

# Commercial Arbitration in Energy Disputes

## Practical Guidance

### Introduction

The joint operating agreement (JOA) is one of the cornerstone contracts in oil and gas projects and is often the starting point for further essential agreements relating to hydrocarbon processing, sales and transportation. Frequently, parties to a JOA are companies of different nationalities with diverse legal, regulatory and cultural backgrounds. It is against this backdrop that, when called into action, the suitability of the often-neglected arbitration element of the dispute resolution clause is exposed. This paper provides practical guidance on the risks and opportunities that the arbitration clause presents. This is discussed by reference to the Association of International Petroleum Negotiators (AIPN) 2002 Model JOA; the best known industry standard contract.

### Importance

The importance of dispute resolution clauses is often overlooked and there is a tendency to adopt a boiler plate approach to their content. The clause is not called into action until circumstances go badly wrong, at which time it is often too late to discover that the provisions are not ideally suited to the particular dispute. Many negotiators will not have recent disputes experience, or that experience will be domestic. In the AIPN JOA, there are opportunities to resolve the dispute before reaching arbitration (notwithstanding that arbitration proceedings can be initiated within the thirty day period after the receipt of the notice of the dispute). In the event of a dispute, Article 18.2 of the AIPN JOA provides firstly for negotiations between senior executives of the parties, then mediation, and then, finally, arbitration.

Thus, under the AIPN JOA, arbitration is called upon as a last resort when more amicable measures have failed to bring resolution. The fact that arbitration may only be anticipated in a minority of cases should not, however, deflect from its importance. In the presence of hostility between the parties, a poorly considered arbitration clause may lead to significant practical problems.

There are two key elements to a successful arbitration clause. First, the parties must be confident that their dispute will be judged fairly. Second, the winning party should be able to enforce the arbitration award.

In this context, the importance of a properly negotiated and robust arbitration clause is paramount to satisfactory dispute resolution. Key issues for consideration in the negotiation and drafting of such a clause in the AIPN JOA are set out below.

### Choice of applicable law

The parties' choice of governing law will usually be upheld by courts and tribunals in countries with developed legal systems. For example, Rome I provides that an express choice of law should be respected by the courts of all EU states (except Denmark). It follows that, by inserting a governing law clause into a contract, parties achieve certainty; they know what law is to be applied to determine questions regarding their rights and obligations under the contract. This, in turn, allows them to analyse their respective legal positions with some degree of confidence.

Although it may seem an obvious point, the failure to agree on a governing law, or the failure to agree upon a suitable governing law, may have catastrophic consequences at the time a dispute arises under a contract.

The law chosen to be applied in the event of a dispute is highly significant, as it can be pivotal to whether disputes arising under the contract can be taken to arbitration and what remedies can be awarded by the arbitrators. Additionally, the provisions of the arbitration law of a chosen

jurisdiction may also impact upon any questions of law which may arise and how these are dealt with in the course of an award being made.

Article 18.1 of the AIPN JOA presents two alternatives:

1. "The substantive laws of \_\_\_\_\_, exclusive of any conflicts of laws principles that could require the application of any other law, shall govern this Agreement for all purposes, including the resolution of all Disputes between or among Parties."; and
2. "The laws of \_\_\_\_\_, to the extent consistent with international law, shall govern this Agreement for all purposes, including the resolution of all Disputes between or among Parties. To the extent the laws of \_\_\_\_\_ are not consistent with international law, then international law shall prevail."

The first option provides for the vanilla choice of the law of a particular state. This will typically be utilised when the parties agree on the governing law of a particular country.

The second option is often chosen when foreign investor is forced to accept the governing laws of a host state. The formulation of the second option is similar to the wording used in Libyan oil concessions in the pre-Gadaffi era. There is arbitral jurisprudence concerning the interpretation of such clauses which should be researched before adapting this formulation. The intent of the provision is to adjust national law if it produces a result that is incompatible with international standards. In practice, this type of "gloss" has provided difficult to enforce.

Many parties to international agreements choose English law the preferred governing law of the agreement. It has become the number one choice for international business.

Factors which favour selection of English law include<sup>1</sup>:

- English law is a well-known, established and widely-used set of rules that are tried and tested, and it is transparent and predictable. Court decisions are widely reported and easily accessible;
- English law as a common law system operates with the doctrine of precedent. The law can evolve more quickly than statute based law in order to adapt to current practiced and behaviour as demanded in a modern society; and
- English law has highly-developed contract and commercial law and provides key remedies which are fair.
- English is widely spoken in international business and is one of the most widely spoken languages in the world. Proceedings conducted in English and interpreting statutes and cases in English are easily accessible for commercial parties;

While not as widely used as English law in international contracts, New York law is also used frequently in the international setting, and is a viable alternative for all the same reasons identified above with respect to English law. After all, New York law stems from the English law, has the same advantages as the English common law system and has a deeply developed and sophisticated body of commercial/contractual case law.

Where there is resistance to choosing English law or New York law because, for example, we recommend choosing another system of common law close to English law, e.g. Singapore, Australian and New Zealand are closely based on English law.

There is in practice no difficulty in identifying an acceptable, neutral alternative. A party insisting on a local law in the Middle East might well accept French as a "neutral" option. The legal systems in the Middle East are based on French law, which is familiar to lawyers in the region.

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<sup>1</sup> For further information, see: *England and Wales: The jurisdiction of choice*. The Law Society

The second clause of the two alternative provisions set out above refers to "principles of international law". Except in unusual cases, this clause should be resisted. There is much debate about what such type of clause means and there are doubts about enforceability. Indeed, because "international law" is not a well defined concept with a uniformly accepted body of source material, agreeing that disputes should be judged according to "international law" will often lead to time consuming and expensive disputes at the time of arbitration. Further, public international law is not particularly well equipped to deal with detailed contractual issues such as mistake, misrepresentation, time of performance, the effect of bankruptcy or liquidation, force majeure or the measure of damages, and so forth. It is not advisable for a business to be exposed to such uncertainty.<sup>2</sup>

It is rare for commercial parties not to agree upon a governing law clause. Where they omit to do so, complex rules exist to determine what the governing law of the contract should be. Where parties are located, or obligations are to be performed, in different jurisdictions, determining the governing law of the contract may be difficult. This may lead not only to uncertainty but also to time and cost being spent arguing at the outset of any dispute over what law should be applied.

### **The seat of arbitration**

Deciding where the arbitration should take place is one of the most important matters to specify when drafting an arbitration clause. Choosing where the arbitration is to take place can affect:

- whether the courts of the seat will intervene in the arbitration;
- what other rules are imposed, in addition to the arbitral rules chosen by the parties;
- whether the dispute is "arbitrable" in that country, that is, whether the subject-matter is something over which the local courts reserve exclusive jurisdiction (such as matters relating to crime or domestic disputes) so that it cannot be submitted to arbitration;
- the possibility of the arbitral award being challenged or appealed; and
- the enforceability of the arbitral award.

It also involves obvious practical considerations: neutrality, facilities, proximity to the witnesses and evidence, familiarity with the language and culture, willingness of qualified arbitrators to participate in proceedings set in that place.

In choosing the seat, you must also consider both the legislation enacted in the particular jurisdiction relating to arbitration, and the attitude of the national courts towards arbitration generally in that jurisdiction. You should also consider the nationality you would prefer for the Chairperson of the arbitration panel, as Chairpersons are often appointed from the situs state.

#### *Legislative framework*

First and foremost, it is important that the country chosen for the seat of arbitration has ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This is because some countries which are signatories to the Convention will only allow enforcement of awards which have been made in countries which are also signatories to the Convention. 146 countries have ratified the Convention, including most of the world's leading trading nations. For a full list of countries see the UNCITRAL website.<sup>3</sup>

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<sup>2</sup> For further information, see: Redfern, Hunter, et al. (2009) *Redfern and Hunter on International Arbitration*.

<sup>3</sup> [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

Most countries have legislation governing arbitrations that take place in their territory. This provides a framework in which arbitral rules operate. The UNCITRAL Model Law on International Commercial Arbitration is intended to even out disparities between national laws and provides a common standard. Its objective is to provide comfort to parties investing in countries which have adopted it. The Model Law seeks to restrict unnecessary court intervention. Many countries have been influenced by the Model Law when adopting new legislation. The English Arbitration Act 1996 is not based directly on the Model Law but draws on many of its elements and goes a considerable way towards achieving similar results. The U.S. Federal Arbitration Act is also considered to be a very pro-arbitration statute.

Generally speaking, parties can rely on legislation based upon the Model Law. If the local arbitration law is not based on the Model Law, however, parties should not select the location without first investigating the likely impact of its legislation on any arbitration. For example, local law may require mandatory procedures to be implemented; the courts may be able to intervene excessively during the arbitration; and there may be barriers to the enforcement of awards, including allowing multiple avenues for appeal.

#### *Approach of the courts*

A state may proclaim itself to be modern, favourable forum for international arbitration, but in practice when the courts become involved, arbitration may come to a grinding halt for many months, if not years. Certain Asian states have this reputation.

#### *Other considerations*

The "seat" of arbitration is usually the same as the place where the arbitration is to be conducted, but this does not necessarily have to be the case and the parties can provide for a different venue by making express provision in the clause. Provision can also be made for hearings to be by telephone and for document-only arbitrations. The "concept" of a seat allows such arbitrations to be tied to one place in legal terms, even though the actual physical location of hearings (because they are by telephone or document only) may be different.

If the seat is not specifically provided for in the clause, in institutional arbitration the rules of the relevant institution will state how the seat is to be determined (normally by the arbitral tribunal or by the institution itself), and in ad hoc arbitration the arbitrators will normally choose the seat. That said, the failure to specify the seat of the arbitration in an arbitration clause can lead to protracted legal battles over where the arbitration should take place, with possible court challenges. Thus, selecting the seat in the arbitration clause will almost certainly save the parties time and expense at the time of dispute.

It is also worth considering the proposed seat's position on sovereign and crown immunity. This issue has come to particular prominence in Hong Kong recently<sup>4</sup> and must be considered when dealing with state-owned entities and other private vehicles in which the state holds a stake. It has been held in Hong Kong that both sovereign immunity and crown immunity are absolute in this jurisdiction. This immunity becomes relevant where a contract provides for dispute resolution by the Hong Kong courts or the counterparty has assets located in Hong Kong. If a party is a state entity, it will be able to invoke its immunity to resist the assumption of jurisdiction over it by the Hong Kong courts, including enforcement proceedings in Hong Kong against its assets, regardless of whether the transaction or assets in question are sovereign or commercial in nature. Sovereign immunity will apply where the party is a foreign (non-PRC) state or state entity, whereas crown immunity will apply where the party is the PRC state or a PRC state entity. The same will apply to any arbitration taking place in Hong Kong.

Article 18.4 of the AIPN JOA provides for a waiver of sovereign immunity. This will be ineffective in a state which operates an absolute doctrine of sovereign immunity, such as Hong Kong.

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<sup>4</sup> *Democratic Republic of Congo v. FG Hemisphere Associates* FACV Nos. 5, 6 & 7 of 2010 and *Intraline Resources SDN BHD v. The Owners of the Ship or Vessel "Ha Tian Long"* HCAJ 59 of 2008

### *London as the seat of arbitration*

The following characteristics help explain why London is a widely chosen seat for arbitration:

- The Arbitration Act 1996 provides a sound framework for arbitration.
- The English judiciary are pro-arbitration and exercise a 'light-touch' which can be relied on;
- Arbitration awards can be enforced through the New York Convention;
- London is perceived as a neutral forum in which to resolve international disputes;
- London has an international reputation for experienced and expert arbitrators to resolve international disputes.; and
- London has a range of highly respected arbitration organisations and high quality facilities to support arbitration.

While London is an excellent venue to hold arbitration, it is not exclusive. Most other countries in western Europe and all of North America are generally safe venues for arbitration. If you are required to arbitrate in Asia, we recommend that you consult with an arbitration expert before agreeing a location.

### **Institutional or ad hoc arbitration**

All arbitrations must be conducted under arbitral rules. These can be chosen by the arbitrators themselves, but it is better for the clause to specify which rules should be used. A basic choice is between arbitration under ad hoc rules and arbitration under institutional rules.

Ad hoc arbitration is conducted under rules adopted for the purpose of the specific arbitration, without the involvement of any arbitral institution. Here the parties can draw up all the arbitral rules themselves. However, since this can be time-consuming and expensive, they usually adopt rules specially written for ad hoc arbitration, for example, the UNCITRAL Rules.

Institutional arbitration is arbitration administered by a specialist institution. Parties should incorporate the rules of the selected institution into the arbitration clause by reference. Such rules are expressly formulated for arbitrations conducted under the administration of the relevant institution.

A perceived advantage of ad hoc arbitration is that it is flexible and may be shaped to meet the wishes of the parties and the facts of the particular dispute. However, it requires the co-operation of the parties and their advisers for this to be done efficiently and effectively. It is an expensive and time-consuming process to draft special rules for an ad hoc arbitration. If ad hoc arbitration is preferred, time and money can be saved by adopting or adapting the UNCITRAL rules of procedure (which are specifically written for ad hoc arbitration) for the particular purposes of the parties. The principal disadvantage of an ad hoc arbitration is that it lacks the 'support net' of an institution and depends for its full effectiveness upon a spirit of co-operation between the parties and their lawyers backed up by an adequate legal system in the seat of arbitration. The spirit of co-operation has usually dissipated by the time a dispute has arisen, however, and it is easy to delay ad hoc arbitral proceedings by raising questions over procedural matters, especially before the arbitral tribunal is appointed. Experienced arbitration practitioners generally favour institutional arbitration. Parties may be forced, however, to adopt ad hoc in negotiations with state entities. Some states have historically been reluctant to accept institutional involvement in disputes.

Institutional arbitration can lend political or moral weight to awards but, more practically, because institutional rules are designed to regulate the proceedings comprehensively from beginning to end, the institutions are better suited to cater for contingencies that might arise, even if (as sometimes happens) the respondent fails or refuses to co-operate. There are other advantages: by choosing

institutional arbitration the parties can avoid the time and expense of drafting a suitable ad hoc clause; the fees and expenses of the arbitration are, with varying degrees of certainty, regulated; and some arbitral institutions independently vet awards. Also the fact that the institution will deal with the arbitrators and importantly, will regulate their fees, is also very helpful. Having said that, the additional layer of bureaucracy imposed by institutional arbitration may cause delay and, inevitably, additional fees are payable. Although the arbitrators' fees are reduced because they have less administration to do, the fees of the institution can add a significant amount to overall costs. This is particularly so where large amounts are in dispute and the fees are calculated by reference to the value of the claims (as is the case with ICC arbitration).

Article 18.2(D)(1) of the AIPN JOA provides for the choice of five institutions or ad hoc arbitration using the UNCITRAL Rules, two of which are the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA). The factors which should be considered when selecting an institution are set out in the following comparative table:

ASPECT OF ARBITRATION	INSTITUTIONAL ARBITRATION			
	ICC	Rule	LCIA	Rule
Advantages	<p>One of the best known arbitral institutions. Composed of members from 90 countries and every continent, the ICC Court is the world's most widely representative dispute resolution institution.</p> <p>One of the most important functions of the ICC Court is the scrutiny of arbitral awards which ensures that arbitral awards are of the highest possible standards and less susceptible to annulment.</p>	n/a	One of the longest-established international institutions for commercial dispute resolution and widely respected.	n/a
Disadvantages	<p>The need for Terms of Reference and the vetting of the award by the ICC Court adds to the time and costs involved to complete the arbitral process.</p> <p>However, the ICC has taken a number of steps to improve efficiency, They include a checklist for arbitrators when drafting awards and a Statement of Acceptance, Availability and Independence for arbitrators to accept or decline.</p>	n/a	May not be considered sufficiently neutral by non-English parties where the other party is English.	n/a

ASPECT OF ARBITRATION	INSTITUTIONAL ARBITRATION			
	ICC	Rule	LCIA	Rule
Particularly suitable for	International arbitrations where the parties come from very differing backgrounds or those where administrative support or guidance is of benefit.	n/a	International arbitrations of all natures.	n/a
How is the arbitration started?	By request sent to the Secretariat of the ICC Court, which then notifies the other party.	4(1)	By request sent to the LCIA and the other party.	1(1)
How many arbitrators are to be appointed?	In the absence of agreement between the parties, 1, unless the ICC decides 3 is appropriate.	8(2)	In the absence of agreement between the parties, 1, unless the LCIA decides 3 is appropriate.	5(4)
Who appoints the arbitrators?	The parties by agreement or nomination (to be confirmed by the ICC Court). In the absence of agreement, the ICC Court will appoint the arbitrators.	8(3) 8(4)	The LCIA with reference to the methods or criteria agreed by the parties.	5(5)
Are there any restrictions on the nationality of the arbitrators?	Yes. A sole arbitrator or chairman is not usually the same nationality as one of the parties.	9(5)	Yes. A sole arbitrator or chairman is not usually the same nationality as one of the parties.	6(1)
What are the time limits for challenging the appointment of an arbitrator?	30 days from notification of his appointment or becoming aware of the relevant circumstances.	11(2)	15 days from notification of his appointment or becoming aware of the relevant circumstances.	10(4)
Multi-party disputes	The ICC Court appoints the tribunal unless all the parties have previously made a joint nomination.	10	The LCIA Court appoints the tribunal (taking into account the parties' nomination, as the case may be).	8
Venue for the hearing	In the absence of agreement between the parties, this will be determined by the ICC Court.	14(1)	In the absence of agreement between the parties, London, unless the LCIA Court decides otherwise.	16(1)
Challenges to the jurisdiction of the tribunal	The ICC Court will rule on the prima facie validity of the agreement to arbitrate. Other questions of jurisdiction are for the tribunal to decide.	6(2)	Made to the tribunal itself.	23(1)

ASPECT OF ARBITRATION	INSTITUTIONAL ARBITRATION			
	ICC	Rule	LCIA	Rule
Procedure	The parties may supplement the Rules in their arbitration agreement. Subject to the Rules, the tribunal has discretion in how to conduct proceedings.	15	The parties are encouraged to agree upon procedures. Any gaps are to be filled by the tribunal.	14
Are proceedings confidential?	No specific provision, though the tribunal may take measures to protect confidential information.	20(7)	Yes	30
Is there a time limit for the making of the award?	6 months from signature of the terms of reference - extendable.	24	None	n/a
If the arbitrators fail to agree on an award, who is it made by?	By a majority of the arbitrators but in the absence of a majority, the Chairperson may make the award alone.	25(1)	By a majority of the arbitrators but in the absence of a majority, the Chairperson may make the award alone.	26(4)
Is there scrutiny of the award by any other body?	Yes - by the ICC Court to identify mistakes in form.	27	No	n/a
Is there an administration fee and if so how is it calculated?	Yes. <i>ad valorem</i> , adjusted to take account of the complexity of the matter.	n/a	Yes – time based	n/a
How are the arbitrators fees calculated?	By reference to the time spent and the value of the dispute.	31(1)	By reference to the time and rates appropriate to the particular circumstances of the case including its complexity and the special qualifications of the arbitrators.	n/a
Can the successful party be awarded legal costs?	Yes - at the discretion of the tribunal.	31(2)	Yes - at the discretion of the tribunal.	28(3)
Are deposits required as advance on costs?	Yes	31(3)	Yes - at the discretion of the tribunal.	24
Will security for the costs of the respondent be ordered?	Not generally, although power arguably exists under article 23. However, advances on costs are payable.	30	Yes - at the discretion of the tribunal.	25(2)

ASPECT OF ARBITRATION	INSTITUTIONAL ARBITRATION			
	ICC	Rule	LCIA	Rule
Other relevant aspects	<p>Terms of reference must be drawn up. These should include a summary of claims and issues. Potentially leads to a more focussed arbitration but often contentious and can delay proceedings.</p> <p>The ICC does not maintain a central list of arbitrators but instead seeks recommendations from its consultative national committees.</p>	<p>18</p> <p>n/a</p>	<p>LCIA arbitration procedure may be quick as there is no requirement for Terms of Reference to be drawn up and there is no review of the final award.</p>	<p>n/a</p>

### 1 or 3 arbitrators

Article 18(D)(3) of the AIPN JOA allows for the appointment of either a sole arbitrator or three arbitrators. An arbitration will be less expensive and involve less delay if the parties provide for a sole arbitrator. Appointments for meetings and hearings can be more easily arranged, a sole arbitrator does not need to spend time deliberating with fellow arbitrators in order to reach a decision and in general, the arbitrator fees for an arbitration conducted by a sole arbitrator is likely to cost, overall, about half as much as the arbitrator fees for an arbitration conducted by three arbitrators. The disadvantage of having a sole arbitrator is there is higher chance of maverick or rogue decisions – only one person makes the award.

In an international dispute, the more usual procedure is to provide for the appointment of an arbitral tribunal of three arbitrators.<sup>5</sup> Where the tribunal is to consist of three arbitrators, the procedure usually adopted is for each party to nominate an arbitrator and for a "neutral" third arbitrator (usually the presiding arbitrator) to be appointed either by agreement between the two party-nominated arbitrators or by agreement between the parties. This has the advantage that each party has a greater sense of investment in the arbitration in that each party has been able to nominate one arbitrator of its choice to listen to its case.

### Qualifications

It is possible to specify the qualifications that an arbitrator is to have. However, care must be taken if you decide to include this sort of provision. If qualifications are defined too narrowly, there may be an insufficient pool of arbitrators who are able or willing to accept appointment. If the qualifications are defined too loosely, this can give rise to satellite disputes, or a finding that the appointed tribunal had no jurisdiction to act. It is generally not advisable to specify in the arbitration clause the qualifications required of arbitrators, as the parties are often better positioned to decide what expertise is required at the time the dispute arises.

Similarly, it is not a good idea to specify arbitration by a named individual. If the named person was unable or unwilling to act when a dispute arose, the arbitration clause would be incapable of being performed and it would not be enforceable. At the very least, it would be necessary to

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<sup>5</sup> If the ICC is asked to choose the number of arbitrators its "rule of thumb" is to appoint three arbitrators if the value of the dispute is over US\$1.5m.

provide a "saving" mechanism in the arbitration clause to ensure that another arbitrator can be appointed to serve if a named individual is unable to act.

### **Removal of an arbitrator; impartiality**

Section 24 of the English Arbitration Act 1996 sets out under what circumstances a party to arbitral proceedings may apply to the court to remove an arbitrator. One such ground for removal is that there are justifiable doubts as to the arbitrator's impartiality.

Impartiality calls for a state of mind which is free from any influences extraneous to the merits of the particular case, which is capable of dispassionate inquiry and an objective judgement, and which is not turned aside by any motivation to favour one side as against the other<sup>6</sup>. The relevant test for bias is 'whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'<sup>7</sup>. The same test applies for both arbitrators and judges.

There is case law covering a range of circumstances where arbitrators have been removed, some examples of which being prior dealings or inappropriate contact with a witness or party, counsel and an arbitrator having come from the same chambers and having a pecuniary or proprietary interest in the subject matter of the dispute. The issues and cases are efficiently discussed in Concise International Arbitration, Mistelis, 2010. In practice, courts in arbitration-friendly jurisdictions are extremely reluctant to uphold challenges to arbitrators, many of which are dismissed or tactically motivated.

### **Enforcement of the award**

One of the attractions of arbitration is that it is normally easier to enforce an arbitration award in a foreign country than it is to enforce a judgement of a court. The foundation instrument for this is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, with 146 signatory states. In essence, signatories to the Convention agree to recognise and enforce arbitral awards made in the territory of another signatory state, subject to specific limited exceptions. This is therefore an essential element to be considered when selecting the seat of arbitration. The seat identifies the 'nationality' of the award for purposes of enforcement under the Convention.

States are however permitted to make certain reservations in that they can limit the applicability of the Convention to awards made in other contracting states only, and states may limit the applicability of the Convention to awards relating to commercial matters. A record of states exercising the exemptions is maintained and published by UNCITRAL on its website<sup>8</sup>.

The Convention also provides for limited grounds on which the enforcement of a Convention award can be refused:

- the parties to the agreement were under some incapacity, or the agreement is not valid under the law to which the parties have subjected it;
- the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings;
- the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration;
- the composition of the arbitral authority was not in accordance with the agreement of the parties; and

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<sup>6</sup> See *Roylance v General Medical Council*.

<sup>7</sup> See *Porter v Magill*.

<sup>8</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html)

- the award has not yet become binding on the parties, or has been set aside or suspended.

These grounds should be borne in mind when drafting the arbitration clause and when engaged in the arbitral process. It is of the essence that the winning party is able to enforce the award.

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