Governing law, Jurisdiction and Enforcement risk – a practical guide for the contract drafter
Introduction

The drafting of appropriate dispute resolution clauses and the evaluation of enforcement risk are essential in the cross-border transactions that are entered into more and more in global commerce.

“As Lord Bingham observed too truly, “It is one thing to recover a favourable judgment; it may prove quite another to enforce it ...”” The House of Lords, July 2009 (Masri v Consolidated Contractors)

In this guide and the accompanying online resource, we share with you some of the know-how and practical tips that we have gleaned from our market-leading experience in the field of cross-border disputes and enforcement.

The guide provides general guidance and tips on the drafting of governing law and jurisdiction clauses and the rationale behind the drafting. It also includes helpful guidance on the related issue of assessing enforcement risk, all in a single conveniently sized booklet.

Meanwhile, our related free online resource provides up to date information specific to over 85 countries about signatories to enforcement treaties, the type of legal system, perceived levels of corruption, the ease of doing business and our practical experiences. The online resource can be found at http://www.elexica.com/en/Resources/Microsite/Governing-Law-Jurisdiction-and-Enforcement-Risk.
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Overview – the interaction between governing law, procedural law and jurisdiction

The concepts of governing law, jurisdiction, procedural law and arbitration rules are all distinct but it is easy to confuse them. They are all important for different reasons.

Governing law

- This is the law applicable to the determination of the substantive legal relations (i.e. the substance of the dispute).

- One needs to consider both the law governing any contractual obligations and the law governing any non-contractual obligations (e.g. claims in tort); the two may be different.

Dispute resolution forum

- The dispute resolution clause nominates the forum in which any disputes will be finally resolved (normally national courts or arbitration).

- Dispute resolution clauses may also refer to non-binding alternative dispute resolution procedures to be engaged prior to litigation or arbitration (such as mediation or early neutral evaluation).

- There is no requirement that a jurisdiction clause coincides with the governing law. Most courts or tribunals can, in general, apply foreign governing laws.
Procedural law (procedural law of national courts or ‘seat’ of arbitration)

- This is the law that governs the procedures relating to the dispute resolution process. It can be different from the governing law and will be the law of the state of the dispute resolution forum.

- In arbitration, the arbitration law of the ‘seat’ usually provides the legal framework in which the arbitration operates. For example, in England this is the Arbitration Act 1996. The arbitration law of the seat will, in particular, set out the extent to which recourse can be had to the national courts in the context of an arbitration – normally this is only in limited circumstances.

Arbitration rules

- The parties may choose a specific set of arbitration rules to govern the procedure for the arbitration.

- Commonly, the parties will apply the rules of a well established arbitral institution such as the LCIA, ICC or ICDR but there is no requirement to choose institutional rules – an arbitration can proceed on an ‘ad-hoc’ basis.
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Governing law

Governing law – why does it matter?

A contract cannot exit in a legal vacuum. It needs a governing law which will define how the contract should be interpreted and construed. Different laws can have different effects.

Examples of common problems that can arise when agreeing to a law include the following:

- Different limitation periods/time bars may apply depending on the governing law, thereby affecting the time in which claims can be brought.

- ‘Good faith’ obligations: many civil law systems incorporate the concept of ‘good faith’ unlike common law jurisdictions. This may, for example, prevent a party from taking a purely self-interested view when exercising a contractual right and require it to take into account the interests of the counterparty by acting fairly, honestly and reasonably.

- Laws regarding the existence of partnerships and joint ventures: some legal systems (such as Swiss law) can infer the existence of a partnership in what might (in other legal systems) be thought to be a purely contractual relationship.

- Laws regarding pre-contractual obligations and economic torts: some laws can impose liability for breaking off pre-contractual negotiations, and laws regarding pre-contractual misrepresentations vary.

- Implied terms: rules regarding the implication of terms into a contract, whether by statute or otherwise, will vary.
Exclusion clauses and limits on liability: the validity of exclusion clauses will depend on the rules of the governing law.

More generally, the following issues need to be borne in mind:

- Certainty of legal system: some legal systems are far more developed and sophisticated than others. Choosing a less developed legal system as the governing law is likely to add uncertainty to the dispute resolution process.

- Common law or civil law: there are significant differences between common law and civil law systems. For example, civil law systems tend to have no formal system of precedent (meaning that prior court decisions are not binding) which can lead to less certainty as to how provisions of the civil code will be applied. However, in common law systems the lack of codification and the continuous development of case law can itself create uncertainty.

- Proving the governing law: if a governing law is chosen that is not the national law of the forum in which the dispute is to be determined, the parties will often need to provide evidence of the foreign law to the court or tribunal. Whilst this can be done, it adds an element of uncertainty to the dispute resolution process. The method for evidencing the foreign law depends on the forum and can vary significantly. In some countries each party will provide expert evidence to the court while in others the court will rely on reports prepared by official bodies. In the absence of evidence, some courts will apply the presumption that the foreign law is the same as the national law of the forum.
How do you determine the governing law?

Determining which governing law applies is a matter for the conflicts of law provisions of the law of the state where the dispute is being determined. In arbitrations, the tribunal normally has a discretion as to what conflicts of law principles it applies.

The courts of EU member states (other than Denmark) are bound to apply the Rome I and Rome II Regulations to determine which governing law applies:


- The ‘Rome II’ Regulation (EC Council Regulation 864/2007) applies in respect of non-contractual obligations (where the “events giving rise to damage” occurred after 11 January 2009).

Outside the EU, courts apply national conflicts of laws rules. In general, most systems of law respect the parties’ freedom to choose the governing law applicable to a contract.

Note that governing law does not affect the procedural law to be applied in the dispute resolution process (sometimes known as the lex fori).
Determining the governing law of a contract (“Rome I”)

Under the Rome I Regulation, choices of governing law are, in general, respected. Article 3 states: “The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case”. There are however some exceptions:

- The parties cannot exclude certain mandatory provisions of domestic or EU law.

- The parties cannot choose applicable company law – this is a matter for the national law.

- Restrictions apply in respect of contracts for the carriage of persons (art. 5(2)).

- Restrictions apply in respect of certain consumer contracts (art. 6), insurance contracts (art. 7(3) and 7(4)) and individual employment contracts (art. 8).

If the parties have not chosen the applicable law, in brief, it will be determined as follows:

- Art. 4(1) sets out the position for a number of specific types of contracts (see table over page).

- Where art. 4(1) does not apply (or the contract falls within two or more categories), by identifying the country in which the party required to effect the “characteristic performance” of the contract is “habitually resident” (art. 4(2)). In contracts for the provision of goods or services, the “characteristic performance” is usually in the place from which such provision takes place.

- There is however an exception to art. 4(1) and art. 4(2) if in “all the circumstances” the contract is “manifestly more closely connected” with another country, in which case the law of that country will prevail (art. 4(3)).
For the above exception to apply, it is not enough to prove that the contract was merely “more closely connected” with another country, as was previously the case with the Rome Convention. The exception is only applicable on the satisfaction of the higher threshold that the aggregate of all the factors that connect a contract to another country must “clearly and decisively outweigh” the required certainty in applying the tests in art. 4(1) and art. 4(2).

In the event that the applicable law cannot be determined by either test in art. 4(1) or art. 4(2), the law that will apply will be that of the country with which the contract is “most closely connected” (art. 4(4)).

In identifying the country with which the contract is most closely connected, note that “account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts” (Recital 21).

Rome I regulation: article 4(1) – default rules relating to specific types of contracts

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The scope of the governing law of the contract under Rome I

The governing law of a contract does not determine the procedural law (lex fori) applicable to the dispute resolution process. There are however certain ‘grey’ areas on the fringes between procedural law and governing law which are clarified by the Rome I Regulation. The regulation confirms that the applicable law of the contract (rather than the procedural law) applies in respect of:

- Questions concerning the existence and validity of a contract (art. 10(1)).

- Interpretation and performance of a contract (art. 12(1)(a-b)).

- The consequences of breach including the assessment of damages (art. 12(1)(c)).

- The ways of extinguishing obligations, limitation and prescription (art. 12(1)(d)), and the consequences of invalidity (art. 12(1)(e)).

- The assignability of claims under the contract (art. 14(2)), and set-off against a claim under the contract (art. 17).

- Presumptions of law and the burden of proof (art. 18(2)).
Determining the governing law of non-contractual obligations ("Rome II")

The courts of all EU member states (other than Denmark) must apply the Rome II Regulation. The purpose of Rome II was to create a unified approach among courts of EU member states regarding:

- the determination of the governing law applicable to non-contractual obligations; and
- the scope of the governing law of the non-contractual obligations.

It was not intended to change the rules dramatically but to ensure a consistency of approach across EU member states.

Under Rome II, a choice of law clause (applicable to non-contractual obligations) between the parties, agreed in advance of the claim, will be binding provided that:

- the clause is between commercial parties; AND
- the clause is ‘freely negotiated’ – standard wording that has not been individually negotiated is unlikely to satisfy this requirement.

Where the parties have not chosen the law applicable to non-contractual obligations, Article 4 sets out the basic rule that the law applicable to a non-contractual obligation is the “law of the country in which the damage occurs (irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur)”

There are however the following general exceptions to this rule:

- Where both parties are habitually resident in the same (other) country (art. 4(2));
- Where the claim is “manifestly more closely connected” with another country (art. 4(3)); and/or
- Where the claim is governed by mandatory laws (art. 16) or where it would be against public policy to apply another law (art. 26).
Special rules apply in relation to the following rights and obligations:

- Product liability;
- Competition;
- Environmental damage;
- Intellectual property rights; and
- Industrial action.

Specific rules also apply in respect of the following types of quasi-contractual claims. In general, these sorts of claims are governed by the law applicable to the contract:

- Unjust enrichment claims;
- Agency/absence of authority claims; and
- Claims relating to pre-contractual dealings.
The scope of the law applicable to the non-contractual obligation under Rome II

Article 15 of the Rome II Regulation clarifies which issues fall within the scope of the law applicable to the non-contractual obligation, rather than the procedural law of the courts determining the dispute. (For example, if a tort claim governed by French law is subject to the jurisdiction of the English courts, would French or English limitation periods apply?) It provides that all the following issues are governed by the law applicable to the non-contractual obligation rather than the procedural law (lex fori):

- The validity of limitations and exclusions of liability;
- Assessment of damage;
- The remedy available (subject to the remedy being within the power of the court determining the dispute);
- Liability for the acts of another person / vicarious liability; and
- Limitation periods.
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Jurisdiction and arbitration clauses

Introduction

The jurisdiction or arbitration clause determines the forum in which any disputes will be determined (e.g. the French courts or by arbitration in New York).

- It does not determine the law to be applied in determining the substance of the dispute – that is the governing law. National courts will in general be prepared to apply a foreign law to a dispute.
- It does however determine the procedural law (referred to as the lex fori) applicable to the dispute resolution process. For example, the English courts will apply the English Civil Procedure Rules, even if they are applying French contract law to a dispute.
- In arbitration, the seat of the arbitration usually determines the national arbitration law under which the arbitration is conducted. It does not however, determine the procedural rules (e.g. LCIA, ICC) to be applied to the arbitration (if any).

Arbitration and litigation before the courts both result in binding and enforceable decisions (subject to any appeals that might be permitted).

In contrast, the term alternative dispute resolution (“ADR”) tends to be used to refer to other forms of dispute resolution that do not result in binding and enforceable decisions. Mediation is the most common form of ADR; in essence it is a voluntary process of assisted negotiation involving a trained neutral intermediary.

In this chapter, we explain why the choice of forum matters, why you might choose arbitration over national courts and the effectiveness of exclusive and non-exclusive jurisdiction clauses.

Specific drafting tips and sample clauses are included in the final chapters of this guide.
Why the forum matters

The choice of the forum in which disputes will be determined is highly significant in the event that a dispute arises. Set out below is a list of some of the matters that can be affected by the choice of courts or arbitration:

- Enforceability of judgment or award – enforceability is often the key factor driving the choice of forum for determining disputes. The issue of enforceability of judgments and awards is dealt with in the following chapter, “Assessing enforcement risk”.

- Costs (see page 22).

- Dispute resolution process (see page 21).

- Privacy and confidentiality:
  - In most countries, court proceedings are held in public and at least some of the court documents can be seen by the public.
  - In contrast, arbitration is a private process and the proceedings and the arbitral award can be kept confidential unless the award is challenged or enforced in court proceedings, in which case the award may become public.

- Neutrality – both perceived neutrality and actual neutrality can be important factors. With respect to some countries, parties will have real concerns about the neutrality and susceptibility to influence of judges.

- Quality of decisions:
  - The quality and experience of judges varies greatly between jurisdictions. Some jurisdictions will rely on non-lawyer judges even in large commercial cases whereas in others there are specialist
courts with experienced judges for large commercial matters. In many civil law countries, the judges follow a separate career path and may have no or very little experience in private practice.

– In an arbitration, the quality of the arbitrators will depend on the selection and appointment procedure.

**Why the forum matters – the dispute resolution process**

The dispute resolution process varies greatly between different dispute resolution forums, for instance in terms of:

- Requirements for statements of case.

- The court’s/tribunal’s power to impose sanctions for failure to comply with orders.

- Disclosure/discovery of documents:
  – The rules regarding the obligations on parties to disclose documents which support the other party’s case vary hugely. In general, civil law jurisdictions do not impose a duty to disclose documents that support the other party’s claim but the court will have the power to require specific documents to be produced. In common law jurisdictions, parties are generally required to disclose all documents that support or adversely affect either party’s case.
  – This can be a highly significant factor in litigation, especially where the circumstances of the case mean that one party is likely to possess the majority of the relevant documents.

- Language and place of hearing.
Finality and rights of appeal:

− In some jurisdictions, parties have automatic rights of appeal irrespective of the merits of their case whilst in others (such as England & Wales) parties generally require the permission of the court to appeal.
− In arbitration, there are generally only limited rights to appeal or challenge the award. The scope for appeals will usually depend on the arbitration law of the seat of the arbitration, and potentially the choice of rules applicable to the arbitration and the wording of the arbitration clause.

Timing and delay.

Interim injunctions – the availability of injunctive relief in proceedings varies between courts of different jurisdictions. Arbitrators can grant injunctive relief but this will not be enforceable until it is given effect by national courts which can vary in their ability to support arbitral proceedings.

The ability to join third parties to the proceedings – because of the private contractual nature of arbitration proceedings, third parties cannot be joined into them without their consent.

Precedents – in common law systems, judges will be bound by precedents set in prior case law whereas that is not the case in civil law systems.

Why the forum matters – costs

Court/tribunal fees:

− Court fees can range from being nominal to being based on a percentage of the value of the claim, depending on the jurisdiction.
− Arbitral tribunal fees are generally much higher since the fees of the arbitrator(s) have to be paid
(sometimes at an hourly rate, but also by reference to the value of the amounts claimed). The institution conducting the arbitration will also charge fees.

**Lawyers’ costs:**

- Costs in common law jurisdictions tend to be significantly higher than in civil law jurisdictions because of the nature of the proceedings and, in particular, the rules on disclosure/discovery.

**Recoverability of costs from losing parties:**

- In common law jurisdictions other than the US, the losing party tends to be ordered to pay the majority of the winning party’s legal fees. In civil law jurisdictions and the US, it is rare for the losing party to be ordered to pay any significant amount in respect of the costs of the winning party.

- In arbitration, the tribunal normally has the express power to award the winning party its costs. This is provided for in the rules of the LCIA, the ICC and the ICDR.

**Security for costs:**

- In common law jurisdictions other than the US, the courts generally have the power to require a claimant to provide security to cover the anticipated legal costs of the defendant in circumstances where it might otherwise be difficult to enforce any costs order at the end of the proceedings.

- In arbitration, the tribunal normally has the power to require a claimant to provide security for the costs of the in appropriate circumstances; this is provided for in the rules of the LCIA (article 25.2), the ICC (article 36) and the ICDR (article 33). Tribunals are sometimes more reluctant to order such security, however.
Arbitration – what are the advantages and disadvantages?

Some of the key advantages and disadvantages of arbitration as compared with court proceedings are set out below.

- **Enforceability** of judgment or award – in general, arbitral awards can be recognised and enforced more widely than court judgments because of the large number of countries that are signatories to the 1958 New York Convention on the recognition of arbitral awards (see page 55).

- **Costs** – certain aspects of the arbitral process may be simpler and cheaper than the equivalent in English courts, such as disclosure, interim applications and determinations regarding jurisdiction. However, the fact that the parties must pay for the costs of the tribunal can add a very significant cost to the arbitration process.

- **Disclosure** – in general, there tends to be more limited disclosure in arbitrations than in court proceedings in common law jurisdictions, and there may not necessarily be any requirement to disclose all relevant documents. It is difficult to tell in advance whether this is likely to be an advantage or a disadvantage, but it is likely to disadvantage a party who will not be in control of the majority of the documents.

- **Privacy and confidentiality** – where confidentiality is a real concern, arbitration has the advantage that it can be kept confidential and pleadings and hearings will not be made public. However, it is not automatically confidential in all jurisdictions and related court hearings may be in public.

- **Multi-party proceedings** – in general, arbitration is less suited to proceedings that are likely to involve multiple parties and, in particular, third parties. Entities that are not party to the arbitration agreement cannot be joined into arbitration proceedings without their consent.
- **Neutrality** – both perceived neutrality and actual neutrality can be important factors. In some countries, parties will have real concerns about the neutrality and susceptibility to influence of judges. Arbitration is often seen as a more neutral process.

- **Quality of decisions** – the quality and reliability of the decision making process will depend on the persons appointed as arbitrators and the appointment process. Given that there are only limited rights to challenge or appeal arbitration awards, parties often choose to have a panel of three arbitrators in higher value matters to give them increased confidence in the decision making process.

**Non-exclusive jurisdiction clauses**

A non-exclusive jurisdiction clause in a contract provides the parties with only a partial degree of certainty. Importantly, it will **not** prohibit the parties from commencing substantive proceedings in courts other than those specified in the clause. However, what it does mean is that if either party commences proceedings which fall within the scope of the clause in the named court, the other party is prohibited from disputing that the named court has jurisdiction to determine the dispute.

In practice, where a contract contains a non-exclusive jurisdiction clause and a dispute arises, or appears likely to arise, there may be a race between the parties to commence proceedings in their favoured court in order to establish the jurisdiction of that court.
How effective is an exclusive jurisdiction clause?

An exclusive jurisdiction clause ("EJC") in a contract will prohibit the parties from commencing substantive proceedings in relation to disputes falling within the scope of the clause in any courts other than those specified in the clause.

In general, most courts will respect EJCs. However, they do not necessarily prevent any proceedings from being started in another court, and the following points should be noted:

- EJCs do not prevent a party from commencing proceedings in a different court to seek interim relief such as freezing injunctions (in support of substantive proceedings in the courts of the exclusive jurisdiction).

- There are some factors which courts will consider override EJCs, even if they respect the clause in principle.

- Parties may act in breach of EJCs to seize a tactical advantage, in particular where the EU jurisdictional rules apply.

Factors that override exclusive jurisdiction clauses

Under the European jurisdiction regime, if the subject matter of a dispute falls within the exclusive jurisdiction provisions in article 22 of the Judgments Regulation (Council Regulation 44/2001) (replaced by the Recast Brussels Regulation (Council Regulation 1215/2012) (the Recast Regulation) article 24 for proceedings issued on or after 10 January 2015), then those provisions will determine which courts have jurisdiction irrespective of any EJC. The exclusive jurisdiction provisions in article 22 are, however, very limited and apply where the substance of the dispute relates to: (i) land; (ii) the formation or dissolution of a company or partnership or the validity of the decisions of its organs;
(iii) the validity of entries in public registers; (iv) the registration or validity of patents, trade marks, designs, or other similar rights; or (v) the enforcement of judgments.

Furthermore, under the EU regime, if a party submits to the jurisdiction of a court other than that specified in the EJC, that court will have jurisdiction irrespective of the EJC (under article 24 of the Judgments Regulation and article 26 of the Recast Regulation).

In general, similar principles are likely to be applied in most other countries. However, in some countries, particularly in the Middle East, the courts will not recognise EJCs and will apply their own rules of jurisdiction irrespective of the contractual provisions.

**Breaches of exclusive jurisdiction clauses**

In practice, despite it being a breach of contract, some parties will still commence proceedings in breach of an EJC. This may be because there is a genuine dispute as to the applicability or meaning of the EJC, or it may simply be a tactical manoeuvre.

A breach of an exclusive jurisdiction clause by one party commencing proceedings in another jurisdiction may result in a claim for damages for breach of contract.

If proceedings are commenced in one state in breach of an EJC (assuming that the EU jurisdiction regime does not apply), if the ‘innocent’ party then commences proceedings in the courts selected in the EJC, those courts are likely to accept jurisdiction (despite the other ongoing proceedings). Furthermore, common law courts such as the English courts are generally prepared to assist in the enforcement of the EJC by granting an injunction prohibiting the counterparty from pursuing the proceedings in other courts in breach of the EJC (known as an “anti-suit injunction”).
EU jurisdiction regime: Proceedings issued before 10 January 2015 – The Brussels Regulation

However, under the EU jurisdiction regime, the courts specified in the EJC can no longer grant an anti-suit injunction prohibiting the other party from pursuing proceedings in another EU court as these injunctions were seen as conflicting with the principles of mutual respect between courts of EU member states. Furthermore, under the old EU regime, if proceedings are commenced in breach of an EJC, the ‘innocent’ party cannot then pursue proceedings in the courts selected in the EJC until the courts where the proceedings were first started have declined jurisdiction (and there are no further rights of appeal). This is because of the principle of EU law that the courts of all EU member states must respect the decision of the court ‘first seised’ in the proceedings as regards whether or not it has jurisdiction. (As stated above, in these circumstances, the English court cannot grant an anti-suit injunction ordering the other party to cease the proceedings commenced in breach of the EJC.)

In practice, these EU rules can be abused by defendants wishing to avoid facing litigation in the relevant courts, with the result that bona fide proceedings can be delayed for several years while the issue of jurisdiction is finally determined (including any appeals) in the courts of another EU member state (which may have no genuine connection with the dispute). This problem (sometimes referred to as the “Italian torpedo”) is well recognised and an attempt has been made to address it in the Recast Regulation (1215/2012), which applies for proceedings that are issued in Member State courts on or after 10 January 2015.

EU jurisdiction regime: Proceedings issued on or after 10 January 2015 – The Recast Regulation

The new regime seeks to neutralise the torpedo. Although the first seised rule still applies as the default, where there is an exclusive jurisdiction clause in favour of one Member State court, the rules
provide that it is that chosen court which has the right to proceed with the case first, even if parallel proceedings have already been commenced in another Member State court (such that the chosen court is the court second seised).

**Provisional/interim applications:** it should be noted that the commencement of proceedings in one EU member state does not prevent an application being made for (provisional) injunctive relief in the courts of another member state.
How to determine which courts have jurisdiction in the event of a dispute

If the dispute is subject to an exclusive jurisdiction clause then, subject to the points raised in the previous section, it should be clear which courts have jurisdiction to determine the dispute and all other courts should decline jurisdiction.

If there is no exclusive jurisdiction clause, whether or not a particular court considers that it has jurisdiction to determine the dispute will depend on the jurisdictional rules of the relevant country. It is however quite possible that more than one court would consider that it had jurisdiction over the dispute.

The courts of EU member states must all apply the jurisdictional rules set out in the Judgments Regulation (or the Recast Regulation for proceedings issued on or after 10 January 2015) where the dispute relates to ‘civil and commercial matters’ and the defendants are domiciled within the EU (subject to a few exceptions where separate rules apply).

The domicile of the parties to the dispute and the subject matter of the dispute will be relevant factors when deciding whether or not a particular court has jurisdiction.

A brief summary of the EU jurisdiction regime (in the Judgments Regulation and Recast Regulation) is set out in the box on page 34.

As above, the new provisions of the amended Judgments Regulation (the Recast Regulation) will be applied by Member State courts for proceedings issued on or after 10 January 2015. The key relevant amendments include changes to the provisions governing: (i) the procedure for resolving jurisdiction races where disputes are commenced in more than one jurisdiction; (ii) jurisdiction agreements; and (iii) the exclusion of arbitration.
The English Civil Procedure Rules regarding jurisdiction (in cases where the Judgments Regulation (or the Recast Regulation) does not apply) are set out in CPR 6. In summary, the approach is that if a defendant is present and can be served within England and Wales, the court will have jurisdiction; if not, the court will only have jurisdiction in limited circumstances:

- **“Service gateways”** – first, the court must be satisfied that the claim falls within one of the “gateways” set out in CPR Practice Direction 6B. These gateways set out the minimum requirements for different types of claim to be considered to have sufficient connection with England to allow a defendant outside the jurisdiction to be served with a claim (see table below).

- **“Forum conveniens”** – second, the court must be satisfied that the English courts are the most appropriate forum in which to determine the dispute from a practical perspective, taking into account factors such as the language, the place of the witnesses and the connection with the forum.
A summary of the main “gateways” for service out of the jurisdiction where the defendants are not domiciled in the EU

| General grounds | “Anchor defendant” rule – where one defendant can be sued in England, other co-defendants can be served out of the jurisdiction. A claim for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction. |
| Interim remedies | A claim for interim/provisional remedies in support of foreign court or arbitration proceedings. |
| Contract claims | Where the contract:  
  – was made within the jurisdiction;  
  – was made by or through an agent within the jurisdiction;  
  – is governed by English law; or  
  – contains an exclusive jurisdiction clause.  
A claim in respect of a breach of contract within the jurisdiction. |
| Tort | A claim in tort where damage was sustained or will be sustained within the jurisdiction, or the damage that has been or will be sustained results from an act committed or likely to be committed within the jurisdiction. |
| Property | A claim where the whole or principal subject matter of the claim relates to property located within the jurisdiction. |
| Trusts | Certain types of trust claims connected with the jurisdiction. |
| Enforcement | A claim is made to enforce any judgment or arbitral award. |
| Breach of confidence or misuse of private information | A claim for breach of confidence or misuse of private information where the detriment was suffered or will be suffered within the jurisdiction, or the detriment was suffered or will be suffered as a consequence of an act committed or likely to be committed within the jurisdiction, |
The EU jurisdiction regime (the Judgments Regulation, replaced by the Recast Regulation for proceedings issued on or after 10 January 2015) – summary of the hierarchy of rules

Exclusive jurisdiction provisions (article 22 Judgments Regulation (‘JR’), article 24 Recast Regulation (‘RR’)): disputes relating to land, registrable rights, constitution of companies, IP rights and enforcement are all subject to the exclusive jurisdiction of the specified courts.

Submission to the jurisdiction (article 24 JR, article 26 RR): if a defendant enters an appearance other than to contest the jurisdiction, that court will have jurisdiction (subject to article 22).

Exclusive jurisdiction clauses (article 23 JR): the courts specified in an exclusive jurisdiction clause shall have jurisdiction and other courts shall decline jurisdiction. Now under article 25 RR: a jurisdiction clause shall be exclusive unless parties have agreed otherwise.

General rule (where the defendant is domiciled within the EU) (article 2 JR, article 4 RR): defendants should be sued in the courts of the country where they are domiciled.

Jurisdiction where the defendant is domiciled outside the EU (article 4 JR, article 6 RR): the jurisdiction of the court where the defendant is being sued should (subject to certain exceptions) be determined by the national law of that country.

Exceptions to the general rule (articles 5 to 21 JR, articles 7 to 23 RR): where one of the exceptions applies, a defendant may be sued in a place other than where they are domiciled. The principal exceptions are:

- Article 5(1) JR, article 7(1) RR – matters relating to a contract: a defendant may be sued in the place of performance of the relevant contractual obligation.
- Article 5(3) JR, article 7(2) RR – matters relating to tort (including product liability): a defendant may be sued in the place where the harmful event occurred or may occur.
- Article 5(4) JR, article 7(3) RR – civil claims linked to criminal charges: these sorts of claims can be brought in the state where the related criminal proceedings were brought.
- Article 5(5) JR, article 7(5) RR – branches, agencies: a defendant may be sued in the place of the branch, agency or establishment (where the dispute arises out of the operation of such branch).
- Article 6(1) JR, article 8(1) RR – anchor defendant rule: where one defendant is properly sued in the place of his domicile, other defendants from other countries may be joined into the same proceedings.
- Articles 8 to 14 JR, article 10 to 16 RR – specific rules apply to insurance contracts.
- Articles 15 to 17 JR, article 17 to 19 RR – specific rules apply to consumer contracts.
- Articles 18 to 21 JR, article 20 to 23 RR – specific rules apply to Employment contracts.
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Assessing enforcement risk

Introduction

Apart from the legal and factual uncertainties specific to any case, the general risks inherent in the dispute resolution process include:

- risks around the certainty of the applicable legal principles;
- risks arising from the reliability of the dispute resolution process; and
- risks associated with the enforceability of any judgment or award.

There are a number of aspects of the risk related to the enforceability of judgments or awards. The first is the solvency risk, namely whether the defendant has the financial means to satisfy the judgment or award. The second is the risk that the defendant will seek to take steps to evade payment of the judgment/award, including putting its assets out of reach of enforcement.

However, in international cases (where a defendant’s assets are located abroad), there are also significant legal risks as to whether the judgment or award will be recognised and enforced in the relevant foreign countries. In order to understand the enforcement risk, one has to understand how judgments are enforced in an international context. The starting point is that a judgment or arbitral award can only be enforced in the country where the judgment was given (or the arbitration had its seat) unless it is recognised in a foreign jurisdiction.

Accordingly, the contract negotiator needs to consider:

- In what jurisdiction would you need to enforce the judgment or award?
- Would the judgment or award be recognised and enforced in the relevant jurisdiction?
These factors will influence:

- the choice between dispute resolution by arbitration or in national courts;
- the choice of national courts; and
- the reliance on other methods of reducing the risk of the counterparty breaching its contractual obligations.

Where the other party to a contract is a state entity, particular attention needs to be paid to the risks arising from principles of sovereign immunity. These can affect both the issue of whether the court has jurisdiction to determine the dispute and whether any judgment will be enforceable. Further information about principles of sovereign immunity is set out on page 69.

In situations where it is likely to be difficult to enforce any judgment or award, steps need to be taken to limit the scope of exposure to the counterparty risk. This might be done by obtaining adequate security from the counterparty at the outset or by taking practical steps to ensure that the level of exposure to the counterparty is kept within an acceptable range.
What decisions can be enforced abroad (in principle)?

- Arbitration awards – yes.

- Final court orders/judgments – yes.

- Expert determinations – no: they are only binding as a matter of contract. Court proceedings are required to obtain a judgment confirming the contractual obligation to comply with the expert determination.

- Adjudication awards – no: adjudication decisions are generally interim in nature and remain subject to any subsequent court decisions. English adjudication awards are, however, enforceable in England despite their interim nature.

- Mediation outcomes – no: mediation creates no binding obligations. Any settlement arising from a mediation will take effect as a contract, which can only be enforced through bringing a claim for breach of contract if it is not complied with.
What types of assets can be enforced against?

At the time of formation of a contract it can often be difficult, if not impossible, to determine against what assets a claimant might want to enforce a judgment debt. However, in principle, judgments and awards can be enforced against almost any asset type including:

- cash;
- land;
- shares;
- debts due from third parties (including bank accounts); and
- personal property/chattels.
Where will you need to enforce any judgment or award?

The place where you will need to enforce any judgment or award will depend on the way in which you seek to enforce the underlying judgment or award:

- To enforce against specific assets, enforcement will be necessary in the place of the asset. Whilst the location or “situs” of the asset may be simple to determine for physical assets such as land, this may not be the case for intangible assets such as debts.

- To commence insolvency proceedings threatening the winding up of a company, enforcement will generally be necessary in the place of incorporation of the company or the place of its centre of main interests (“COMI”). However, local winding up proceedings may also be possible in other countries where the defendant has a business establishment.

- To take steps against the directors of a company, it may be necessary to enforce in the place where the directors are domiciled.

- However, it may also be possible to obtain injunctive or other protective relief from the courts of the state of origin of the judgment even if there are no assets in that country. Such orders are referred to as ‘in personam’ orders since they are binding on the persons named in the order but they are limited in effect in that (i) they do not have any effect “in rem” (i.e. they do not affect property rights); and (ii) in general, they will not bind third parties outside the jurisdiction.
Enforcement against the judgment debtor’s assets

In order to evaluate the enforcement risk, one needs to determine what assets the counterparty owns and where they are located. In general, enforcement against a judgment debtor’s assets will be in the state where the assets are located. In the case of tangible property, the place of the asset is usually reasonably clear but the position is more difficult in relation to intangible property. However, unless specific security interests are granted or covenants are provided, it may be impossible to prevent assets from being moved or sold once the contract has been completed.

Most legal systems have procedures to allow for enforcement against tangible property and debts. However, the extent to which one can enforce against future or contingent rights and/or jointly held property varies.

An outline of the sorts of enforcement procedures available and the place of enforcement for different types of assets is set out below:

- **Shares**
  - charging orders, attachment orders and orders for sale.
  - Place: country of incorporation of relevant company.
- **Land**
  - charging orders, attachment orders and orders for sale.
  - Place: country in which land is located.
- **‘Personal’/moveable property**
  - Seizure.
  - Place: country in which property is located.
- **Debts** (including bank accounts)
  - Garnishee/attachment proceedings/third party debt orders.
  - Place: the starting point is the place of debtor. BUT conflicts of law issues arise where the creditor is in another country or the agreement is governed by a different law.
The precise conditions that need to be established in order to put a company or person into insolvency or bankruptcy will vary from jurisdiction to jurisdiction. In some jurisdictions it is sufficient to show that the debtor has failed to satisfy a debt owed to one creditor whilst in other jurisdictions it is necessary to establish a more general inability on behalf of the debtor to satisfy its debts. This distinction can be particularly significant when a debtor is seeking to evade payment rather than being unable to pay.

The starting point is that insolvency proceedings will take place where the debtor has its principal place of business and/or place of incorporation. However, under many legal systems there is scope for local insolvency proceedings in other countries where the debtor has a business establishment.

Insolvency procedures have advantages and disadvantages for creditors seeking to ensure payment of their debts:

- The advantages include the significant powers given to insolvency officers to investigate the affairs of a company or business and to set aside prior transactions where they were at an undervalue or they ‘preferred’ particular creditors.

- The disadvantages stem from the loss of control over the process and include: (i) the requirement to share the debtor’s assets amongst all the creditors; (ii) the significant cost of the process; and (iii) the timescale of the process.
Steps against the directors of corporate debtors

Although directors are not personally liable for the debts of a company (other than in exceptional circumstances) there are steps related to enforcement which may involve proceedings against the directors personally. Some of these steps are listed below:

- Procedures to compel directors to provide information about a company’s assets.
- Potential tortious claims seeking to impose personal liability on the directors.
- Contempt of court and/or committal proceedings for breaches of court orders.

The question as to which courts are competent to determine these sorts of proceedings can give rise to complex jurisdictional issues and this needs to be considered on a case by case basis.
What do you do if the enforcement risk is high?

At the contract drafting stage, where one party is concerned about its ability to enforce debts against the counterparty to a contract, it may seek to mitigate this risk by taking one or more of the following steps:

- Change the **dispute resolution provisions** to increase the prospect of the award or judgment being enforceable;

- Require the grant of **security** interests over specific immovable assets;

- Require the provision of a **bond** to secure payments that may become due;

- In the case of contracts for sale of goods, include **retention of title** clauses;

- Limit the extent of any **financial exposure** by controlling the credit provided and requiring prompt payment.
Enforcing a judgment or award internationally

In order to enforce a court judgment/order or arbitration award against assets, the judgment or award needs first to be recognised by the state which has jurisdiction over the relevant assets. (References in this guide to court judgments include court orders.) Whether or not a state will recognise a court judgment or arbitration award will depend on:

- International treaties or conventions; and
- Local law provisions in the state of enforcement.

Some of the most important treaties and conventions are set out in the table below.

### International conventions/regimes relating to the enforcement of judgments and awards

<table>
<thead>
<tr>
<th>Convention</th>
<th>Parties to convention (in general terms)</th>
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<tr>
<td>New York Convention on enforcement of arbitration awards</td>
<td>156 countries</td>
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<tr>
<td>Judgments Regulation/Brussels Regulation (EC Council Regulation 44/2001), replaced by the Recast Regulation (Council Regulation 1215/2012) applicable to proceedings issued on or after 10 January 2015</td>
<td>EU member states</td>
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<tr>
<td>European Enforcement Order Regulation (EC Council Regulation 805/2004)</td>
<td>EU member states (other than Denmark)</td>
</tr>
<tr>
<td>Hague Recognition and Enforcement Convention 1971</td>
<td>Very limited application</td>
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<tr>
<td>Hague Convention on Choice of Court Agreements</td>
<td>Mexico and EU member states (other than Denmark)</td>
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<tr>
<td>Lugano Convention</td>
<td>EU states, Switzerland, Norway and Iceland</td>
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<tr>
<td>Administration of Justice Act 1920 (English statute)</td>
<td>Act applies to judgments from various Commonwealth states</td>
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<tr>
<td>Foreign Judgments (Reciprocal Enforcement) Act 1933 (English statute)</td>
<td>Act applies to judgments from various Commonwealth states</td>
</tr>
<tr>
<td>Riyadh Convention</td>
<td>Various Arab states</td>
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<tr>
<td>GCC Convention</td>
<td>GCC member states</td>
</tr>
<tr>
<td>OHADA Uniform Act on Arbitration</td>
<td>OHADA member states</td>
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</table>
Where a treaty or convention is applicable, enforcement should in theory be a relatively straightforward process in respect of final ‘money payment’ judgments. (Note that a number of enforcement regimes distinguish between judgments requiring the payment of money, which are enforceable, and other judgments, such as declarations and injunctions, which are not enforceable.) However, in practice, the reliability and speed of the process will depend on the courts of the state of enforcement. Further information about each of these treaties and conventions is set out in the following section.

Even if there is not an applicable international convention or treaty, many states will recognise foreign court judgments (for the payment of money) under provisions of their own domestic law. For example, there is no applicable convention or treaty between England and the US but English court judgments are regularly enforced in the US.

- In common law jurisdictions, the procedure is generally to commence a claim for payment of the debt represented by the court judgment. There are very limited potential defences and the proceedings normally are determined as a summary judgment.

- In civil law jurisdictions, generally, the procedure is to apply to have the foreign judgment granted ‘exequatur’, giving it the status of a domestic judgment.

National laws vary: what is essential (from the perspective of the party enforcing the judgment) is that the enforcing court should not seek to reopen the merits of the underlying judgment but should focus on establishing whether the judgment was properly granted in a court of competent jurisdiction. Some of the factors that enforcing courts typically take into account are as follows:

- Did the court granting the judgment have jurisdiction over the dispute?

- Was the defendant properly served with the proceedings?
- Was there a decision on the substance of the case (rather than a purely procedural determination of the matter)?

- Is the judgment final and could it be appealed?

- Is there “reciprocity” in respect of the recognition of judgments between the two states?

- Would the recognition of the judgment offend against public policy?

Comments on our practical experiences of enforcing judgments internationally are set out on page 59.
A summary of the key international conventions and treaties

The Judgments Regulation (EC Council Regulation 44/2001, also known as the “Brussels I Regulation”), replaced by the Recast Brussels Regulation (EC Council Regulation 1215/2012)

Proceedings issued before 10 January 2015 – The Judgments Regulation

The Judgments Regulation sets out a straightforward system for the mutual recognition of judgments between EU member states. The state of the place of enforcement is obliged to recognise a judgment of another EU member state provided that certain basic conditions are met. The defendant then has a right to appeal against the recognition of the judgment but there are only very limited grounds on which recognition can be overturned (as set out in article 34 of the Judgments Regulation). In outline, these are where:

- recognition or enforcement would be contrary to public policy;
- the defendant did not have a proper opportunity to defend the underlying proceedings; and/or
- where there is a conflicting judgment in the state of enforcement or elsewhere in the EU.

The Judgments Regulation applies to all “civil and commercial” matters but certain matters are excluded from its scope, including matters related to arbitration. It also applies both to injunctions and orders requiring the payment of money, as long as the order has been made at an inter-partes hearing.

While in theory the system for recognition should be very straightforward and quick, in practice, it can still be relatively costly and time consuming to register a judgment in some EU member states. In recognition of the practical difficulties in enforcing judgments in other EU member states, there are controversial proposals to implement a new regime which would allow for the automatic recognition of judgments of one EU member state in other member states.
The Judgments Regulation has been replaced by the Recast Brussels Regulation (1215/2012), (the Recast Regulation) and will apply to proceedings that are issued on or after 10 January 2015.

Proceedings issued on or after 10 January 2015 – The Recast Regulation

Many of the basic principles in the Judgments Regulation have not changed (although the paragraph numberings have). So, for example, the default rule remains that a defendant should be sued in the court of the Member State in which it is domiciled. The rules providing alternative bases for establishing jurisdiction (eg in matters relating to contract and tort) also survive.

The key relevant amendments are to the provisions governing:

- the procedure for resolving jurisdiction races where proceedings relating to the same dispute are commenced in more than one jurisdiction;
- jurisdiction agreements;
- the exclusion of arbitration;
- the applicability of the Judgments Regulation to non-EU matters and defendants; and
- the abolition of *exequatur* (the need to obtain a court order before enforcing a foreign judgment).

**Lugano Convention**

The Lugano Convention (which was updated in 2007) is very similar to the Judgments Regulation. It allows for the recognition of judgments of EU Member States in Switzerland, Norway and Iceland (and vice-versa). The Lugano Convention is not affected by the Recast Regulation.

**European Enforcement Order Regulation (EC Council Regulation 805/2004, the “EEO Regulation”)**

The EEO Regulation provides a special simplified system for the recognition of certain types of judgments granted in uncontested claims. It applies to EU member states to which the Judgments
Regulation (or Recast Regulation) applies (except for Denmark). Where such a judgment becomes enforceable in the state that granted it, the court that gave judgment may issue a certificate confirming that the judgment was uncontested and this then constitutes a European Enforcement Order. The European Enforcement Order can then be enforced directly in the courts of any other member state in the same way that a local court judgment court can be enforced. This removes any scope for challenging the recognition of the judgment in the state of enforcement (although in very limited circumstances the enforcement may be stayed). Minor amendments to the EEO Regulation were made by EC Council Regulation 1103/2008.

**Administration of Justice Act 1920**

The Administration of Justice Act 1920 is a UK statute which provides for the registration in the UK of court judgments from certain British Commonwealth countries. The procedure is relatively straightforward and allows only very limited grounds for challenging registration, provided that certain basic criteria are met. However, it applies only to final ‘money-payment’ judgments (including arbitration awards where the sum payable has become enforceable in the same manner as a court judgment under the law of the place where the arbitration award was made). Once registered, the foreign judgment takes effect as if it were a domestic judgment.

In general, those countries to which the 1920 Act applies also have reciprocal legislation which provides for the registration of other Commonwealth judgments on the same grounds. However, this is not necessarily the case and in some countries to which the 1920 Act applies, there is no reciprocal legislation.

**Foreign Judgments (Reciprocal Enforcement) Act 1933**

The Foreign Judgments (Reciprocal Enforcement) Act 1933 is a UK statute which provides for the registration in the courts of the UK of foreign judgments of countries with whom the UK has signed a bi-lateral convention or treaty. These countries are largely Commonwealth countries or countries forming part of the former British Empire.
The procedure, which applies only to final ‘money-payment’ judgments (including arbitration awards where the sum payable has become enforceable in the same manner as a court judgment under the law of the place where the arbitration award was made), is relatively straightforward and allows only very limited grounds for challenging registration, provided that certain basic criteria are met. Once registered, the foreign judgment takes effect as if it were a domestic judgment.

Some of the countries falling within the scope of the 1920 or 1933 Act are countries to which the Brussels regime (replaced by the Recast Regulation) applies. Where that is the case, the Brussels regime takes precedence.

**Riyadh Arab Agreement for Judicial Co-operation 1983 (the “Riyadh Convention”)**

Each signatory of the Riyadh Arab Agreement for Judicial Co-operation 1983 (known as the Riyadh Convention) will recognise and enforce both court judgments and arbitral awards of any other signatory. The signatories to the agreement are Algeria, Bahrain, Djibouti, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates and Yemen. Recognition and enforcement without re-examination of the merits is conditional upon leave to enforce being granted by the competent court in the country of origin of the judgment or award.

Note that recognition of a judgment or award may be refused on certain grounds, including:

- the judgment or award being contrary to Sharia or the constitution, public policy or good morals of the country in which enforcement is sought;
- if there were certain procedural irregularities in the case, such as the losing party not being properly notified of the hearing so that it could not defend itself;
- if the parties were not properly represented at the hearing in accordance with the laws of the country in which enforcement is sought; or
if the dispute has already been the subject of a judgment or award between the same parties on
the same facts in the country in which enforcement is sought (or another country if that judgment
has been recognised), or if proceedings are ongoing.

GCC Convention for the Execution of Judgments, Delegations and Judicial
Notifications (the “GCC Convention”)

Judgments issued in any of the member states of the Gulf Cooperation Council (the “GCC”) are
enforceable in any other GCC state. The six member states are the United Arab Emirates, Bahrain,
Qatar, Kuwait, Saudi Arabia and Oman.

Hague Recognition and Enforcement Convention 1971

The aim of the Hague Convention on Recognition and Enforcement was to create a simplified and
consistent framework for the recognition and enforcement of foreign court judgments.

However, this convention was in practice overtaken by the European regime of the Brussels
Convention and so very few countries have signed up to it. Furthermore, the practical effect of the
convention is particularly limited since it only applies in respect of the enforcement of judgments of
one contracting state in another contracting state. However, on 25 November 2014, the European
Parliament plenary session gave its consent on the draft Council Decision to the approval, on behalf

Hague Convention on Choice of Court Agreements

The Hague Convention on Choice of Court Agreements was drafted to create uniform rules on
jurisdiction, recognition and enforcement of foreign judgments in civil or commercial matters, to the
end of promoting international trade and investment. This convention has been ratified by Mexico
and the European Union. As a result of the ratification by the EU, all EU member states will be bound by this convention, with the exception of Denmark. Singapore and the United States of America have signed (but not ratified) the convention and are not legally bound by it. This convention entered into force on 01 October 2015.

The convention only applies to international cases. Cases are considered international unless all the parties to the dispute are resident in the same contracting state and all elements of the dispute, irrespective of the court chosen in the agreement, relate only to that contracting state.

The Hague Convention on Choice of Court Agreements applies in cases where an agreement between two or more parties specifies that the court of one contracting state shall have exclusive jurisdiction to decide relevant disputes that have arisen or may arise (“exclusive choice of court agreement”). The convention provides that the court selected in the exclusive choice of court agreement will have jurisdiction to hear disputes to which the agreement applies unless the dispute falls within a category excluded from the scope of the convention. The convention imposes an obligation on the selected courts to hear such cases and not to decline to hear them on the basis that they should be heard in the court of another jurisdiction (unless the contract is null and void under the law of that contracting state). If proceedings are commenced in a court of another contracting state, contrary to the exclusive choice of court agreement, those courts must suspend or dismiss those claims unless certain exceptions apply.

Courts of a contracting state must recognise and enforce any judgment made by the court of another contracting state pursuant to an exclusive choice of court agreement and are prohibited from reviewing the merits of the judgment. There are limited circumstances under which the court of a contracting state may refuse to enforce the judgment of another contracting state court made pursuant to an exclusive choice of court agreement:

- the agreement is null and void under the selected state’s law;
lack of capacity of a party at the time of entering into that agreement;
- improper notification of proceedings to the defendant;
- the judgment was obtained by fraud;
- enforcement would be manifestly against the public policy of the enforcing state;
- the judgment is inconsistent with another judgment given in the enforcing state in a dispute with the same parties; and
- the judgment is inconsistent with an earlier judgment in another contracting state between the same parties on the same cause of action and the earlier judgment fulfils the conditions for implementation under this convention.

It should be noted that this convention does not cover arbitration and related proceedings.

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the “New York Convention”)

The New York Convention is an international convention, which 156 countries have agreed to be bound by (through ratification, succession or accession). As per the convention the states agree to enforce international arbitration awards provided that certain basic criteria are met. The New York Convention also obliges courts of contracting states to respect and enforce arbitration agreements.

“Reciprocity” – one question that commonly arises is whether awards will only be recognised if they were granted in a state which is also a signatory to the New York Convention; i.e. is there a requirement for reciprocity? The answer is that there is no automatic requirement for reciprocity under the New York Convention. However, article I of the New York Convention allows a contracting state to declare that it will only apply the New York Convention to the recognition and enforcement of awards made in the territory of another contracting state and a number of states have made this form of declaration.

The New York Convention provides for only limited challenges to recognition of awards but, in practice, problems can still arise. In particular:
Some countries do not implement the New York Convention in accordance with its terms;

The scope of the “public policy” defence to enforcement can still be an issue; and

Determined debtors can still cause significant delays by pursuing challenges, whether or not they are well-founded.

In practice, enforcement of foreign arbitral awards in parts of the Middle East is still rare, although the position appears to be improving. Within the EU, proceedings can still be very slow; it took eight years to enforce an award in a recent case in Greece. Further comments regarding our practical experiences of enforcing judgments and awards internationally are included in the country specific information that accompanies this resource at http://www.elexica.com/en/Resources/Microsite/Governing-Law-Jurisdiction-and-Enforcement-Risk/3-Country-Information

The only grounds on which a party should be able to object to recognition of an award under the New York Convention are that:

- The arbitration agreement was not valid under the applicable law;
- The party against whom the award was made was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case;
- The award extends to matters not within the scope of the arbitration;
- The tribunal was not constituted in accordance with the arbitration agreement or the law of the place of the arbitration;
- The award is not yet binding or has been set aside;
The subject matter of the dispute is not capable of settlement by arbitration under the law of the place of enforcement; and/or

The recognition or enforcement of the award would be contrary to public policy in the place of enforcement.

There have been a number of decisions internationally in relation to the final ground listed above. Such decisions indicate that not all national courts agree that it is international public policy that is of relevance to the question of enforcement, rather than domestic public policy. As a result, the concept of public policy has been interpreted widely as a possible ground for not recognising an arbitral award. There is also some concern that the process of enforcing arbitration proceedings can be derailed through a manufactured public policy argument.

Further comments regarding our practical experiences of enforcing judgments and awards internationally are included in the country specific information that accompanies this resource at http://www.elexica.com/en/Resources/Microsite/Governing-Law-Jurisdiction-and-Enforcement-Risk/3-Country-Information.

Organisation pour L’Harmonisation en Afrique de Droit des Affaires (OHADA) arbitration regime

OHADA seeks legal integration between its member states, in order to promote their economic development and regional integration, and to facilitate trade and investment between them. The majority of the 17 OHADA member states are francophone, civil law jurisdictions.

The OHADA arbitration regime provides for two arbitration mechanisms, the first being under the rules of the OHADA Uniform Act on Arbitration (the “OHADA Uniform Act”) and the second being via the Common Court of Justice and Administration (the “CCJA”).
The OHADA Uniform Act sets out arbitration rules applicable to any arbitration where the seat of arbitration is within a member state. Arbitral awards made in any of the member states are enforceable in other member states, subject to the granting of an *exequatur* (see page 47). The OHADA Uniform Act does not distinguish between domestic and international arbitration.

The OHADA Treaty of 1993 provides for, amongst other things, the creation of a supranational court, namely the CCJA, in order to ensure the common interpretation and application of the OHADA Treaty, the OHADA Uniform Act and of other harmonised legislation. The CCJA also acts as an arbitral institution.

Where parties submit disputes to the CCJA in its capacity as an arbitration centre, the arbitral awards rendered in accordance with the Arbitration Rules of the CCJA are binding and enforceable in any member state subject to the granting of an *exequatur*. Parties may refer their dispute to the CCJA provided at least one of them is domiciled in a member state, or whole or part performance of the contract takes place in a member state. All CCJA arbitral awards are deemed final and binding across the various OHADA member states.
Practical experience of recognising court judgments and arbitration awards internationally

In our market leading experience of enforcing judgments internationally, whether under a treaty or under local law, the following legal issues can often give rise to disputes aimed at preventing or frustrating enforcement:

**Legal hurdles**

- **Reciprocity** – under many systems of law, it is necessary to establish “reciprocity” between the state of origin of the judgment and the state of enforcement, in order to enforce a judgment. This means that it is necessary to establish that the laws of the state of origin of the judgment will recognise judgments of the state of enforcement in the same way. It can be surprisingly difficult to establish reciprocity with civil law countries where enforcement in the state of origin is pursuant to common law rather than statute because of the different procedural approaches.

- **Sharia law** – in some Islamic legal systems, judgments will not be enforced if they are perceived to be contrary to Sharia law.

- **Jurisdiction** – most systems of enforcement will require confirmation that the court of origin had jurisdiction to determine the dispute, but the precise requirements can vary in subtle but very significant ways.

- **Public policy** – most systems of enforcement will allow recognition of a foreign judgment to be refused where it is perceived to be contrary to public policy in the enforcing state.

- **Banking secrecy laws** – whilst banking secrecy laws do not themselves prevent judgments from being recognised, they can pose a significant barrier to effective enforcement proceedings against
bank accounts. In recent years, banking secrecy laws have been diluted in a number of states, but in some states, they are still strong.

When considering the prospect of enforcing a judgment, attention needs to be paid to the following practical issues, as well as the legal position:

- **Delay** – the speed of the enforcement process and any appeals procedure can vary greatly between countries. The need to serve court documents in foreign countries, in particular, can cause delays.

- **Costs** – the costs of enforcement proceedings will, in many situations, not be recoverable. Furthermore, in some countries, large court fees will be payable at the outset of enforcement proceedings.

- **Language** – the enforcement proceedings will in general be conducted in the language of the place of enforcement and this can give rise to additional costs and uncertainties.

- **Reliability of legal system** – the reliability and impartiality of the legal system can be an important consideration when considering enforcement risk.

- **In practice**, this means that, if a judgment debtor is prepared to take steps to prevent or challenge foreign enforcement, it can often cause significant delays and complications. For this reason, obtaining the right interim relief in the form of injunctions and provisional attachments can be crucial.
Country specific information (treaties and conventions, etc.)

In order to assist contract drafters in assessing the potential for the enforcement of court judgments and/or arbitration awards in specific countries, we have created an electronic resource containing specific information relevant to enforcement in over 80 different countries. To access this information go to Simmons & Simmons’ online resource, elexica, at http://www.elexica.com/en/Resources/Microsite/Governing-Law-Jurisdiction-and-Enforcement-Risk. There is no charge for this service but you are required to register to access this and other information on elexica.

The following information is provided for each country:

- Basis of legal system (civil law, common law, Sharia law).

- Applicable treaties: New York Convention, ICSID Convention, Judgments Regulation (replaced by the Recast Regulation), Lugano Convention, Administration of Justice Act 1920, Foreign Judgments (Reciprocal Enforcement) Act 1933, Hague Conventions on Enforcement of Judgments, Service and Taking of Evidence, other bi-lateral civil procedure conventions with the UK.

- Transparency International rankings and gradings.

- World Bank Doing Business – enforcement of contracts rankings.

- Simmons & Simmons’ practical experiences in the jurisdiction.

This guide is also accessible online in the same elexica resource.
Process agents and addresses for service within the jurisdiction
Process agents and addresses for service within the jurisdiction

The purpose of having a process agent is to render the defendant “present” in England for jurisdiction purposes. This is because, under English law rules (but not the European rules), the English Courts automatically have jurisdiction over a defendant who is present within the jurisdiction. Such presence can either be physical or – in the case of a process agent appointed by a prospective defendant – deemed. The important part is the address rather than the agent. It is equally permissible to serve the foreign company care of a local address without actually appointing an agent.

Counterparties with a place of business in the UK

If the counterparty is an English company, then there is generally no need to appoint a process agent since service of process may be effected readily upon the registered office.

If the counterparty has a less permanent establishment in England, you may wish to include a process agent clause to cover the situation where the counterparty ceases to maintain its establishment in England.

Foreign counterparties domiciled outside the EU

In situations where your counterparty does not have a place of business in England, and it is not domiciled within the EU, the advantage of having an address for service in England is that there will be no need to make an application to the Court for permission to serve the counterparty out of the jurisdiction. Although permission would normally be granted in a case where the parties have agreed
to submit disputes to the jurisdiction of the English courts, it is an additional step which needs to be taken hence adding to the time and costs of the litigation.

**Foreign counterparties domiciled within the EU**

Under the EU jurisdiction regime, the legal analysis is different. Where a defendant is domiciled in an EU member state, the English court’s jurisdiction will not depend on whether it can be served in England and a claimant does not need permission to serve proceedings in another EU member state. There are a range of permitted methods for service on a defendant domiciled in another EU member state, at least some of which are relatively straightforward (under the EU Service Regulation, EC Council Regulation 1393/2007).

Accordingly, whilst a process agent clause still serves a useful purpose where the counterparty is domiciled in the EU, it is less significant than in cases where the counterparty is domiciled outside the EU.

**Drafting tips**

When drafting these clauses, particular care needs to be taken to provide for the situation where the process agent ceases to act or is no longer at the address in England to ensure that there is nonetheless some address in England at which service may be effected.
Sovereign immunity
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Sovereign immunity

In general terms, the principle of ‘sovereign immunity’ means that the government of one state is immune from the civil and criminal jurisdiction of the courts of another state.

The principle applies to the sovereign head of the state (who represents the state itself). However, government bodies, institutions, state banks and other high-ranking ministers can also be classed as part of the ‘state’, and may therefore also be entitled to claim immunity. This can be a problem in cross-border agreements for two reasons. First, if one party is a government-owned entity, then a foreign court may refuse to hear a claim against it on the basis of its own principles of sovereign immunity. Second, even if you obtain a judgment against a sovereign entity, you may be unable to enforce that judgment in the country where the assets are located on the basis of sovereign immunity principles in the place of enforcement.

There are various sources of the law on sovereign immunity, including:

- The United Nations Convention on Jurisdictional Immunities of States and their Property;

- International customary law;

- Statute (for example, the State Immunity Act 1978 in England); and

- Common law principles.

In many jurisdictions, a state body will not be immune from adjudication in a foreign court if the dispute relates to a purely commercial transaction for the supply of goods or services. When contracting with a state affiliate, one can include clauses whereby the state entity waives immunity
from suit and/or immunity from enforcement against specified assets. However, advice should always be taken as to whether the waiver is in fact effective in the relevant jurisdictions.

If entering an agreement with an entity affiliated with a foreign state, it is therefore always important to consider this risk and to explore possible alternative deal structures. If there are no alternatives available, it is advisable to plan ahead, for example by requesting a guarantee or indemnity from a non-government third party.

In addition, most countries will have an “act of state” doctrine which prevents parties litigating the exercise by a foreign government of its executive powers.
Bilateral Investment Treaties ("BITs")

There are a large number of bi-lateral investment treaties between different states, the purpose of which is to provide protection for persons investing overseas and to guarantee certain rights and standards on behalf of the governments of countries subject to investment. Whenever a commercial party has seen the value of its investment in a foreign state reduced by the actions of the host state or its agencies, the investor should consider whether a BIT claim is appropriate.

In view of the very large number of BITs in existence, we have not sought to compile data on BITs in this resource, although we are happy to advise on specific circumstances.

Investment treaty disputes are most commonly determined in ICSID arbitrations. The country specific information on elexica at http://www.elexica.com/en/Resources/Microsite/Governing-Law-Jurisdiction-and-Enforcement-Risk/3-Country-Information includes details regarding countries which are party to the ICSID Convention.
Terminology
Terminology

The sphere of governing law, jurisdiction and enforcement is full of potentially confusing terminology and abbreviations. The more common of these are set out below:

- **Brussels Convention** – the international convention between EU member states that preceded the Brussels I Regulation.

- **Brussels I Regulation** – EC Council Regulation 44/2001, also known as the “Judgments Regulation”, relating to jurisdiction and enforcement amongst courts of EU member states for proceedings issued before 10 January 2015.

- **Brussels II Regulation** – EC Council Regulation 2201/2003, relating to civil proceedings relating to divorce, separation and marriage annulment, as well as to all aspects of parental responsibility.

- **EAPO Regulation** – European Asset Preservation Order; proposed regulation regarding EU-wide asset preservation orders over bank accounts.

- **Hague Convention** – there are a large number of different Hague Conventions relating to different aspects of judicial cooperation; each convention has different signatories.

- **ICC** – International Chamber of Commerce.

- **ICDR** – International Centre for Dispute Resolution (a division of the American Arbitration Association).

- **Judgments Regulation** – also known as the Brussels I Regulation, as above.
- LCIA – London Court of International Arbitration.

- Lugano Convention – the international convention regarding jurisdiction and the enforcement of judgments applicable to certain European states not within the EU.


- Recast Regulation – EC Council Regulation 1215/2012, relating to jurisdiction and enforcement amongst courts of EU member states, replacing the Brussels I Regulation and applying to proceedings issued on or after 10 January 2015.

- Rome Convention – the international convention between EU member states that preceded the Rome I Regulation.

- Rome I – EC Council Regulation 593/2008, relating to the applicable law in respect of contractual obligations.

- Rome II – EC Council Regulation 864/2007, relating to the applicable law in respect of non-contractual obligations.

- Service Regulation – EC Council Regulation 1393/2007, relating to the service of court documents between EU member states.


- 1933 Act – (UK) Foreign Judgments (Reciprocal Enforcement) Act 1933.
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Drafting tips and sample clauses

Tips for drafting governing law clauses

When negotiating and/or drafting governing law clauses, the following points, in particular, should be considered:

- Is the governing law a law with which I am familiar?

- Does the clause cover contractual and non-contractual obligations? If not, do you understand what law is likely to govern non-contractual claims?

- Is there any particular reason for favouring or avoiding a particular governing law for non-contractual obligations?

- Will the choice of contractual and non-contractual law be respected in the forum where disputes are likely to be determined?

- There are significant practical benefits to having a single predictable law applicable to all types of claims.

- Will any choice of governing law relating to non-contractual disputes be valid under the EU Rome II Regulation? Is it “business to business” and has it been “freely negotiated”?

- Are you confident that the dispute resolution forum will be capable of properly applying the chosen governing law?
Tips for drafting jurisdiction and arbitration clauses

General points:

- Ensure that clauses are consistent within an agreement and between related agreements. You should not have both an arbitration clause and a jurisdiction clause within the same agreement unless a distinction is being drawn between different types of disputes.
- Refer to chapter 2 of this guide in relation to the decision as to what form of dispute resolution is appropriate for this dispute.
- Check the online resource that accompanies this guide for specific information about the countries where any judgment will need to be enforced (http://www.elexica.com/en/Resources/Microsite/Governing-Law-Jurisdiction-and-Enforcement-Risk/3-Country-Information).

Exclusive or non-exclusive jurisdiction clauses:

- Non-exclusive clauses provide that the courts of the specified jurisdiction will have jurisdiction if proceedings are commenced in that court. Before agreeing to this form of jurisdiction clause, you should be satisfied that you understand why a non-exclusive jurisdiction clause is appropriate (see page 26, above).
- Exclusive clauses provide that proceedings may only be commenced in the specified jurisdiction. Most other courts will recognise such clauses and decline jurisdiction where there is an exclusive jurisdiction clause in favour of another court (see page 27, above).

Split clauses depending on the nature of the dispute:

- Some contracts will provide that certain types of dispute will be determined by one form of dispute resolution whilst other types of dispute will be determined through another process.
These types of clauses are generally enforceable but particular care needs to be taken that the classification of different types of dispute is clear in order to avoid uncertainty.

Asymmetric/one-sided clauses:

These are clauses which apply different provisions to claims brought by different parties. For example, an international bank may require that any claims brought against it be brought in the English High Court but, for claims that the bank may bring, it may consider that it would have difficulty enforcing an English judgment against the relevant counterparty and that it would be easier to enforce an arbitration award. In this case, the clause may therefore provide that the counterparty agrees that the bank may bring claims against it in arbitration proceedings.

Whilst these sort of clauses are seen in some commercial contracts, they are unlikely to be permitted in consumer contracts and specific advice should be taken before including such a clause. It is also important to note that certain jurisdictions, such as France and Russia, refuse to enforce asymmetric clauses. France has previously refused to enforce asymmetric clauses by reference to the Lugano Convention. Since the wording of the Lugano Convention is very similar to that of the Judgments Regulation and the Recast Regulation, there is a risk that other EU courts may adopt a similar interpretation. However, in England the enforceability of such clauses has been previously upheld by the courts.

Provisions regarding injunctive relief:

The fact that the substance of disputes is to be determined before one court (or in an arbitration) does not in principle prevent a claimant from seeking provisional injunctive relief in support of the claim from the courts of another country.

The EU jurisdiction regime (in the Brussels I Regulation, as well as in various IP-specific pieces of legislation such as the Community Designs Regulation (Council Regulation 6/2002/EC)) specifically recognises this and the courts of England and several other common law jurisdictions have express powers enabling them to grant injunctive relief in support of foreign proceedings and/or arbitration proceedings.
However, there remains a risk that the courts of another state might construe an exclusive jurisdiction clause as preventing another court from granting injunctive relief, and for this reason, one sometimes sees express wording on this point in jurisdiction or arbitration clauses.

Tiered dispute resolution processes (mediation or negotiation provisions):

- It is not unusual to see clauses that provide that the parties should first seek to resolve a dispute through a non-binding process before resorting to arbitration or litigation.
- When drafting these sort of clauses care needs to be taken as to whether the initial ADR process is compulsory and prevents parties proceeding to the courts or arbitration even in respect of urgent matters.
- There are times when it is essential that court or arbitration proceedings are commenced without delay and in these circumstances, an obligation first to mediate or negotiate for a fixed period can give rise to difficulties.
Specific drafting issues for arbitration clauses

‘Seat’ of the arbitration

The ‘seat’ of the arbitration – this is important because it usually determines the legal framework in which the arbitration will operate. For example, if the seat is England, the arbitration will be governed by the English Arbitration Act 1996.

The law of the seat governs issues such as:

- Rights of appeal (or to refer legal issues) to the national courts;
- The national court’s powers to compel witnesses to give evidence in the arbitration;
- The ability of a party to seek injunctive relief from the national court in support of the arbitration; and
- The scope for challenging the appointment of the tribunal on grounds of bias.

Note that the actual place where the hearing is conducted can be different from the ‘seat’ of the arbitration.

Appointment of tribunal

Number of arbitrators – this will normally be one or three. Choosing three arbitrators (rather than one) will increase the cost of the dispute resolution process, and may slow down the procedure, but should give the parties more confidence in the right decision being reached.
The procedure for the selection of the arbitrator(s) may be set out in the clause or alternatively can be left to the provisions set out in any applicable institutional rules. Where there are to be three arbitrators, it is not unusual for each party to nominate an arbitrator and for the relevant institution to appoint the chairperson.

**Institutional rules**

Procedural rules applicable to the arbitration (e.g. LCIA, ICC, ICDR) – these rules provide the procedure for the arbitration process which supplement the very general legal framework that will be set out in the national arbitration law. Where national arbitration law may provide the potential to waive rights of appeal, for example, the rules may automatically make such an election.

For further guidance regarding the difference between different institutional rules and the varying costs, please refer to our online resource “International Arbitration” at [http://www.elexica.com/en/Resources/Microsite/Arbitration-matters](http://www.elexica.com/en/Resources/Microsite/Arbitration-matters).
Sample clauses

Set out below is some sample wording for clauses relating to governing law, jurisdiction, arbitration and process agents. These forms of wording will not necessarily be appropriate in all cases and legal advice should always be taken before incorporating sample wording.

**Governing law clause**

This Agreement and any non-contractual obligations arising from or connected with it shall be governed by English law and this Agreement shall be construed in accordance with English law.

**Exclusive jurisdiction clause**

In relation to any legal action or proceedings arising out of or in connection with this Agreement (whether arising out of or in connection with contractual or non-contractual obligations) (“Proceedings”), each of the parties irrevocably submits to the exclusive jurisdiction of the English courts and waives any objection to Proceedings in such courts on the grounds of venue or on the grounds that Proceedings have been brought in an inappropriate forum. This clause shall not prevent any of the Parties from applying for provisional measures (including interim injunctive relief) in the courts of any other competent jurisdiction.

**Non-exclusive jurisdiction clause**

In relation to any legal action or proceedings arising out of or in connection with this Agreement (whether arising out of or in connection with contractual or non-contractual obligations) (“Proceedings”), each of the parties irrevocably submits to the non-exclusive jurisdiction of the English courts and waives any objection to Proceedings in such courts on the grounds of venue or on the grounds that Proceedings have been brought in an inappropriate forum.
Service of process / process agent clause

[Party B] irrevocably appoints [ ] of [ ] as its process agent to receive on its behalf service of process of any Proceedings in England. Service upon the process agent shall be good service upon [Party B] whether or not it is forwarded to and received by [Party B]. If, for any reason, the process agent ceases to be able to act as process agent, or no longer has an address in England, [Party B] irrevocably agrees to appoint a substitute process agent with an address in England acceptable to [Party A] and to deliver to [Party A] a copy of the substitute process agent’s acceptance of that appointment within 30 days. In the event that [Party B] fails to appoint a substitute process agent, it shall be effective service for [Party A] to serve the process upon the last known address in England of the last known process agent for [Party B] notified to [Party A] notwithstanding that such process agent is no longer found at such address or has ceased to act [provided that a copy of the proceedings is also sent to [Party B’s] current registered office or principal place of business wherever situated.]
**Arbitration clause**

The various institutions recommend standard provisions. It should be noted that we usually recommend some level of modification to these standard clauses to suit the circumstances.

The recommended ICC clause is:

“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

The recommended LCIA provision is:

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [ ].

The governing law of the contract shall be the substantive law of [ ].”
The recommended HKIAC provision is:

“Any dispute, controversy difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof of any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted.

The law of this arbitration clause shall be...(Hong Kong law)

The seat of arbitration shall be...(Hong Kong)

The number of arbitrators shall be ... (one or three). The arbitration proceedings shall be conducted in .... (insert language).”

The recommended CIETAC provision is:

“Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission (CIETAC) for arbitration which shall be conducted in accordance with the CIETAC’s arbitration rules in effect at the time of applying for arbitration. The arbitral award is final and binding upon both parties.”

The recommended DIAC provision is:

“Any dispute arising out of the formation, performance, interpretation, nullification, termination or invalidation of this contract or arising therefrom or related thereto in any manner whatsoever, shall be settled by arbitration in accordance with the provisions set forth under the DIAC Arbitration Rules (“the Rules”), by one or more arbitrators appointed in compliance with the Rules.”
The recommended AAA provision is:

“Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.”

Further information about the institutions’ standard clauses can be found on their websites. For example:

- [www.iccwbo.org](http://www.iccwbo.org) (ICC)
- [www.lcia.org](http://www.lcia.org) (LCIA)
- [http://www.cietac.org](http://www.cietac.org) (CIETAC)
- [http://www.diac.ae](http://www.diac.ae) (DIAC)
- [www.adr.org](http://www.adr.org) (AAA)

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