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Introduction to international arbitration and its place in the Asia-Pacific

1 Introduction and definition of arbitration

Over the past 20–30 years, international arbitration has become by far the most popular mechanism for resolving international commercial disputes in the Asia-Pacific and globally. International arbitration is exceptionally effective because of its flexibility, neutrality, finality, and enforceability. It is flexible because parties are accorded enormous freedom to choose the manner in which their dispute is decided. They can, for example, agree on the seat of arbitration, the identity of the arbitrators, the applicable law, the number of written briefs (if any), the number of oral hearings or meetings (if any), and whether there will be expert or factual evidence. The neutrality of arbitration principally relates to separating the dispute resolution mechanism from any of the parties’ countries and from any political interference. Parties can, for example, select a seat of arbitration, applicable law and arbitrators from a country that is neutral with respect to all parties. Arbitration is final because domestic legal systems generally do not permit any appeal from arbitrators’ awards, and allow only very limited review of such awards on procedural grounds. Arbitration is enforceable thanks to its recognition in virtually all domestic laws and thanks to several international treaties. Arbitral awards may be enforced using the enforcement mechanisms of state courts in most countries throughout the world. As we will see, the study of international arbitration is exciting, innovative, creative, and yet sometimes complex.

In this chapter, after briefly defining arbitration in the introduction, we set out its historical evolution in Section 2. Section 3 summarises the characteristics of international arbitration as we know it today, including the sources of international arbitration law, thus introducing the concepts which are addressed in

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much greater detail throughout the book. Finally, Section 4 explains the role, status and culture of international arbitration in the Asia-Pacific region.¹

1.3 A definition of arbitration can be found in any dictionary. A straightforward and accurate definition is that provided in *Black's Law Dictionary* which defines arbitration as '[a] method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding'.² This identifies the core elements which are applicable even in the most advanced forms of international commercial arbitration. It states that arbitration:

- (i) is a 'method of dispute resolution' (arbitration is simply a procedure or method for resolving disputes);
- (ii) 'involving one or more neutral third parties' (the notion that all of the arbitrators be neutral, independent and impartial is an essential feature of arbitration);
- (iii) 'who are usually agreed to by the disputing parties' (appointment of the arbitrator or arbitral tribunal by agreement of the parties, or by some agreed method, is one of the most important, defining features of arbitration; more generally, party consent is essential to all aspects of arbitration);
- (iv) 'whose decision is binding' (there would be limited value in arbitration if a party to an arbitration agreement could subsequently refuse to comply with its obligation to arbitrate or could refuse to honour the arbitrator's decision. The binding nature of arbitral decisions (called 'awards') has been facilitated by the law, which is comprised of both domestic laws and international treaties. The law provides a framework to ensure that arbitration agreements and arbitral awards are legally enforceable).

1.4 There are many different types of arbitration, and even different species of international commercial arbitration. The most common is sometimes called 'New York Convention arbitration' because the awards are enforced pursuant to the procedures set out in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'). However, 'New York Convention arbitration' as a name is inaccurate because it omits a small number of private arbitrations in countries that are not signatories to the New York Convention. Some call this kind of arbitration simply 'commercial arbitration' but we prefer 'international commercial arbitration' to distinguish it from domestic arbitration.

¹ This book focuses on the following Asia-Pacific jurisdictions: Australia, China (Mainland), Hong Kong, India, Indonesia, Japan, Korea (Republic of), Malaysia, New Zealand, the Philippines and Singapore. However, examples from other jurisdictions are mentioned from time to time.
² *Black's Law Dictionary*, 8th edn, Thomson West, 2004, p. 112. A similar definition can be found in any dictionary or in the various books on arbitration. See, e.g. the discussion of the definitions in J-F Poudret and S Besson, *Comparative Law of International Arbitration*, 2nd edn, Thomson, 2007, paras 1–3, who conclude that 'arbitration is a contractual form of dispute resolution exercised by individuals, appointed directly or indirectly by the parties, and vested with the power to adjudicate the dispute in the place of state courts by rendering a decision having effects analogous to those of a judgment'. Another useful definition is found in Section 3(d) of the Philippines Alternative Dispute Resolution Act 2004: "Arbitration" means a voluntary dispute resolution process in which one or more arbitrators, appointed in accordance with the agreement of the parties, or rules promulgated pursuant to this Act, resolve a dispute by rendering an award."

International commercial arbitration may be contrasted with ‘ICSID arbitration’ which is the most common type of ‘investment arbitration’. ICSID arbitrations arise under the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (‘ICSID Convention’). A distinctive feature of ICSID arbitration is that one party must be a state (i.e. government) or a state entity. States can also be parties to international commercial arbitrations.³ Although ICSID arbitration differs from international commercial arbitration in several respects, especially concerning the applicable substantive law and recourse against and enforcement of awards, there are numerous similarities in terms of procedure and practice. 1.5

This book focuses principally on international commercial arbitration, which is the main form of international arbitration, but much of the book also applies to ICSID arbitration. The sections that are specific to ICSID arbitration are the brief history of ICSID at Section 2.3.2 below and the description of the main features of ICSID in Chapter 10. 1.6

2 A brief history of arbitration

2.1 Ancient history to the birth of modern international law

International arbitration has seen enormous growth in the last 40–50 years and has unquestionably become the preferred method for resolving international commercial disputes both in the Asia-Pacific and worldwide. However, the concept of parties referring to a neutral third party of their choice for the resolution of disputes between them is very much older and dates back to ancient times. Arbitration is said to have existed ‘long before law was established, or courts were organised, or judges had formulated principles of law’.⁴ 1.7

Recourse to arbitration indeed seems natural: when two people wish to resolve a difference between them, an instinctive reaction is to turn to a mutually respected third person, such as a tribal elder. It is therefore not surprising that arbitration was practised in ancient times in all corners of the globe. 1.8

Arbitration in China can be traced back to about 2100–1600 BC.⁵ Mediation gained an even stronger foothold in China because of Confucianism. Confucius is 1.9

³ In fact, most arbitrations involving state parties are international commercial arbitrations rather than ICSID arbitrations. In 2009, for example, 78 of the ICC International Court of Arbitration’s 817 new cases involved a state or state entity. By comparison, ICSID’s total number of new cases for the year 2009 was 25. Moreover, arbitrations involving states are often entirely ad hoc, for example using the UNCITRAL Arbitration Rules, and/or partially administered by the Permanent Court of Arbitration in The Hague.

⁴ F Kellor, *American Arbitration, Its History, Functions and Achievements* 1, Harper & Brothers, 1948, p. 3. For an excellent collection of resources on the history of arbitration see D Roebuck, ‘Sources for the History of Arbitration: A Bibliographical Introduction’, (1998) 14(3) *Arbitration International* 237.

⁵ Xu Chuanbao, *Traces of International Law in Prior Qing Period*, 1931, pp. 254–255, cited in Kay Zhongjun Ch’ien, MK McCardell and H Yu, *Rights and Remedies: A Comparison of Consumer Law in China and Hong Kong*, Intern Publications by Civic Exchange, 2004, p. 20; Jingzhou Tao, *Arbitration Law and Practice in China*, 2nd edn, Kluwer Law International, 2008, p. 1 et seq briefly discusses the history of arbitration in China from 1912 onwards. For a more recent era see RK Wagner, ‘Magistrate Justice, Proto-arbitration and Foreign-trader Driven Litigation Reforms: Aspects of Commercial Dispute Resolution in Late Imperial and Early Republican

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said to have believed that conflict and litigation were sources of great disharmony which in turn damaged social relationships.⁶ Arbitration was also popular in ancient Egypt; it has been said that until about the mid-20th century, around 80% of all disputes would be settled out of court by recourse to a respected and popular elder chosen for his wisdom, integrity and standing in the community.⁷ India also has an ancient history of resolving disputes in a three-tiered structure that is comparable to modern-day arbitration. This system continued through until the British arrived in India and made significant changes to the judicial system.⁸

- 1.10 Early examples of arbitration from the West include ancient Greece, in particular for the resolution of maritime disputes with trading partners such as the Phoenicians and between Greek city states, and ancient Rome.⁹ Arbitration was the preferred method for resolving civil disputes in Europe during the Middle Ages. It was also used to resolve colonial power struggles between states, such as to define the zones of influence among colonial empires in the 15th and 16th centuries. Western states would often turn to the Pope to arbitrate such issues, giving the arbitral award an almost divine authority. Known examples include the arbitral decision rendered in 1493 by Pope Alexander VI which clarified borders between Portuguese and Spanish colonies in the Pacific Ocean and paved the way for the linguistic division of Latin America between Spanish and Portuguese.¹⁰ It also clarified land ownership division in India.¹¹ International disputes were also frequently referred to other sovereigns who acted as arbitrators in the resolution of those disputes.¹²

- 1.11 Arbitration was not without its critics as it developed in the West. Some felt that the idea of private justice was an affront to a nation state's judicial system.

China', 3 September 2008, unpublished LLM dissertation, School of Oriental and African Studies, University of London (on file with authors).

⁶ ES Reinstein, 'Finding a Happy Ending for Foreign Investors: The Enforcement of Arbitration Awards in the People's Republic of China', (2005–2006) 16 *Indiana International and Comparative Law Review* 37.

⁷ ASEl-Kosheri, 'Is There a Growing International Arbitration Culture in the Arab-Islamic Juridical Culture?', (1996) *ICCA Congress Series* 47 at pp. 47–8. See also D Roebuck, 'Cleopatra Compromised: Arbitration in Egypt in the First Century BC', (2008) 74 *Arbitration* 263.

⁸ V Raghavan, 'New Horizons for Alternative Dispute Resolution in India', (1996) 13(4) *Journal of International Arbitration* 5, at pp. 6–7. See also the transcript of a speech by the then President of India, Shri KR Narayanan: Speech by the President of India at the Inauguration of the International Council for Commercial Arbitration Conference – New Delhi, 2 March 2000; Introduction by Fali S Nariman, President of ICCA and Vice Chairman of the International Court of Arbitration of ICC, published in 17(5) *Journal of International Arbitration* 153. The President speaks of Mohandas Karamchand Gandhi and Buddha as espousing the values of arbitration.

⁹ See generally C Reus-Smit, 'The Constitutional Structure of International Society and the Nature of Fundamental Institutions', (1997) 51(4) *International Organization* 555, who discusses the use of arbitration to resolve interstate disputes; G Murray, 'Reactions to the Peloponnesian War in Greek Thought and Practice', (1944) 64 *The Journal of Hellenic Studies* 1, at p. 5; HT King and MA LeForestier, 'Arbitration in Ancient Greece', (1994) 49 *Dispute Resolution Journal* 38; D Roebuck and B de Loynes de Fumichon, *Roman Arbitration*, Holo Books, 2004; and D Roebuck, *Ancient Greek Arbitration*, Holo Books, 2001.

¹⁰ See A Gautier, *100 dates qui ont fait le monde: 3000 ans de mondialisation*, Studyrama, 2005, p. 157.

¹¹ A Gordon, *La vie du pape Alexandre VI. et de son fils Cesar Borgia*, ed. Pierre Mortier, 1732, p. 104. See also F Despagne, *Cours de Droit International Public*, ed. L Larose 1894, p. 702.

¹² PA Merlin, *Répertoire universel et raisonné de jurisprudence*, H Tarlier, 1825, p. 28. An interesting book that reproduces numerous ancient treaties in which third party sovereigns were appointed as arbitrators is WG Grewe, *Fontes Historiae Iuris Gentium/Sources Relating to the History of the Law of Nations*, Walter de Gruyter, 1995.

In England in 1609, Sir Edward Coke held that an arbitration agreement was ‘by the law and of its own nature countermandable’.¹³ More than 200 years later, a similar comment can be found in United States jurisprudence. The United States Supreme Court in 1836 somewhat patronisingly referred to an arbitral tribunal as ‘a mere amicable tribunal’.¹⁴ One US commentator reflecting on the judicial view of arbitration at that time has noted that ‘a dispute settled by an arbitrator could be appealed to an American court and essentially be treated as though it had never been investigated before’.¹⁵

The lack of specific legal recognition given to arbitrators’ decisions, and in particular the inability to enforce arbitration agreements was indeed its historical weakness. For example, the English Arbitration Act 1697 allowed either party to the dispute to withdraw its consent to arbitrate right up to the point when the arbitrator’s decision was issued. 1.12

Despite such early scepticism of arbitration, and despite its mere partial recognition and enforceability by the law, recourse was still had to it. It is interesting to note, for example, that George Washington’s will contained an arbitration clause providing that any dispute about interpretation of its wording should be resolved by a panel of three arbitrators.¹⁶ 1.13

The first international commercial arbitration of the modern era is often said to be the Alabama Claims Arbitration¹⁷ which took place in the aftermath of the American Civil War. The US claimed that Britain had violated neutrality obligations under international law by allowing the battle ship *CSS Alabama* to be constructed in Britain in full knowledge that it would enter into service with the Confederacy.¹⁸ As a consequence, the US asserted that Union merchant marine and naval forces had suffered heavy direct and indirect damages.¹⁹ After years of unsuccessful US diplomatic initiatives to obtain compensation, it was agreed in the Treaty of Washington 1871 that the claims would be resolved by a five-member arbitral tribunal sitting in Geneva.²⁰ The arbitral tribunal issued its 1.14

13 *Vynior’s Case*, 8 Cohe. Rep 81b, 82a, 77 Eng Rep 597, 599 (England, King’s Bench).
14 *Hobart v Drogan* 35 US 108 (1836) (US Supreme Court) at p. 119.
15 BL Benson, ‘An Exploration of the Impact of Modern Arbitration Statutes on the Development of Arbitration in the United States’, (1995) 11 *Journal of Law, Economics and Organization* 479, at p. 484.
16 ‘My Will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants – each having the choice of one – and the third by those two. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testators intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States.’ Cited www.gwpapers.virginia.edu/documents/will/text.html.
17 This is the name given to the claims in the Treaty of Washington 1871.
18 The *CSS Alabama*’s story, beginning with the manner in which it was commissioned and armed through to its naval battles and its ultimate demise, is extraordinary. It involves many acts of subterfuge and culminates in a sea battle witnessed by thousands of people standing on the French coastline. See, e.g. T Bingham, ‘The Alabama Claims Arbitration’, (2005) 54 *International & Comparative Law Quarterly* 1; EC Bruggink, ‘The Alabama Claims’, (1996) 57 *Alabama Lawyer* 339; EB Canfield, ‘Alabama’s Defeat Was No Surprise’, (2004) 18(4) *Naval History* 43.
19 Charles Sumner, then Chairman of the Senate Foreign Relations Committee, argued that British aid to the Confederacy had prolonged the Civil War by two years and indirectly cost the US hundreds of millions or even billions of dollars (Sumner suggested US\$2.125 billion). Some Americans adopted this argument and suggested that Britain should offer Canada to the US as compensation.
20 The arbitrator appointment process was relatively straightforward but interesting: ‘one shall be named by Her Britannic Majesty; one shall be named by the President of the United States; His Majesty the King of

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decision in September 1872, ordering Britain to pay the US some \$15.5 million²¹ in compensation for direct damages suffered. The claims for indirect damages were rejected. Unlike international arbitrations these days, delivery of the award was accompanied by a gunnery salute.

- 1.15 The Alabama Claims dispute prompted the global recognition of international arbitration and the development of certain principles of international arbitration as we know them today. It also helped trigger a movement towards codifying international law to facilitate peaceful solutions to international disputes.²² The Alabama Claims can be considered a precursor to The Hague Conventions of 1899 and 1907 (which instituted the Permanent Court of Arbitration), and perhaps even part of the inspiration for aspects of the League of Nations, the International Court of Justice and the United Nations.

2.2 Early 20th century: The birth of globalisation and international law

- 1.16 The seeds of international commercial arbitration as we know it today were sewn in the late 19th and early 20th centuries as a response to growing international trade, mainly in Europe, and the desire for an internationally enforceable, commercially sensible mechanism to resolve disputes. Robert Briner and Virginia Hamilton explain:²³

As nations increasingly affirmed their sovereignty and international trade outgrew its former structures, the dispute resolution mechanisms developed within trade associations began to prove inadequate. The group pressure that had formerly been such an effective means of ensuring enforcement of arbitral awards lost its power, and there were no specific legal means of compulsion to take its place.

- 1.17 Arbitral institutions contributed substantially to the growth of international arbitration during this period. The London Court of International Arbitration ('LCIA') was established in 1892 (then called the London Chamber of Arbitration). The *Law Quarterly Review* at that time reported that 'this Chamber is to have all the virtues which the law lacks. It is to be expeditious where

Italy shall be requested to name one; the President of the Swiss Confederation shall be requested to name one; and His Majesty the Emperor of Brazil shall be requested to name one.' (Preamble, Treaty of Washington 1872).

²¹ This would correspond to about £160 million in 2005, Bingham op. cit. fn 18. For further discussion on the Alabama claims see also S Hilmer, 'The Alabama Claims – The Origins of International Arbitration', (2008) July *Asian Dispute Review* 87.

²² According to one leading international arbitrator, the peace movement of the late 19th and 20th centuries 'considered international adjudication and arbitration as a substitute for war in settling international conflicts', K-H Böckstiegel, 'The Role of Arbitration within Today's Challenges to the World Community and to International Law', (2006) 22(2) *Arbitration International* 165, at p. 171.

²³ R Briner and V Hamilton, 'The History and Purpose of the [New York] Convention' in E Gaillard and D Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards, the New York Convention in Practice*, Cameron May, 2008, p. 3. See also Yasuhei Taniguchi, 'Is There a Growing International Arbitration Culture? – An Observation from Asia', (1996) 8 *ICCA Congress Series* 31, at pp. 38–39.

the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife.’²⁴ The LCIA was followed by establishment of the Chartered Institute of Arbitrators in 1915. The first edition of the Institute’s journal *Arbitration*, published in February 1916, reported that it was formed ‘at the instance of members of those professions whose services are usually invoked for the purpose of acting as Arbitrators in commercial matters . . . with a view to their corporate association, both for their own benefit and the interest of the general public’.²⁵

The International Chamber of Commerce (‘ICC’) was established in 1919 by a group of international businessmen who called themselves ‘Merchants of Peace’. They quickly realised that an effective mechanism for resolving international business disputes would foster growth in international commerce and assist in achieving world peace. The ICC began administering international disputes in 1921 and had dealt with 15 such cases before the ICC International Court of Arbitration (‘ICC Court’) was created in 1923. The ICC Court’s mission was to foster international trade by providing a framework for the resolution of international commercial disputes. 1.18

Various ICC congresses in the early 1920s called strongly for better legal recognition of arbitration, which was rapidly gaining popularity among international businessmen. The following resolution was adopted at an ICC Congress in Rome in March 1923:²⁶ 1.19

The International Chamber of Commerce considers that for the purpose indicated in the preceding resolutions it is desirable that one or more international conventions should be negotiated with the least possible delay, to embrace the largest possible number of States, particularly those of commercial importance. Such conventions should pledge the contracting States to recognise and make effective arbitration clauses in international commercial contracts, and to provide that if two parties of different nationalities agree to refer disputes that may arise between them to arbitration, an action brought by either party in any country shall be stayed by the Court, provided that the Court is satisfied that the other party is, and has been, willing to carry out the arbitration.

This and other pressure prompted the League of Nations to adopt the 1923 Geneva Protocol on Arbitration Clauses, the first genuine international treaty specifically concerned with commercial arbitration. It provided for the recognition of arbitration agreements and awards. It also offered a mechanism for the enforcement of an arbitral award in the jurisdiction that it was made, but did not facilitate the enforcement of an arbitral award made outside the enforcing jurisdiction, i.e. foreign arbitral awards. Foreign awards, if recognised at all, 1.20

²⁴ E Manson, ‘The City of London Chamber of Arbitration’, (1893) 9 *Law Quarterly Review* 86.
²⁵ (1916) 1(2) *Arbitration* 2.
²⁶ International Chamber of Commerce, Resolutions Adopted at the Second Congress, Rome, March 1923, Brochure no. 31, at 37, cited in Briner and Hamilton, op. cit. fn 23, p. 5. Briner and Hamilton provide a captivating account of the lobby for legal recognition of arbitration during this period.

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were subjected to various national enforcement procedures depending on the law of the state in which enforcement was sought.

- 1.21 The Geneva Protocol was followed by the much wider 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. This convention sought to improve on the 1923 Geneva Protocol by extending the scope of the recognition and enforcement of awards to all contracting states. In other words, it was not limited to enforcement of awards made in the enforcing court's own state (as was the case under the 1923 Geneva Protocol). While this assisted with the enforcement of foreign awards, a significant weakness of the two Geneva conventions was that neither the US nor USSR were parties. In addition, the language of these treaties was far from ideal, with various shortcomings and unclear provisions.²⁷ Neither of these treaties has much practical effect today, either in the Asia-Pacific or elsewhere, because they have been superseded by the New York Convention.²⁸

- 1.22 A particularly interesting example of an international arbitration in the pre-World War Two period is the *Abu Dhabi* oil case.²⁹ It concerned an oil concession granted by the Sheik of Abu Dhabi to a foreign private company in 1939. The dispute arose over the geographical limits of the concession holder's oil extraction rights. The two arbitrators appointed under the arbitration agreement chose Lord Asquith as their 'umpire' because they could not agree on the outcome of the case. Lord Asquith made a controversial decision regarding the law applicable to the dispute. While acknowledging that Abu Dhabi law would ordinarily apply since the contract was signed and to be performed in Abu Dhabi, Lord Asquith concluded that:³⁰

[the Sheik, an] absolute, feudal monarch . . . administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments.

- 1.23 Applying 'principles rooted in the good sense and common practice of the generality of civilised nations – a sort of "modern law of nature"',³¹ Lord Asquith determined that the subsoil of the territorial belt was included in the concession agreement. In favour of the Sheik of Abu Dhabi, however, Lord Asquith found that the concession holder had no rights with regard to the subsoil outside the territorial belt on the Continental Shelf.

²⁷ Briner and Hamilton, op. cit. fn 23, pp. 7–8; A Redfern, M Hunter, N Blackaby and C Partasides, *Law and Practice of International Commercial Arbitration*, 4th edn, Sweet and Maxwell, 2004, paras 1–146, 3–4 and 10–22. See also V Petocha, 'Geneva Convention on the Execution of Foreign Arbitral Awards', (1986–1987) 1 *World Arbitration Reporter* 11.

²⁸ Article VII(2) of the New York Convention states that 'The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention'. For domestic legislation implementing these treaties see, as an example, Sections 53–60 of the Indian Arbitration and Conciliation Act 1996.

²⁹ *Petroleum Dev (Trucial Coast) Ltd v Sheikh of Abu Dhabi* (award of 28 August 1951), reprinted in (1952) 1 *International and Comparative Law Quarterly* 247.

³⁰ *Ibid.*, at 250–251.

³¹ *Ibid.*, at 251.

Lord Asquith’s award was made from an excessively Western perspective and would not be acceptable in the globalised world of international arbitration today. 1.24

2.3 Post-World War Two: Development of a framework for international arbitration

The outbreak of World War Two halted international business. However, its immediate aftermath saw huge economic growth and trade, particularly from the 1950s onwards when global commerce between private parties began to flourish. This was stimulated by various post-war initiatives at the international level, including the establishment of the International Bank for Reconstruction and Development (later renamed the World Bank) and International Monetary Fund in 1944; and the establishment of the General Agreement on Tariffs and Trade (usually called the ‘GATT’) in 1947. 1.25

2.3.1 1958 New York Convention

Perhaps the most important milestone in the entire history of international commercial arbitration was the adoption of the New York Convention. Its completion in 1958 cannot be viewed in isolation as a sudden act of innovation. It was a product of the developments described above and further lobbying by the international business and legal communities since the early 20th century. 1.26

The ICC played a significant role in the lobbying process of the 1950s, including submitting to the United Nations a ‘Preliminary Draft Convention’ on the recognition and enforcement of international arbitral awards and agreements.³² The ICC’s proposal for an international award that was not subject to any control by the courts of the place of arbitration proved to be unacceptable to most states. The United Nations Economic and Social Council (‘ECOSOC’) instead produced its own draft convention for the enforcement of foreign awards.³³ ECOSOC’s draft was debated by representatives of some 40 countries at the ‘Conference on International Commercial Arbitration’, also known as the New York Conference, held at United Nations Headquarters in New York from 20 May to 10 June 1958.³⁴ After the first week of this conference, the Dutch delegation submitted a substantially altered version of Articles III to V of the ECOSOC draft.³⁵ Thereafter, 1.27

³² See AJ van den Berg, *The New York Convention of 1958: Towards a Uniform Interpretation*, Kluwer Law International, 1981, p. 7 and Briner and Hamilton, *op. cit.* fn 23, pp. 8–9.

³³ United Nations Economic and Social Council, Draft Convention on the Enforcement of Foreign Arbitral Awards, UN Doc E/2704 and Corr 1.

³⁴ See generally Briner and Hamilton, *op. cit.* fn 23, pp. 13–19. For the Summary Records of the New York Conference, see UN Doc E/Conf 26/SR 1–25; and for other preparatory materials of that conference, including suggested amendments to the ECOSOC draft and reports of the Working Parties, see UN Doc E/Conf 26/7 and L 7–63. These documents are reproduced in G Gaja, *International Commercial Arbitration: The New York Convention*, Oceana Publications Inc, 1978–1980, Part III. See also www.uncitral.org.

³⁵ United Nations Economic and Social Council, United Nations Conference on International Commercial Arbitration, ‘Consideration of the Draft Convention on the Recognition and Enforcement of foreign arbitral Awards (Item 4 on the Agenda) – Netherlands: amendments to Draft Convention; UN Doc /CONF.26/L.17 (26 May 1958).

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the conference continued its deliberations using the Dutch proposals as the basis for discussions. A Working Party was appointed and prepared a revised draft in the light of the discussions.³⁶ That version, with some further modifications, was adopted by the conference on 10 June 1958 by 35 votes to none, with four abstentions.³⁷

1.28 The final text of the New York Convention was not quite as business-friendly as some lobbyists might have wished, but was nonetheless a remarkable achievement given the diversity of cultural and political interests that ultimately consented to it.

1.29 The New York Convention facilitates the recognition and enforcement of foreign arbitral awards and agreements. It is said to have a pro-enforcement bias. There are many reasons for this bias but two are paramount. First, a major object and purpose of it is 'to encourage and liberalise the process of recognition and enforcement of awards by decreasing the scope for obstruction by national courts and laws'.³⁸ The second reason is due to the principle of comity. As Justice Prakash stated in the Singapore High Court decision of *Hainan Machinery Import & Export Corporation v Donald & McArthy Pte Ltd*:³⁹

the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist. As a nation which itself aspires to be an international arbitration centre, Singapore must recognise foreign awards if it expects its own awards to be recognised abroad.

1.30 If the party against whom enforcement of an award is sought does not resist enforcement, the procedure should be very straightforward and akin to quasi-administrative proceedings.⁴⁰ There are very limited grounds in Article V on which a party can resist enforcement.⁴¹

1.31 Twenty-five states were parties to the New York Convention by the end of 1958. Since then, numerous others have signed, bringing the total number of parties at the time of writing to approximately 145.⁴² States seeking to portray themselves as players on an international commercial market, and wishing to attract foreign investment, readily adopted it. The growing number of parties meant that the New York Convention in turn expanded its geographical reach and, consequently, the advantages that it offered. It became vital to the expansion of cross-border trade and investment and caused a dramatic shift in the way that

36 United Nations Economic and Social Council, United Nations Conference on International Commercial Arbitration, Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Item 4 on the Agenda), UN Doc E/CONF.26/L.43 (New York Convention draft of Working Party no. 3) (3 June 1958).

37 United Nations Economic and Social Council, United Nations Conference on International Commercial Arbitration, Summary Record of the Twenty-fourth Meeting, UN Doc E/CONF.26/SR.24 (12 September 1958).

38 R Garnett and M Pryles, 'Recognition and Enforcement of Foreign Awards under the New York Convention in Australia and New Zealand', (2008) 25 *Journal of International Arbitration* 899, at 904.

39 [1996] 1 SLR 34, at para 45; (1997) XXII *Yearbook of Commercial Arbitration* 771. See also *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 1 HKLRD 665.

40 These are the words of Lord Justice Rix in *Gater Assets Ltd v Nak Naftogaz Ukrainiy* [2007] 2 Lloyd's Rep 588 at 603, para 72.

41 Enforcement of awards is dealt with briefly below at Section 3.4.6, and in much more detail in Chapter 9.

42 A list of parties to the New York Convention is provided at Appendix 4.