlement within 30days, the parties are then required to pursue mediation for 30 days. The mediation must be facilitated by any engineer from the Ghana Institute of Engineers. If the parties are unable to resolve the dispute after ten days, the dispute shall then be referred to the Ghana ADR Hub for arbitration by a sole arbitrator appointed by the ADR Hub.*
>
> *A dispute arises between the parties in relation to the tiling of the second and third floors of the building. The bank refers the dispute to arbitration and ADR Hub appoints a sole arbitrator. The contractor challenges the jurisdiction of the tribunal on two grounds:*

[58] Id., at page 23.

1. *The dispute does not relate to latent defect and therefore is not within the scope of the arbitration agreement.*
2. *The parties did not attempt amicable settlement and mediation as required under the contract and therefore arbitration.*

By virtue of the doctrine of competence-competence, this challenge to the jurisdiction of the tribunal i.e whether the dispute falls within the arbitration agreement and whether pre-requisites for referral to arbitration had been satisfied, must be heard and determined by the sole arbitrator.

Confidentiality

This is typically used to refer to the obligation not to disclose information concerning the arbitration to third parties. The concept of keeping information within a restricted group, for example, not disclosing it beyond those directly involved in the arbitration or, sometimes, keeping it within an even more restricted group, such as legal counsel only.[59] Arbitration proceedings are not public proceedings but a private process.[60] Whether or not arbitration is confidential is a matter governed by the applicable law and any relevant arbitration rules.

Obligations of confidentiality extend not only to prohibiting third parties from attending the arbitral hearings but also to a party's disclosure to third parties of hearing transcripts, as well as written pleadings and submissions in the arbitration, evidence adduced in the arbitration, materials produced during disclosure and arbitral awards.

Conflict of Interest

Competing or incompatible loyalties, concerns or aims, such that a person may not be independent or impartial.[61] The IBA has made available its Guidelines on Conflict of Interest in International Arbitration.

Consent Award

A Consent Award (Agreed Award) is made to incorporate a settlement reached between the parties into an Award, at the request of the parties and upon the agreement of the tribunal. It is an award reflecting a settlement agreement reached by parties to an arbitration.[62]

Parties to an arbitration may arrive at a settlement before the award is rendered. They may simply advise the tribunal of this and terminate the tribunal's mandate, thus removing its jurisdiction to decide their dispute. They may, on the other hand, wish to

[59] The Book of Jargon, at page 25.
[60] Redfern and Hunter, at para 2.161.
[61] The Book of Jargon, at page 25.
[62] Id.

have their agreement recorded in the form of an award, perhaps for certainty, or to guarantee that their settlement will indeed be executed.[63]

Conservatory measures

Orders of a temporary nature, made against one party by an authority before a final decision is rendered, such as attaching assets that risk being depleted.

Consolidation

The joining of several arbitration proceedings into one arbitration, potentially on the basis of separate contracts, for reasons such as efficiency. It refers to the merger of several ongoing arbitrations into a single proceeding, subject to the similarity between the cases and the parties involved.

Costs submission

This is typically filed by each party after all other steps in the arbitration have been completed, relating to the costs of the arbitration that they have spent and wish to recover.

Counterclaim

A claim brought by a party that did not initiate the arbitration proceedings, i.e. the Respondent in an international arbitration.

Correction of Award

The amendment of an Award, after its publication, to correct clerical mistakes or accidental slips, or to clarify or remove any ambiguity.[64] Article 33 of the UNCITRAL Model Law allows for correction and interpretation of an award as well as the possibility of an additional award. Many institutional rules have similar provisions. If a party requests that a tribunal clarify, correct, or supplement its award, or if the arbitrators propose to do so on their own initiative, they must be certain that applicable law permits it and in what circumstances. An obvious clerical slip such as the mis-spelling of a party's name or leaving off a zero in a calculation will be uncontroversial, but still must be brought to the attention of both parties who must then have the opportunity to comment.[65]

Corruption

Fraud, dishonesty, or illegal behaviour, often involving the payment of a bribe, which may taint the basis for a claim and, therefore, depending on its nature and timing,

[63] Rutherford, M., Dundas, H., Bowsher, P., Barrington, L., and Crook, J., International Award Writing (Chartered Institute of Arbitrators, 2014), at page 11.
[64] The Book of Jargon, at page 27.
[65] International Award Writing, at page 54.

cause an arbitral tribunal to dismiss a claim, or otherwise cite the Corruption as affecting the outcome of the dispute.[66]

Damages

Amount of money owed by one party to compensate for the harm it has caused the other party.

Default Award

An Award rendered against a party who did not participate in the arbitration despite having received notification or who stopped participating before the end of the Arbitration. However, unlike a default judgment, the Claimant must still prove its case, in order to obtain any Award and the fact that a Respondent does not defend the claim is not enough.[67]

The arbitral tribunal needs to take a proactive role in testing the assertions made by the participating party, and then to make a "determination" of the issues presented to it.[68] The tribunal must ensure that a default award records the steps taken to give the defaulting party an opportunity to present its case, and it failing to avail itself of that chance.[69] The tribunal, if it does render an award in favour of the participating party, must show that it tried to communicate with the defaulting party, and then give reasons for the decision that are clearly based on its consideration of the merits of the case as presented to it. In the absence of such an explanation, the losing party may later "re-surface" to attack the award on the grounds that it did not have the opportunity to present its case.

Disclosure/ Discovery

Common law legal concept according to which each party must produce the documents relevant to the dispute. It is typically more limited in international arbitration than in common law jurisdictions.

Dispute

A dispute arises where a claim is made by one party to an arbitration agreement, followed by a rejection of that claim by the other party, or the elapse of time after the claim is made, whichever occurs first. It is a disagreement between parties. In some jurisdictions, a dispute has been considered a necessary precondition to arbitration. There have therefore been many debates as to whether parties are truly in dispute if, for example, there is clearly a correct answer that can easily be established, such as

[66] The Book of Jargon, at page 27.
[67] Id., at page 30.
[68] International Award Writing, at page 11.
[69] Id.

the winner of a particular race. For this reason, the scope of an arbitration agreement is often expressed to cover, for example, disagreements, controversies, or claims, as well as disputes.[70]

Dispute Resolution Clause

It is a provision in a contract setting out the mechanisms and terms for the resolution of disputes. It is an arbitration agreement embodied in a clause(s) in a contract.[71]

Documents Only

Arbitration proceedings in which the dispute is decided only on the documents the parties submit, dispensing altogether with a hearing.[72]

Domestic Arbitration

It is a process of dispute resolution in which parties to a contract residing in the same jurisdiction agree on the rules of arbitration and institutions of arbitration as established in that jurisdiction to govern any future dispute that may arise from the contract. Any arbitral decision given will be enforced in the domestic courts of that country.

> *Example*
>
> *Sunset Company Limited, a business registered as a limited by liability in Ghana, enters into a contract with Mr Osei, a financial consultant based in Ghana, to review the company's financial activities and provide professional advice. The consultancy contract signed between them contains an arbitration clause stating that any future disputes arising out of or in connection with the contract would be resolved by arbitration at the Ghana ADR Hub under the Alternative Dispute Resolution Act, 2010 (Act 798).*

Domestic Award

An arbitral award made in the territory of a state where the recognition and/or enforcement of such an award are sought.[73]

Double- Hatting

Double-hatting is whereby an individual serves as arbitrator in one case and as legal counsel in another. It is the situation where when individuals simultaneously perform different roles across cases- individuals may act sequentially and even simultaneously as arbitrator, legal counsel, expert witness, or tribunal secretary.

[70] The Book of Jargon, at page 33.
[71] Id.
[72] Id., at page 34.
[73] Id.

Critics view it as highly suspect, rife with potential for arbitrators, whether acting unconsciously or in knowing disregard of their ethical obligations, to render decisions that advance either the interests of their clients or their own interests in attracting or retaining clients.[74] It may encourage repeat appointments of the same individuals, hinders diversity, may be problematic when it comes to enforcement of the arbitral award as issues of due process may be raised to set aside the award, and presents the issue of conflict of interest and ethical dilemmas. Those with a less harsh view nevertheless see the situation as creating an appearance of impropriety.[75]

> *Example:*
>
> *You are defending a Respondent in an institutional arbitration headquartered overseas. The arbitrator is a lawyer from a prominent firm there. Mid-way through proceedings, the Claimant's lawyer gives notice that it has retained a new lawyer on his counsel team. This new lawyer is from the same country as the arbitrator and the administering institution. She also happens to be the Vice-Chair of the institution administering the arbitration. Reading the rules, as Vice-Chair she sometimes has the power to unilaterally appoint arbitrators for proceedings administered by the institution. Challenging the appointment won't accomplish anything, as this is an institutional conflict that would affect any arbitrator appointed.*
>
> *For the rest of the arbitration, the Respondent feels that the institution is sitting as counsel for his adversary.*

Due Process

It is the proper application of a procedure so as to ensure fair treatment of the parties and, for example, a proper opportunity for each to be heard.[76]

Emergency Arbitrator

Individual appointed according to certain arbitral institutions' rules to decide on urgent orders before the constitution of an arbitral tribunal. It is an arbitrator appointed by an arbitral Institution on an urgent basis specifically to deal with an application for interim relief which cannot wait for the constitution of the arbitral tribunal that is to deal with the substantive dispute between the parties.[77]

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[74]Crook, J.R., Dual Hats and Arbitrator Diversity: Goals in Tension, (Symposium: A Focus On Ethics in International Courts and Tribunals, American Society of International Law, 2019), at page 284. https://www.cambridge.org/core/services/aop-cambridge-core/content/view/FC6538AE5CBDF495577F94D8F51AFA0F/S2398772319000369a.pdf/dual_hats_and_arbitrator_diversity_goals_in_tension.pdf

[75] Id.

[76] The Book of Jargon, at page 35.

[77] Id., at page 36.

Emergency measures

Orders made by an emergency arbitrator, before the constitution of an arbitral tribunal.

Energy Charter Treaty

The Energy Charter Treaty is a multi-lateral treaty, providing a transnational framework for trade, transit and investments in energy. It also incorporates dispute settlement mechanisms for investor-state disputes, providing several options for recourse to arbitration.[78]

Enforceability

The potential for forcing compliance with, for example, an Award (in that case, through National Courts). [37]

Enforcement

The process for forcing compliance with, for example, an Award (in that case, through National Courts).

Equality of Arms

Each party to a dispute having an equivalent opportunity to present its case, so as to have a fair balance between the parties. For example, if one party has significantly more resources at its disposal than another, equality of arms may be assisted by limiting the submissions that are permitted.[79]

Escalation clause

Also known as a multi-tiered dispute resolution clause, it provides for a dispute resolution mechanism entailing more than one method. Such mechanisms often start with the notification of a dispute, followed by some form of consensual resolution attempt and ultimately, if an amicable solution is not achieved, by arbitration or litigation. It is essentially a contractual term according to which parties should endeavour to amicably settle the dispute before putting forward any request for arbitration.

> *Example:*
>
> *Any dispute arising out of or relating to this agreement shall be resolved by the parties first engaging in good faith negotiations to resolve the matter amicably. All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence. A party desiring to*

[78] https://www.energycharter.org/

[79] The Book of Jargon, at page 37.

initiate negotiation shall deliver to the other party a written notice of the existing dispute and a demand to commence negotiations.

If the dispute has not been resolved by negotiation within (decide the number of days suitable) days of the delivery of the demand to commence negotiations, the parties shall endeavour to settle the dispute by mediation under the Mediation Rules of the Ghana ADR Hub. All communications during the mediation are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence and any additional confidentiality and professional secrecy protections afforded by applicable mediation laws.

Any dispute not resolved through negotiation or mediation as outlined above shall be resolved by final and binding arbitration administered by the Ghana ADR Hub in accordance with its arbitration rules by (one or more) Arbitrator(s) appointed in accordance with the said Rules.

The seat of the arbitration shall be…….. (city, country).

The arbitration shall be conducted in the …….. (language).

The procedural law of the arbitration shall be the law of the seat of the arbitration.

The law applicable to the substance of the dispute shall be the law of (country).

Evidentiary Hearing

A hearing at which the Arbitral Tribunal considers factual matters and witnesses may be cross-examined. Typically, the parties' representatives will also make legal submissions at these hearings. [80]

Ex Officio

A Latin term which literally means "from the office." Ex Officio is sometimes used to describe a situation in which an Arbitral Tribunal, for the purposes of its role in determining a Dispute, acts without the request of any party, for example, applying legal principles or investigating facts on its own.

Expedited Procedure

Expedited arbitration is commonly used to describe arbitration proceedings that are conducted within specified time limits based on a party agreement, i.e. a sped-up process. While such proceedings may entail substantial pressure on the parties, counsels and tribunal, they generally reduce the time taken from the initiation of the proceedings to the rendering of an award. Several arbitral institutions to offer specific rules for fast-track proceedings, which typically apply by virtue of an explicit agreement or the fulfilment of specific criteria (i.e., amount in controversy does not exceed a specific value).

[80] Id.

Expedited procedures in arbitration usually involve either the appointment of arbitrators or the process as a whole, in which case the process is normally streamlined and the time for each step reduced. There is a well-known saying “speed, low cost, quality, pick any two.”[81] For this reason, expedited procedures are usually used if compromises on the normal process are appropriate, for example because the Dispute is over a relatively small sum. [41]

Expert

A person or entity appointed by a party or arbitral tribunal to provide an impartial opinion on specified matters in dispute by drawing on their specialised knowledge, experience and/or qualifications.[82]

Expert Determination

A process by which an expert resolves a dispute by giving their opinion on the correct position. Sometimes the determination of the expert is made binding, in which case it operates as a contractual agreement between the parties to abide by the determination (and so does not benefit from the same enforceability as an arbitral award).[83] Expert Determination is often used for valuations and discrete technical matters, if a relatively quick opinion of an expert is considered preferable to a judicial determination according to the law.[84]

Expropriation

It involves the taking of a foreign investment by a State government through the exercise of its sovereign powers, either for public purposes or otherwise. Over time, expropriation has evolved from specific or "direct" takings and now includes "indirect" expropriation.

FIDIC

Fédération des Ingénieurs Conseils / International Federation of Consulting Engineers, a society of engineers involved in the drafting of standard forms of international construction contracts.

FIDIC Orange Book

Conditions of Contract for Design-Build and Turnkey.

[81] Id.
[82] Id., at page 41.
[83] Id.
[84] Id.

FIDIC Red Book

Conditions of Contract for Works of Civil Engineering Construction.

FIDIC Silver Book

Conditions of Contract for EPC (Engineering Procurement Construction) Turnkey Projects.

FIDIC Yellow Book

Conditions of Contract for Electrical and Mechanical Works including Erection on Site.

Final Award

A final award resolves definitively each and every issue which has been submitted to the tribunal for decision. It is a decision by the tribunal that finally determines the substantive issues with which they deal. It is an award which deals with all the remaining matters in dispute in the arbitration.[85] A final award creates a res judicata which (subject to any right to appeal or challenge the award) prevents the parties from re-opening the dispute or challenging the findings of law or fact made in the award in future proceedings.[86]

Foreign Award

It is an arbitration award made in another state, i.e. the award was made at a seat of arbitration outside the jurisdiction. For instance, any award made in a seat other than Ghana is a foreign award, even if the arbitration proceedings and hearings were conducted in Ghana.

Fork-in-the-Road Clause

This clause is generally found in bilateral investment treaties (BITs), a claimant must decide between bringing its claims against its adversary either through the arbitration mechanisms provided in the treaty or local venues provided for in the relevant contract.

Forum Non Conveniens

A principle by which a court can refuse to hear a case if there is a more appropriate forum in which to try the claim taking into account private and public factors, including the interests of the parties, the ease of access to evidence, the enforceability of

[85] The Book of Jargon, at page 42.
[86] Id.

judgment, the interest of the invoked court to decide the dispute, and the ends of justice. [87]

For instance, a court in Ghana may decline to hear a case because the dispute arises from events that took place in Nigeria, the evidence (and in particular witnesses) are located in Nigeria, the parties are domiciled in Nigeria or the parties have agreed to resolve disputes in the courts of Nigeria by including a forum selection clause in their contract.

Forum Selection Clause

A clause designating the legal forum in which the parties agree to resolve claims against each other, such as arbitration or the national courts of a particular state.[88]

Forum Shopping

The process of selecting the most advantageous forum in which to commence legal proceedings in circumstances in which there is a choice.[89]

Functus Officio

Latin for having performed (in the sense of exhausted) a term of office. An arbitral tribunal that has issued its award becomes functus officio, meaning that it ceases to have power or authority with respect to the issues decided in the award (beyond the making of any permitted correction or interpretation).[90]

Governing Law

The law which the parties choose to govern the substance/merits of their dispute. The law according to which a contract is to be interpreted. As a general principle, the laws of the jurisdiction with which the contract has the closest connection will apply if the parties do not stipulate the law of the contract.

Hearing

A meeting with the arbitral tribunal during which the parties' representatives may make oral submissions and witnesses and experts may be questioned on their evidence.

Hot-Tubbing/Witness-Conferencing

Hot-tubbing is the concurrent giving of oral evidence by two or more witnesses, typically expert witnesses. The giving of the evidence is not 'witness-by-witness', but

[87] Id., at page 43.
[88] Id.
[89] Id.
[90] Id.

rather 'theme-by-theme' examination. Article 8.3(f) of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, for example, specifically provides for witness conferencing: *"the Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses be questioned at the same time and in confrontation with each other (witness conferencing)."*

The questioning of witnesses at a hearing can sometimes lead them into hot water, and a "hot tub" is a large container of heated water often occupied by two or more persons at a time as a recreational activity. Bringing the two concepts together, "hot-tubbing" is the name given to a range of procedures by which factual or expert witnesses are questioned together by counsel and/or the arbitral tribunal. This technique allows two or more fact or expert witnesses presented by one or more of the parties to be questioned together on particular topics by the arbitral tribunal and possibly by counsel.[91] Questioning is usually led by the tribunal but it can also be led by counsel or experts themselves. It is also known as "concurrent evidence" or "witness conferencing."

The traditional method of hearing witnesses consists of long hours of questioning technically trained witnesses (expert witnesses), but in truth, nobody in the hearing room can efficiently counter such a witness.[92] What generally happens under the traditional method is that the expert witness is subsequently confronted at a later stage with a counter-witness and with the transcript of the hearing of the first witness in hand. This method proves inefficient. The second witness will often explain why, from a technical point of view, the first witness was entirely wrong, and again, nobody can effectively check or challenge this.[93] What then often follows are lengthy post-hearing briefs where each side analyses the testimony of the other party's expert witness(es) and to seek to justify their own position.[94]

Hot-tubbing is often used in arbitrations which concern mergers and acquisitions, construction, turnkey projects, research and development, intellectual property and other fields where a contractual process based on complex technical facts, systems and procedures, involved most or all potential witnesses who, given their expertise, are not only factual but also quasi-expert witnesses.[95] Consequently, hot-tubbing appears to be ideally applied in such circumstances, although it been successfully used

[91] 2018 ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration, at paragraph 79.
[92] Peter, W., Arbitration International, Volume 18, Issue 1, 1 March 2002, at pages 47–58. (https://doi.org/10.1023/A:1014238725055)
[93] Id., at page 49.
[94] Id.
[95] Id., at page 48.

in less technical arbitrations. The basic characteristic of these arbitrations is that most witnesses are far more knowledgeable in the particular field than the members of the panel or even well-prepared counsel.[96]

Advantages

1. Enhanced efficiency and clarity.

    - If properly conducted the process should clarify the technical points at issue and permit the arbitral tribunal to apply the results to the specific dispute. Alternating questioning assures that each side can express itself until the matter is clear or, if there is still disagreement among the parties, until it is clear why the sides still have diverging opinions and the underlying rationale for their positions.[97]

    - Matters are dealt with efficiently on the spot.[98]

    - The side by side presentation of evidence makes it easier to compare different evidence presented on particular issues.

    - Experts can challenge or rebut each other directly, so that the tribunal is able to immediately appreciate the areas of agreement and the areas of dispute on particular issues.

2. Higher quality of evidence directly on points of issue.

    - In the traditional system, the strength and impact of counsel's questions frequently dwarf the quality of the witnesses' response. By contrast, in hot-tubbing, the debate takes place among the informed and specialised witnesses so that it is expert knowledge against expert knowledge and no longer the lawyer's questioning technique against the witnesses' expert knowledge. Counsel and arbitrator alike play the role of catalysts.[99]

    - Enhances the involvement of the Tribunal. Leading the hot tub (or even supervising it, if led by experts and/or counsel) forces the Tribunal to be well-informed and pro-active in the proceedings.

[96] Id., at page 49.
[97] Id., at page 50.
[98] Id., at pages 49.
[99] Id., at page 50.

- Potential to lead to settlement because the issues brought to the fore, enabling the parties and the tribunal to see the strengths and weaknesses of each party's position on an issue.

2. Conducive to settlement because parties realise with more clarity the strengths and weaknesses of their respective positions, particularly since witnesses are present throughout proceedings. [100]

Disadvantages

1. Loss of control by counsel:

   - Questioning is usually led by Tribunal, so counsel loses control over the questioning process.

   - It allows counsel to control the territory that their experts are asked to cover.

2. Disruptive proceedings:

   - It may reward an expert who sells or is more persuasive.
   - A weak or inhibited expert may make concessions or compromise.

3. Increased costs.

4. There may be a pre-existing relationship between experts which may impede.

5. Hot-tubbing may produce stilted discussions.

Hot-tubbing is generally recommended if there is conflicting opinion evidence on a specialist topic or where there is conflicting factual evidence of two or more witnesses. It is best-suited in circumstances where there is a hardworking and informed tribunal since it imposes a serious task of preparation on the members of the arbitral tribunal. The technique is therefore not suitable for arbitrators who intend to learn the particulars of the file through the hearings and who wish to limit their role to the occasional question.[101] However, hot-tubbing is generally not recommended if the main issue is the credibility of a witness/expert or if the Tribunal is less than diligent.

[100] Id., at page 56.
[101] Id., at page 51.

IBA Guidelines on Conflicts of Interest

These are non-exhaustive principles (commonly accepted as expressive of best practices and so sometimes referred to as "Rules") published by the IBA addressing Conflicts of Interest that may occur in arbitrations. The guidelines consist of a Waivable and Non-waivable Red List (describing serious or severe situations), an Orange List (describing situations that give cause for doubting an arbitrator's independence or impartiality), and a Green List (describing situations which should not normally give rise to any concern).

IBA Guidelines on Party Representation

Non-binding guidelines adopted on 25 May 2013 by the IBA with a focus on regulating, amongst others: (a) communications between party representatives and (i) arbitrators, and/or (ii) the arbitral tribunal; (b) witness evidence and expert evidence; and (c) document production.[102]

IBA Rules of Ethics for International Arbitrators

Non-binding guidelines prepared in 1987 by the IBA for the purposes of ensuring the impartiality and proper conduct of arbitrators in international arbitral proceedings.[103]

IBA Rules on the Taking of Evidence

The IBA Rules are a set of non-binding rules adopted on 29 May 2010 and intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between parties from different legal traditions.[104] The rules are designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration.[105]

ICSID Arbitration Rules

The Arbitration Rules that govern ICSID Arbitration following the registration of a Request for Arbitration under the ICSID Convention.[106]

ICSID Arbitrations

Arbitrations conducted pursuant to the ICSID Arbitration Rules.[107]

[102] The Book of Jargons, at page 50.
[103] Id., at page 48.
[104] Id.
[105] Id.
[106] Id, at page 49.
[107] Id.

ICSID Conciliation Rules

The procedure that governs Conciliations administered by the ICSID Secretariat.[108]

ICSID Convention

It is an acronym for the Convention on the Settlement of Investment Disputes between States and Nationals of Other States made at Washington, D.C., USA in 1965 (also referred to as the Washington Convention). This Convention provides for the resolution of investment disputes.[109]

ICSID Institution Rules

The procedure governing the institution of an arbitration or conciliation under the ICSID Convention.[110]

Infra Petita

This term is often used to mean that a tribunal has not considered all of the issues that have been submitted to it. Literally, the term means "less than what was sought". Under some procedural laws this can be a ground for challenging the award.[111]

Injudicious Remarks

This is generally a reference to comments showing a lack of judgement. If an arbitrator makes such comments, it may lead to allegations of bias.[112]

Interim (Interlocutory) Award

An award that does not dispose finally of a particular claim (eg. one of several claims for damages), but instead decides a preliminary issue relevant to disposing such claims.[113] An arbitral award which has only temporary effect and does not finally decide an issue (which can, accordingly, be revisited by the arbitral tribunal at a later stage of the arbitration).

> *Example*
>
> *A tribunal may issue an award on choice of law or the interpretation of a contractual provision as an interim award, as a step towards disposing of a claim for loss of profits.*

[108] Id.
[109] Id.
[110] Id.
[111] Id., at page 51.
[112] Id.
[113] Born, G., at page 295.

Interim Measure/Interim Relief

A temporary measure ordered by an emergency arbitrator, arbitral tribunal, or court in support of an arbitration, for instance to maintain the current status by preserving property or assets pending the award.[114]

Interlocutory Award

An Award made during the course of the Arbitration, before the Final Award.

International Arbitration

Arbitrations that transcend national boundaries because the parties are of different nationalities or reside in different jurisdictions. It is therefore arbitration with elements arising out of or relating to two or more states, although the precise definition and significance of meeting the criteria differs according to the procedural law.[115]the key elements of an international arbitration are:

a. the agreement to arbitrate;
b. the need for a dispute;
c. the commencement of an arbitration;
d. the arbitral proceedings;
e. the decision of the tribunal; and
f. the enforcement of the award.[116]

International Arbitration Norms

It is an informal body of practices, conventions and procedures that are typically encountered in international arbitration proceedings, and which are often recognized by tribunals and are sometimes applied in resolving procedural disputes.[117]

Intervention by Third Parties

The involvement of a non-signatory to the arbitration agreement or a non-party to the dispute in the arbitration proceedings before the arbitral tribunal.[118]

Juridical Person

A non-human legal entity created by law having distinct identity, legal personality, duties, and rights.[119]

[114] The Book of Jargons, at page 52.
[115] Id.
[116] Redfern and Hunter, at paragraph 1.39.
[117] The Book of Jargons, at page 53.
[118] Id., at page 55.
[119] Id., at page 57.

Jurisdiction

The scope of an arbitral tribunal's power i.e. the scope of authority or competence of an arbitral tribunal.

Jurisdictional Award

An award by a tribunal dealing only with issues of jurisdiction.

Jurisdictional Challenge

A jurisdictional challenge is essentially an attack on the arbitrator's power and authority to hear and decide the dispute, and may involve challenging the existence, validity, scope or enforceability of the arbitration agreement. Since a jurisdictional challenge is fundamental to the validity of arbitration proceedings and to the enforceability of arbitral awards, the UNCITRAL Model Law and Rules require a party to be diligent in raising this challenge. Consequently, the challenge must be raised promptly/at the earliest possible stage/ as soon as possible/timeously. Under Article 23(2) of the UNCITRAL Rules and Article 16(2) of the UNCITRAL Model Law, a jurisdictional challenge must be raised no later than in the Statement of Defence or in relation to a counterclaim or a claim for set-off, in the Reply to the counterclaim or claim for set-off.

In relation to a plea that the arbitrator has exceeded its jurisdiction, this must be raised as soon as the matter alleged to be beyond scope of the jurisdiction is raised. In practice, this means that it should be raised within reasonable time, based on when the objecting party knew, or with reasonable diligence could have discovered, the grounds for the objection.

If the objecting party is not diligent and fails to raise the jurisdictional issue within time, the right to object may be deemed as waived under Article (4) of the UNCITRAL Model law and Article 32 of the UNCITRAL Rules, unless the party can show that under the circumstances its failure to object was justified.[120]

In instances when an arbitrator renders its decision on the jurisdictional challenge as a preliminary question, a party has to be diligent in challenging that decision before a court. Article 16(3) of the UNCITRAL Law provides that this must be done within 30days of being notified of the tribunal's decision.

The requirement for diligence by parties in raising jurisdictional issues is particularly essential because some parties do not raise it in good faith, but rather use it as a device to disrupt and/or delay the arbitration.

[120] Article 23 of UNCITRAL Rules

Jurisdiction Ratione Materiae

An arbitral tribunal's jurisdiction to decide on the subject matter of a particular case.[121]

Jurisdiction Ratione Personae

An arbitral tribunal's jurisdiction over a party's personal rights, rather than over property interests.[122]

Jurisdiction Ratione Temporis

Also known as temporal jurisdiction, it is an arbitral tribunal's jurisdiction to decide a case based on whether the facts giving rise to the dispute arise within the applicable timeframe for the instrument on which the claims are based.[123]

Jurisdiction Ratione Voluntatis

An arbitral tribunal's jurisdiction to hear a case based on the consent of the parties to submit their dispute to that authority.[124]

Jurisdictional Nexus

The connection between the party and the underlying facts of a case required to establish jurisdiction.[125]

Jus Cogens

Under Article 53 of the Vienna Convention, it is defined as a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Lex Arbitri

The procedural law that governs the arbitration[126] which is typically embodied in the arbitration statute of the arbitral seat. The law of the arbitral seat typically deals with issues such as the appointment and qualification of arbitrators, the qualifications and professional responsibilities of professional representatives, the extent of judicial intervention in the arbitral process, the availability of provisional relief, the procedural conduct of the arbitration, the form of the award and the standards of annulment.

[121] The Book of Jargons, at page 57.
[122] Id.
[123] Id.
[124] Id.
[125] Id.
[126] Id., at page 59.

Lex Contractus

The law applicable to a contract, a shorthand for Lex Loci Contractus.[127]

Lex Feranda

A Latin expression that is used in the sense of "what the law should be".[128]

Lex Fori

The law of the state where the arbitration takes place.[129]

Lex Lata

A Latin expression that means "the law as it exists," otherwise known as established law.[130]

Lex Loci Arbitri

The law of the state where the arbitration takes place, i.e. seat of Arbitration and place of Arbitration.[131]

Lex Loci Contractus

The law of the state where a contract was made.[132]

Lex Mercatoria

A set of legal principles based on concepts, found in developed legal systems, which are widely recognized by the international business community.[133] The existence, scope, and application of Lex Mercatoria is the subject of much debate. However, it has been successfully invoked in arbitrations as the basis on which the Arbitral Tribunal should resolve issues in the absence of any clearly applicable law.[134]

Lex Societatis

A Latin expression meaning "the law of the society."[135]

[127] Id.
[128] Id.
[129] Id
[130] Id.
[131] Id.
[132] Id
[133] Id.
[134] Id.
[135] Id.

Lex Specialis

Latin for a law governing a specific subject matter. According to the doctrine of lex specialis derogat legi generali, a specific legal rule overrides the more general one.[136]

Memorial

A memorial is a detailed presentation of the facts and all the evidence (documents, witness statements, experts' reports) that support a party's claims and defences in arbitration. The information is submitted concurrently at an early stage of the arbitration process. The memorial is therefore an 'all cards on the table' process of arbitration which shows the entirety of a parties' case from the outset.[137]

The difference between memorials and pleadings is the timing of the witness statements and expert reports. For memorials, parties serve witness statements and/or expert reports alongside the pleadings and supporting evidence. The pleadings process, on the other hand, consists of exchanges on facts, then submission of the witness statements and expert reports and then finally submissions on the law.[138]

Memorials closely match aspects of litigation in civil law jurisdictions whereas pleadings are more aligned to common law jurisdictions.[139] Consequently, those from civil law jurisdictions largely endorse the memorial approach. Moreover, most major arbitration institution rules and the UNICTRAL Rules assume that parties will serve the arbitration tribunal and the opposing party with all the documents you intend to rely on alongside the pleadings.[140] Arbitral institutions such as the ICC prefer the memorial approach whereas the LCIA preferred the pleading approach.[141] Therefore, when addressing the pleading or memorial issue, parties must consider the institutional rules to which the arbitration is bound and whether parties' cases would be best served by using one style over the other.

Advantages

- The arbitration tribunal gets a complete overview of the legal and factual matters from the very start of the arbitration and therefore are better suited to grasp the issues in dispute and manage the parties accordingly.

- Reduced likelihood of the arbitration from dragging from one procedural hearing to the next without any tangible progress being made.

[136] Id.
[137] Smith, A., and Jones, M., Memorials or pleadings? A Cultural Conflict (https://beale-law.com/publications/743-arbitration-news-memorials-or-pleadings-a-cultural-conflict)
[138] Id.
[139] Id.
[140] Id.
[141] Id.

- The production of the evidence at the earliest stages of the arbitration may have the effect of narrowing factual issues or ruling out some points entirely as issues of non-dispute.

- Often in cases referred to arbitration, one party has a significantly stronger position on the law, which means that under the pleadings process this will only come to light at the very end of the submissions while the memorial style ensures that this is revealed earlier on in the process, to the benefit of the arbitrators and the parties.[142]

- It not only streamlines the factual issues surrounding the dispute but may also increase the likelihood of resolving the dispute.[143] Memorials have the effect of encouraging parties to face up to the case from an early stage and reminds the parties that extra expense will have to be expended in the early stages of the arbitration. These legal and commercial influences may encourage the parties to engage in realistic early evaluation of the dispute and potentially earlier settlement.[144]

Disadvantages

- Advocates for the pleadings process argue that memorials serve as inefficient basis on which evidence is led, as it may later turn out to be points of no dispute.

- They also argue that value points to a party's case may only arise in rebuttal, therefore requiring two rounds of witness statements or expert reports.

- The upfront costs of preparing experts/witnesses as there may be with pleadings.

Model Arbitration Clause

Model Arbitration Clauses are often published by arbitral institutions as an example of an arbitration clause and can be used by parties or adapted as appropriate for their circumstances.

Nemo Judex in Causa Sua

Referred to as the rule against bias, the principle requires that no one shall be a judge in his own cause. The arbitrator should not have a personal interest in the outcome of the case (independence) and should not be biased (impartiality). Independence is

[142] Id.
[143] Id.
[144] Id.

concerned with the relationship between the arbitrator and one of the parties, whether financial or non-pecuniary interest[145]and is judged objectively. Impartiality however requires an arbitrator to be free from bias in favour of one of the parties or in relation to the issues in dispute, and is a question of his subjective state of mind.

New York Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted on 10 June 1958 in New York, is one of the key instruments in international arbitration. Member-states are obliged to give effect to arbitration agreements and to recognize and enforce arbitral awards rendered outside the respective country's territory, with limited exceptions. As of June 2020, 164 countries are party to the New York Convention, facilitating the enforcement of arbitral awards on an almost world-wide scale.[146] The 164 signatories include 160 of the 193 United Nations member states plus the Cook Islands, the Holy See, and the State of Palestine. Thirty-four UN member states have not yet adopted the Convention.[147]

The full text of the New York Convention can be found on UNCITRAL's homepage.[148]

Non Liquet

A Latin phrase which refers to circumstances in which the applicable law (statute and case law) does not produce a clear answer to the legal issue in question.[149]

Non-Recognition of Arbitral Award

This is a reference to the situation where a court finds that an award is not valid and binding because of issues such as procedural irregularity, non-arbitrablility or invalidity of an arbitration agreement.

Non-Signatory

A third party that is not a signatory to or formally executed an arbitration agreement or the underlying contract containing the arbitration clause.

Non-Waivable Red List

A number of situations, set out in the IBA Guidelines on Conflicts of Interest, which are regarded as compromising an arbitrator's impartiality and independence in a manner

[145] R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Uguarte (No.2) [1999] 1 All ER
[146] http://www.newyorkconvention.org/countries
[147] Id.
[148] https://uncitral.un.org/
[149] The Book of Jargons, at page 64.

that cannot be waived by the parties and so act as an absolute prohibition on the individual in question serving as arbitrator in the relevant matter.[150]

Notice of Arbitration

The document by which a party commences arbitration, for example, under the UNCITRAL Rules.

Notice of Dispute

A written document or communication indicating that there is a dispute. In the Investment Treaty context, this is the written communication to a Host State by which an investor typically starts the negotiation period or Cooling off Period for the resolution of a dispute arising out of an Investment Treaty. It is also known as a Request for Consultations or a Trigger Letter.[151]

OHADA Common Court of Justice and Arbitration

The Common Court of Justice and Arbitration (CCJA), which was established in 1998, assumes the hybrid roles of arbitration institution, supreme court and advisory body to the seventeen member states of the Organization for the Harmonization in Africa of Business Law (OHADA). Its arbitration proceedings are governed either by its Rules of Arbitration, or by the OHAHA Uniform Act on Arbitration (UAA).

Option to Arbitrate

An arbitration agreement drafted such that arbitration must be chosen in accordance with the terms specified if it is to be the forum for resolution of the dispute.[152] See Unilateral Option clause (Asymmetric Arbitration clause) below.

Orange List

A non-exhaustive enumeration of specific circumstances that may give rise to doubts about an arbitrator's impartiality or independence in the IBA Guidelines on Conflicts of Interest in International Arbitration.[153]

Pacta Sunt Servanda

It is a Latin term for "agreements must be kept," meaning that the parties to an agreement should abide by the agreement.[154]

[150] Id., at page 65.
[151] Id., at page 66.
[152] Id.
[153] Id.
[154] Id., at page 68.

Pacta Tertiis Nec Nocent Nec Prosunt

It is a Latin term for "treaties neither obligate not benefit third parties." This principle is incorporated in Article 34 of the Vienna Convention whereupon a State may not incur obligations or enjoy rights under a treaty to which it is not a party. More generally refers to the principle that agreements neither bind nor benefit third parties.[155]

Parallel Proceedings

Two or more related procedures conducted at the same time by different courts or arbitral tribunals (or a combination of the two).[156]

Partial Award

Partial awards resolve one or more, but not all, issues submitted to the tribunal, leaving some claims for further consideration and resolution in future arbitral proceedings.[157] For example, the issue of whether the tribunal has jurisdiction may be resolved in a preliminary award, or a partial award, or even an interim award. Once a tribunal decides that it has no jurisdiction over the entire dispute, this will in effect end the proceedings, and so would constitute a final award.[158] If the tribunal decides it has jurisdiction, even over only certain issues, it can render a partial or interim award.[159]

It is useful to issue a partial award to determine the applicable law to the merits of the case, or to separate the issues of liability from the amounts which need to be determined only if the tribunal decides that a party is indeed liable. It may also be useful to issue a Partial Award to interpret a contractual provision, to delineate the extent of the claims the tribunal will entertain.

Institutional rules also generally provide for Partial awards. Article 34(1) of the UNCITRAL Rules provides that the arbitral tribunal may make separate awards on different issues at different times. Such provisions grant the arbitrators power to make partial awards even in the absence of statutory authorisation. Even without provisions in institutional rules, this authority is inherent in the arbitrator's mandate to resolve the parties' dispute in an efficient manner.[160]

[155] Id.
[156] Id.
[157] Born, G., at page 294.
[158] International Award Writing, at page 11.
[159] Id.
[160] Born, G., at page 294.

Partiality

It is used to describe the situation where an arbitrator is being unfairly inclined to favour one party over the other.

Party Autonomy

The parties' freedom of choice (for example, to determine the procedure to be followed).[161]

Party Representatives

The persons, usually lawyers, acting on behalf of a party in an arbitration.[162]

Party-Appointed Experts

The expert witnesses appointed by the parties to an arbitration, as opposed to experts appointed by the arbitral tribunal itself.[163]

Pathological Arbitration Clause

It is a term used to describe an arbitration clause, or more generally an arbitration agreement, whose defective drafting does not allow the constitution of an arbitral tribunal without the intervention (not anticipated by the parties) of a court or which renders it impossible to establish arbitral jurisdiction.[164] Where it is impossible to establish jurisdiction, it is rendered null and void or cannot be applied and the national court regains jurisdiction to resolve the dispute.[165]

It has also been described as a clause that is impossible or extremely difficult to implement, likely to breed disagreement during the arbitration, or likely to invite challenges to the award.[166]

It can also be defined as a diseased clause/provision for Arbitration, meaning that the provision is unworkable. These clauses are drafted in such a way that they may lead to disputes over the interpretation of the arbitration agreement, may result in the failure of the arbitral clause or may result in the unenforceability of an award.[167] An agreement may be pathological if it lacks specificity, referring to non-existent arbitral institutions, arbitration rules or arbitrators, internally contradictory arbitration

[161] The Book of Jargon, at page 68.
[162] Id.
[163] Id.
[164] www.parisarbitration.com
[165] Id.
[166] Shearman, F., and Bennett, S., "Avoiding Pathological 'Pathological' Arbitration Clauses," in The Practical Lawyer, August 2006, at page 44.
[167] Bishop, R.D., A Practical Guide for Drafting International Arbitration Clauses, Houston, King and Spaulding, 2000, at page 18.

agreements, optional or non-mandatory arbitration agreements (providing for court and Arbitration proceedings at the same time).

Pathological clauses usually result in increased costs, unnecessary litigation on the interpretation of the clause and sometimes even reputational damage for the legal professional who drafted such that defective clause.

Examples:

Non-existence

An arbitration clause in an agreement provides that all disputes arising in the agreement should be referred to the Alternative Dispute Resolution Centre in Accra for arbitration. There is no Alternative Dispute Resolution Centre in Accra. Although the Alternative Dispute Resolution Act, 2010 (Act 798) provides for such a centre, it is yet to be set up and is therefore not in existence. This clause is therefore pathological and incapable of implementation.

Over-specificity

An arbitration clause in a contract signed in 2019 provides that the parties should appoint Prof. John Mensah of the University of Ghana to arbitrate any future disputes. Prof. John Mensah passes away on April 2020 and a dispute subsequently arises between the parties in August 2020. The arbitration clause becomes a pathological clause since the arbitrator to be appointed is no longer alive.

An arbitration clause in a contract provides that the sole arbitrator to be appointed by the parties should be a Ghanaian female with 30 years of experience in the capital markets sector, at least 15 years of which should have been spent heading a local regulatory agency and fluent in English, German and Mandarin. This clause could be deemed pathological because it is practically impossible to find an arbitrator meeting the qualifications agreed on by the parties.

Equivocation

An arbitration clause in a contract that states as follows is pathological:

"Any dispute arising out of this contract must be resolved by arbitration under the rules of the Ghana ADR Hub by a sole arbitrator agreed by the parties. Nevertheless, any party may institute an action before the Ghanaian courts to resolve the dispute. OR Nevertheless any party may appeal the decision of the sole arbitrator before the Ghanaian court."

This is because it is unclear whether the parties are indeed choosing arbitration as the mode of dispute resolution since the option of going to court to resolve the same dispute is provided or there is ambiguity as to whether or not the parties intend the arbitration award to be binding because there is provision for an appeal of the award in court.

Omission

An arbitration clause may simply state:

"Any dispute arising out of this agreement may be resolved by arbitration."

This clause identifies arbitration as the dispute resolution mechanism but opens up several avenues for litigation over the implementation of the clause. It does not identify the seat, applicable rules, arbitrators to be appointed etc, which means that such a clause is prone to litigation.

Peremptory Order

An order specifying a time for compliance following which further consequences may follow. Peremptory Orders usually follow a failure to adhere to an original Order, and may take the form of an Unless Order.[168]

Permanent Court of Arbitration (PCA)

The PCA is an intergovernmental organization providing services for the resolution of disputes involving various combinations of states, state entities, intergovernmental organizations, and private parties.[169]

Pre-Hearing Conference

A meeting (whether in person or by telephone/ videoconference) held prior to a Hearing in order to address matters (usually procedural) related to that hearing.[170]

Pre-Hearing Exchange

The mutual service by each party on the other of the documents they intend to present at a hearing.

Preliminary Hearing

A hearing or meeting convened by the arbitral tribunal with the parties soon after the constitution of the arbitral tribunal for the purpose of discussing how the arbitration will proceed from that point up until the hearing.[171] It is rare for arbitrators immediately after appointment to have sufficient information to be able to start work on the decision.

Usually, the tribunal will meet with the parties to get them to prepare their cases in a way that will help the tribunal to understand the facts and issues within the dispute and the evidence which is available. A face-to-face meeting is the norm in larger cases but this conversation may take place through phone/video conference if parties reside in different cities or countries.

[168] The Book of Jargons, at page 59.
[169] Id., at page 69.
[170] Id.
[171] Id., at page 70.

Preliminary Issue

A matter decided in advance of the main hearing, usually in an attempt to save time and costs by resolving an important dispute (such as one relating to jurisdiction) at an early stage.[172]

Preliminary Objections

A matter raised at an early stage of the process which, if upheld, would normally have a substantial impact upon the further proceedings. For example, a preliminary objection to the jurisdiction of an arbitral tribunal.[173]

Presumption of Arbitrability

The rebuttable assumption that a matter can be resolved through arbitration (is arbitrable) and is covered by the relevant arbitration clause.[174]

Private International Law

The body of law that regulates the relationships between private citizens and entities from different nations.[175]

Privileges

Special legal treatment, benefit, advantage, or immunity.[176]

Procedural Fairness

A suitable and balanced approach to the process, which allows each party the appropriate opportunity to present its case and defend against any case made against it. Procedural Law: the law applicable to the Arbitration proceedings. In many cases, the procedure for the Arbitration will be a mixture of the Arbitration Rules adopted by the parties (often through the incorporation by reference of a recognized set of rules, such as those of the ICC, LCIA, AAA, or UNCITRAL) and any mandatory rules set down by the law of the seat. [72]

Procedural Order

A decision of an arbitral tribunal dealing with procedural and administrative aspects of an arbitration, such as the timetable for the proceedings.[177] Procedural Orders concern the conduct of an arbitration rather than substantive issues. These decisions almost always deal with logistical matters, scheduling of hearings or submissions,

[172] Id.
[173] Id.
[174] Id., at page 71.
[175] Id.
[176] Id.
[177] Id., at page 72.

disclosure issues, etc. Orders are issued by the tribunal in order to move the arbitral proceedings forward and to protect the integrity of the proceedings.

Example:

IN THE MATTER OF UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

FALSESTART UK LIMITED **CLAIMANT**

And

DORUS GHANA LIMITED **RESPONDENT**

PROCEDURAL ORDER 4

Having heard from Mr. Cory Long for the Claimant and Dr. Kofi Asante for the Respondent, I ORDER AND DIRECT as follows:

Amended Pleadings

1. The Respondent shall serve its Amended Statement of Defence on the Claimant with a copy to me no later than 10th December 2017.
2. The Claimant shall serve its Amended Statement of Reply with a copy to me no later than 30days after service of the Amended Statement of Defence.
3. Amended Witness Statements shall be exchanged no later than 30days after service of the Amended Reply and are to stand as evidence in chief.
4. All statements shall include a copy of any documents referred to in the Statements.

Disclosure

5. The parties are to co-operate and to disclose to each other relevant documentation within their possession or power upon request.
6. The parties are at liberty to apply to me if necessary, for an Order of Disclosure of specific documents or specific classes of documents.
7. The parties or their experts are to agree figures as figures and facts as facts as far as possible.

Experts

8. The parties have permission to retain one expert in respect of each area of expertise.
9. The parties are to notify each other of the area of expertise in which they intend to call expert witnesses within a reasonable time.
10. Any Amended Expert Reports are to be served no later than 60days after service of the Amended Statement of Reply and are to stand as evidence in chief.
11. Experts are to meet on a without prejudice basis as often as necessary prior to service of the reports in order to reduce the issues between them.

The Hearing

12. The parties are to meet and agree on proposed dates between June 2018 and August 2018 for the hearing and communicate those dates to me for my consideration.
13. The final dates for the hearing are to be the subject of my further directions after considering the proposed dates agreed by the parties.
14. The venue is to be arranged by the clamant with the agreement of the Respondent and/or my further direction.
15. The claimant is to prepare a properly paginated hearing bundle with the agreement of the Respondent and shall provide one copy to me and one copy to the Respondent no later than

14days prior to the commencement of the hearing and is also to retain one copy for the use of all witnesses.

16. The opening and closing addresses are for the most part to be confined to writing.
17. The Claimant is to provide an opening address to me with a copy to the Respondent by 7days before the commencement of the hearing.
18. The sequence and dates for the provision of the parties' closing addresses are to be the subject of my further directions given at the hearing.

Costs

19. All costs pursuant to this amendment application shall be borne by the Respondent.
20. Costs include any cancellation fees for the venue of the hearing, any costs occasioned by Claimant in responding to the amendment and amending its Witness Statements and

Generally

21. Both parties are at liberty to make representations regarding the content of this order.

Made this 1st day of August 2020.

Procedural Rules

The rules governing how an arbitration is conducted. These vary by arbitral institution. For example, the ICC, LCIA, and AAA each have procedural rules.[178]

Procedural Timetable

The schedule set by the arbitral tribunal in consultation with the parties which outlines the steps that each party is to take in the arbitration, such as in relation to the timing of filing written submissions.[179]

Provisional Measures

They are orders of a court or tribunal issued on an interim and temporary basis (e.g., pending the final disposition of a case).[180]

Public Interest

An interest of the general public which warrants particular recognition, promotion, and protection by rules of law or particular decisions.[181]

Public International Law

It is the body of law that regulates the conduct of States and international organizations.[182]

[178] Id.
[179] Id.
[180] Id., at page 72.
[181] Id.
[182] Id.

Public Policy

Public policy can be expressed as a legal set of principles that forms the critical basis of the fundamental operations of a given legal system. Many jurisdictions divide issues between procedural and substantive public policy. Under the New York Convention, an arbitral award violating the public policy of the country of enforcement can be rejected or set aside.

It has also been defined as a State's notions of justice and public morality. Public policy considerations may affect whether a dispute is arbitrable or an award enforceable.[183]

Reasoned Award

An award stating the reasons upon which it is based.[184]

Receptum Arbitrum

A Latin expression meaning the agreement to hear a dispute.[185]

Reciprocity

Under international law, it is the exchange of rights, privileges and obligations between States for mutual benefit.[186]

Recognition of Award

It is the confirmation by a court in which enforcement of an arbitral award is being sought that the award is valid and binding on the parties.

Rectification

It is the correction of an award if it contains a mistake, usually typographical or clerical errors). See Correction of Award.

Redfern Schedule

A document, in tabular form, which sets out the respective positions of the Claimant, Respondent, and arbitral tribunal regarding requests for disclosure of documents.[187] The Redfern Schedule is a columnar presentation of a request for disclosure, usually for documents, and contains the submissions of the requesting party, the position of the responding party and a fourth column for use by the Arbitrator for a decision on the requirement for disclosure.

[183] Id.
[184] Id.
[185] Id., at page 73.
[186] Id
[187] Id

Example:

No.	Requesting Party	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Request	Reply to Objections to Document Request	Tribunal's Decisions
			Ref. to Submissions	Comments			

Rejoinder

This expression is used in cases in which there are multiple rounds of written submissions exchanged between the parties, the Rejoinder being the second written submission made by the Respondent (i.e. in Answer to the Claimant's Reply).[188]

Relief

The legal remedy claimed by a party in the arbitral proceedings.[189]

Remedy

The means by which an arbitral tribunal or court gives redress for a claim, such as damages.[190]

Remission

The reference by a court, upon the application of a party, of an award back to the arbitral tribunal for reconsideration in whole or in part.[191]

[188] Id., at page 72.
[189] Id., at page 74.
[190] Id.
[191] Id.

Removal of Arbitrator

The dismissal of the arbitrator from the proceeding.[192]

Replacement Arbitrator

An arbitrator appointed to replace another arbitrator who has been recused or removed.[193]

Reply

A Claimant's response to a Respondent's Statement of Defence.[194]

Request for Arbitration

A document by which a party commences arbitration under various arbitration rules. See Notice of Arbitration.

Request to Produce

The request of one party to the other party to produce evidence, often in the document production phase of an arbitration.[195]

Res Judicata

It is the Latin term for "a matter already judged," and refers to either of two concepts: in both civil law and common law legal systems, a case in which there has been a final award or judgment which is no longer subject to appeal; and the legal doctrine meant to bar (or preclude) continued arbitration or litigation of a case on the same issues between the same parties. In this latter usage, the term is synonymous with "preclusion."[196]

Reservation

In international law, this is defined in Article 2 of the Vienna Convention on the Law of Treaties (1969) as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." It is also sometimes referred to as a "declaration," "understanding," "interpretative declaration," or "interpretative statement." [197]

[192] Id.
[193] Id.
[194] Id.
[195] Id.
[196] Id.
[197] Id.

Reserve Seat

If the parties have not designated a seat of arbitration, or if the parties have designated two seats of arbitration, it is the less preferred seat of arbitration.[198]

Respondent

A party against whom a claim is brought by a Claimant.

Response

The Respondent's Answer to the Request for Arbitration in, for example, arbitrations under the LCIA Arbitration Rules. Under some other arbitration rules, such as the ICC arbitration rules, the equivalent document is called the Answer.[199] As well as replying to the factual and legal claims made by the Claimant in the Request for Arbitration, the Response may need to raise any Counterclaims and/or jurisdictional objections and include the Respondent's Nomination of an Arbitrator.[200]

Restitution

Under common law, restitution means the return to the injured party of the amount by which the party that caused the injury was unjustly enriched.[201]

Rome Convention

It is the Convention on the Law Applicable to Contractual Obligations. This Convention was signed on 19 June 1980 and entered into force in 1991. It sets Conflict of Laws rules to determine the law applicable to contractual obligations.[202]

Scott Schedule

A Scott Schedule provides a precise columnar presentation of the issues to be decided and the position of each party on the issues. It is a presentation of multiple issues to be decided by the Arbitrator. It may be described as a form of particulars especially where a party's case is made up of a substantial number of claims. It is an effective way of presenting conflicting evidence and listing agreed and disputed facts or issues. It is prepared before the start of the hearing and everyone, including the Arbitrator and witnesses, are better equipped to conduct a fair and efficient process.

In commercial arbitrations, often the pleadings embodying the claim, response, counter-claim, and reply are voluminous and are not, nor are they necessarily required

[198] Id.
[199] Id.
[200] Id., at page 75.
[201] Id.
[202] Id.,

to be confined to allegations of fact. In many cases, pleadings set forth the evidence a party relies on and even contain argument. A Scott Schedule prepared prior to the arbitration hearing may serve to not only isolate issues, but also can be helpful in sequencing the evidence on each issue at the hearing. This concept applies not only to lay witnesses but to expert witnesses.

Scott Schedule helps to identify the key issues between the parties, and to set out for the arbitrators in a single document, a summary of the parties' rival cases on an item-by-item basis. They are often used in disputes that are factually very complex. It can be confusing and time-consuming to move back and forth between the parties' rival (and often very long) statements of case in order to compare what each of them says about a particular item. A Scott Schedule is designed to provide a single-source document setting out the rival cases. They are typically used to compare the parties' respective positions.

A Scott Schedule is named after its originator, His Honour George Scott, Official Referee of the United Kingdom High Court of Justice, 1920-1933. Ideally, the parties agree on format and each can insert their own content. Thereafter, the schedule will have, in columnar form, the claimants' position on all relevant issues, as well as a statement of those issues and a description of the evidence supporting each position. The respondent then replies with admissions or agreement or a denial, but in all cases, states the reasons for the position. From the point of view of an Arbitrator, the Scott Schedule prepared by the parties can be presented to the Arbitrator prior to the arbitration hearing, at a pre-arbitration meeting. Any disputes as to format or content can be decided by the Arbitrator at that meeting and the arbitration hearing can go forward on the basis of the Scott Schedule.

With intense focus by all parties on the preparation of a Scott Schedule, some of the issues may be resolved and others narrowed. As stated by Scott Gray, use of the Scott Schedule to expedite the resolution of quantum issues is "particularly well suited"

Example:

(a) Heads of Claim

Claim No.	Description of Claim	Claimant		Defendant		Arbitrator	
		Claim Make-up	Claim Amount	Claim Make-up	Claim Amount	Comments	Amount
1.							
2.							

(b) Schedule of Financial Claims

Claim No.	Description of Claim	Claimant			Defendant		Arbitrator	
		Contract Clauses Claim Made Under	Claim Make-up	Claim Amount	Claim Make-up	Claim Amount	Comments	Amount
1.								
2.								

(c) Schedule of Delay Events

Claim No.	Details of Delaying Event	Claimant			Defendant	Arbitrator	
		Effect of the Event	Total Delay	Description of Disruption	Comments	Comments	Price
1.							
2.							

Schedule of Costs

A table setting out the fees and charges payable by parties to an arbitral institution for the arbitral tribunal and the administration of the proceedings. A Schedule of Costs will typically outline the applicable fees for filing documents and applications (including commencing the arbitration), the administrative charges payable (calculated either on an hourly rate or by reference to the amount in dispute in the proceedings), Deposits/advances on costs and Arbitral Tribunal/Arbitrator fees.[203]

Sealed Offer

An offer to settle a dispute which, if not accepted, may be shown to the Arbitrator(s) after their decision on the merits and taken into account when determining how to allocate costs between the parties.[204] A tribunal receives a sealed envelope from a party, which is opened only after the award has been written, save as to costs. It then considers the offer, and if the prevailing party has won less that the amount in the

[203] The Book of Jargon, at page 76.
[204] Id, at page 77.

offer, it will not be reimbursed for its costs after the date of the offer.[205] It is used to encourage parties to settle their disputes by imposing cost penalties on those who choose to continue with the proceedings in the face of a reasonable offer to settle.[206]

Seat of Arbitration

The seat of the arbitration is the place to which the arbitration is legally connected and from which all juridical consequences flow. It is the jurisdiction in which the arbitration is deemed, legally speaking, to take place and the Award to be made (regardless of the physical location of the tribunal).[207] The physical location of an arbitration hearing is of little consequence beyond the convenience of the participants. However, the seat is crucially important because it determines which legal system provides the procedural law and supervisory courts for the arbitration (the national court responsible for applying that law), and where the award is deemed to be made (which can be very important for the purposes of enforcement, for example, under the 1958 New York Convention).[208] It also determines the national courts responsible for and arbitration law applicable to the annulment of awards.[209] The choice of a seat brings with it submission to the laws of that country, including any mandatory provisions of its law on arbitration.[210] An arbitration is conducted within the framework of the law of arbitration of that jurisdiction and is the factual connecting factor between that arbitration law and the arbitration itself, providing the nexus of contracting and procedural rights and obligations between parties and the arbitration.[211] The seat of arbitration has been described as the legal centre of gravity for the arbitration.[212]

The choice of the seat will normally:

a. determine the law governing the procedural, as opposed to the substantive, aspects of the arbitration;
b. determine which national courts will have a supervisory and supportive jurisdiction over the proceedings, including the power to set aside an award; and thus
c. affect the enforceability of the award.

[205] International Award Writing, at page 51.
[206] Anjomshoaa, P., Costs Awards in International Arbitration and the use of "Sealed Offers", International Arbitration Law Review, Issue 2, (2007).
[207] The Book of Jargon, at page 77.
[208] Id.
[209] Born, G., at para. 3.70
[210] Id, at para 3.63
[211] Reymond, 'Where Is an Arbitral Award Made?' (1992) 108 LQR 1, at p. 3.
[212] Born, G, at para 3.56.

The seat does not depend on the domicile of the parties or the arbitral tribunal and should not be confused with the location of any hearings that may be held in venues other than the seat.

Separability

The doctrine of separability means that the arbitration agreement is legally distinct from the contract in which it is contained, i.e. that even though the arbitration agreement is included in and closely related to the underlying commercial contract, it is a separate and autonomous agreement and severable from that contract. It is the legal doctrine by which the arbitration clause (agreement) is deemed to be a separate contract from the contract in which it is included (allowing, for example, the arbitration agreement to survive the termination or the declaration of nullity of the main contract).[213] This means that the invalidity or the termination of the main contract will not usually affect the validity of the arbitration agreement. The tribunal is left with the jurisdiction to decide on the effects arising from the invalidity or termination of the contract.

The separability principle allows the very existence of the arbitral proceeding, preserving the arbitration clause and thus making it possible to resolve the dispute even when the main contract is invalid. The rationale for the separability presumption is that the parties' agreement to arbitrate consists of promises that are independent from the underlying contract, i.e. the mutual promises to arbitrate constitutes a separable and enforceable contract between the parties distinct from the underlying contract.[214]

The principle of separability is sometimes confused with the kompetenz-kompetenz principle. Separability of the arbitral agreement from the main contract allows the arbitrators to decide the dispute even when the main contract is null and void, assuming that the invalidity does not affect the arbitral agreement itself. However, when the relevant point is, for instance, related to the validity of the signature on the arbitration agreement and consequently with the competence of the arbitral tribunal itself, it is the kompetenz-kompetenz concept, and not the separability principle, that allows the arbitrator to first rule on their own jurisdiction.

[213] The Book of Jargon, at page 77.
[214] Born, G., at page 54.

Sequestration of Witnesses

When a witness is not permitted to be present at the hearing until they give evidence.[215]

Serious Irregularity

It is one of the grounds upon which a party may challenge an award under the English Arbitration Act 1996. The serious irregularity in the procedure followed must have caused substantial injustice.[216]

Set Aside

A court at the seat of arbitration denying effect to (i.e., annulling) an award.[217]

Set-Off

The reduction or elimination of a debt or claim by reference to a countervailing debt or claim.[218]

Settlement

The voluntary resolution of a dispute by agreement between the parties, so that an arbitrator is no longer required to reach a finding on the dispute.

Severability

A principle that a particular clause may be invalid (and severed from the rest of the agreement) without the agreement itself being considered invalid as a result.[219]

Slip Rule

The ability of an arbitral tribunal to correct minor (for example, typographical or mathematical) errors in its award.[220]

Soft Law

Rules and guidelines that are not themselves binding but which have some legal significance, for example having been drawn up by established professional bodies.[221]

[215] Id.
[216] Id.
[217] Id.
[218] Id., at page 78.
[219] Id.
[220] Id.
[221] Id., at page 79.

Sole Arbitrator

The name given to an individual who serves as the only arbitrator forming the arbitral tribunal.[222]

Sovereign (or State) Immunity

It is protection enjoyed by sovereign states and/or their instrumentalities against the jurisdiction of other states' courts or tribunals or from the execution of any judgment or award.[223]

Sovereignty (of States)

The power of a State to do everything necessary to govern itself including making, executing, and applying laws, engaging in war, imposing and collecting taxes, and forming treaties with other sovereign States.[224]

State

Under international law, a State is an entity with (a) a permanent population, (b) a defined territory, (c) a government, and (d) the capacity to enter into relations with other States. A possible fifth criterion is that the entity be recognized by other States as such.[225]

State-to-State Arbitration

Arbitration proceedings relating to disputes between States.[226]

Statement of Case

A written submission setting out a party's position.[227]

Statement of Claim

A written submission setting out the Claimant's full position in detail (usually for the first time).[228]

Statement of Defence

A written submission setting out the Respondent's Answer to the Claimant's Statement of Claim.[229]

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[222] Id.
[223] Id., at page 79.
[224] Id.
[225] Id., at page 70.
[226] Id.
[227] Id., at page 81.
[228] Id.
[229] Id.

Statement of Defence to Counterclaim

A written submission setting out the Claimant's Answer to the Respondent's Counterclaim.

Statement of Reply

A written submission setting out the Claimant's Answer to the Respondent's Statement of Defence. If the Respondent has made a Counterclaim, the Statement of Reply is usually accompanied by a Statement of Defence to Counterclaim.

Submission

An oral or written communication from a party's representatives to the arbitral Tribunal making an argument.

Submission Agreement

An agreement by parties to submit an existing dispute (dispute that has already arisen between them) to arbitration. It is essentially an arbitration agreement entered into after a dispute has arisen between the parties, as opposed to a prior agreement by the parties to resolve future disputes by arbitration. Typically, it is difficult to negotiate a submission agreement once a dispute has arisen.[230]

> *Example:*
>
> *Parties to a fin-tech contract have a dispute resolution clause that allows any of the parties to commence litigation proceedings when a dispute arises. A dispute subsequently arises relating to an alleged defect in the novel software to be used on the electronic platform on which the fin-tech product will operate. The dispute is of a very technical nature involving in-depth understanding of algorithms relating to the software in question and must be resolved within three months to enable the purchasing party launch its novel fin-tech product.*
>
> *The parties are concerned about the time it may take to resolve the issue in court, since a delay in the launch of the fin-tech product would greatly compound any damages claim and would no longer make the product competitive on the matter. Also, the parties worry that the niche area of the subject matter of the dispute requires a specialist to be able to understand the dispute properly to determine it. The parties therefore agree on a submission agreement after the dispute arises.*
>
> *The submission agreement specifically provides for an algorithm specialist with six years knowledge and experience with a specified algorithm, and the dispute must be resolved within three months.*

[230] Born, G., at p. 34

Example:

We the undersigned parties hereby agree to submit to arbitration administered by the Ghana ADR Hub under its Arbitration Rules the following controversy. (Here describe the controversy or dispute to be submitted)

a. *The number of arbitrators shall be …….*
b. *The seat of the arbitration shall be…… (city, country)*
c. *The arbitration shall be conducted in the ……(language)*
d. *The law applicable to the substance of the dispute shall be the law of (country)*[231]

Substantive Jurisdiction

The authority of a court or arbitral tribunal to determine a dispute. It is generally concerned with (a) whether there is a valid arbitration agreement, (b) whether the Tribunal is properly constituted, and (c) what matters have been submitted to Arbitration in accordance with the arbitration agreement.[232]

Summary Procedure

It is a shortened procedure in which the arbitral tribunal does not hear full evidence and argument, and sometimes dispenses with an oral hearing. Summary Procedures are normally best suited to dealing with weak cases if the dispute is confined to a legal issue, with no evidence requiring a full trial, and/or if there is clearly no viable claims or defences.[233]

Supervisory Jurisdiction

The role of State courts in supporting and ensuring that an arbitration proceeds in accordance with the agreement of the parties. The courts of the seat of arbitration have supervisory jurisdiction over that arbitration and when requested, can make orders to support the arbitration.[234]

Example:

An arbitration may have its seat in Paris but the venue of the arbitration hearings may be in Accra, i.e. at a conference room at Golden Tulip Hotel. The courts in Paris would have supervisory jurisdiction over the arbitration, rather than the Ghanaian courts. If there is the need to bring an application in a court to support the arbitral proceedings, such as an interlocutory injunction application, it is the Parisian courts that have jurisdiction to make that order.

[231] Model Submission clause, Ghana ADR Hub Arbitration Rules, at page 97.
[232] Id., at page 82.
[233] Id.
[234] Id.

Terms of Appointment

The terms on which a person or entity, for example, an arbitrator or expert, is engaged to perform their functions. The Terms of Appointment of an arbitrator may deal with matters including entitlement to fees and expenses, assistance from third parties, immunity from suit and consequences of resignation.[235]

Terms of Reference

It is a document required by the ICC Rules, detailing the missions of the arbitral tribunal as well as the parties' backgrounds and positions, and a key feature of ICC arbitration. It sets out the names and addresses of the parties and their representatives, a summary of their claims, the place of arbitration, and, if appropriate, a list of the issues to be determined by the tribunal.[236] The Terms of Reference are usually reviewed in draft form by the parties at the request of the tribunal, after which it must be signed by both the parties and the arbitrators and submitted to the ICC.

Third-Party Funding

The provision of finance for all or part of the legal costs of a party by an entity with no connection to the proceedings. The funding is usually provided in return for a fee which may be linked to and/or payable from the proceeds recovered by the funded party.[237]

Transparency

The right and means to examine the process of decision making. In arbitration, there is an inherent tension between the confidentiality interests of the parties and the systematic interest in promoting transparency.[238]

Tribunal-Appointed Experts

Individuals with specialized knowledge in a particular field, matter or issue appointed by the Tribunal to assist it understand the dispute. Subject matter or legal experts appointed by an arbitral tribunal to help the arbitrators understand a Dispute that requires specialized knowledge.[239]

Tribunal's Expenses

The expenses incurred by the arbitral tribunal as distinct from the fees payable to the arbitral tribunal for work undertaken.

[235] Id., at page 83.
[236] Id.
[237] Id., at page 84.
[238] Id., at page 85.
[239] Id., at page 86.

Tribunal Fees

The charges for the arbitral tribunal's services, i.e. the fees charged by the arbitrators for hearing the matter or sitting on the matter.

Tribunal Secretary

The Secretary to the arbitral tribunal is usually a lawyer who works with the president/chair of the arbitral tribunal and assists the arbitral tribunal in order to minimize the time that the arbitrators spend on the case.

Truncated Tribunal

An arbitral tribunal in which one or more of the originally appointed members have either been removed, have resigned, or have passed away.[240]

Umbrella Clause

An obligation under a treaty by a State to comply with all obligations, undertakings, or commitments it has assumed or entered into towards investments made by investors from the other signatory State or States.[241]

Umpire

A third person brought in to an Arbitration to resolve a deadlock in a Dispute being heard by two Arbitrators that do not agree. Also, a person chosen to be a permanent Arbitrator for the duration of a collective bargaining agreement.

UNCITRAL Arbitration Rules

The UNCITRAL Arbitration Rules are a set of procedural rules developed and published by the United Nations Commission on International Trade Law (UNCITRAL). Unlike other arbitral institutions, UNCITRAL does not administer arbitration proceedings but instead provides rules of procedure that may be adopted by the parties to an arbitration agreement. They are the most widely used set of rules on arbitral procedure in ad hoc proceedings. A revision of the UNCITRAL Arbitration Rules became effective on 15 August 2010 and is available online.[242]

UNCITRAL Model Law

The UNCITRAL Model Law on International Commercial Arbitration (Model Law) is a format for national Arbitration law adopted by UNCITRAL in 1985 and promoted as the basis for the reform and harmonization of Arbitration legislation around the world. It

[240] Id.
[241] Id, at page 86.
[242] http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf

is designed to assist States in reforming and modernizing their laws on arbitral procedure to take into account the particular features and needs of international commercial arbitration.[243]

It covers 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.[244] It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.[245] The Model Law has inspired a number of national law revisions in countries all over the world, including the Austrian arbitration law. To date, the arbitration laws of at least 40 States have been reformed with regard to the Model Law. It was published in 1985 and amended in 2006.

Unilateral Option Clause (Asymmetric Arbitration Clause)

Unilateral option arbitration clauses (UAC) are clauses under which the parties bound by it are restricted to bringing proceedings in a particular jurisdiction, while at the same time providing one or more parties the option to elect that a dispute be referred to arbitration.[246] Simply, they are dispute resolution clauses providing for arbitration but giving one party the right instead to refer any particular dispute to litigation before the courts. It encompasses not only those clauses where one of the parties is expressly named as the one vested with the option, but also those where the option is given with regard to certain types of claims which may arise or which are likely to arise only against one of the parties. They are sometimes referred to as “sole option clauses”, “asymmetrical clauses”, “non-mutual clauses” or “one-sided clauses”.

Under unilateral option clauses, more generally, one party has a choice as to whether to bring a claim in a specified forum other than the dispute resolution forum that binds the other party.[247] Usually, it grants one party or a group of parties the right to elect between arbitration or litigation to resolve a dispute, or enables one party to choose to litigate before a specific jurisdiction, while constraining the other party to a specific forum or a specific mode of dispute settlement.[248]

These clauses are commonly used in the banking (finance contracts) and construction industries, and are exclusively advantageous to one of the parties. A party may prefer a UAC to allow flexibility in the way a dispute may be resolved. For instance, courts

[243] https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration
[244] Id.
[245] Id.
[246] van Zeist, B., ‘Unilateral Option Arbitration clauses: An unequivocal choice for arbitration under the ECHR? Maastrict Journal of European and Comparative Law, (Volume 25, Issue 1, page 77-86), at 77
[247] Redfern para 2.95
[248] Nassar, Y, ‘Are unilateral Option Clauses Valid’, Kluwer Arbitration Blog, 13 October 2018.

allow default judgments where no defence is filed, and, may grant summary judgments where a party has no real prospect of successfully advancing or defending a claim. Such procedural devices have no real equivalent in arbitral proceedings and may be useful as quick and relatively inexpensive means of resolving very straightforward disputes. A unilateral option clause therefore provides the flexibility to select the dispute resolution method most appropriate to the case at hand. As the suitability of a specific dispute resolution method depends on the particularities of an individual case (and sometimes the location of the assets against which enforcement of an award might be required), a party to a contract with a stronger bargaining power may therefore seek the flexibility of a unilateral option clause.[249]

The Ghanaian courts have not made any direct pronouncement on whether such clauses are valid and enforceable under our laws. However, English law recognises unilateral portion clauses, and the English courts have consistently ruled that such clauses are valid and enforceable. By reason of the common law being one of the sources of Ghana law, such clauses should be enforceable in Ghana.

In the English case of Law *Debenture Trust Corporation Plc v. Electrim Finance BV*[250] the relevant contract provided that disputes would be resolved by the English Courts but the bondholders would have the right to refer a claim to arbitration if they so wished. The court noted that while such clauses give an additional advantage to one party, since many other contractual provisions do so.[251] Jurisdictions such as the United States[252], Italy[253], Singapore[254] and Australia[255] have similarly held such clauses as valid and enforceable. However, other jurisdictions have relied on lack of mutuality (consideration), lack of certainty, unconscionability, equality of treatment and the potestative nature of option clauses[256] as basis for not enforcing such clauses. In the Russian case of *Russian Telephone Co v. Sony Ericsson Mobile Communications Rus*[257], the arbitration agreement gave one party the sole option to refer disputes to the Russian courts instead of ICC arbitration in London. The Russian court held that the principle violates procedural equality between parties and is therefore unenforceable. Although the court held that the clause was unenforceable, it did not strike it out but instead construed the clause so that both parties had the choice to either arbitrate or

[249] Clifford, C., and Browne, O., 'Avoiding Pitfalls in Drafting and Using Unilateral Option Clauses', Latham & Watkins LLP International Arbitration Newsletter.

[250] [2005] EWHC 1412 (CH).

[251] Law Debenture Trust, at page 44.

[252] *DiMercurio v Sphere Drake Insurance Plc* 202 F.3d 71 (1st Cir. 2000).

[253] *Astengo v Commune Di Genova*, Judgment No. 2096, Corte Di Cassazione, 22 October 1970.

[254] *WSG Nimbus Pte Limited v. Board of Control for Cricket* in Sri Lanka [2002] SGHC 104.

[255] *PMT Partners Pty Limited V Australian National Parks & Wildlife Service* (1995) 184 CLR 302.

[256] The situation where performance of a contract is subject to a condition precedent, the fulfillment of which falls within the discretion of one of the contracting parties.

[257] Case No. A40-49223/11-112-401, 19 June 2012.

litigate. The court did not address the validity of the arbitration agreement as such, but based its decision on the jurisprudence of the Russian Constitutional Court and the European Court of Human Rights in relation to the right to a fair trial and the opportunity to present one's case.[258]

> *Example:*
>
> *Any claim or dispute or breach of the terms of the contract shall be settled amicably between the parties by mutual consultation. If no amicable settlement is reached through discussions, at the election of Dyna-Jet, the dispute may be referred to and personally settled by means of arbitration proceedings, which will be conducted under English Law; and held in Singapore."* [259]

Unless Order

An Order, usually given after a failure to comply with a previous Order, that a party will suffer certain consequences (such as being precluded from pursuing a claim or Defence) if it does not comply.[260]

Unmeritorious Challenges

Challenges to Arbitrators or Awards that are made, usually for tactical reasons, despite lacking any merit.

Validation Principle

A principle under which an Arbitral Tribunal seeks to apply a law that gives effect to the parties' Arbitration Agreement.

Venire Doctrine

Short form of the Latin phrase "venire contra factum proprium," i.e., a party cannot contradict its previous actions, particularly if the affected party has relied upon them.

Venue of Arbitration

The physical location where the arbitration hearing takes place, which is often the same as but may be different from the Seat of Arbitration / Place of Arbitration.[261] The arbitral tribunal may hold any hearing at any convenient geographical place in consultation with the parties and hold its deliberations at any geographical place of its own choice, but if the venue is elsewhere than the seat of the arbitration, the

[258] Redfern, at para 2.95
[259] *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* (2017) SGCA 32.
[260] Id., at page 88
[261] Id., at page 89.

arbitration is nonetheless treated for all purposes as conducted at the arbitral seat and any award or order is by the tribunal is deemed to have been made at the seat.[262]

> *Example:*
>
> *An arbitration clause may provide that the seat of arbitration is London, nevertheless the arbitration hearing may be conducted in Accra or Lagos, depending on the convenience to the parties, the associated costs of conducting hearings in a particular jurisdiction or any other factors that the parties and the tribunal deem relevant in deciding where the hearings should be conducted.*

Waivable Red List

Circumstances set out in the IBA Guidelines on Conflicts of Interest which are regarded as potentially compromising an Arbitrator's Impartiality and Independence and must therefore be disclosed by a potential Arbitrator, but which can be waived by the parties if they wish to do so.[263]

Waiver

The release of a right. The conditions required for an effective waiver vary according to any agreement between parties and the applicable law.[264]

Witness Examination

The questioning of a witness at a hearing.[265]

Witness of Fact

A person who gives evidence, by way of a Witness Statement and/or orally, as to factual matters within their personal knowledge. A witness of fact is to be distinguished from an expert witness who gives an opinion based on their expertise, professional qualifications, and/or knowledge.[266]

Witness Statement

A written statement embodying the testimony of a person with knowledge of facts relevant to the dispute.[267]

[262] LCIA Rules, Article 16(3)
[263] The Book of Jargon, at page 89.
[264] Id.
[265] Id.
[266] Id.
[267] Id., at 90.

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