CHAPTER 3
INTERNATIONAL ARBITRATION

3.1 Introduction

Over the course of the 20th century, the commercial world became international in every sense of the word, and no other industry reflects this globalisation better than the energy sector. It is as common to find a major Nigerian oil company contracting with a large French exploration organisation as it is to find an English construction firm dealing with a Russian power plant owner, or a Chinese state-owned enterprise setting up a joint venture with a Chilean mining company.¹

The oil industry illustrates why energy disputes need a dispute resolution procedure that takes into account the international flavour of commerce. Historically, oil-rich countries may not have had the technology, capital and management skills to find and extract oil and the major corporations had greater power to insist on disputes being resolved in the courts of the home nations. The creation of the Organisation of the Petroleum Exporting Countries in the 1960s allowed petrostates to start their own state-backed national oil companies to take charge of reserves, and the sector has seen the emergence of the likes of Saudi Aramco, National Iranian Oil Company and Kuwait Oil Company as dominant players in the industry. This shift in the balance of power means that the international community is operating on a markedly more level playing field.²

In addition to securing a neutral venue, choosing arbitration creates greater opportunities for the enforcement of awards than can be obtained in relation to national court litigation.³ The reason for this is the enforcement framework provided by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.⁴ Parties can select arbitrators with expertise in the relevant industry or subject matter of the underlying commercial contract; they can choose the language in which the proceedings will be conducted. Arbitration also offers greater

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² Ibid.
³ Ibid.
⁴ Ibid.
procedural flexibility compared with court proceedings, and is generally private and confidential; disputes can be resolved faster because the possibility of appeals is limited, and sometimes the costs can be lower.\textsuperscript{5}

Therefore, parties regularly demand dispute resolution procedures that recognise the international context of their industries and do not favour one party over another. Submitting disputes to the national courts of either party can now be an unpalatable option for both sides. The public forum of court litigation may also prove undesirable in the competitive world of energy, where commercial terms need to be kept secret.\textsuperscript{6}

Redfern and Hunter note that “there is now a consensus in the business International arbitration community that arbitration is the principal method of resolving international disputes”.\textsuperscript{7} States have modernised their arbitration laws to accommodate this growing trend and parties are including arbitration clauses in high-value contracts with increasing regularity.

The International Chamber of Commerce Court of Arbitration (ICC) received:

- 529 requests for arbitration in 1999, involving 1,354 parties from 107 different countries and territories and arbitrators from 57 different countries;
- 593 requests for arbitration in 2006, involving 1,613 parties from 125 different countries and territories and arbitrators from 71 different countries; and
- 793 requests for arbitration in 2010, involving 2,145 parties from 140 different countries and territories and arbitrators from 73 different countries.\textsuperscript{8}

### 3.2 Arbitration in the Energy Sector

Arbitration is the dispute resolution mechanism of choice in the energy sector. Parties regularly include arbitration clauses in joint venture agreements, joint operating agreements, production sharing contracts, construction contracts and commodity export contracts. The Association of

\textsuperscript{5} Ibid.
\textsuperscript{6} Ibid.
\textsuperscript{7} Alan Redfern, Martin Hunter, \textit{et.al}, \textit{Redfern and Hunter on International Arbitration}, 439 (oxford university press oxford, 2009).
International Petroleum Negotiators also has arbitration as the standard form of dispute resolution in all of its main standard agreements, including:⁹

- the Study and Bid Group Agreement 2006;
- the Farm-Out Agreement 2004;
- the Joint Operating Agreement 2002;
- the Unitisation and Unit Operating Agreement;
- the Gas Sales Agreement; and
- the Gas Transfer Agreement.

In addition to any contractual rights to arbitration, bilateral investment treaties (and multilateral investment treaties) provide investors in contracting nations with the opportunity to bring an arbitration against a state (or state entity) for any acts that breach the agreement to protect investments in that state by investors from the counter-signatory state.

Claims relating to project management have also been referred to arbitration. In ICC Case 11663 a company had failed to pay cash calls and to provide letters of credit on time or in the correct form to the oil ministry of the country in which the oil exploration and production project was being carried out.⁻ Its counterparties in the shared management agreement and participation agreement successfully sought a declaration that it had forfeited its interest in the project as a result.

In Joint Venture Yashlar v Government of Turkmenistan a joint venture partner claimed (unsuccessfully) that its partner’s drilling of two exploratory wells was so incompetent that it constituted a repudiation of the joint venture agreement.¹¹ The tribunal was also asked to consider whether the contract had been frustrated macroeconomic and geopolitical changes which made it impossible for the joint venture to sell gas on the international markets.

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3.3 What is International Arbitration?

3.3.1 Key Aspects

Arbitration is a consensual and binding procedure for resolving disputes. It serves as an alternative, rather than a supplement, to litigation through the courts and provides autonomy to the parties over all aspects of the proceedings. As the parties control the manner in which the dispute will be resolved, they are free to agree or the law that will govern the arbitration, the venue of the hearing, the procedural rules (if any) that will guide them through the dispute and, importantly, the identity’ of the individual or individuals who will decide on the dispute.12

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As arbitration is consensual, it arises only out of an agreement between the parties that a particular dispute will be resolved by arbitration rather than through the courts. Typically, that agreement may be contained in the main contract (eg, the joint operating agreement, the production sharing contract and the engineering procurement and construction contract). More rarely, after a dispute has arisen the parties may agree to refer that particular dispute to arbitration.14

Once the parties have agreed to refer disputes to arbitration, they cannot unilaterally withdraw their consent. Furthermore, an arbitration agreement will survive termination of the contract in which it is contained so that if that contract comes to an end, the right to arbitrate any dispute that arises from that contract will still exist.15

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13 Supra note 1 at 25.
14 Ibid.
15 In English law, this was established by Heyman v Darwins [1942] 1 All ER 337 and Confirmed in Fion Trust & Holding Corporation v Yuri Privalov [2007] EWCA Civ 20. It is also in Section 7 of the English Arbitration Act 1996. It is further recognised in Article 16 of the United Nations Commission a International Trade Law (UNCITRAL) Model Law. All of the major procedural rules recognise this principle - for example, see Article 6.9 of the ICC Rules; Article 23 of the London Court of Internations Arbitration (LCIA) Rules; Article 15.2 of the American Arbitration Association (AAA) Rules; Article 23 of the UNCITRAL Rules; and Article 21.2 of the Swiss Rules.
The terms of the arbitration agreement are critical and most national arbitration laws require the arbitration agreement to be in writing in order to ensure certainty of those terms.\(^{16}\) This reflects the fact that the terms of the arbitration, in relation to both the procedure and the choice of law, derive from the parties’ agreement, and therefore those terms must be clearly defined. In particular, an arbitration agreement should make clear which national laws will govern the substance and procedure of the dispute and identify which procedural rules (if any) the parties wish to adopt.\(^{17}\)

The effectiveness of arbitration depends largely on the willingness of the court to accept the parties’ decision to refer their dispute to arbitration. As a result, 146 countries have ratified the New York Convention. Notable exceptions to the list of contracting states in the energy sector are Libya, Iraq and a large number of central and eastern Africa states.\(^{18}\)

The New York Convention is the bedrock of international arbitration. It obliges contracting states to recognise a written arbitration agreement, and therefore, at the request of one of the parties, to stop any proceedings that are brought in the courts in breach of a due process arbitration agreement. The New York Convention also obliges the national courts of contracting states to enforce awards that are made in other contracting states, unless:

- those courts deem the award to be against public policy;
- the subject matter of the dispute is not capable of settlement by arbitration in that state; or
- the award is invalid for one of the reasons set out in Article V.\(^{19}\)

### 3.3.2 Laws Governing the Arbitration

A defining characteristic of the international nature of arbitration is that parties may be subject to a possible four different governing laws to fit their circumstances and requirements.

First, they may choose a governing law for the substantive dispute. This could be either a national law or international general principles such as the UNIDROIT (International Institute for the Unification of Private Law)’ Principles of International Commercial Contracts. The tribunal

\(^{16}\) A notable exception is France, which has no formal requirements for arbitration agreements (Article 1507 of the French Code of Civil Procedure).

\(^{17}\) Supra note 1 at 25.

\(^{18}\) Id., at 26.

\(^{19}\) Ibid.
will then be obliged to refer to this law in making its award on the merits of the dispute. Parties are strongly encouraged to select a governing law. If they fail to do so, the arbitrators will select a governing law. For arbitrations with a London seat, this power is found in Section 46(3) of the Arbitration Act 1996, under which the tribunal is to apply the law determined by the choice of law rules which it considers applicable.\(^{20}\)

In practice, parties\(^{21}\) frequently agree to the substantive law of a ‘neutral’ state — that is, a state other than the states of incorporation of the contract parties. In the energy sector, parties sometimes opt for the national laws of a host state qualified by a reference to consistency with general principles of law. Such compromise formulations may give limited comfort in terms of predictability of outcome. Arbitral tribunals have interpreted such clauses either from a perspective which entirely ignores the reference to the national law (as in the case of the two sole arbitrators in the Texaco\(^{22}\) and BP\(^{23}\) arbitrations brought against Libya following the cancellation of oil concessions), or by straining to ignore the reference to general principles and apply the national law without qualification.

Another well-known example of compromise between competing possible choices of governing law is represented by the Channel Tunnel construction contract, where the parties agreed to “the principles common to both English and French law, and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals”.\(^{24}\) The parties spent huge amounts arguing over what principles were common to English and French law.

Second, it is important that parties give careful consideration to the juridical seat of the arbitration, as this will dictate the law governing the arbitration proceedings (the ‘lex arbitri’). Major examples of national laws are the English Arbitration Act 1996, the US Federal Arbitration Act, the French Code of Civil Procedure (Articles 1504 to 1527), the German Code of Civil Procedure (Articles 1025 to 1066) and the Singapore International Arbitration Act. Most national laws are based on

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\(^{20}\) \textit{Ibid.}.

\(^{21}\) International Institute for the Unification of Private Law.


the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, which is widely recognised as the common standard. If a national law departs significantly from the Model Law, parties should be wary of agreeing that country as the seat for arbitration.\textsuperscript{25}

The \textit{lex arbitri} has significant implications for:

- the laws governing the definition and form of an arbitration agreement;
- the jurisdiction of a tribunal to hear a dispute;
- the identity of the relevant courts to which parties should apply for interim applications;
- the ability of the courts to supervise the arbitration (eg, to remove an arbitrator for misconduct);
- the right of the parties to appeal any award; and
- the nationality of the award for enforcement purposes.\textsuperscript{26}

The \textit{lex arbitri} also confirms which national laws will provide the procedural framework within which the arbitration should work, in conjunction with any institutional procedural rules that the parties adopt. For reasons of public policy, many national laws contain mandatory provisions out of which the parties cannot contract.\textsuperscript{27}

Notwithstanding the importance of choosing a seat, if the parties choose one of the major institutional procedural rules (eg, the ICC Rules, the Singapore International Arbitration Centre (SIAC) Rules or American Arbitration Association (AAA) Rules) but fail to select a seat, the institutional court or tribunal will have the power to designate a seat and will, in most cases, choose a recognised and neutral place. In the case of the London Court of International Arbitration (LCIA), London will be designated as the seat unless the institutional court considers it appropriate to be elsewhere.\textsuperscript{28}

\textsuperscript{25} Supra note 1 at 27.
\textsuperscript{26} See below for further discussion on the enforcement of arbitral awards.
\textsuperscript{27} For example, Schedule 1 of the English Arbitration Act 1996 sets out the mandatory provisions which relate to the courts’ ability to remove arbitrators, the duties of the tribunal and the parties, the enforcement of arbitral awards and the parties’ ability to challenge an award on the grounds of lack of jurisdiction or serious irregularity.
\textsuperscript{28} Article 16.1 of the LCIA Rules.
With the comprehensive institutional procedural rules of the ICC, the SIAC, the AAA and the LCIA becoming increasingly authoritative and widespread, it may be questioned whether the lex arbitri is as significant as it might have been historically.\textsuperscript{29}

While this could be true for the procedural effects, the law of the arbitration proceedings still has considerable importance in the context of disputes which have a substantive law of a state whose courts have been unsupportive of arbitration. In that situation, it is essential that the seat is in an arbitration-friendly state.\textsuperscript{30}

Although parties may select a seat for arbitration, this does not mean that they must hold hearings at that location. It is not uncommon, for example, to have the seat of arbitration as London but, as a matter of convenience, to have some or all oral hearings in a different country. Many of the major institutional rules make it clear that the tribunal may decide to hold hearings at any venue that it deems appropriate, which may be different from the seat. Therefore, the parties should be aware that even though the arbitration is physically held in a particular country, this does not necessarily mean that the juridical seat is the same.\textsuperscript{31}

Finally, the parties must also have regard to the law of the country in which they want to enforce an award. Most commonly, this will be wherever the counterparty has most of its assets. The New York Convention obliges any signatory country to enforce an arbitral award where the seat of that arbitration is also a signatory country. However, the national courts that are requested to enforce an award may refuse to do so if the subject matter of the dispute is not capable of settlement by arbitration under the law of that country or if enforcement would be contrary to public policy of that country.\textsuperscript{32}

### 3.3.3 Procedural Rules

In addition to the national laws that govern the arbitration, the parties can elect to incorporate procedural rules which provide a framework in which the arbitration proceedings will be conducted. The use of institutional rules can add political or moral weight to awards so that if a court is asked to consider the procedural propriety of an award, it is less likely to set it aside.

\textsuperscript{29} Supra note 1 at 27.

\textsuperscript{30} Id at 28.

\textsuperscript{31} Ibid.

\textsuperscript{32} Article V (2) of the New York Convention.
Institutional rules are also beneficial on a practical level, as they are designed to regulate the proceedings comprehensively from beginning to end and they contemplate contingencies that might arise, but which parties may have not anticipated themselves. Parties can also avoid the time and expense of drafting lengthy procedural rules from scratch and the fees and expenses of the arbitration are already defined, so no further negotiation is required.\textsuperscript{33}

There are now several established sets of institutional rules that parties might adopt. In particular, the ICC, LCIA and Stockholm Chamber of Commerce (SCC) Rules are regularly used by parties in Central Europe, while the SIAC Rules are commonly incorporated where the seat of arbitration is in Southeast Asia.\textsuperscript{34} Arbitrations in the United States usually adopt the AAA Rules and Chinese proceedings are likely to be conducted under the auspices of the Chinese International Economic and Trade Arbitration Commission. Alternatively, parties may not want to be restricted by the institutional rules and may elect to proceed on an ad hoc basis. In that situation, the parties should agree a set of procedural rules for the arbitration themselves and it is common to refer to the UNCITRAL Rules for guidance.\textsuperscript{35}

Choosing an institution is largely governed by parties’ familiarity with particular rules or by opinion of the international acceptability or reputation of a given institution. According to the 2008 International Arbitration Study conducted by Queen Mary College, University of London, 45% of parties expressed a preference for the ICC as the institutional body, 16% chose the AAA and 11% selected the LCIA.\textsuperscript{36}

The various institutional rules are largely similar and provide the framework for conducting an arbitration. Broadly, they set out how to start an arbitration, how the tribunal should be constituted, the obligations of the parties and the tribunal, the manner in which pleadings, witness statements and expert reports should be exchanged, the conduct of the hearing and the details of issuing awards.\textsuperscript{37}

\textsuperscript{33} Supra note 1 at 28.
\textsuperscript{34} Ibid.
\textsuperscript{35} Ibid.
\textsuperscript{36} Queen Mary University of London School of Arbitration available at: www.arbitrationonline.org/research/ArbitrationInstStat/index.html. (Visited on 10 March, 2014).
\textsuperscript{37} Supra note 1 at 29.
However, differences do exist between the sets of rules. For example, the ICC Rules provide for an emergency arbitrator to be appointed before the constitution of the tribunal to hear any urgent applications for interim or conservatory measures.38

The emergency arbitrator does not then have to be a member of the tribunal that is appointed to decide the dispute. In contrast, the LCIA has a procedure for expedited tribunal formation. That tribunal remains in place to hear the dispute proper. Another area where they differ is in relation to fees. The differences can be significant. For example, the LCIA calculates fees by reference to daily or hourly rates; the ICC and the AAA assess the arbitrators’ fees by reference to the amount in dispute. In very high-value disputes this means that an ICC arbitration can cost the parties materially more than one conducted under the auspices of the LCIA.39

3.3.4 Selection of Arbitrators

In arbitration proceedings, the parties can choose whom they want to resolve the dispute. Normally, the parties will select either one or three arbitrators depending on the size and complexity of the dispute. If the parties are unable to agree on the identity of arbitrators, the major institutional rules provide that the institution itself will make the appointment.40

To avoid reverting to the institutional rules position, or if no rules have been incorporated, the parties should set out in their arbitration agreement how they want to appoint the arbitrators. They are free to choose anyone they deem fit, or they may wish to restrict the choice to individuals with relevant expertise in the particular field. Individuals appointed to serve as arbitrators must be impartial. Certain institutional rules also stipulate that the arbitrator shall be independent of the parties. For example, the arbitration agreement might state that the parties should choose an arbitrator with at least 15 years’ experience in the oil industry, or that the arbitrator must be a member of the Institute of Chartered Engineers.41

If the parties agree to three arbitrators, each party can nominate one of the arbitrators, ensuring that at least one of the arbitrators is familiar with the national or legal culture of the

38 Ibid.
39 Ibid.
41 Supra note 1 at 29.
country where the relevant party is based. However, the arbitrator is not an advocate of the appointing party in the deliberations of the arbitral tribunal. Appointing three arbitrators is often perceived as a ‘safer’ option as they are less likely to produce a maverick decision. When there are limited grounds for appeal, as is often the case in arbitration, this is an important consideration. Indeed, the institutional arbitration rules typically exclude any right of appeal against an arbitration award on its legal or factual merits.\textsuperscript{42}

The nomination of arbitrators is not always straightforward in energy disputes. If there are several parties to, for example, a joint operating agreement or a production sharing contract, then it is important to ensure that the arbitration agreement is drafted to allow the parties that comprise the claimant or the respondent to agree jointly the selection of the nominated arbitrator. For example, if Party A, Party B and Party C agree a joint operating agreement and an arbitrable dispute arises under that joint operating agreement such that Party A and Party B wish to make a claim against Party C, then Party A and Party B will have to agree on the nomination of the arbitrator to be appointed by the claimant. They cannot make separate nominations. The major institutional rules include provisions to account for this situation and provide that, in the absence of an agreement between the parties comprising the claimant or respondent, the institution itself will appoint all arbitrators.\textsuperscript{43}

3.3.5 Conduct of Proceedings

The essence of arbitration is that the parties have significant influence over the conduct of proceedings. However, the institutional rules all provide for a similar format and it is common practice for the parties to follow those procedures, whether by incorporation of the rules themselves or by using the rules as a template to adapt according to the parties’ particular requirements.\textsuperscript{44}

An arbitration is generally commenced by the claimant serving a request or notice for arbitration at the procedural institution (with the relevant filing fee) or, if no institution has been

\textsuperscript{42} Supra note 1 at 30.  
\textsuperscript{43} Supra note 1 at 30.  
\textsuperscript{44} Ar. Gör. Şeyda Dursun, a critical examination of the role of party autonomy in international commercial arbitration and an assessment of its role and extent, 108 Yalova Üniversitesi Hukuk Fakültesi Dergisi (2012/1).
agreed, on the other party. The institutional rules set out the requirements for the contents of the request or notice for arbitration and include various formalities such as:

- the names and addresses of the parties;
- a description of the dispute;
- their nomination of arbitrator (in accordance with any requirements stipulated in the arbitration agreement);
- the relief sought; and
- the arbitration agreement itself.\(^{45}\)

The request is not intended to be a comprehensive statement of case, but should be a summary of the claimant’s position. It need not be accompanied by any witness statements or expert reports.

The respondent then typically has 30 days to respond, if it wishes, from the date that it receives the request or notice from the institution (if any) or the other party. The institutional rules also contain the formal requirements for the response and include the respondent’s position on the claims put forward and its nomination of arbitrator (in accordance with any requirements stipulated in the arbitration agreement).\(^{46}\) The respondent should also put forward any counterclaims that it wishes to raise in the response. As with the request, the response is not intended to be a comprehensive statement of case, but should be a summary of the respondent’s position, and need not be accompanied by any witness statements or expert reports.

The claimant may then want to serve a reply to any counterclaims raised by the respondent. If so, some institutional rules stipulate that it shall do so within 30 days of receipt of the response.\(^{47}\)

If the parties have agreed to have three arbitrators, and the two nominated by the parties are free and willing to act, then a third will be appointed in accordance with the procedure under the arbitration agreement. The institutional rules typically provide that the institute will appoint the third arbitrator, who will act as the chairman.\(^{48}\) If the parties are unable to decide on their

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\(^{45}\) See Article 4 of the ICC Rules; Article 1 of the LCIA Rules; Article 2 of the AAA Rules; Article 2 of the SCC Rules and Article 3 of the UNCITRAL Rules.

\(^{46}\) See Article 5 of the ICC Rules; Article 2 of the LCIA Rules; Article 3 of the AAA Rules; Article 5 of the SCC Rules and Article 19 of the UNCITRAL Rules.

\(^{47}\) See Article 5(6) of the ICC Rules and Article 3(2) of the AAA Rules.

\(^{48}\) See, Article 8(4) of the ICC Rules; Article 5.6 of the LCIA Rules and Article 13(3) of the SCC Rules.
respective nominations, the institution (if incorporated into the arbitration agreement) will decide instead.\footnote{See, Article 8(4) of the ICC Rules; Article 7.2 of the LCIA Rules; Article 6(3) of the AAA Rules and Article 13 of the SCC Rules.}

If the parties have nominated the ICC to preside \textsuperscript{2} over the arbitration, the tribunal (once constituted) will seek to agree the terms of reference with the parties as soon as possible after it receives the parties’ request, response and reply (if any). The terms of reference set out the details of the parties and their claims, the seat of arbitration and the details of the arbitrators. No new claims may be raised by either party once the terms of reference have been signed without the permission of the tribunal.\footnote{See, Article 23 of the ICC Rules. 22 See Article 16 of the AAA Rules and Article 23 of the SCC Rules.}

Other institutional rules do not provide for an equivalent to terms of reference, but stipulate that the tribunal will draw up a procedural timetable in consultation with the parties, normally at a preliminary hearing.\footnote{Supra note 1 at 31.} At the preliminary hearing, the parties should consider how many rounds of submissions they wish to make and whether they wish to adopt a memorial-based system, whereby witness statements, expert reports and documentary evidence are all served with the statement of case; or would prefer an approach familiar to common law court systems of serving statements of case, providing disclosure of documents, serving witness statements and expert reports sequentially. It is also advisable to try to agree a date for a hearing well in advance, as the tribunal and the parties will find that the coordination of diaries can cause frustrating delays.\footnote{Ibid.}

At the preliminary hearing, the parties may also wish, and commonly do, to agree to incorporate the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration. These rules provide authoritative and trusted guidelines for the submission of statements of case, witness statements, expert reports and documentary evidence in international arbitration proceedings, and are regularly adopted throughout the world.\footnote{Ibid.}

The claimant will typically submit its statement of case with all documents on which it relies (in accordance with the IBA Rules), including any witness statements and expert reports, by
the date stipulated in the procedural timetable. This is also the procedure laid down by the ICC Rules of Arbitration.

The respondent will then submit its memorial with all documents on which it relies by the date stipulated in the procedural timetable.

A typical procedural timetable will provide that, following the first round of submissions, the parties will submit their requests to produce in relation to documents believed to be held by the other party. This is a contrast to disclosure in civil litigation and may be a shock to those more familiar with the US-style process of discovery. The IBA Rules set out a procedure for making requests to produce, and require the parties provide a sufficient description of the requested documents to identify them and a statement as to why those documents are relevant or material to the outcome of the case. If one party objects to a request, the tribunal rules on the disputed request.54

One purpose of the IBA Rules is to prevent ‘fishing expeditions’ by either party. A criticism of the wide disclosure in common law litigation is that court procedures oblige parties to produce all documents that may be relevant to either side’s case, and therefore vast quantities of documents may be provided, escalating the costs of the proceedings. The request to produce is intended to limit the number of documents that are exchanged to those that each party can identify as existing and that are likely to be directly relevant to the outcome of the case.55

Following the exchange of documents, which can become somewhat protracted if the parties raise numerous objections requiring a ruling by the tribunal, the parties may agree to a second round of submissions. These should be limited to responding to points made in the first round, rather than a repetition of points already made.56

Finally, the parties will attend an oral hearing on the dates agreed at the preliminary hearing. The extent of pre-hearing written pleadings is greater in arbitration practice than in many common law court systems. The oral hearing is the occasion for testing the evidence submitted by witnesses and considering the opinion evidence put forward by experts. During the hearing, the

54 Id., at 31.
55 Ibid.
56 Ibid.
fact and expert witnesses are cross-examined. The hearing is conducted in private (unless agreed otherwise).\textsuperscript{57}

### 3.3.6 Enforcement

Arbitration awards are intended to be binding and the parties will carry out the decision made in an award without delay.\textsuperscript{58} This is also an express term in the major institutional rules.\textsuperscript{59}

In general, parties abide by awards without requiring recourse to the courts. A study by the School of International Arbitration at Queen Mary, University of London suggests that only 11\% of arbitrations require enforcement proceedings and of those, only 20\% encounter difficulties in enforcement.\textsuperscript{60}

In theory, the enforcement of arbitration awards should be relatively straightforward. Under Article III of the New York Convention, the national court: of signatory countries are obliged to enforce any arbitral award issued in a fellow signatory country, unless those courts deem the award to be invalid for one of the following reasons under Article V:

- The parties were under some incapacity or the agreement was invalid under the law of the arbitration agreement or the seat;
- The party against which the award was made was not given proper notice of the appointment of the arbitrator or the arbitration proceedings;
- The award deals with a dispute that falls outside the scope of the arbitration agreement;
- The tribunal was not composed in accordance with the arbitration agreement; or
- The award is not binding or has been set aside by a competent authority at the seat of arbitration.

\textsuperscript{57} Ibid.
\textsuperscript{59} See, Article 28(6) of the ICC Rules; Article 27(1) of the AAA Rules; Article 26.9 of the LCIA Rules; Article 40 of the SCC Rules and Article 32 of the UNCITRAL Rules.
\textsuperscript{60} Study by School of International Arbitration and Queen Mary, University of London (sponsored by PricewaterhouseCoopers L.I.P), entitled “International Arbitration: Corporate attitudes and practices 2008” pp 8 and 10, cited in \textit{Redfern and Hunter on International Arbitration}, Redfem, Hunter et al.620 (2009).
Additionally, the national courts of the country in which enforcement is sought may set aside the award if they consider that the subject matter of the dispute is not capable of settlement by arbitration under the law of the enforcing country or that enforcement would be against public policy.

Therefore, the New York Convention prevents the courts of the enforcing country from re-examining the merits of the case. Instead, those courts are restricted to examining the award for any procedural impropriety or contravention of public policy of the enforcing country. While this, in theory, promotes the enforcement of arbitral awards around the world, some national courts have invoked their right to set awards aside on the grounds of public policy by applying a very wide interpretation of public policy. This is true of the countries of South Asia, where courts have interfered with arbitration awards by finding that arbitrators have exceeded their jurisdiction in reaching a decision on the merits with which the enforcing court does not agree.61

However, parties should be aware that there is no treaty power to enforce an arbitral award if the assets of a losing party are based in a state that is not a signatory to the New York Convention. The winning party may have to bring a fresh claim in the courts of that state, potentially by way of enforcement of a debt using the award as evidence. This is not possible under some national laws.

3.3.7 Appeal

The parties’ ability to appeal against an award is subject to the law of the seat of arbitration. Applications to set aside awards should be brought in the courts of the seat of the arbitration, unless a party is challenging the enforcement of an award, in which case the courts of the country in which enforcement is sought would have jurisdiction to hear any such challenge.

In England, there are only three grounds on which a party can appeal against an award. First, a party can challenge on the basis that the tribunal lacked jurisdiction to resolve the dispute.62

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61 See, the Indian cases of Oil & Natural Gas Corporation, Ltd v Saw Pipes (2003) 5 SCC 705 applied in Venture Global Engineering v Satyam Computer Services Ltd, Civil Appeal 309 (January 10 2008); the Philippines case of Luçon Hydro Corp v Hon Rommel 0 Baybay & Transfield Philippines, Inc; and the Indonesian case of ED & F Man (Sugar) Ltd v Yani Haryanto.

However, a party may lose its right to challenge an award on this basis if it failed to make an objection at an early stage.

The second ground on which an award may be challenged in England is a serious irregularity. However, the Arbitration Act 1996 sets out the limited circumstances in which a serious irregularity may have occurred and the test for satisfying one or more of these criteria is difficult to meet. Section 68 states that a serious irregularity may have occurred if one or more the following is established:

- The tribunal failed to comply with Section 33 (general duty of tribunal);
- The tribunal exceeded its powers (otherwise than by exceeding its substantive jurisdiction, in which case an appeal may be brought under Section 67);
- The tribunal failed to conduct the proceedings in accordance with the procedure agreed by the parties;
- The tribunal failed to deal with all issues that were put to it;
- Any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeded its powers;
- There is uncertainty or ambiguity as to the effect of the award;
- The award has been obtained by fraud or the award (or the way in which it was procured) is contrary to public policy;
- There has been a failure to comply with the requirements as to the form of the award; or
- There is any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

The third ground of appeal is on a point of law arising out of the award.” However, the parties may agree to disapply this provision, and in fact many of the institutional rules do so.

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63 See, Cameroon Airlines v Transnet Ltd [2004] EWHC 1829 Comm for an example of an appeal that did succeed.
64 Section 69 of the Arbitration Act 1996.
65 For example, the ICC, the LCIA, the AAA and the SCC Rules all state that arbitral awards are final and binding.
In the United States, awards can be challenged exclusively on the grounds set out in the Federal Arbitration Act or (if the seat is New York) the Civil Practice Laws and Rules. These grounds are that:

- the award was obtained by fraud, corruption or undue means;
- the arbitrators were biased;
- the unsuccessful party was deprived of a fair procedure; or
- the arbitrators acted beyond their powers or exercised their powers in such a way as to make the award unsafe.  

Under most national laws, there is a notable absence of a right to appeal on the merits of the case. Arbitration is intended to be a final and binding method of dispute resolution, and parties are therefore generally limited to appealing on procedural irregularities rather than opening up the merits in a national court. This position is mirrored in the New York Convention so that although parties can resist enforcement, they can do so only on the basis of procedural irregularities or matters of public policy (as described above).  

3.4 Prevalence of Arbitration in the Energy Sector

There are obvious reasons for the popularity of arbitration in the energy sector. The sector is highly international. Further, contracts frequently involve parties from several jurisdictions, some of which are state or quasi-state entities.

3.4.1 Neutrality

In international contracts, there can be a perceived disadvantage in having a dispute referred to the ‘home’ court of a counterparty, particularly if the counterparty is a state entity. Arbitration permits the parties to refer their disputes to a neutral forum. In addition, the consensual nature of arbitration means that the parties can ensure that the composition of the tribunal, as well as the seat of the arbitration and the location of any hearings, is neutral. This is particularly relevant to energy projects where state-owned companies are often the owners, operators or employers with

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66 Supra note 1 at 34.
67 Ibid.
foreign corporations acting as partners or contractors. In those circumstances, neither party may be happy with deferring control over the dispute to the courts of the other party’s home nation.\textsuperscript{68}

\textbf{3.4.2 Enforceability}

Generally speaking, arbitration awards are easier to enforce than court judgments. The New York Convention provides an extensive enforcement regime for international arbitration awards. Most industrialised nations are signatories.\textsuperscript{69} There is no real equivalent for the enforcement of court judgments\textsuperscript{70}.

\textbf{3.4.3 Flexibility}

There is much greater scope for the parties to adapt procedures to the needs of a particular dispute in arbitration than in court. In arbitration, parties are generally free to agree a suitable procedure, hold hearings in a neutral country and appoint arbitrators who are of a different nationality from the parties. Arbitrators can also be empowered to decide a dispute under different substantive or procedural rules from the rules which a court is compelled to observe.\textsuperscript{71}

The flexibility that arbitration offers is particularly well suited to the energy sector. Projects are often carried out on tight timescales, and the arbitral proceedings can therefore be adapted to fit around the ongoing projects. Energy disputes also tend to be highly technical and often require an expert in that field to understand and ultimately resolve the dispute. The flexibility of arbitration opens up the possibility of appointing an arbitrator to suit the requirements of a particular dispute rather than putting the parties at the mercy of the court’s rota of judges and thereby risking having to explain technical points which an arbitrator of sufficient expertise would more easily understand.\textsuperscript{72}

\begin{itemize}
\item \textsuperscript{68} \textit{Ibid.}
\item \textsuperscript{69} \textit{Available at: www.uncitral.org/uncitral/en/uncitral_texts/arbitration,(visited on 15 December, 2014).}
\item \textsuperscript{70} The Hague Convention on Choice of Court Agreements of 2005 is the litigation equivalent of the New York Convention. However, to date only Mexico has acceded to it. The United States and the European Union have signed it, but not yet ratified it. Two ratifications or accessions are required before it will enter into force, and it will be some time before it has the impact of the New York Convention.
\item \textsuperscript{71} \textit{Supra} note 1 at 35.
\item \textsuperscript{72} \textit{Ibid.}
\end{itemize}
3.4.4 Privacy/Confidentiality

Court trials are open to the public, except in the most exceptional circumstances, and statements of case are publicly available (unless the court orders otherwise). Judgments are also published for anyone, including competitors, to see. In comparison, arbitration hearings are held in private and the documents produced and awards issued are generally confidential. Thus, commercial secrets and ‘dirty linen’ need not be exposed in public.73

Where parties are choosing arbitration for privacy reasons, they would be well advised to ensure that an express confidentiality provision is included in the arbitration agreement or procedural order, as attitudes to confidentiality will vary in different jurisdictions.

3.4.5 Multiple Parties and Multiple Agreements

Contracts relating to energy projects often have multiple parties or a suite of interlinking agreements that comprise the project agreement. Multi-party agreements or related agreements involving some, but not complete, duplication of parties present procedural challenges.74

Typically, national court procedures permit the joinder of all relevant parties to a dispute so that all aspects can be resolved in one hearing. They also permit the consolidation of related actions — for example, where they all arise in respect of related contracts. There is no compulsory right of joinder or consolidation in arbitration, as an arbitral tribunal has jurisdiction only over those parties which have entered into the arbitration agreement. This means that where there are multiple parties and multiple agreements, there is a risk of parallel proceedings and inconsistent outcomes. Provision for joinder and consolidation in arbitration can be made, but requires careful consideration and drafting beforehand.75

The recently amended ICC Rules include provisions that permit a tribunal to consolidate arbitrations if:

- the parties agree to the consolidation where the disputes arise from the same arbitration agreement; or

73 Id., at 34.
74 Supra note 1 at 36.
75 Ibid.
the disputes arise under different arbitration agreements but between the same parties and in connection with the same legal relationship and the ICC Court deems the arbitration agreements to be compatible.\textsuperscript{76}

The ICC Rules also permit the joinder of an additional party, although this is subject to a valid arbitration agreement existing between the party seeking joinder and the party sought to be joined. However, if such joinder is required after the appointment of any arbitrators, the consent of all parties is required.\textsuperscript{77}

3.4.6 Speed and Cost

Although it used to be said that arbitration was quicker than litigation, this has become less accurate with the increasing involvement of lawyers in arbitration together with the difficulties in convening a three-person tribunal. The process has slowed to a similar pace to that of the courts. Overall, it is now difficult to make generalised comparison between the speed of arbitration and litigation, as this will depend on many factors — for example:

- the availability of the members of the tribunal;
- the availability of the parties and their legal and expert advisers;
- the requirement of multiple interim applications;
- disputes over disclosure of documents; and
- disputes over jurisdictional issues.\textsuperscript{78}

If there is an appeal of a court judgment, arbitration will be significantly faster than litigation, given that there is little possibility of appealing an arbitration award (see above on finality of decision). The circumstances in which an arbitrator’s award can be appealed in most jurisdictions including England and Wales, the United States, China, Singapore, France and Switzerland is now very limited indeed. In contrast, most court judgments around the world can be appealed relatively easily to a higher appellate court, involving more delay, cost and uncertainty.\textsuperscript{79}

Arbitration is often perceived as being cheaper than litigation, but this is now rarely the case. The fact that parties are not required to pay for the judge’s time and the hit of the court, and the

\textsuperscript{76} Article 10 of the ICC Rules.
\textsuperscript{77} Article 7 of the ICC Rules.
\textsuperscript{78} Supra note 1 at 37.
\textsuperscript{79} Ibid.
availability of procedures such as summary judgment, mean the court litigation can be cheaper. However, there is a substantial amount of front loading of costs in court proceedings, while flexible and more cost-efficient procedures can be agreed in arbitration. However, this is dependent on the parties cooperating.\(^{80}\)

### 3.4.7 Summary Determination

A further limitation in international arbitration is that although in principle an arbitral tribunal can determine claims and defences summarily, in practice the power is rarely used. In contrast, court judges are happier to determine matters at an early stage whether by way of preliminary issue or summary judgment. Therefore (if claims are likely to be straightforward and are indisputably due, court proceeding may be preferable.\(^{81}\)

### 3.4.8 Recalcitrant Parties

Arbitral tribunals’ coercive powers are much more limited than those of a court and generally speaking, judges tend to be less tolerant of recalcitrant behaviour and more robust in imposing sanctions. As a result, there is more scope for a party to delin matters in arbitration.

However, the major institutional rules and most national laws permit a tribunal to make an order of security of costs if it deems necessary.\(^{82}\) Under some national laws, the tribunal may also dismiss a claim if a party refuses to comply with that order.\(^{83}\) Under most national laws and institutional rules, the powers of the tribunal also extend to imposing interim measures and making orders for disclosure or orders requiring the attendance of witnesses at a hearing.\(^{84}\) However, the effectiveness of such orders is somewhat untested.

If a party fails to adhere to an order made by the tribunal, the other party must rely on the national courts to enforce it. In England, the ultimate sanction that a tribunal can impose is to issue a peremptory order (under Section 41(5) of the Arbitration Act 1996); failure to comply with that order entitles the other party to make an application to the English courts for enforcement under

\(^{80}\) Ibid.

\(^{81}\) Ibid.

\(^{82}\) See, Section 38(3) of the English Arbitration Act 1996; Article 28 of the ICC Rules; Article 25(2) of the LCIA Rules; Article 21(2) of the AAA Rules; Article 32(2) of the SCC Rules and Article 26(2) of the UNCITRAL Rules.

\(^{83}\) Section 41(6) of the English Arbitration Act 1996.

\(^{84}\) See, Article 28 of the ICC Rules; Article 25 of the LCIA Rules.
Section 42 of the Arbitration Act. A party’s failure to comply with a court order may result in that party being held in contempt of court and a criminal prosecution. The Arbitration Act also gives the courts power to make freezing orders over a party’s assets or orders to seize relevant evidence or to secure the attendance of witnesses at a hearing.

The courts in the United States have a similarly wide scope for enforcing tribunals’ orders, including tribunals that sit outside the United States, but whose orders relate to evidence within the United States. The courts may subpoena witnesses, order depositions to be taken and order the production of documents.

3.5. Arbitration in India

3.5.1 A Brief History of Arbitration Law in India

Arbitration has a long history in India. In ancient times, people often voluntarily submitted their disputes to a group of wise men of a community called the panchayat—for a binding resolution.

Modern arbitration law in India was created by the Bengal Regulations in 1772, during the British rule. The Bengal Regulations provided for reference by a court to arbitration, with the consent of the parties, in lawsuits for accounts, partnership deeds, and breach of contract, amongst others.

Until 1996, the law governing arbitration in India consisted mainly of three statutes: (i) the 1937 Arbitration (Protocol and Convention) Act, (ii) the 1940 Indian Arbitration Act, and (iii) the 1961 Foreign Awards (Recognition and Enforcement) Act. The 1940 Act was the general law governing arbitration in India along the lines of the English Arbitration Act of 1934, and both the 1937 and the 1961 Acts were designed to enforce foreign arbitral awards (the 1961 Act implemented the New York Convention of 1958).

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85 Section 44(3) of the English Arbitration Act 1996.
86 Section 44(2)(c) of the English Arbitration Act 1996.
87 Section 43 of the English Arbitration Act 1996.
88 Section 7 of the Federal Arbitration Act and Section 7505 of the New York Civil Practice Laws and Rules.
90 The New York Convention of 1958, i.e. the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is one of the most widely used conventions for recognition and enforcement of foreign awards. It sets forth the procedures to be used by all signatories to the Convention.
The government enacted the Arbitration and Conciliation Act, 1996 (the 1996 Act) in an effort to modernize the outdated 1940 Act. The 1996 Act is a comprehensive piece of legislation modeled on the lines of the UNCITRAL Model Law. This Act repealed all the three previous statutes (the 1937 Act, the 1961 Act and the 1940 Act). Its primary purpose was to encourage arbitration as a cost-effective and quick mechanism for the settlement of commercial disputes. The 1996 Act covers both domestic arbitration and international commercial arbitration.

### 3.5.2 The Arbitration Act, 1940

The Arbitration Act, 1940, dealt with only domestic arbitration. Under the 1940 Act, intervention of the court was required in all the three stages of arbitration, i.e. prior to the reference of the dispute to the arbitral tribunal, in the duration of the proceedings before the arbitral tribunal, and after the award was passed by the arbitral tribunal. Before an arbitral tribunal took cognizance of a dispute, court intervention was required to set the arbitration proceedings in motion. The existence of an agreement and of a dispute was required to be proved. During the course of the proceedings, the intervention of the court was necessary for the extension of time for making an award. Finally, before the award could be enforced, it was required to be made the rule of the court.

While the 1940 Act was perceived to be a good piece of legislation in its actual operation and implementation by all concerned - the parties, arbitrators, lawyers and the courts, it proved to be ineffective and was widely felt to have become outdated.

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This Convention was first in the series of major steps taken by the United Nation since its inception, to aid the development of international commercial arbitration. The Convention became effective on June 7, 1959.  
6 The 1996 Act, Section 85.  
91 The 1996 Act, Section 85.  
92 Justice Ashok Bhan in his inaugural speech delivered at the conference on ‘Dispute Prevention and Dispute Resolution’ held at Ludhiana, India, October 8, 2005.  
93 Krishna Sarma, Momota Oinam, Angshuman Kaushik, Development And Practice Of Arbitration In India Has It Evolved As An Effective Legal Institution? Working papers appear on CDDRL’s, no3, 3(October 2009), available at website: http://cddrl.stanford.edu. (Visited on 12 December 2014)  
94 Ibid.
3.5.3 The Arbitration and Conciliation Act, 1996

The 1996 Act, which repealed the 1940 Act, was enacted to provide an effective and expeditious dispute resolution framework, which would inspire confidence in the Indian dispute resolution system, attract foreign investments and reassure international investors in the reliability of the Indian legal system to provide an expeditious dispute resolution mechanism.\(^95\)

The 1996 Act has two significant parts – Part I provides for any arbitration conducted in India and enforcement of awards thereunder. Part II provides for enforcement of foreign awards. Any arbitration conducted in India or enforcement of award thereunder (whether domestic or international) is governed by Part I, while enforcement of any foreign award to which the New York Convention or the Geneva Convention applies, is governed by Part II of the 1996 Act.\(^96\)

The 1996 Act contains two unusual features that differed from the UNCITRAL Model Law.

First, while the UNICITRAL Model Law was designed to apply only to international commercial arbitrations,\(^97\) the 1996 Act applies both to international and domestic arbitrations. Second, the 1996 Act goes beyond the UNICITRAL Model Law in the area of minimizing judicial intervention.\(^98\)

The changes brought about by the 1996 Act were so drastic that the entire case law built up over the previous fifty-six years on arbitration was rendered superfluous.\(^99\) Unfortunately, there was no widespread debate and understanding of the changes before such an important legislative change was enacted. The Government of India enacted the 1996 Act by an ordinance, and then extended its life by another ordinance, before Parliament eventually passed it without reference to a Parliamentary Committee—a standard practice for important enactments. In the absence of case laws and general understanding of the Act in the context of international commercial arbitration, several provisions of the 1996 Act were brought before the courts, which interpreted the provisions in the usual manner.\(^100\)

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\(^95\) Supra note 93 at 4.

\(^96\) Ibid.

\(^97\) See, Article 1 of the UNCITRAL Model Law.

\(^98\) S K Dholakia, “Analytical Appraisal of the Arbitration and Conciliation (Amendment) Bill, 2003”, *ICA’s Arbitration Quarterly*, ICA, New Delhi, 2005 vol. XXXIX/No.4 at page 3. S K Dholakia is a Member of ICC International Court of Arbitration and Senior Advocate, Supreme Court of India.

\(^99\) (1999) 2 SCC 479 (Sundaram Finance vs. NEPC Ltd.). The Supreme Court held at p 484 thus: ‘The provisions of this Act (the 1996 Act) have, therefore, to be interpreted and construed independently and in fact reference to the 1940 Act may actually lead to misconstruction.’

\(^100\) Supra note 93 at 4.

3.6 Conclusion

The neutrality and autonomy that arbitration offers make it an enticing option for parties in international energy disputes. The procedure under which the dispute will be heard can be adapted to suit the parties’ requirements and the identity of the individuals to resolve the issues can be tailored to the technical intricacies that are inherent in energy disputes.

Arbitration is no longer an unknown quantity in the energy sector and is becoming or is already the default form of dispute resolution for many companies. The infrastructure around the world to deal efficiently and effectively with disputes by way of arbitration is firmly established.

In many ways, arbitration has become more than an alternative to litigation and is in fact the better option for parties in a dispute. While it invariably has its limitations most notably the power of tribunals to deal with recalcitrant parties and the potentially high costs that arbitral proceedings involve the overall benefits that arbitration brings to parties in confidential, complex and international disputes mean that it should be given consideration when agreeing dispute resolution procedures.