Chapter 1

Arbitration and the Model Law

[This chapter introduces the UNCITRAL Model Law for International Commercial Arbitration and deals with a number of points relevant to the Model Law and international commercial arbitration more generally. There is an explanation of what the Model Law is, what it covers and when it applies. Emphasis is placed on the Model Law's harmonising aim and the implications of that for its interpretation and application. There is also an examination of several fundamental principles which underpin the Model Law. The latter part of the chapter deals, from the perspective of the Model Law, with two fundamental matters which are central to an understanding of international commercial arbitration. One is the fact that the different aspects of an international commercial arbitration can be governed by different laws and rules. The other is the role played by the place of arbitration, the legal system to which an arbitration is most closely connected.]

[UNCITRAL Model Law; international commercial arbitration; harmonisation; applicable laws; place of arbitration; seat]

1.1 What is arbitration?

Arbitration is a means of resolving legal disputes. When commercial parties enter into a transaction there is the possibility a dispute could arise in relation to their contract. If there is a dispute and the matter is not settled informally, there needs to be some way of resolving it more formally. The default position will usually be resolution of the dispute in a national court by a state-appointed judge. But contracting parties can depart from that default position and agree to resolve their dispute by other means. The most obvious—and, arguably, most effective—alternative dispute resolution mechanism for commercial parties is arbitration. Arbitration law and practice is concerned with the procedure for settling disputes rather than the substance of disputes.

Suppose that A and B enter into a contract whereby A will supply software to B and at a subsequent point there is a dispute over the software supplied. There could be a number of substantive legal issues arising out of that dispute. What precisely did A and B agree to? Was the contract breached? Did either party have a right to terminate the contract? How should damages be assessed? The answers to those kinds of (substantive) questions will be largely found within the parties' agreement and the contract rules from the law applicable to the contract. Arbitration law is procedural law and deals with a different set of questions. When will parties be bound by an agreement to settle disputes by arbitration? How should arbitrators be appointed? How should an arbitral tribunal handle evidence? Can an arbitral award be enforced by a national court? The UNCITRAL Model Law on Commercial Arbitration—the subject matter of this book—is aimed at providing a straightforward approach towards questions such as those. But not only that. The Model Law (as a model law) is concerned with harmonising arbitration law across jurisdictions and doing so in a way that is 'pro-arbitration'. Pro-arbitration rules, approaches and policies that are those that are aimed at securing the

effectiveness of arbitral process.[1] In other words, rules, approaches and policies that will make the arbitration work rather than hinder it.

At its most basic, arbitration as means of dispute resolution is characterised by the following features. First, arbitration is voluntary and relies on the consent of the parties. If there is no arbitration agreement there can be no obligation on the parties to resolve their dispute by arbitration. Nor will an arbitral tribunal have jurisdiction to adjudicate on the dispute. The consensual nature of arbitration also means that the parties will most likely have significant freedom to decide on the arbitral procedure. Second, arbitration takes place apart from state institutions such as national courts and does not involve state-appointed officials. Arbitration is a private process, with the arbitrator(s) selected by the parties themselves or according some agreed appointment procedure. Third, arbitration resolves disputes in a way that is binding on the parties. In other words, they are legally obliged to comply with decisions of the arbitral tribunal, including the final award at the end of the process; in that sense, arbitration bears similarities to litigation. The binding nature of an arbitrator's decisions creates a significant contrast with mediation. A mediator's role is to help parties reach an agreement to settle their dispute rather than to impose a settlement on then. And while it is correct in one sense to say that arbitration takes place apart from national courts and does not involve state-appointed judges, that does not tell the whole story.

If A and B are bound by an arbitration agreement, the substance or merits of their dispute—who breached the contract, the extent of the loss flowing from the breach, etc—must be resolved in arbitral proceedings. But, as will become clear, the success of arbitration, both in individual cases and as means of dispute resolution more generally, is linked to the support and supervision provided by national legal systems. For that reason, there needs to be legal frameworks governing the nature and extent of court powers to ensure the arbitral process is supported in ways that mean court involvement does not become court interference. The Model Law, where adopted as part of a state's arbitration legislation, will provide a coherent body of rules for the arbitral process, including the relationship between the arbitral process and national courts.

1.2 Why arbitration?

Arbitration can be particularly attractive where the parties' contract has an international dimension. Recall the contract between A and B for the supply of software. If A is, for example, an Indian company and B a German company, it could make sense for them to agree that disputes relating to their transaction be settled by arbitration, given that arbitration would offer a 'neutral' forum that is neither an Indian court, a German court or indeed any other national court. Arbitration in Singapore, Paris or Vienna could offer a level of neutrality not necessarily available with a national court. There could be other advantages to arbitration for A and B, one being the parties' ability to select the arbitrator(s). They may wish to select as the arbitrator a lawyer with experience in disputes concerning technology-related contracts; that could allow for an efficient and effective resolution of the dispute by someone well-qualified to consider

[1] George Bermann, 'What does it mean to be "pro-arbitration"?' (2018) 34 Arbitr Int 341.

the legal issues and evidence against the commercial and technical context of the agreement. Privacy and confidentiality could be another attraction for commercial parties such as A and B. In contrast to court-based litigation, there is, in general, an expectation that arbitral proceedings and the material generated by it will be treated as confidential.[2] Finally, there is another important advantage to arbitration that needs to be mentioned here: the impact of the New York Convention 1958 and, in particular, the role it plays in the enforceability of an arbitral award (the equivalent of a court judgment). The New York Convention—on the basis of its extensive reach and the broad international consensus on its application—makes its more straightforward to enforce arbitral awards on a cross-border basis compared to court judgments.[3] Accordingly, if A were successful in the arbitral proceedings, it may be considerably easier for A to enforce the tribunal's award against B in a range of countries around the world than it would be with a court judgment from India, Germany or elsewhere.

1.3 The UNICTRAL Model Law

Arbitration, as observed above, requires an appropriate legal framework in which to operate. The legal systems of most countries around the world will have laws governing arbitration, including international commercial arbitration. National arbitration laws, including those based on the Model Law, will include provisions that reflect the obligations imposed on states by the New York Convention 1958: i.e., those obligations relating to the recognition and enforcement of international arbitration agreements and foreign arbitral awards. But national arbitration laws will almost always go beyond those two specific areas that are expressly governed by the New York Convention. They will, in addition, address matters such as the appointment of and challenge to arbitrators, determination of the law applicable to the merits of a dispute and the setting aside of arbitral awards. One reason international commercial arbitration works well in practice is because there is, in general terms, a broad consensus on how those national laws should regulate and support the arbitral process. That consensus can be attributed in large part to the influence and reach of the New York Convention, widely regarded as one of the most successful attempts at harmonisation within the commercial law realm.[4] Although the New York Convention is on its face concerned only with the recognition and enforcement of arbitration agreements and arbitral awards, it is generally accepted that the Convention also performs a more pervasive function in relation to the structure of international commercial arbitration and the spirit in which it should be conducted. Indeed, a prominent and authoritative commentator on international commercial arbitration speaks of the Convention as 'a universal constitutional charter for the international arbitral process'.[5] The Model Law offers a means by which national legal systems can give effect to their specific obligations under the New York Convention and more generally provide a legal framework for the arbitral process that is consistent with the Convention's pro-arbitration aims.

[2] 2018 International Arbitration Survey: The Evolution of International Arbitration (Queen Mary University of London); Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International, updated August 2022) §20.01. Although, as Born acknowledges, the importance of confidentiality within international commercial arbitration is not accepted by all.
[3] Born (n 2) §1.02[C].
[4] Roy Goode, Herbert Kronke and Ewan McKendrick: *Transnational Law: Text and Materials* (2nd ed, OUP 2015) 19.22.
[5] Born (n 2) §1.04[A][1].

1.3.1 What is the Model Law?

A model law is a mechanism for harmonising across legal systems some aspect of law that would benefit from the same or a highly similar approach irrespective of jurisdiction. The facilitation of international trade is an obvious motive for harmonising commercial law.[6] It is generally assumed that a common set of rules rather than disparate national rules will achieve this by making it simpler and cheaper to conduct business on a cross-border basis. There are different means by which harmonisation might be achieved. A model law is one means. A treaty or convention is another means, and a contractually-incorporated instrument yet another.[7] Each method of harmonisation will have its advantages and disadvantages and there may not be a single, correct way of pursuing the harmonisation of some aspect of commercial law. In contrast to a treaty or convention, a model law has no legal effect in its original form. Its text needs to be adopted by states as their legislation in the area to which it relates. UNCITRAL has produced a number of model laws, of which the Model Law on International Commercial Arbitration is probably the best known and most successful. The remit of UNCITRAL—the United Nations Commission on International Trade Law—is to promote the 'harmonization and modernization of the law of international trade … by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law.'[8]

The Model Law was first adopted by UNCITRAL in 1985, with a revised version in 2006. In recommending the Model Law to states, a resolution of the United Nations emphasised 'the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.'[9] Nearly a decade earlier, at the outset of the process to develop a draft text, it had been said that, 'The ultimate goal of a model law would be to facilitate international commercial arbitration and to ensure its proper functioning and recognition.'[10] As will be evident throughout this book, a key theme within international commercial arbitration (and a fundamental principle underpinning its laws and rules) is party autonomy: the idea that the parties should be free to determine the procedure for their arbitration. Indeed, it was a concern for party autonomy which was in part the inspiration for the Model Law. Back in the 1970s a regional body, the African-Asian Legal Consultative Committee, had suggested the preparation of a protocol to the New York Convention in order to 'clarify a number of issues' relevant to that region, with one such issue being party autonomy.[11] UNICTRAL's response was not, however, the drafting of a protocol to be appended to the Convention. It was to begin work on what was to became the Model Law. At

[6] Goode, Kronke et al (n 4) 5.03–5.04.
[7] A treaty or convention is international law agreed by and binding on and between states. A contractually-incorporated instrument (such as arbitration rules or standard terms for a particular kind of transaction) has no binding force unless and until contracting parties agree to be bound by its terms.
[8] From the homepage of the UNCITRAL website: https://uncitral.un.org [accessed 21 July 2023].
[9] General Assembly Resolution 40/72 (11 December 1985).
[10] Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration, UN Doc A/CN.9/207.
[11] Comments by the Secretariat on the Decision by the Asian-African Legal Consultative Committee on International Commercial Arbitration Taken at Its Seventeenth Session, UN Doc. A/CN.9/127/Add.1 (21 April 1977) para 1.

the time of writing, 87 states (and a total of 120 jurisdictions) have enacted legislation based on the Model Law. And while there are some prominent arbitration jurisdictions that have not adopted the Model Law, the laws governing international commercial arbitration in those countries will bear many similarities to the Model Law. England, France, Switzerland and Sweden are examples of prominent arbitration jurisdictions which have not adopted the Model Law but which have legislation in keeping with much of what is contained within the Model Law.

The Model Law's provisions deal with various aspects of international commercial arbitration including matters relevant to arbitration agreements, the appointment and removal of arbitrators, interim measures and the setting aside and enforcement of arbitral awards.[12] Some of those provisions directly reflect the obligations imposed on states by the New York Convention. The Model Law's Article 8(1) implements Article II(3) of the New York Convention: i.e., the obligation to refer to arbitration a dispute covered by an arbitration agreement. Articles 35 and 36 of the Model Law give effect to Articles III, IV and V of the New York Convention: i.e., the obligation to recognise and enforce foreign arbitral awards subject to a limited number of reasons to refuse recognition or enforcement. In many ways, the key Model Law provisions are those which regulate the relationship between an arbitration and national courts, sometimes referred to as the 'external' aspect of arbitral procedure.[13] The 'internal' procedural aspects (the tribunal's conduct of the arbitration) are addressed relatively briefly in the Model Law and there are, it is suggested, two reasons for that brevity. The first is party autonomy and the expectation parties will decide for themselves how the arbitral procedure is to work; that will be done to a large extent by the selection of arbitration rules. For that reason, it makes sense for many of the Model Law's provisions to be default provisions; in other words, provisions that will apply if the parties do not make their own arrangements on particular points of procedure. The other reason is the widespread discretion afforded to arbitral tribunals, allowing them to conduct the arbitration as they deem appropriate within the framework agreed by the parties (see Article 19), albeit subject to certain basic procedural norms such as equal treatment of the parties (see Article 18).

The Model Law provides a legal framework for international commercial arbitration rather than a complete code. In addition to the limited content on 'internal' procedural matters, there are some matters relevant to international commercial arbitration which are not addressed in the Model Law's provisions. The law governing arbitration agreements and the interpretation of arbitration agreements are examples of legal issues not addressed in the Model Law, at least not directly.[14] Confidentiality is untouched by the Model Law and the approach to confidentiality may well vary between Model Law countries. So, while aiming for a harmonised approach towards key aspects of arbitral procedure, the Model Law does not provide a solution to every legal issue relevant to international commercial arbitration.

1.3.2 When does the Model Law apply?

[12] See chapters 2, 3 and 5 respectively.
[13] The 'external' and 'internal' terminology is used by Born (n 2) §1.04[F][3].
[14] While matters such as these are not addressed directly in the Model Law, they are nevertheless relevant to the way arbitration agreements and the tribunal's jurisdiction are assessed when applying provisions such as Articles 8, 16 and 34.

The question—when does the Model Law apply—could be answered in several ways. In the first place, one might say the Model Law applies when its provisions have been enacted as law in a particular state or jurisdiction. If so, the Model Law will represent the legislation on international commercial arbitration within that state or jurisdiction, perhaps with some variations to the original text.[15] One might refer to a country which has adopted the Model Law as a 'Model Law country'. Another way of answering the question would be to say the Model Law applies where, for a particular matter referred to arbitration, the place (or seat) of arbitration is within a jurisdiction that has adopted the Model Law. That is the effect of Article 1(2), an important Model Law provision considered below in the discussion of the place of arbitration (see 1.6). Another response would be to say, in keeping with Article 1(1), that the Model Law applies where there is an 'international commercial arbitration'. These three elements—arbitration, commercial and international—will be considered in turn.

In Article 2(a) of the Model Law, the term 'arbitration' is defined as 'any arbitration whether or not administered by a permanent arbitral institution'.[16] That definition ensures that, for the purposes of the Model Law, arbitration is given a wide meaning and, in particular, that a particular dispute is not excluded from the Model Law's reach simply because of the way the arbitral process is administered. But it does not tell us what an arbitration is. The Digest of Case Law suggests that 'Courts have consistently adopted the view that the process of arbitration requires as essential ingredients the *existence of a dispute* or the potential of a dispute requiring resolution between the parties, *an agreement to refer such disputes to a third person as arbitrator* and whose *decision is to be final and binding* upon the parties'.[17] Although in many cases it will be obvious that there is an arbitration there can be situations where on closer inspection the dispute resolution process involves something other than arbitration: e.g., mediation or expert determination.

Assuming the parties have agreed to resolve disputes by arbitration, the Model Law will apply if the arbitration is both 'commercial' and 'international'. A footnote to Article 1(1) provides a wide, non-exhaustive definition of 'commercial' indicating that the vast majority of business transactions between commercial parties and the disputes arising from those transactions will be regarded as 'commercial'.[18] It will be rare therefore for the commercial nature of the parties' dispute and their underlying transaction to be open to question. Having said that, the 'commercial' point has been tested recently in a case before the Supreme Court of Canada.[19] The dispute concerned a contract whereby one party agreed to deliver food ordered from restaurants by making use of the other party's technology. The agreement was expressly stated to be a licence agreement; it was also stated that the agreement was not intended to create an

[15] Gilles Cuniberti, *The UNICTRAL Model Law on International Commercial Arbitration: A Commentary* (Edward Elgar 2022) 0.12–0.17.
[16] An institutional arbitration is an arbitration which is administered by an arbitral institution, usually with use of the relevant institution's arbitration rules. By contrast, an arbitration conducted without the involvement of an institution is known an ad hoc arbitration. The UNCITRAL Arbitration Rules as non-institutional rules would be suitable for an ad hoc arbitration. See Born (n 2) §1.04[C][1]–[3].
[17] UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 12 (emphasis added).
[18] Ibid 9–10.
[19] CLOUT case 1964 [*Uber Technologies Inc v Heller*, 2020 SCC 16, Supreme Court of Canada.].

employment relationship between the parties. However, a majority of the court held that the dispute concerned employment-related matters and was therefore not 'commercial'.[20] For that reason, the parties' dispute was beyond the scope of Ontario's International Commercial Arbitration Act, legislation which is based on the Model Law. In reaching that conclusion, the majority judges relied on two points. First, when assessing the 'commercial' point, the focus should be on the nature of the parties' dispute rather than their relationship. Second, according to the Analytical Commentary a labour or employment dispute is not 'commercial' for the purposes of the Model Law.[21] On both points of those points, the dissenting judge took a different view.[22] Although a relatively rare example, the case raises important considerations of legal policy about what should and should not count as a 'commercial' dispute and thus whether certain disputes will come within the Model Law's remit (and by extension the remit of the New York Convention).

The term 'international' is also given a broad scope in the Model Law, and there are four ways in which an arbitration could be classed as 'international'. First, where the parties have their places of business in different states: Article 1(3)(a). Second, where the parties have selected the place of arbitration and that place is in a state other than the one in which the parties have their places of business: Article 1(3)(b)(i). Third, where the place for performance of the contract is in a state other than that in which the parties their places of business or where the dispute is most closely connected with that country: Article 1(3)(b)(ii). Fourth, where the parties expressly agree the subject matter relates to more than one country: Article 1(3)(c). The question as to whether an arbitration is 'international' can sometimes arise where a country has adopted the Model Law as its legislation for international commercial arbitration but has separate legislation for domestic arbitration. In a case from Singapore the court had to determine whether to apply Singapore's domestic or international arbitration legislation.[23] While each party had its place of business in Singapore and had agreed to arbitration in Singapore, the arbitration was 'international' on the basis of Article 1(3)(b)(ii). The contract to which the dispute related, a sales contract made on FOB (free on board) terms, required the seller to deliver the goods at a port in Korea. Given the importance of the seller's delivery obligation in sales contracts, it was held that a substantial part of the contract was to be performed in Korea bringing Article 1(3)(b)(ii) into play.

Recall the question posed above: when does the Model Law apply? The preceding discussion indicates that the most straightforward way of answering that question is to say the Model Law applies where the place (or seat) for an international commercial arbitration is a Model Law country. There are, however, forms of dispute resolution that do not count as 'international commercial arbitration' and where the Model Law cannot apply, even if it is clear the dispute is an international commercial dispute. Mediation is one such example and, as noted earlier, the key point here is that a mediator (in contrast to an arbitrator) does not render decisions binding on the parties; rather, a mediator assists the parties in reaching a settlement in relation

[20] Ibid at [18]–[28].
[21] Analytical commentary on draft text of a model law on international commercial arbitration: report of the Secretary-General, A/CN.9/264 (1985) 21.
[22] CLOUT case 1964 (n 19) at [210]–[218].
[23] CLOUT case 208 [*Vanol Far East Marketing Pte Ltd v Hin Leong Trading Pte. Ltd* [1996] SGHC 108 (Singapore)].

to the dispute. A settlement agreement following mediation is binding on the parties not because of the mediator's involvement but because it embodies the agreement of the parties on how the dispute should be resolved.[24] A contract might provide for expert determination on a particular point (such as the valuation of shares in a company or some other asset) and, even if the expert's decisions are intended to be binding on the parties, the process would not count as 'arbitration' and therefore come within the remit of the Model Law.

International commercial arbitration usually involves disputes between private, non-state entities.[25] There are, however, forms of arbitration, such as investor-state (or investment) arbitration, which are beyond the scope of the Model Law. Investor-state arbitrations concern disputes arising out of agreements where one party (the non-state entity) makes some investment in a foreign state. Although the underlying agreement is commercial in one sense, the fact that one of the parties is a state can give rise to issues which are not relevant to commercial arbitrations or at least not to the same extent. There may, for example, be particular concerns about confidentiality and transparency or the selection of arbitrators. Although there is some overlap between international commercial arbitration and investor-state arbitration in terms of fundamental concepts, the differences warrant governance by different legal regimes. While international commercial arbitration is underpinned by the New York Convention 1958, the legal framework for investor-state arbitrations is usually supplied by the ICSID regime (International Centre for Settlement of Investment Disputes), which includes the ICSID Convention. Disputes between states concerning international law obligations may also be settled by arbitration, and arbitrations arising out of such disputes may be governed by specific legal regimes.[26]

1.3.3 Interpreting and applying the Model Law

One advantage of a model law is that it should have been drafted in plain, straightforward language, unencumbered by jargon specific to particular jurisdictions or legal traditions. But, given the harmonising context, some of its provisions may have been drafted in a way that is deliberately vague or open-ended. That could reflect trade-offs between the general and the specific, and the fact that it is not possible for those drafting a legal text to address every instance in which the provision might be applied. It may also reflect the reality of the drafting process, including the need for compromises between different groups and individuals who contribute to the development of the harmonisation project. Some compromise seems inevitable when seeking agreement amongst participants who are not only from different countries but also different legal, political and economic cultures.

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[24] A recent development in international commercial dispute resolution is the UN Convention on International Settlement Agreements Resulting from Mediation (New York, 2018), usually referred to as the Singapore Convention on Mediation. Its text bears some similarities to the text of the New York Convention.

[25] But not always: e.g., CLOUT case 1965 [*Betamax v State Trading Corporation* [2021] UKPC 14 (Privy Council, Mauritius)]; *Dallah Real Estate and Tourism Holding Inc* v *Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46 (UK Supreme Court, England).

[26] E.g., the World Trade Organisation's dispute settlement processes can involve a referral to arbitration: Uruguay Round Agreements, Annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes), art 25.

Two factors will be particularly relevant to the way the Model Law is interpreted and applied. The first is the Model Law's content: its provisions are intended to embody a contemporary, pro-arbitration approach in keeping with both the letter and spirit of the New York Convention.[27] Second, there is the Model Law's aim to provide a harmonised legal framework for international commercial arbitration. In other words, the Model Law should be interpreted and applied in a manner that supports (rather than hinders) arbitration and which promotes a consistent approach to international commercial arbitration across jurisdictions.[28] The harmonisation of legal rules can have significant benefits, but it may require from adjudicators and lawyers a change of mindset in terms of legal method and reasoning. An attempt to harmonise legal rules in a particular area of law will require, as a first step, an agreed text for those rules. But, if the project is to achieve its harmonising aim, that text must be interpreted and applied in a consistent manner across the jurisdictions where it is adopted. The Model Law is not a treaty or convention and so the need for precise uniformity (or even something approaching precise uniformity) is not required from states where the Model Law is adopted. Indeed, one can expect the Model Law to be adopted by legal systems with certain variations to its text, thereby creating differences from the outset.[29] While there needs to be realism about the nature and extent of uniformity that is required or can be achieved, that need not involve a denial of certain key considerations. One is that the Model Law is intended as an exemplar for legislation on international commercial arbitration. Another point is this: amongst those involved with international commercial arbitration, there are broad consensuses at the 'macro' level about what arbitration needs if it is to function as an effective mechanism for the resolution of international disputes.

The desirability of a uniform approach towards the Model Law—at least from UNCITRAL's perspective—is given concrete expression in Article 2A(1). That provision states: 'In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.' Of particular importance here are the references to 'international origin' and the promotion of 'uniformity in its application'. Article 2A was added to the Model Law as part of the 2006 revisions and is an interesting provision for a couple of reasons. The first is that equivalent provisions are found in a number of other UNCITRAL texts, most notably the UN Convention on Contracts for the International Sale of Goods (usually referred to as the 'CISG').[30] Second, it appears that a

[27] Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration* (OUP 2017) 64.

[28] For an argument that users of commercial arbitration place a premium on certainty, see Frédéric Bachand and Fabien Gélinas, 'Legal Certainty and Arbitration' in Thomas Schultz and Federico Ortino (eds), *Oxford Handbook of International Arbitration* (OUP 2020) 377–97. And see Dean Lewis, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration: Australia, Hong Kong and Singapore* (Kluwer Law International 2016) who argues, with particular reference to Article 34, that there are limits on the uniformity achieved across the Model Law jurisdictions considered.

[29] Cuniberti (n 15) 0.12–0.17.

[30] Although relatively little has been said about Article 2A in case law and secondary literature on the Model Law, Article 7 of the CISG has spawned a vast literature on how the CISG should be interpreted and applied: e.g., Steven D Walt, 'The Modest Role of Good Faith in Uniform Sales Law' (2015) 33 B U Int'l L J 37; Ingebord Schwenzer, 'Divergent Interpretations: Reasons and Solutions' in Larry A DiMatteo (ed), International Sales Law: A Global Challenge (Cambridge University Press 2014) 102–19. Indeed, many will have heard of the idea of the 'homeward trend' and the importance that an adjudicator, when interpreting the CISG, looks beyond his or her own home jurisdiction with its particular legal concepts and traditions. There is, however, a certain irony about provisions such as Article 2A (Model Law) and Article 7 (CISG): while they are intended to direct an adjudicator when interpretating and applying of the relevant text, they are themselves open to interpretation. For example,

number of Model Law countries have decided not to include Article 2A in their national arbitration legislation implementing the Model Law or have done so in an amended form. And for that reason, one might question the extent to which Article 2A should be regarded as an essential component of the Model Law.[31] While Article 2A provides a useful reminder about the Model Law's international status and its harmonising aim, national courts (especially where there are judges with a sound understanding of international arbitration) have nevertheless tended to appreciate the need to understand the context in which the Model Law was created and in which it is to be applied.[32]

When interpreting and applying the Model Law how does an adjudicator respect the its 'international origin' and 'promote uniformity' whether or not Article 2A is part of the relevant national legislation? It may mean the setting aside of domestic legal influences that might otherwise be relevant.[33] It may also mean paying attention to the way other jurisdictions have interpreted and applied the Model Law (and also New York Convention) by considering foreign case law or by attempting to discern the existence of an international consensus on relevant points. While the judge in a national court will not be bound by foreign authorities, decisions from other jurisdictions can provide useful insights into how the Model Law has been applied elsewhere. Foreign case law may also assist a court in identifying the accepted norms which underpin the practice of international commercial arbitration.

UNCITRAL facilitates an engagement with case law in two ways. One is the CLOUT database which contains summaries of relevant cases and (and where available) a link to the full text of the relevant judgment.[34] The other is the Digest of Case Law which provides a summary of selected case law on the Model Law on an article-by-article basis.[35] Beyond case law and associated resources, assistance in interpreting and applying Model Law provisions may be found in the *travaux préparatoires* (a French language term which literally means 'preparatory works'). The *travaux préparatoires* are materials created during the development and drafting the Model Law, and these documents can offer insights into what the drafters intended by the use of a particular phrase, the development of a particular provision or why it was decided to omit reference to certain points from the final text.[36] A useful document from among the

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one might consider what is meant by 'uniformity' and how far it should extend. It is not clear there would an obvious or straightforward answer to the question.

[31] Cuniberti (n 15) 2A.02.

[32] E.g., *lululemon athletica v Ind Color* 2021 BCCA 428 [43] (Court of Appeal for British Columbia, Canada).

[33] E.g., *Montpelier Reinsurance Ltd v Manufacturers Property & Casualty Ltd* [2008] Bda LR 24 [21] (Supreme Court of Bermuda); *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 [8] (High Court, Australia).

[34] CLOUT stands for 'Case Law on UNCITRAL Texts'. The database is available on the UNCITRAL website: uncitral.un.org.

[35] Digest of Case Law (n 17). See also the 2016 UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) which might assist with the interpretation and application of Model Law provisions (in particular, Articles 8, 35 and 36) which give effect to obligations under the New York Convention.

[36] For works providing detail on the Model Law's *travaux préparatoires* see: Ilias Bantekas, Pietro Ortolani, Shahia Ali, Manuel A Gomez and Michael Polkinghorne, *The UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (Cambridge University Press 2020); H M Holtzmann and J E Neuhaus (eds), *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 1989); Howard M Holtzmann, Joseph Neuhaus, Edda Kristjansdottir and Thomas Walsh, *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial*

travaux préparatoires is the Analytical Commentary which provides, from UNCITRAL's perspective, an indication of what the various Articles mean and how they should be interpreted.[37] It is also commonplace for courts dealing with international arbitration to refer to legal commentaries, which could be specific to the Model Law or more general works on international commercial arbitration.[38] For a good example of a court in a Model Law country drawing upon foreign case law, commentary on international arbitration and *travaux préparatoires* when interpretating the Model Law, consider the Singapore case of *Tomolugen Holdings v Silica Investors*.[39]

1.4 Fundamental principles

Article 2A(2) of the Model Law states that 'Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.' And although it refers to 'general principles on which [the Model] Law is based', the Model Law's text does not state expressly what those general principles are. One can nevertheless identify several fundamental principles which, it might be claimed, underpin the law and practice of international commercial arbitration and which are, accordingly, central to the Model Law and its application. Five key principles—party autonomy, empowerment of the tribunal, equal treatment and arbitrator impartiality, the finality of awards, limiting court intervention—will be considered here. These principles need not be seen as mutually exclusive. There will be points at which they overlap, and points at which they exist in tension. Many of the legal policy choices that national courts have to make as they interpret and apply the Model Law reflect a tension between those principles: e.g., balancing empowerment of the tribunal with an appropriate level of court support and supervision, or balancing respect for the finality of awards with the right of a national court to uphold the forum state's public policy by refusing to recognise or enforce an award.

1.4.1 Party autonomy

Party autonomy is the principle that contracting parties can choose the rules for their transaction and related arrangements. Respect for party autonomy means the law will recognise such choices as valid and enforce them, subject to any necessary limitations; a legal system is, for example, unlikely to allow a party to enforce a contract concluded for an illegal purpose. Party autonomy is a central feature of commercial law, including international commercial arbitration. Indeed, the importance attached to party autonomy was recognised at the outset

Arbitration: Legislative History and Commentary (Kluwer Law International 2015); Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* (Kluwer Law International 2019).

[37] Analytical commentary (n 21). See also the Reports of the United Nations Commission on International Trade Law on the work of its eighteenth (1985) and thirty-ninth (2006) sessions: UN Docs A/40/17 and A/61/17.

[38] Recent commentary on the Model Law includes: Binder (n 36); Cuniberti (n 15); and Bantekas, Ortolani et al (n 35). For examples of more general commentary on international commercial arbitration see: Born (n 2); and Nigel Blackaby, Constantine Partasides and Alan Redfern, *Redfern and Hunter on International Arbitration* (7th edn, OUP 2022).

[39] CLOUT case 1661 [*Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57 [25]–[70] (Court of Appeal, Singapore)]. The case involved the application of Article 8(1) and the standard of review a court should adopt when requested to refer a matter to arbitration: see section 2.7 in the following chapter.

when UNCITRAL was beginning work on what would become the Model Law. It was said that:

> Probably the most important principle on which the model law should be based is the freedom of the parties in order to facilitate the proper functioning of international commercial arbitration according to their expectations. This would allow them to freely submit their disputes to arbitration and to tailor the "rules of the game" to their specific needs. It would also enable them to take full advantage of rules and policies geared to modern international arbitration practice as, for example, embodied in the UNCITRAL Arbitration Rules.[40]

Party autonomy, accordingly, matters to arbitration in two key ways. First, by allowing parties to choose arbitration as their method of dispute resolution. Second, assuming they do opt for arbitration, by allowing contracting parties to determine the procedural framework for the arbitral process. The importance attached to party autonomy by the Model Law is apparent from even a superficial reading of its text. Many of the Model Law's provisions are framed expressly in default terms; in other words, it is stated they will apply in the absence of an agreement to the contrary.[41] The Model Law allows and expects parties to exercise their autonomy in relation to matters such as: the choice of seat,[42] the number arbitrators,[43] the process for appointing arbitrators,[44] particular requirements for the conduct of the arbitration,[45] and the tribunal's powers in relation to interim measures.[46] The importance of party autonomy is seen also in the provisions that deal with the setting aside and enforcement of awards: a departure from what the parties have agreed can be a reason for a court to set aside the award or to refuse its enforcement.[47]

1.4.2 Empowerment of the arbitral tribunal

Legal frameworks governing international commercial arbitration—as exemplified by the Model Law—tend to emphasise the empowerment of the arbitral tribunal. That approach is in contrast to previous eras where national courts may have viewed arbitration with suspicion and where national legal systems (in terms of both legal rules and judicial attitude) were often anti-arbitration rather than pro-arbitration.[48] The Model Law's empowerment of the tribunal is evident at various points. For example, the doctrine of competence-competence in Article 16(1) enables the tribunal to rule on its own jurisdiction, while the tribunal has the power to grant interim measures in accordance with Articles 17 and 17A. Then, there is the broad discretion given to the tribunal under Article 19(2) in relation to the conduct of the proceedings. And, finally here, one might observe the absence of an appeal on the merits in Article 34; in other words, resolution of the merits of the dispute is for the tribunal and the tribunal alone and

[40] Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration, UN Doc A/CN.9/207, 78, para 17.
[41] A point noted in the Analytical Commentary (n 21) 26.
[42] Article 20(1).
[43] Article 10(1).
[44] Article 11(2).
[45] Article 19(1).
[46] Article 17(1).
[47] Articles 34(2)(a)(iii) and (iv) and 36(1)(a)(iii) and (iv).
[48] See Born (n 2) §1.01.

cannot be subject to subsequent court review. The empowerment of the tribunal is apparent not only at those specific points within the Model Law's text. It is also a pervasive theme underpinning the dynamic between arbitral tribunals and national courts and is related to another fundamental principle: the need to limit court intervention (see 1.4.5 below). A court might, for example, refuse to grant an interim measure where the relief sought by one of the parties is within the power of the tribunal.[49] If the tribunal is able to grant the relief sought, that should in the ordinary course of things be the most appropriate context in which to consider the point, even if the court in question technically has the power. In other words, while empowerment of the tribunal (in a positive sense) is certainly clear from the way the Model Law has been drafted, it is also evident (in a negative sense) in the self-restraint shown by courts who are aware that respect for the tribunal and the arbitral process will sometimes require them to decline to exercise powers within their jurisdiction.

1.4.3 Equal treatment and arbitrator impartiality

Arbitration is a process whereby disputes are resolved according to relevant legal standards and accordingly requires arbitrators to reach decisions based on a proper response to relevant material such as the parties' agreement, submissions made by the parties and evidence. For that reason, it is important that an arbitral tribunal is impartial in the way it conducts the arbitration, not favouring one party over the other when assessing the parties' respective cases. This principle is important if parties are to have confidence that the arbitral process is a fair one. It is reflected in the express requirement that the parties be treated equally: Article 18. It also underpins Article 12 which obliges arbitrators to disclose potential conflicts of interest and allows for an arbitrator's appointment to be challenged where 'circumstances exist that give rise to justifiable doubts as to his impartiality or independence'.

1.4.4 Finality of awards

Another fundamental principle underpinning the Model Law and international commercial arbitration is the finality of awards. This is the idea that an award, once rendered by the tribunal, will be treated as conclusive in the vast majority of cases. Indeed, the Model Law's text allows for no appeal to national courts on the merits of a dispute.[50] The finality principle is also seen in the pro-enforcement stance of the Model Law (which reflects New York Convention practice), including the limited grounds on which an award might be set aside or enforcement refused.[51]

1.4.5 Limiting court intervention

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[49] *Leviathan Shipping Co Ltd v Sky Sailing Overseas Co Ltd* [1998] 4 HKC 347 (Court of First Instance, Hong Kong).

[50] *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 3 [33] (Court of Appeal, Singapore). Some Model Law jurisdictions may nevertheless allow for a limited appeal on the merits: e.g., in Mauritius, the International Arbitration Act allows the parties to opt in to the possibility of an appeal on questions of Mauritius law: s 3B and First Schedule, para 2.

[51] E.g., *Corporacion Transnacional de Inversiones v STET International* (1999) 45 OR (3d) 183, (Ontario Superior Court of Justice, Canada); *KB v S* and others [2015] HKCFI 1787 [1] (Court of First Instance, Hong Kong); CLOUT case 1965 (n 25) [18]. In the words of the Digest of Case Law (n 17) at 139: 'Courts have regularly emphasized that the finality of awards was one of the main purposes of the Model Law'.

International commercial arbitration is by its nature a dispute resolution mechanism that operates apart from national court systems. Yet, there is a paradox here. For while arbitration is about resolving disputes apart from national courts, it is fair to say that arbitration could not function adequately without judicial support. Arbitral tribunals derive their jurisdiction from the parties' agreement and arbitrators, therefore, lack the coercive power of the state that is at the disposal of judges in national courts. Many arbitrations will be resolved without the need for any court assistance or intervention: the parties will comply with directions from the tribunal, the tribunal will render its award, and the award will be satisfied by the award-debtor. But that is not always be the case. Although court involvement is likely to be the exception, there needs to be a legal framework to regulate the relationship between arbitral tribunals and courts. The Model Law is, to a large extent, concerned with that legal framework and the relationship it governs. Even with a consensus in general terms that international commercial arbitration needs the support of national courts, the challenge comes in determining the details. What kinds of court intervention or support are appropriate? How should courts exercise the powers they possess in relation an international commercial arbitration? When should they exercise those powers? The tension is between the need for court powers to help make an arbitration 'work' and the possibility court involvement could impede the arbitral process. Court powers in relation to arbitration should be clear and carefully circumscribed, lest recalcitrant parties find opportunities to use court applications for tactical advantage.

The Model Law gives specific expression to this principle of limited judicial involvement in Article 5: 'In matters governed by this Law, no court shall intervene except where so provided in this Law.' Courts in Model Law countries have held it to be a mandatory provision, an unsurprising conclusion given the importance of setting limits on court involvement.[52] The reference in Article 5 to 'matters governed by this Law' creates a divide, therefore, between legal issues governed by the Model Law and those not governed by it. The Model Law stipulates the ways in which courts can intervene with the former but not the latter. There are some matters where there is little doubt that aspect of arbitration law falls outside the Model Law: the fixing of costs and the power to consolidate arbitral proceedings would be examples.[53] In those cases the relevant legal rules (including the extent to which courts can intervene) will be found within the relevant domestic law.

In cases where a matter is clearly governed by the Model Law, courts have recognised the importance of Article 5 in declining the relief sought. In a case from Singapore one of the parties, against the backdrop of an arbitrator challenge, sought from the court an injunction to restrain the arbitrator from taking further part in the arbitration.[54] The difficulty for the relevant party was this: where a challenge to the arbitrator's appointment is pending, Article 13(3) permits the arbitrator to continue unless or until he is removed as a result of the challenge. Court invention, in the form of the injunction sought, would have conflicted with Article 13(3) and thus gone beyond what the Model Law permits a court to do in the context of an arbitrator

[52] Digest of Case Law (n 17) 20.
[53] Richard Garnett, 'Article 5 of the Model Law: Protector of the Arbitral Process?' (2021) 38 J Int Arbitr 127, 129.
[54] *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush* [2004] SGHC 26 (High Court, Singapore).

challenge. In another case, this time from Bermuda, the court was faced with an application for court assistance with the appointment of the tribunal.[55] The parties had agreed to a particular process for appointment of the tribunal and one of the parties had failed to comply with that process. The other party requested the court order performance of the agreed appointment process, a request which was refused. According to the court, its power under Article 11(4) was limited to appointing an arbitrator. The court could appoint an arbitrator where the agreed appointment procedure had broken down, but it could not enforce the parties' own appointment procedure; the court's powers to intervene were limited to those set out in Article 11. Article 5 would apply in a similar way if there was an attempt to set aside an award for a reason not covered by one of the grounds in Article 34(2). Likewise, with an attempt to seek court review of decision by the tribunal under Article 16(3) that did not amount to a ruling on its jurisdiction.

Three further observations can be made here. First, the divide between matters governed by the Model Law and those not so governed is made more complex by the fact that some matters may be impliedly (rather than expressly) governed by the Model Law.[56] It will be relatively straightforward to identify a matter expressly governed by the Model Law: one simply reads the provisions in question. But whether a particular matter is impliedly governed by the Model Law will be a question of reading 'between the lines' and here there could be room for reasonable disagreement. Second, for matters falling outside the Model Law, courts will sometimes make reference to their inherent or residuary jurisdiction and their ability to use that jurisdiction to prevent injustice or abuse of process.[57] Where relevant, a court will have to consider under the law of the forum what it is permitted to do under its inherent or residuary jurisdiction. Assuming a court does have the power to use its inherent jurisdiction in particular way, it will then have to consider whether in the circumstances it should exercise that power. The following questions are likely to be relevant to that enquiry. Would the court's exercise of its inherent jurisdiction complement or conflict with the tribunal's jurisdiction? Would it usurp the tribunal's authority and discretion to determine the arbitral procedure? Has the matter already been considered by the tribunal? Without the assistance requested from the court would the arbitration be impeded? If the court does decide to exercise its inherent jurisdiction, will that amount to support for the arbitration or an inappropriate intervention?

The final point concerns a pervasive theme that will considered at various points in subsequent chapters. Limitations on judicial intervention can also be relevant to those matters unequivocally governed by the Model Law's text, but which appear to allow for some discretion. An example is the power of national courts under Article 17J to grant interim measures. Another is the decision whether or not to set aside an award should one or more of the grounds in Article 34(2) be satisfied. In those areas a national court—certainly according to the Model Law's text—has the power to decide whether or not to grant the request. But it is likely that some knowledge of relevant case law and understanding of the way international commercial arbitration operates will lead a judge to exercise caution even where the requested intervention is, at least on paper, possible. A court may, for example, be reluctant to set aside

[55] *Montpelier Reinsurance* (n 33).
[56] Garnett (n 53) 135–42.
[57] CLOUT case 601 [*China Ocean Shipping Co v Whistler International Ltd* [1999] HKCFI 693 [37] (Court of First Instance, Hong Kong)]; *Montpellier Reinsurance* (n 33) [44]; *KVC Rice v Asia Mineral Resources* [2017] SGHC 32 [66]–[73] (High Court, Singapore).

an award (or refuse enforcement under Article 36) where some non-compliance with the agreed procedural rules for the arbitration has had only a minimal impact on the process.[58] In a similar vein, a court may well decline to grant an interim measure out of respect for the tribunal's mandate. If the tribunal is able to grant the interim measure sought, a judge may conclude the court should defer to the tribunal on such a matter.[59] Having said that, the need for judicial restraint in such matters may not be obvious from the Model Law's text alone. The proper application of Model Law provisions such as Articles 17 J and 34(2) may require a degree of judicial restraint that is not stated explicitly in the Model Law. It is, rather, a restraint that is self-imposed by national courts given the spirit in which international commercial arbitration should be conducted.

1.5 Applicable laws and rules

Where there is a purely domestic dispute, the question of applicable law will rarely be open to question. Consider a contract between two companies with their places of business in Country X and with the obligations under the contract to be performed in Country X. There is a reasonable chance the parties will have chosen the law of Country X to govern their contract, especially if they have received legal advice or are using an appropriate standard form agreement. And even where they have not chosen the governing law, it is highly likely conflict of laws rules would yield the law of Country X as the applicable law. It is also likely disputes will be settled in Country X, meaning that the law of Country X would apply to the dispute resolution process, whether taking place in national courts or in arbitration. Where, however, a transaction has an international dimension the matter of applicable law(s) may not be so straightforward, that includes the context of international commercial arbitration. As a starting point, it is important to distinguish three different aspects of an international commercial arbitration—the arbitral process, the substance of the dispute, the arbitration agreement—and observe that a different law could apply to each of those aspects.[60]

First, there is the law governing the arbitral procedure (sometimes referred to as the *lex arbitri)* which will almost always be the law of the place (or seat) of arbitration. Thus, if the place of arbitration is Country X, the law of Country X will supply the procedural law for the arbitration. And if Country X is a Model Law country, the key legal rules for the arbitral procedure will be those contained in the Model Law. Second, there is the law governing the substance or merits of the dispute (or *lex causae*). This is the law that will apply to substantive legal questions arising from the parties' dispute: what are the various rights and obligations under the contract, was the contract breached, how should damages be assessed, etc? Where the Model Law applies, the law (or legal rules) governing the substance or merits will be determined in accordance with Article 28, a point considered further in chapter 4. Third, there is the law

[58] CLOUT case 1756 [*TCL Air Conditioner (Zhongshan) Co v Castel Electronics Pty Ltd* [2014] FCAFC 83 [154] (Federal Court, Australia)]; CLOUT case 1651 [*Popack v Lipszyc*, 2016 ONCA 135 [31] (Court of Appeal for Ontario, Canada)].

[59] *Leviathan Shipping* (n 49).

[60] *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 [1] (UK Supreme Court, England). The law of the forum where enforcement of an arbitral award is sought could also be relevant: see art 36(1)(b)(i) and (ii) ML implementing art V(2)(a) and (b) NYC. In a similar vein, the law of the forum where enforcement of the arbitration agreement is sought could be relevant as well.

governing the arbitration agreement, which is discussed in chapter 2. At this point, two brief points can be made about the applicable law for an arbitration agreement. First, the law governing the arbitration agreement is not a matter expressly addressed in the Model Law and, therefore, the approach for determining the applicable law can vary across Model Law jurisdictions. Second, even where the arbitration agreement is contained in a clause within the main contract, one cannot assume the law governing the main contract necessarily applies to the arbitration agreement.

The same law—Spanish law, for example—could apply to the arbitral procedure, the arbitration agreement and the substance of the dispute. But that would be the case in respect of each aspect for reasons independent of one another. If Spanish law governs the arbitral procedure that will be because Spain has been selected as the place of arbitration. If Spanish law governs the merits of the dispute, that may be because Spanish law has been selected by the parties to govern their contract. Alternatively, in the absence of party choice it could be that the applicable conflict of laws approach (Article 28 or equivalent) points towards Spanish law. If Spanish law governs the arbitration agreement, that will be because the relevant choice of law analysis for arbitration agreements points towards Spanish law. By the same token, the three aspects could be governed by different laws. For example, Spanish law governing the arbitral procedure because Spain has been selected by the place or seat of arbitration. German law governing the merits of the disputes because German law has been selected by the parties as the law applicable to their contract or because relevant conflict of law rules points towards German law. English law governing the arbitration agreement because the parties have made a specific choice of English law for the arbitration agreement.

While the place of arbitration will supply the law governing arbitral process, the parties might select arbitration rules to govern the 'internal procedure' for the arbitration.[61] Suppose that the parties' arbitration agreement states the following: 'Any disputes in relation to this agreement shall be settled by arbitration. The place of arbitration shall be Singapore and the UNCITRAL Arbitration Rules shall apply.' Given that Singapore has been selected as the place of arbitration, Singapore law (and thus the Model Law assuming it is an international commercial arbitration) will supply the procedural law for the arbitration. The UNCITRAL Arbitration Rules will, however, apply to internal workings of the arbitration. So, for example, matters relevant to the handling of evidence will be determined by Article 27 of the UNCITRAL Arbitration Rules (rather than Article 19(2) of the Model Law). In a similar vein, the appointment of arbitrators would be determined in accordance with Articles 8 to 10 of the UNCITRAL Arbitration Rules (rather than Article 11 of the Model Law). The selection of arbitration rules will not, however, displace the provisions of the Model Law entirely. The reason is that the Model Law's 'external' procedural rules—those rules governing the relationship between the arbitration and the legal system at the place of arbitration—will still apply. So, if a party applies to the courts in Singapore to set aside an arbitral award the setting aside process will be governed by Article 34 of the Model Law.

[61] E.g., UNCITRAL Arbitration Rules; ICC Rules of Arbitration; Arbitration Rules of the Singapore International Arbitration Centre.

Both the Model Law and any relevant arbitration rules contain 'rules' that will apply to the arbitration. The 'rules' within the Model Law (or at least some of them) will apply because they are part of the legal system at the place of arbitration. By contrast, the 'rules' within the relevant arbitration rules will apply because the parties have agreed to use them for the arbitration.[62] So, while 'rules' from the Model Law and 'rules' from the relevant arbitration rules will apply to the arbitration they will be binding on the parties and tribunal for different reasons related to the status those instruments have. The Model Law, when implemented in a particular jurisdiction, has the force of law. Arbitration rules will be binding as and when the parties select those arbitration rules for their arbitration; in other words, they will be binding because the parties themselves have agreed to use those rules.

1.6 The place (or seat) of arbitration

A fundamental concept within international commercial arbitration is the place (or seat) of arbitration.[63] The place (or seat) refers to the jurisdiction with which an arbitration has its primary legal connection.[64] It is important for two related reasons. First, the place (or seat) of arbitration provides the procedural law for the arbitration, a point noted already. Second, the courts at the place of arbitration will have the main responsibility for supervising and supporting the arbitration. Certain court interventions, such as arbitrator challenges and the setting aside of arbitral awards, will be restricted to courts at the seat. The Model Law achieves that in Article 1(2) by stating that: 'The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.' The practical consequence of that wording is that court support for the arbitration will happen primarily at the place (or seat), with the input of non-seat courts limited to three aspects: recognition and enforcement of arbitration agreements (Article 8), enforcement and grant of interim measures (Articles 9, 17 H, 17 I and 17 J) and recognition and enforcement of arbitral awards (Articles 35 and 36). Although the point is not made explicitly in the New York Convention, the relevance and primacy of the seat is reflected at least implicitly in some of its provisions: see Article V(1)(a), V(1)(d) and V(1)(e).

In line with the principle of party autonomy, Article 20(1) allows the parties to choose the place of arbitration and, in many if not most cases, they will take that opportunity. If there is no choice of place (or seat) by the parties, Article 20(1) directs the tribunal to choose the place of arbitration, taking into account 'the circumstances of the case, including the convenience of the parties.'[65] The Model Law does not, however, authorise national courts to choose the place

[62] Or, perhaps in rare cases because the tribunal (in the absence of arbitration rules selected by the parties) has exercised its procedural discretion to select arbitration rules.
[63] The terms 'place of arbitration' and 'seat of arbitration' are used interchangeably in this work, although 'place of arbitration' will be the default term given that it reflects the Model Law's drafting. Having said that, 'seat' tends to be used more frequently and is the term used in the New York Convention.
[64] While there is a broad consensus on the role and importance of the arbitral seat, there are some whose vision for international arbitration is 'delocalised' in the sense of being detached from national legal systems: e.g., Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff 2010).
[65] For an example of a tribunal choosing the place of arbitration (and language for the arbitration) see CLOUT case 786 [Cairo Regional Center for International Commercial Arbitration, No. 1/1994, Egypt, 31 October 1995].

of arbitration: that can only be done by the parties or tribunal.[66] Although the drafting of Article 20 could perhaps be clearer with the use of different terminology, a careful reading of the provision reveals a distinction between two concepts: the arbitral seat, and the physical location of arbitral proceedings. Article 20, however, uses the word 'place' to refer to both concepts. In Article 20(1) the phrase 'place of arbitration' is referring to (what is more commonly known as) the arbitral seat. The place (or seat) of arbitration is a legal concept rather than a geographical location; it is the 'formal legal or juridical home' for the arbitration.[67] By contrast, in Article 20(2), the word 'place' refers to the venue for, or physical location of, the arbitral proceedings. And Article 20(2) makes an important point: the venue for or physical location of the arbitral proceedings need not be same as the place or seat. So, for example, if the parties have selected Country X as the seat, they need not travel to Country X for the arbitral proceedings. The arbitral proceedings could take place in Country Y or Country Z or any other country without affecting the choice of Country X as the seat. In a case where the arbitral proceedings were originally due to take place in Indonesia but were subsequently moved to Singapore, it was held that the change in geographical location had not brought about a change in the place of arbitration.[68] If the parties had wanted to change the place of arbitration that would have required the use of clear words.[69] Indeed, with technological developments arbitral proceedings can now with relative ease be conducted remotely and so the tribunal may not 'meet' in any particular location as such.[70] Consider, for example, a hearing conducted online with the arbitrators joining from their countries of residence (Portugal, Mexico, UK), the parties from their places of business (Brazil, China) and witnesses from their countries of residence (Spain, Canada, Malaysia).

An arbitration agreement will often include an unambiguous, express choice of seat: e.g., 'The place [or seat] of arbitration shall be Vienna, Austria'. The parties could also select the seat by agreeing to use a set of arbitration rules with a default choice of seat. If the parties' agreement stated that 'Disputes shall be settled by arbitration under the Mercatorian Arbitration Rules' and those rules stated that the Republic of Mercatoria was (in the absence of a contrary agreement) to be the place of arbitration, that would amount to a choice of Mercatoria as the place of arbitration. And although not as sophisticated as other forms drafting, wording such as 'Arbitration in Bermuda' or 'Arbitration: Hamburg' has been accepted as designating the place of arbitration (rather than simply the venue).[71]

Problems can arise where there is has been no clear and express choice of place (or seat) by the parties. For without a clear idea of the place (or seat), the procedural law for the arbitration and the correct place for court assistance may be in doubt. A point such as this may come to light where one party seeks help with appointment of an arbitrator or applies to set aside an

[66] That a national court cannot choose the seat creates a conundrum in situations where court help is needed with the appointment of arbitrator but the place of arbitration has not been selected by the parties. In *KVC Rice* (n 57) at [66]–[73] a court in Singapore suggested that the court could use its residuary powers to appoint an arbitrator to get the arbitral process started. It would then be for the arbitrator to select the seat.
[67] Born (n 2) §1.04[E][4].
[68] *PT Garuda Indonesia v Birgen Air* [2002] SGCA 12 (Court of Appeal, Singapore).
[69] Ibid [34].
[70] Maxi Scherer, 'Remote Hearings in International Arbitration: An Analytical Framework' (2020) 37 J Int Arbitr 407.
[71] CLOUT case 571 [Hanseatisches Oberlandesgericht Hamburg, Germany, 11 Sch 06/01, 24 January 2003].

award. Given that only courts at the seat are permitted to intervene in matters such as those, it may be necessary for a court to consider whether the parties have made an implied choice of seat and, if so, what that choice is. It may be possible to discern an implied choice of seat from factors such as a choice of procedural law for the arbitration or a choice of venue, and in many cases, it will be relatively straightforward to arrive a particular conclusion on an implied choice of seat.[72] Some cases are not so straightforward and can involve significant creativity in the interpretative process. In one such case, the parties' agreement required disputes to be resolved by arbitration but also granted to the Singapore courts jurisdiction over any disputes. Although a concurrent choice of arbitration and litigation creates an apparent conflict between two methods of dispute resolution, it was held that there was a valid arbitration agreement with an implied choice of Singapore as the seat given the reference to the Singapore courts having jurisdiction.[73] In some cases, it is simply not possible to discern an implied choice of seat from the parties' agreement. The consequences of that will depend on the stage at which the seat question arises. If the matter arises during the arbitration, the tribunal can select the seat in accordance with Article 20(1). If arising after the final award has been rendered, the seat may be inferred from the place where the arbitration took place (in particular, the final or main arbitral hearing).[74]

With an appropriate understanding of international commercial arbitration amongst commercial parties and their legal advisers, ambiguity over the place of arbitration should be rare. Sometimes, however, commercial parties will combine written terms from previous agreements or standard form contracts without legal advice. Sometimes lawyers, even the best lawyers, can fail to spot an omission or inconsistency in a draft agreement. Situations such as those can create the conditions in which the place of arbitration is open to question: has it been chosen and, if so, what is it? A couple of examples are illustrative of the point. In the first example, a German court was asked to appoint a tribunal chair, something it would have the power to do only if Germany was the seat.[75] The transaction involved an Italian employer and a German contractor and was made using a standard form contract from a German trade body. While there had been no express choice of seat by parties, it was held that they had impliedly chosen Germany as the seat. A couple of points were relevant to that conclusion. First, there was a reference in the arbitration agreement to a German court if assistance was needed in connection with the appointment of the tribunal: this was the 'Landgericht' at the employer's place of business. Although the form of arbitration agreement used was intended for German domestic transactions (rather than for cross-border transactions), it made sense in the context of the agreement to say that court assistance should be sought from the German courts. Second, there were, according to the court, various factors linking the transaction and dispute to Germany, including: the application of German law to the merits; the use of the German language for the contract; and the fact the price was stated in German currency. While the outcome—an implicit choice of Germany as the place of arbitration—makes sense on the particular facts, one might sound a note of caution. Given that the different aspects of an international commercial arbitration—arbitration agreement, procedure, and merits—need not

[72] E.g., *Shashoua v Sharma* [2009] EWHC 957 (Comm) (High Court, England) where the seat was implied from a choice of venue.
[73] *BXH v BHI* [2020] SGCA 28 [50]–[62] (Court of Appeal, Singapore).
[74] CLOUT case 374 [Oberlandesgericht Düsseldorf, Germany, 6 Sch 02/99, 23 March 2000].
[75] CLOUT case No 439 [Brandenburgisches Oberlandesgericht, Germany, 8 SchH 1/00, 26 June 2000].

be governed by the same law, it should not be assumed that connections and choices relevant to the substance of a transaction, and therefore the merits of a dispute, can necessarily be used to determine the place of arbitration and arbitral procedure. Indeed, contracting parties may choose the place of arbitration for the very reason that it is neutral with regard to factors such as the parties' places of business, the place of performance of the contract and the law applicable to the merits.

The other case—this time from Singapore—demonstrates there may be limits on the extent to which a court is willing discern a choice of seat that is favourable to the arbitral process.[76] The question of the seat was raised as part of a challenge to the tribunal's jurisdiction, a point that will be considered further in chapter 2. The parties had selected Chinese law to govern their contract and had also agreed disputes would be settled by 'arbitration in Shanghai' under the auspices of the Singapore International Arbitration Centre (SIAC). The SIAC rules contained a default provision designating Singapore as the seat. One of the parties contended that the seat was Shanghai in China, the other argued it was Singapore. This difference of opinion was important. The identity of the seat was likely to have an impact on the law governing the arbitration agreement and, thus, the arbitration agreement's validity. If Singapore law applied to the arbitration agreement, there was a chance it would be enforceable; if Chinese law applied it would be unenforceable.

A majority of the tribunal and the judge in the High Court held that the seat was Singapore with Shanghai the venue for the arbitral proceedings. Singapore had been chosen as the seat given the reference to the SIAC rules; Shanghai was merely the venue for the proceedings. The Court of Appeal (along with the dissenting member of the tribunal) disagreed and held that the seat was China. The reference to 'arbitration in Shanghai' overrode the default choice of Singapore as the seat that was contained in the SIAC rules. That was a significant finding for the following reason: it meant the arbitration agreement would be unenforceable under the applicable law. Had the place of arbitration been Singapore, a different result could have been reached. In arriving at that decision, the Court of Appeal noted the limits on its ability to interpret words in an agreement beyond what they might reasonably mean.[77] It is, of course, not uncommon for lawyers, judges and arbitrators to express different opinions on the interpretation contractual provisions, including arbitration agreements. A case such as this in the arbitration context reveals a tension between two things: one is the desire to achieve a pro-arbitration outcome, the other is respect for party autonomy. Arbitrators and judges will tend to interpret arbitration agreements in ways that are consistent with an arbitration agreement's validity and application to the dispute. That means words and phrases in the arbitration agreement may be given a liberal interpretation. But, the importance of party autonomy means that the arbitrator or judge is not at liberty to rewrite an arbitration agreement, and there may come a point where a pro-arbitration approach to interpretation can go no further, including when seeking to determine a choice of seat.

[76] *BNA v BNB* [2019] SGCA 84 (Court of Appeal, Singapore).
[77] Ibid [104].

Given the importance afforded to the place of arbitration what considerations should influence the parties' choice on this point?[78] Some considerations will be legal, others practical. A key legal consideration will be to ensure the place of arbitration is in a New York Convention state. That concern is, however, less acute than it once was. A significant majority of states around the world, currently around 170, are bound by the New York Convention, and where the Model Law has been adopted it comes with the Convention obligations already incorporated. For that reason, earlier concerns about reciprocity between the place (or seat) of arbitration and the enforcement forum with regard to the New York Convention are now largely redundant.[79] Another legal consideration will be the extent to which the place of arbitration is in a jurisdiction that is regarded as 'pro-arbitration'. That is likely to mean two main things. First, the country's arbitration laws are in keeping with general consensuses about the way that international commercial arbitration should work; by adopting the Model Law that will be achieved to a significant extent. Second, the judiciary in that jurisdiction have experience of arbitration-related matters and an appreciation of the spirit in which international arbitration should conducted, especially the importance of limiting court intervention. A country's adoption of the Model Law may be part of a policy to make that country an attractive venue for international arbitration, a point to which the courts may allude in explaining the context for particular decisions.[80]

Aside from the condition of a country's laws and legal system, other considerations relevant to the selection of the place of arbitration are likely to include following: neutrality; the presence of a particular arbitration institution; convenience; likely costs; and the availability of arbitrators and lawyers with appropriate experience and expertise. Given the concerns a contracting party may have about litigation in the courts of another party, a neutral seat is likely to allay some of the anxieties about the right to a fair hearing and equal treatment of the parties should a dispute arise. Cost and convenience should speak for themselves: commercial parties will want to resolve their dispute in a way that is efficient both in financial terms and with regard to time. It is cheaper to conduct an arbitration in some places rather than others, while geographical location may also be important to the parties. One factor that is likely to be influential in the selection of the place of arbitration is the presence of a particular arbitration institution. While institutional rules will tend to allow a different seat to be chosen, the default position on this point will often be the place where the institution is based. There is no one size fits all solution to the question: what should be the place of arbitration? Beyond selecting a jurisdiction that pursues pro-arbitration policies, the answer will depend on the particular preferences of the parties and the outcome of their negotiations as to the dispute resolution arrangements.

[78] For a comparison of various 'venues' that might be selected for an international arbitration, see Michael Ostrove, Claudia Salomon and Bette Shifman, *Choice of Venue in International Arbitration* (OUP 2014).

[79] Article 1(3) of the New York Convention allows a Contracting State 'on the basis of reciprocity [to] declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.' The Model Law's text does not include a provision enabling states to make a reservation in this regard.

[80] *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] SGHC 104 [89]–[91] (High Court, Singapore); CLOUT case 1965 (n 25) [17].