STEPHENSON HARWOOD

An introduction to international arbitration: a guide from Stephenson Harwood LLP

Contents

"The firm has scored many wins when it comes to arbitration-related litigation [...] it is considered a 'go-to' firm."

Global Arbitration Review 2017

1. Introduction

Although arbitration is often referred to as part of the new wave of 'alternative' dispute resolution techniques, such as mediation, it is one of the oldest forms of dispute resolution. Arbitration was practised in ancient Greece and Rome. The first English Arbitration Act was passed in 1698.

International arbitration has grown in importance in the last few decades, in tandem with globalisation. This is for several reasons. Most importantly, arbitration works. According to a recent survey of major global corporations, arbitration is the most favoured dispute resolution mechanism for international matters (ahead of court litigation, mediation, adjudication and expert determination), whether as claimants or respondents.

As this guide demonstrates, there are several forms of arbitration, many adapted to the circumstances of particular types of dispute. Yet, whatever form it takes, arbitration always offers the opportunity for parties to bypass the traditional court route and, in the right circumstances, it offers many advantages.

Arbitration is particularly well-suited to international cases because it applies a single set of rules to multi-jurisdictional disputes, but still relies on the powers held by national courts to enforce awards.

Arbitration is most well-established in the insurance, construction, energy and shipping industries and is taking root in other areas too, notably in financial services. In 2013, for the first time, the International Swaps and Derivatives Association (ISDA) published a guide to arbitration for its members. Nevertheless, there remains a degree of misunderstanding and confusion about arbitration.

Perhaps the least understood difference between arbitration and other forms of dispute resolution is that the decision to use arbitration is overwhelmingly made when contracts are entered into – long before the dispute arises. To reap the benefits of arbitration, the right decisions must therefore be made at an early stage.

This guide will explain how arbitration works, how it should be used and its benefits and drawbacks.

2. Quick reference guide

What is arbitration?

Arbitration is an alternative to litigation. It is primarily used to resolve disputes arising from commercial contracts, especially contracts with an international element. Arbitration is also the designated default dispute resolution process in disputes between governments and companies under international trade or investment treaties.

By agreement between the parties (usually contained in a clause of the contract in dispute), an independent arbitrator, or a panel of three arbitrators (the tribunal), is appointed to hear the dispute and to produce a ruling (the award) on the merits.

The tribunal may award damages or other relief against the losing party. Awards can be enforced in the 156 signatory countries to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (see http://www.uncitral.org/uncitral/en/ uncitral_texts/arbitration/NYConvention_ status.html).

How does arbitration differ from other methods of dispute resolution?

Arbitration shares some of the traits of litigation and mediation but has features which are distinct from both. Similar to litigation, the award made by the tribunal in an arbitration is binding on the parties. However, unlike going to court, the process is usually less formal and is confidential. Although mediation is informal, it requires both parties to reach an agreed settlement rather than having a decision imposed on them; this means that, subject to an award being challenged in court, there is greater finality to the arbitration process.

How do I commence arbitration proceedings?

How and where to arbitrate is determined by the parties' arbitration agreement, usually contained in the contract in dispute. The agreement sets out how many arbitrators are to be appointed, how they are to be appointed, where the arbitration will be held, in what language it will be conducted and under which institutional rules (if any). It is also possible for both sides to agree to go to arbitration after the dispute has arisen, but this is much less common because the agreement of both parties is necessary. This is often not possible when a commercial relationship has already broken down.

Who runs arbitrations?

There are a number of well-established organisations that administer international arbitrations and each has its own set of rules. Some well-known institutions include the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the Singapore International Arbitration Centre (SIAC).

There is also a range of organisations specific to particular industries (shipping or commodities, for example) which administer arbitrations. Other administering bodies include the dispute resolution mechanisms attached to international trade and investment treaties such as the International Centre for the Settlement of Investment Disputes (ICSID). Although these organisations have fixed geographical bases (the ICC, for example, is based in Paris), many of these bodies will run arbitrations in any country chosen by the parties.

It is far from compulsory, however, for arbitrations to be administered by one of these organisations. Ad hoc arbitrations can be established by agreement between the parties and these arbitrations are often run using the United Nations Commission on International Trade Law (UNCITRAL) rules.

Arbitrations are also subject to the laws of the country which is the 'seat' of the arbitration, regardless of the governing law of the contract in dispute. Although many countries have implemented the UNCITRAL Model Law (which provides an arbitration-friendly legislative framework) into their national law, there can be significant differences between jurisdictions.

"It's a sharp team with a panache for making a solid and comprehensive analysis of issues, and for providing succinct and practical advice in complex matters. Their research skills are simply outstanding."

Chambers UK 2018

What are the advantages of arbitration?

- It is confidential (unless the parties agree otherwise).
- It can be quicker and cheaper than litigation, especially for smaller and mid-sized cases.
- The procedure is flexible and can be altered to suit the specific circumstances of each case.
- For technically complex disputes, parties can select arbitrators with the relevant experience or background to hear the dispute, rather than having to rely on a judge (or jury) who will likely have no relevant technical experience.
- In most countries, enforcing awards is usually more straightforward than enforcing court judgments thanks to the New York Convention, to which 156 countries are currently signatories.
- It avoids national courts which may be perceived as corrupt and/or inefficient.
- For international disputes, it can prevent different countries' laws coming into conflict by settling on one governing law and one set of rules at the outset. The arbitration can also be held in a pre-determined neutral venue, reducing the possibility of 'forum shopping' delaying the proceedings and removing accusations of deliberate or cultural bias in the outcome.

What are the disadvantages of arbitration?

- Unlike judges, arbitrators' fees must be paid by the parties. This can be expensive compared to conventional court fees in many jurisdictions.
- Arbitration can be more expensive and time consuming than court proceedings for larger, more complex disputes.
- Arbitration can be more time consuming because of problems with the availability of arbitrators, especially if they are based abroad. In court proceedings, any available judge can hear a case.
- Avenues for appealing and/or challenging awards are limited if you lose.
- Arbitrators sometimes lack the power to make certain interim orders against the parties before publishing the final award.
- Unlike mediation, arbitration is an adversarial process. It is less likely that a commercial relationship will survive after the process has ended.
- In disputes involving more than two parties, arbitration can be difficult to manage, particularly where some aspects of the dispute are subject to arbitration and others to litigation.

3. Arbitration or litigation?

It is a fundamental principle of almost all countries' arbitration law that there must be an agreement between the parties to refer a dispute to arbitration. If this is not the case, then arbitration will not be available as a means of dispute resolution.

Otherwise, the main factors to consider include:

- Cost and time
- Selection of arbitrators
- Procedure
- Confidentiality
- Neutrality
- Appeals process
- Enforcement

Cost and time

Arbitration is sometimes said to be quicker and cheaper than litigation. This may be true, but is normally only the case in respect of small to medium-sized disputes. For larger, more complex disputes, arbitration can be more expensive and time-consuming than litigation. There are several reasons for this.

First, a judge in court proceedings is not paid by the parties. Arbitrators' fees are borne by the parties. This can be expensive, particularly where there are three arbitrators. Their fees are usually paid (in part at least) in advance, may be proportionate to the value of the dispute and may be non-refundable in the event of settlement.

Second, arbitration may take longer than litigation because there is no system to regiment the availability of arbitrators. Especially with a three-person tribunal, it can be difficult to book hearing times which all the arbitrators can attend. In addition, a lenient tribunal may permit the parties more extensions of time to meet deadlines than would be permitted by the courts.

Finally, in arbitration, the parties have to find and pay for a hearing venue, whereas the use of a court is free.

A factor which may affect the parties' decision to arbitrate is the level of court fees in the relevant jurisdiction. In many jurisdictions, court fees are modest, but in others, court fees can be significant.

Selection of arbitrators

The fact that the parties can select their arbitrators, or at least choose an appropriate arbitration centre which will select the arbitrator(s), often makes arbitration a more attractive option than litigation, where judges are selected without reference to the parties' wishes. The obvious advantage of selecting your own arbitrator is that you can either choose someone with expertise relevant to the subject matter of the dispute

or, if the matter turns on a point of law, you can select a lawyer or a judge. Once selected, the tribunal will be in charge of the case for its duration. With litigation, a number of judges may deal with a case during its lifetime.

Finally, contrary to common belief, it is not true that an arbitrator will be sympathetic to the party who appointed him or her.

Procedure

The arbitration process is more flexible than court proceedings. The parties can choose a procedure which is suitable to the dispute; this takes precedence over the views of the tribunal. Therefore a dispute could be resolved solely by reference to documents or written submissions, without the need for a hearing.

Confidentiality

One of the most attractive aspects of arbitration is that all the proceedings are held in private and are confidential. Hearings in court proceedings are generally heard in public. The principle attraction of arbitration is that oral evidence given by a party's employees, directors or senior executives will not be heard by the public, and competitors and others will not know about the dispute.

Neutrality

Where parties come from different countries they can choose a neutral forum for the resolution of their dispute. For example, contracting parties from two different countries could choose England as the place of arbitration: a neutral forum that would avoid either party having to submit to the jurisdiction of the other party's national courts.

Appeals process

In many jurisdictions, the ability to appeal awards to the court is limited. This preserves the principle that the parties are free to agree how their disputes are resolved with minimum court intervention. From a commercial point of view, it means that the rendering of an award by the arbitrators will normally mark the end of proceedings. In order to avoid any uncertainty, parties can exclude the right of appeal in their arbitration agreement. Under a number of institutional arbitration rules, there is no right of appeal. This provides greater finality than litigation in many jurisdictions.

Enforcement

The enforcement of judgments or awards is an important factor to take into account when choosing an appropriate means for the resolution of disputes. Due to a number of conventions (the most well-known being the New York Convention), arbitration awards are recognised and can be enforced in 156 countries. It provides, in theory, for a relatively simple and effective method of obtaining recognition and enforcement of awards across the globe. In reality, even in some countries which are parties to the New York Convention, enforcement can still be relatively difficult. However, the enforcement of awards is generally still far easier than the enforcement of court judgments.

The Decision

There are clearly a number of important considerations to be taken into account when deciding whether to resolve disputes by arbitration or litigation. Often commercial agreements between parties include a provision that disputes will be referred to arbitration in a stated country. It is important, therefore, to weigh up the advantages of arbitration before agreeing to such a provision. It is also important to carefully choose the jurisdiction for settling disputes, whether arbitration or litigation is chosen.

Some contracting parties prefer to choose a country with which the parties are most closely connected or where the performance of the contract is most likely to take place. Others choose to select a country that is totally unconnected with the parties, to introduce an element of neutrality. It must be remembered that, whichever country is chosen, the arbitration process itself will be subject to the laws of the country of the arbitration's 'seat'—even if the governing law of the contract in dispute is different.

4. Drafting an arbitration agreement

The first step in any arbitration is the drafting of an appropriate arbitration agreement. This usually begins when the underlying contract is negotiated. Careful thought needs to be given to the form of the arbitration agreement. Unfortunately, in many cases the parties' corporate counsel incorporate boilerplate arbitration agreements which do not take into account the particular circumstances of the contract.

It is important to carefully consider what is included in the arbitration agreement because getting it wrong can be extremely costly.

Some of the main factors to consider are listed below. Some will be more relevant to individual circumstances than others and there may be additional factors that are relevant to the particular circumstances of each contract.

It is always advisable to seek legal advice when drafting arbitration agreements.

Considerations:

- Is arbitration the most suitable form of dispute resolution, bearing in mind the nature of the contract?
- Do the parties want to refer all disputes arising out of the contract to arbitration or only certain types of dispute?
- Where do the parties want the 'seat' of the arbitration to be? This is important because the seat of the arbitration will also mean that the laws of that jurisdiction will apply to the arbitration's procedure. Some jurisdictions do not have laws (or courts) which adequately support effective arbitration.
- Do the parties want the arbitration to be ad hoc or conducted under institutional rules?
- How many arbitrators do the parties want to appoint (one or three)? Three will increase the cost and usually mean that diaries are harder to co-ordinate.
- Who will appoint the arbitrators — the parties or an independent body? What happens if the parties cannot agree? There must be a fall-back position.
- In what language do the parties want the arbitration proceedings to be conducted?
- How many parties are likely to be involved? If there are more than two, then a multi-party arbitration clause may be necessary.
- In multi-party scenarios, consideration must be given to whether the tribunal should be provided with a specific power to consolidate connected arbitrations and/or join additional parties to the arbitration.

5. Investment treaty arbitration

One type of international arbitration which has seen a significant increase in popularity in the last decade is investment treaty arbitration.

Most investment treaty arbitrations are conducted under the auspices of the International Centre for Settlement of Investment Disputes (ICSID). ICSID was created by the 1965 Washington Convention, which has been ratified by 161 states. It is a division of the World Bank, which administers arbitrations under its own rules. ICSID was created to promote international trade and investment, by providing a neutral and specialised forum for the settlement of disputes between a host state and an investor from another state, which has arisen out of an investment made in the host state.

ICSID arbitration has a number of distinguishing features. First, unlike other international arbitrations, arbitrations conducted under its rules are delocalised; the arbitration has no seat. Second, ICSID awards are directly enforceable in signatory states as if they were judgments of the courts of the state of enforcement. Third, enforcement of ICSID arbitration awards is governed by the Washington Convention, not the New York Convention.

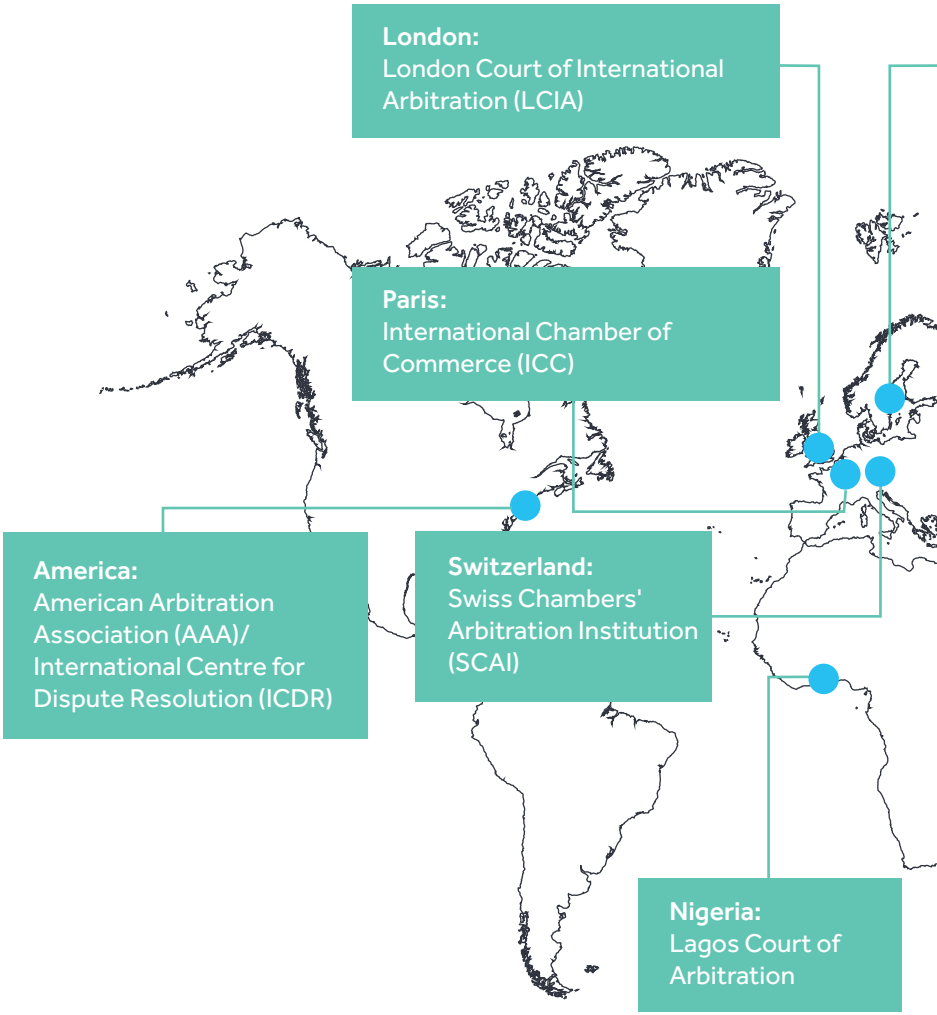
As with other types of arbitration, there must be an agreement to arbitrate. This may be a specific contractual agreement to resolve disputes by ICSID arbitration. However, more commonly, the agreement is contained elsewhere, as the investor is generally not suing its contractual counterparty but the state in which the investment was made. The arbitration agreement is therefore usually found in the host state's national investment legislation, a multilateral investment treaty or a bilateral investment treaty (BIT).

BITs provide a framework agreement between two states for the protection and fair treatment of investments made by nationals of either state in the territory of the other state. There are currently more than 2,800 BITs in force globally.

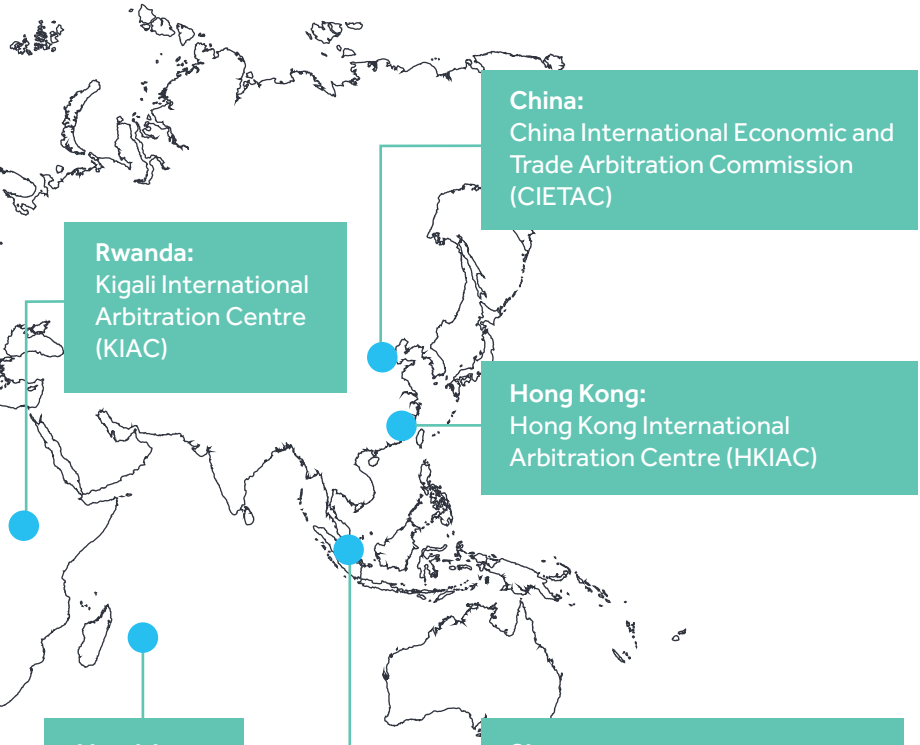
Investment treaty arbitration may provide an aggrieved party with an additional or alternative means of recovering its losses. Investment treaty arbitration is therefore a useful and significant type of arbitration in an increasingly globalised world.

6. An overview of the major arbitration centres

Choosing the right arbitration venue is important. In this section, we provide a brief overview of the major centres.



Stockholm:
Stockholm Chamber of Commerce (SCC)



China:
China International Economic and Trade Arbitration Commission (CIETAC)

Rwanda:
Kigali International Arbitration Centre (KIAC)

Hong Kong:
Hong Kong International Arbitration Centre (HKIAC)

Mauritius:
LCIA – MIAC

Singapore:
Singapore International Arbitration Centre (SIAC)

American Arbitration Association (AAA)

www.adr.org

Established in 1926, the AAA is a well-recognised provider of administered arbitration proceedings. In 1991, it formally adopted a set of rules to govern its increasing load of international cases. The AAA International Arbitration Rules, which are based on the UNCITRAL rules, were revised in 2008. Long a leader in domestic arbitration services in the United States, the AAA is becoming increasingly prominent in international arbitration.

The AAA also has expedited procedures that apply when no claim or counterclaim exceeds a specified amount. Parties can agree to use these procedures even if their claims and counterclaims are of greater value. The Stockholm Chamber of Commerce is the only other major arbitration institution with a set of rules specifically designed for expedited proceedings. Other institutions are considering whether to introduce such rules.

China International Economic and Trade Arbitration Commission (CIETAC)

www.cietac.org.cn

Arbitration in mainland China is dominated by CIETAC which was established (as the Foreign Trade Arbitration Commission of the International Trade Promotion Commission) in April 1956. CIETAC is an independent non-governmental arbitration institution. It maintains a panel of over 1,000 arbitrators from more than 30 countries who possess extensive professional knowledge in various industries.

Originally it only had jurisdiction to deal with disputes involving a foreign party. Subsequently, its jurisdiction has expanded to both domestic and international arbitrations. CIETAC is now the most important arbitration institution in China. It has administered more than 10,000 international disputes since its establishment. On average, around 1,000 new disputes are filed each year.

Hong Kong International Arbitration Centre (HKIAC)

www.hkiac.org

The premier arbitration body in Hong Kong is HKIAC. It was established in Hong Kong in 1985 to provide a broad range of arbitration services. It is an independent and non-profit making company.

HKIAC has administered over 4,000 international and domestic disputes, primarily in the areas of construction, commercial disputes, joint ventures and shipping. HKIAC also manages the Hong Kong office of the Asian Domain Name Dispute Resolution Centre, which is the only domain name provider in Asia and provides dispute resolution service for generic top-level domain names (for example, .com, .org and .net). HKIAC has also been appointed as the domain name dispute resolution service provider for .hk, .cn, .pw and .ph domain names.

HKIAC maintains a panel of highly experienced arbitrators. There are approximately 300 international and local arbitrators on the panel, consisting of judges, senior counsel and leading individuals from international commerce. As the only statutory appointing authority for arbitrators in Hong Kong, HKIAC is empowered to determine the number of arbitrators and/or to appoint arbitrators if the parties cannot agree.

International Chamber of Commerce (ICC)

www.iccwbo.org

The ICC and its International Court of Arbitration is one of the most prominent and well regarded institutions for international arbitration. Since its inception in 1923, the ICC has administered over 10,000 arbitrations involving parties and arbitrators from over 170 countries and territories.

The Court of Arbitration does not determine disputes. However, it plays an important role in administering arbitrations under the ICC rules.

Two procedural aspects of ICC arbitrations are noteworthy. First, within two months (or such additional time as the tribunal may allow) after the tribunal receives the file, the tribunal prepares 'terms of reference' and submits them to the Court of Arbitration for approval. The terms of reference are intended to define the claims and defences of the parties at an early stage, to crystallise the issues for determination by the tribunal and to address procedural issues. Once the terms of reference have been approved by the Court of Arbitration, new claims can only be made with the permission of the tribunal.

Second, before an award is published by the tribunal, the Court of Arbitration reviews the draft award for its form. The Court of Arbitration may also make suggestions concerning the substance of the draft award. This review process is intended to promote the publication of consistently high quality awards by ICC tribunals.

Kigali International Arbitration Centre (KIAC)

www.kiac.org.rw

KIAC was established in 2013. It aims to take advantage of Rwanda's increasingly business friendly reputation to establish itself as the leading arbitral institution for the resolution of African disputes.

Lagos Court of Arbitration (LCA)

www.lagosarbitration.org

Founded in November 2012, the LCA aims to become West Africa's premier arbitral institution, offering a credible local alternative to the LCIA and ICC, which currently administer the majority of arbitrations relating to Africa's largest economy.

London Court of International Arbitration (LCIA)

www.lcia-arbitration.com

The LCIA is one of the oldest major international arbitration centres. Although based in London, it is an international institution and a large proportion of the members of the LCIA Court are not from the United Kingdom. In 2011, the LCIA and Mauritius government jointly established a new arbitration centre in Mauritius, LCIA-MIAC, with its own set of rules.

The LCIA offers international arbitration anywhere in the world. However, if the parties have not stipulated a venue in their arbitration agreement (and unless the LCIA determines there is some reason why another venue should be chosen), London will be the seat of the arbitration.

The LCIA deals with a variety of commercial disputes, including those relating to energy, foreign trade, transport, distribution, technology, construction and engineering.

In order to provide and to maintain its services and to meet the needs of the international business community, the LCIA has formed Users' Councils which cover the major trading areas of the world. Each Users' Council has its own officers and devises its own programme of activities appropriate to the needs of the region.

The LCIA's latest rules came into effect in October 2014. Notable changes include provisions on the conduct of parties and legal representatives, as well as greater scope for emergency relief (including the appointment of emergency arbitrators).

Singapore International Arbitration Centre (SIAC)

www.siac.org.sg

Many significant commercial arbitrations in Singapore take place under the auspices of SIAC. Created in 1991, SIAC is recognised as one of the leading arbitration institutions in Asia. Having been initially funded by the Singapore government, SIAC is now entirely self sufficient and is affiliated with the Singapore Business Federation, the apex organisation of the business community in Singapore. Since its inception, SIAC has administered over 1,000 disputes involving parties from the Americas, Europe, Asia and other parts of the world. Over 80% of these disputes were international.

Stockholm Chamber of Commerce (SCC)

www.chamber.se

The Arbitration Institute of the SCC is a prominent national arbitration institution that has become increasingly significant in international arbitration circles, particularly for east-west commercial disputes.

The SCC administers arbitrations under its own rules and also under the UNCITRAL rules. The Arbitration Rules of the SCC requires the tribunal to render an award within six months of the date the matter is referred to the tribunal (although this period can be extended).

Unlike most of the other major arbitration institutions whose standard rules can be modified to accommodate requests for expedited decisions, the SCC has designed a separate set of rules specifically for expedited arbitrations, which can be modified by the parties. The use of the Expedited Rules of the SCC is recommended to resolve relatively minor disputes in a speedy and cost-effective manner.

Swiss Chambers' Arbitration Institute (SCAI)

https://www.swissarbitration.org/

The SCAI is the primary international arbitration institution in Switzerland. It brings together the chambers of commerce of the biggest cities in Switzerland, which have been offering arbitration services since the early twentieth century. It is one of the most important arbitration centres in Europe, particularly for intra-European disputes. Its rules were last updated in 2012.

Where one of the parties is not domiciled in Switzerland and does not have its habitual residence there, the arbitration will be subject to the Swiss Federal Statute on Private International Law.

United Nations Commission on International Trade Law (UNCITRAL)

www.uncitral.org

UNCITRAL, established in 1966, is the central legal body at the United Nations devoted to international trade law. In 1976, the Commission promulgated a set of arbitration rules to govern international arbitration proceedings outside the framework of an established administering body. The UNCITRAL rules, last revised in 2010, are the rules of choice for ad-hoc arbitrations.

Several arbitration institutions will serve as an appointing authority for UNCITRAL arbitrations, and will administer arbitrations under the UNCITRAL rules. The AAA, LCIA, SCC and HKIAC, among others, will serve both functions. Resorting to the UNCITRAL rules in an institutional arbitration may be appropriate where the parties desire an institutional arbitration in a particular venue, but do not wish to use the rules of the particular institution.

In addition to its Arbitration Rules, in 1996 UNCITRAL promulgated its "Notes on Organising Arbitral Proceedings". The Notes provide a useful procedural checklist of matters to consider when organising and conducting an international arbitration, whether ad hoc or institutional.