

# Making choices around governing law, jurisdiction and forum

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# Topics

- Governing law
- Choice of forum – litigation vs arbitration
- Arbitration – what rules / seat to choose
- Brexit – how does this effect your choice

# Governing Law

- Specifies the law that will govern the interpretation of a contract
- NO express choice: **UNCERTAINTY**
  - a court will decide which law to apply to the contract in accordance with the conflict of laws principles of that jurisdiction
  - an arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable (UNCITRAL Model Law)
- In Europe – parties can contractually agree a governing law for non-contractual obligations
- Brexit - UK intends to incorporate the provisions of Rome I and Rome II into domestic law; parties' agreement on choice of law should continue to be respected by EU Courts
- Local counsel advice – any mandatory local law

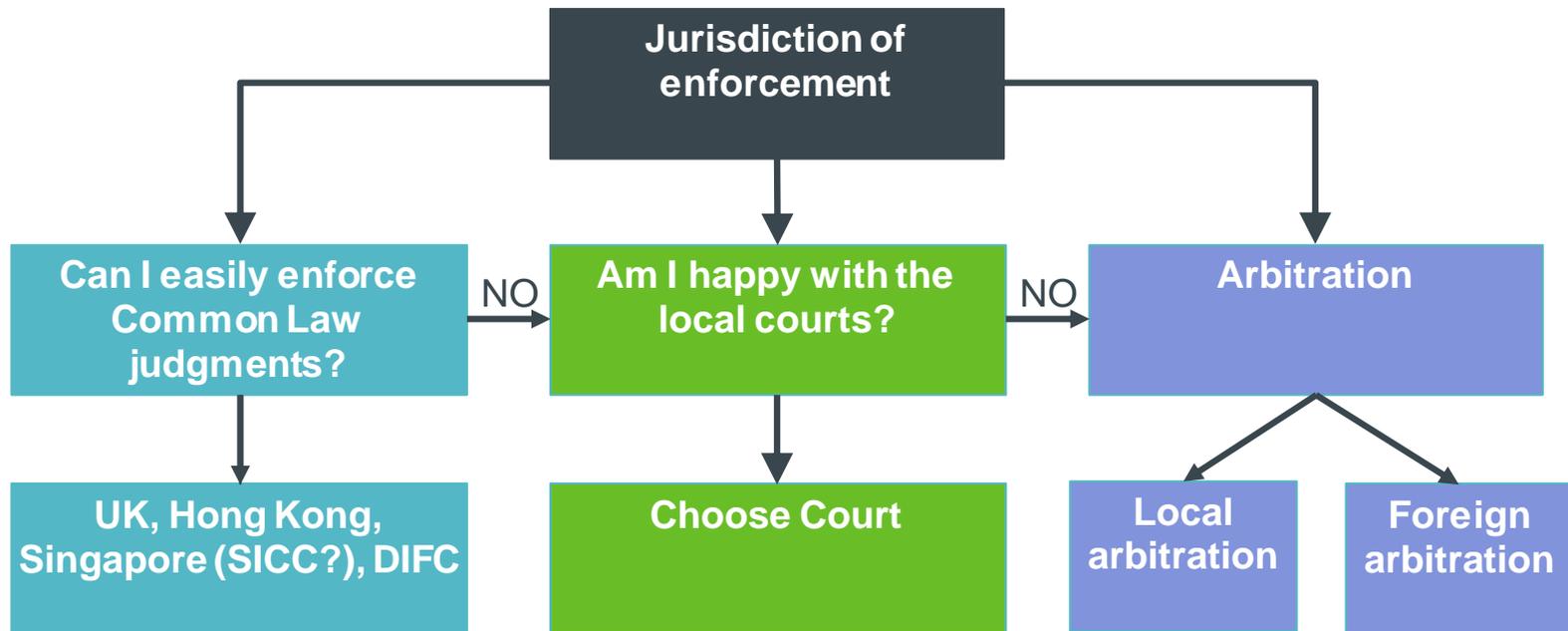
## Governing Law - typical clauses

- *This Agreement shall be governed by and construed in accordance with the laws of Singapore.*
- *This Agreement and any non-contractual obligations arising for or connected with it shall be governed by the law of England and Wales and this Agreement shall be construed in accordance with the law of England and Wales.*

# Dispute Resolution provisions are essential

- Dispute resolution provisions are necessary in international contracts, to address:
  - The place of dispute resolution
  - The forum for dispute resolution
  - The method of resolving the dispute
- The place, forum and method will
  - Influence the quality of the process and result
  - Affect the enforceability of the judgment or award
- What if there is no provision? **Jurisdiction battles and forum shopping**

# Making choices – key factors



# Litigation

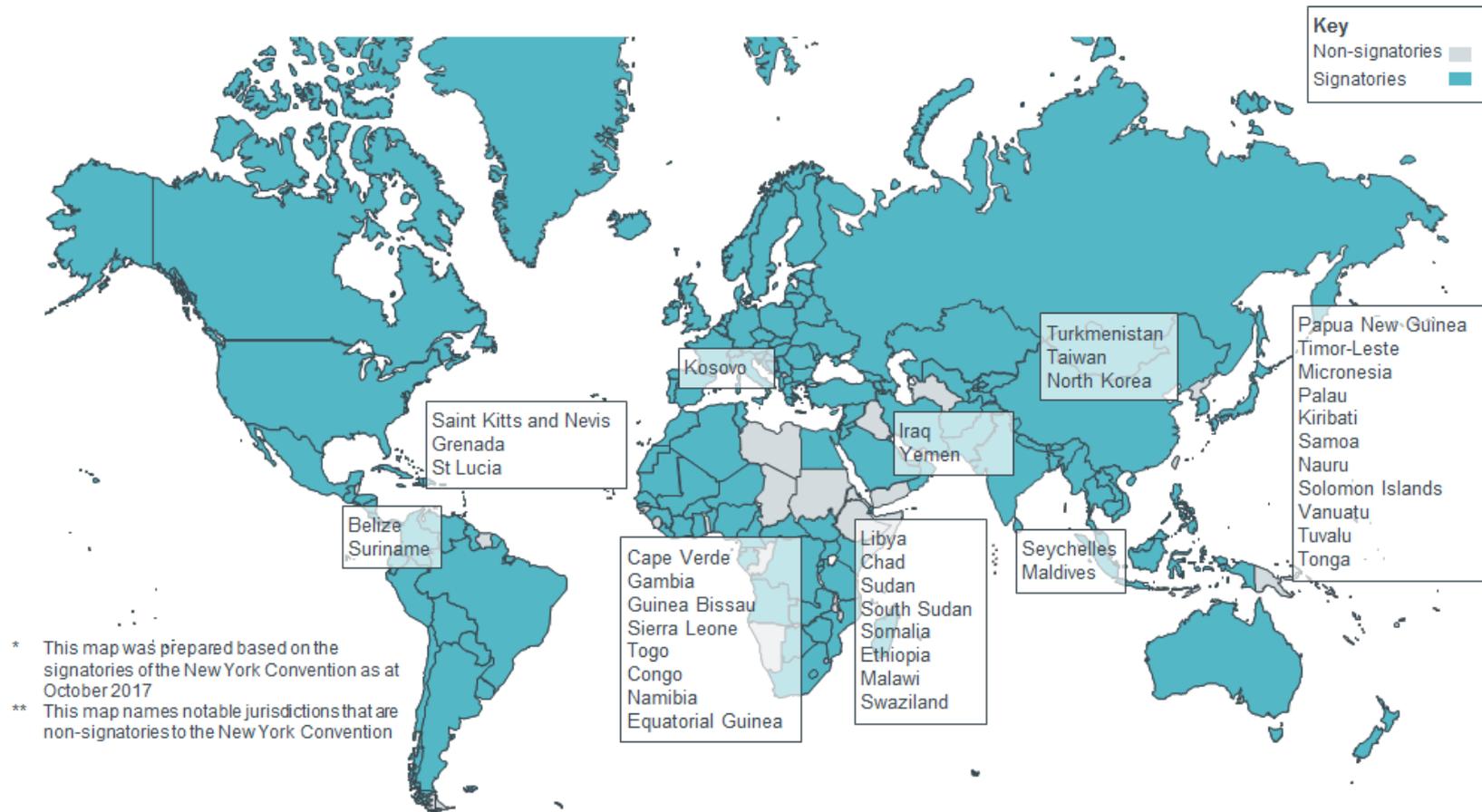
- Established commercial jurisdictions (UK, Hong Kong, Singapore)
  - Generally money judgments can be enforced routinely in other Commonwealth countries (but there are exceptions)
  - Mutual recognition of HK / China judgments if exclusive jurisdiction
  - Hague Convention (currently limited)
  - Exclusive or non-exclusive?
  
- International courts
  - SICC
    - “International and commercial”
    - Local judges and 15 international judges
    - Modified procedures but still has appeal
    - Foreign counsel for offshore cases
  - DIFC
  - Recognition in China

# Arbitration or Litigation

Arbitration	Litigation
Consensual binding process – stems from the parties’ agreement	Inherent jurisdiction – multiple contracts and third parties
Flexibility / Autonomy / International rules	Prescribed procedure – may be unfamiliar / local language
Privacy / Confidentiality	Generally open proceedings
Finality	Right of appeal and precedent
Costs	Costs / Delay (some places)
Neutral tribunal	Local judges
Enforceability: NY Convention	Enforceability: treaty/common law

# Arbitration

## Signatories and non-signatories to the New York Convention



\* This map was prepared based on the signatories of the New York Convention as at October 2017  
\*\* This map names notable jurisdictions that are non-signatories to the New York Convention

# Key issues in drafting arbitration clauses

## Components of an arbitration clause

- Submission of disputes to arbitration
- Seat of arbitration
- Institutional or ad hoc arbitration
- Institutional rules
- Number of arbitrators
- Emergency arbitrators
- Consolidation
- Joinder
- Expedition / cost reduction

# Key issues in drafting arbitration clauses

## Common issues in arbitration clauses

- Submission of disputes to arbitration
  - Relationship with tiered dispute resolution mechanism
  - Overlapping arbitration / jurisdiction clauses
  - Incorporation by reference
- Asymmetric / one-way clauses
  - May make arbitration agreement / award unenforceable in some jurisdictions
- Multi-contract / multi-party
  - Arbitration involving two or more parties (and/or more than one agreement) can create difficulties
  - Not all institutional rules have relevant provisions; address in the contract
  - Consistency across agreements

## Impact of Brexit

- Recast Brussels Regulation provides an EU-wide regime for determining jurisdiction and enforcement of judgments in civil and commercial matters.
- It will cease to apply following Brexit absent any new agreement.



# Impact of Brexit on governing law and jurisdiction

## Choice of law

Largely unaffected by Brexit. UK intends to incorporate the provisions of Rome I and Rome II into domestic law; as such parties' agreement on choice of law should continue to be respected by EU 27

## Jurisdiction

Jurisdiction clauses in favour of England & Wales may no longer be recognised and enforced by the EU27 Courts as existing European regime on jurisdiction no longer applicable to UK

## Enforcement of judgments

EU27 Courts will no longer be obliged automatically to recognise and enforce English court judgments and vice versa

# Transition Period

## Jurisdiction

- The provisions of the Recast Regulation in respect of jurisdiction will apply to legal proceedings instituted and choice of court agreements agreed before the end of the transition period (i.e. 31 December 2020)
- Uncertainty as to application of broader provisions of the Recast Regulation (i.e. *lis pendens* / enforcement)

## Enforcement of judgments

- The provisions of the Recast Regulation in respect of recognition and enforcement of judgements will apply to judgments given before the end of the transition period.

## Choice of law

- Rome I and II shall apply for contracts and events giving rise to damages that occurred prior to the end of the transition period. (Slightly academic, as UK will incorporate into domestic law anyway)

# Post withdrawal – negotiating positions

UK	EU 27
<p>Rome I &amp; II (choice of law) will be incorporated into UK domestic law</p>	<p>Negotiating position unclear</p>
<p>Sign up to Hague Convention on Choice of Court Agreements 2005</p> <ul style="list-style-type: none"> <li>▪ EU27 consent not required</li> <li>▪ Only applies to exclusive jurisdiction clauses</li> </ul> <p>Sign up to Lugano Convention 2007 if possible – requires EU27 consent</p>	<p>Notwithstanding draft withdrawal agreement, still appear to be preparing for the possibility of a “no deal” scenario</p>

# What does this mean in practice?

- Governing law – continue to choose English law if you would have before
- Jurisdiction
  - Consider what contracts may be affected
  - Where is the other party based?
  - Where are its assets?
  - Which governing law and jurisdiction clauses are currently used?
  - Is enforcement within Europe a concern?

Disputes  
Aviator

## How to mitigate any enforceability risk?

# Determine how to mitigate any enforceability risk

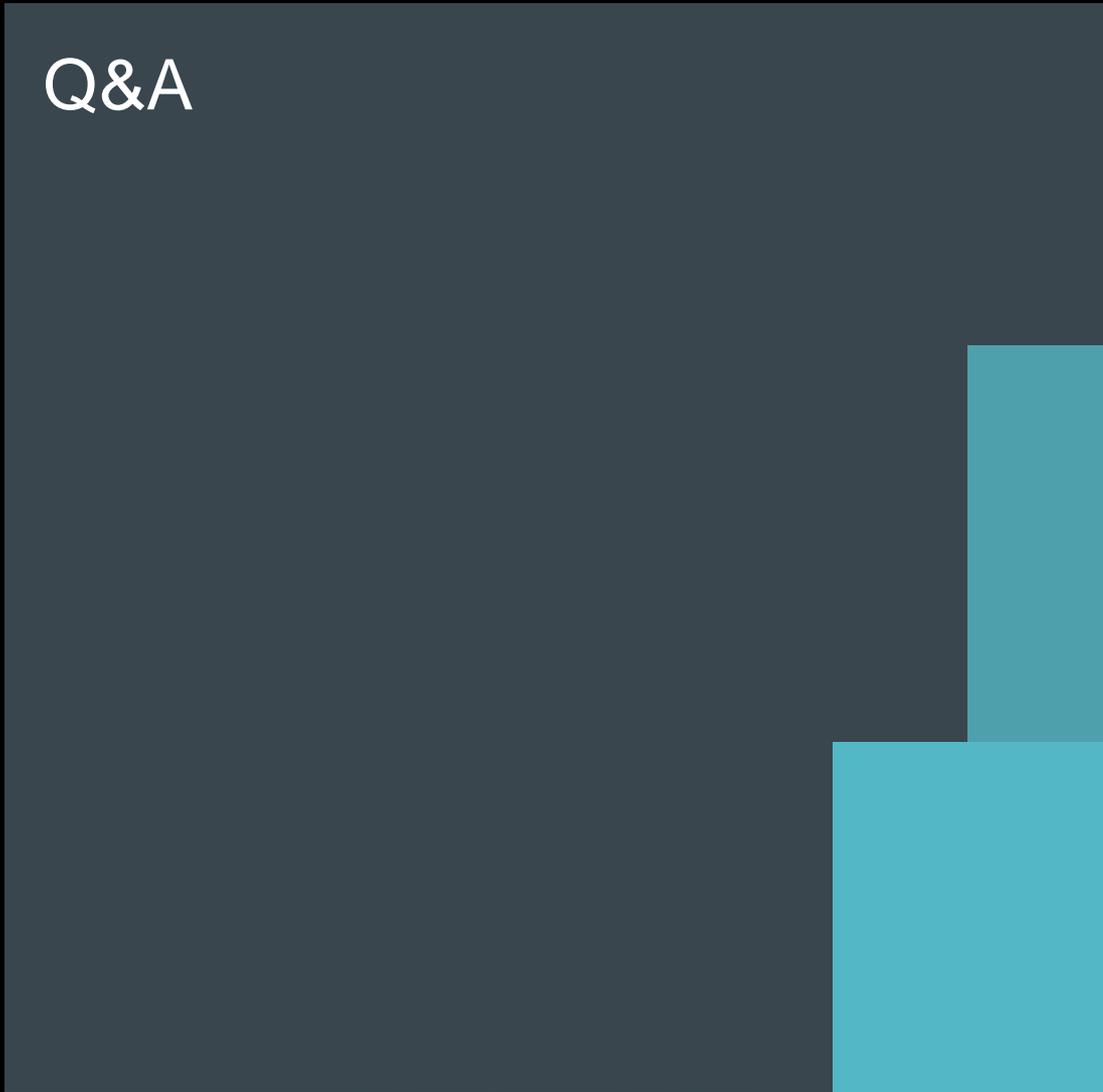
Option	Issues
A governing law clause in favour of an EU27 or EFTA state	Choice of English law likely to be recognised by EU27, so resist pressure to pick another law unless desirable to do so for other reasons
A jurisdiction clause in favour of an EU27 or EFTA state?	Are you comfortable with proceedings in that court (procedure, costs, speed etc). How high is EU enforcement risk on facts? Are English courts preferable in circs?
Non-exclusive jurisdiction clause	Keeps options open, but note Hague Convention only applies to exclusive jurisdiction clauses
Exclusive jurisdiction clause in favour of English courts	Opportunity to benefit from Hague Convention – EU27 courts will have to recognise English judgments. Anti-suit injunctions?

# Arbitration in a post-Brexit world

## English arbitration should be unaffected

- Brexit concerns: recognition of jurisdiction agreements and enforcement of judgments/ awards by EU27 courts
- New York Convention will be unaffected by Brexit:
  - Obliges contracting states to recognise and give effect to arbitration agreements
  - Obliges contracting states to enforce arbitration awards
- London-seated arbitration may seem relatively more attractive
  - Availability of EU anti-suit injunctions (getting around the *West Tankers* problem)?

Q&A



## Disputes Aviator

An online resource designed to enable in-house counsel to quickly understand the enforceability risks associated with the use of English jurisdiction and governing law clauses in the event of a cross border dispute following Brexit

**Access available by subscription via  
[elexica.com](http://elexica.com)**

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# Appendices

# Appendix 1: International Arbitration in Asia Pacific

Country	New York Convention (NYC)	UNCITRAL Model Law Status	Legislation	Arbitration Institution(s)	ICSID Convention	Hague Convention
Australia	✓	✓	International Arbitration Act 1974	Australian Centre for International Commercial Arbitration (ACICA)	✓	✗
Cambodia	✓	✓	Law on Commercial Arbitration	National Commercial Arbitration Centre (NCAC)	✓	✗
China	✓ RC	✗	Arbitration Law 1994	China International Economic Trade Arbitration Commission (CIETAC) Beijing International Arbitration Centre (BIAC) Shanghai International Arbitration Centre (SHIAC) Shenzhen Court of International Arbitration (SCIA)	✓	Signed not ratified
Hong Kong	✓ RC	✓	Hong Kong Arbitration Ordinance	Hong Kong International Arbitration Centre (HKIAC)	✓	✗
India	✓ RC	✓	Arbitration and Conciliation Act 1996	Mumbai Centre for International Arbitration (MCIA) Indian Council of Arbitration (ICA) Chartered Institute of Arbitrators India (CI Arb India)	✗	✗

R = Will only recognise and enforce awards made in the territory of another contracting State

C = Will apply the Convention only to differences arising out of legal relationships, that are considered commercial under the national law

T = Will apply the Convention only to the extent to which those States grant reciprocal treatment concerning awards made in the territory of non-contracting States

Country	New York Convention (NYC)	UNCITRAL Model Law Status	Legislation	Arbitration Institution(s)	ICSID Convention	Hague Convention
Indonesia	✓ RC	✗	Law No 30/1999 on Arbitration and Alternative Dispute Resolution	Badan Arbitrase Nasional Indonesia (BANI)	✓	✗
Japan	✓ R	✓	The Arbitration Law, Law No 138 of 2003	Japan Commercial Arbitration Association (JCAA)	✓	✗
Laos	✓	✗	Law on Resolution of Economic Disputes No. 02/NA	Office of Economic Dispute Resolution	✗	✗
Macau	✓ RC	✓	Decree-Law No. 55 of 1998	World Trade Centre Macau Arbitration Centre	✓	✗
Malaysia	✓ RC	✓	Arbitration Act 2005	Kuala Lumpur Regional Centre for Arbitration (KLRC) now known as Asian International Arbitration Centre (AIAC)	✓	✗
Myanmar	✓	✓	Arbitration Act 2016	None	✗	✗
New Zealand	✓ R	✓	Arbitration Act 1996	Arbitrators' and Mediators' Institute of New Zealand (AMINZ) New Zealand International Arbitration Centre (NZIAC)	✓	✗
Pakistan	✓ R	✗	Arbitration Act, 1940 The Recognition and Enforcement (Arbitration Agreements Foreign Arbitral Awards) Act 2011	Center for International Investment and Commercial Arbitration (CIICA)	✓	✗

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Country	New York Convention (NYC)	UNCITRAL Model Law Status	Legislation	Arbitration Institution(s)	ICSID Convention	Hague Convention
Papua New Guinea	x	x	Arbitration Act 1951	Not aware of any	✓	x
Philippines	✓ RC	✓	Alternative Dispute Resolution Act of 2004 Arbitration Law 1953	Philippine Dispute Resolution Centre (PDRCI)	✓	x
Republic of Korea	✓ RC	✓	Arbitration Act	Korean Commercial Arbitration Board (KCAB) Seoul International Dispute Resolution Centre (SIDRC)	✓	x
Singapore	✓ R	✓	International Arbitration Act (Cap. 143A) Arbitration Act (Cap. 10)	Singapore International Arbitration Centre (SIAC)	✓	✓
Taiwan	x	Based on Model Law but modified	Taiwan Arbitration Act	The Chinese Arbitration Association, Taipei (CAA)	x	x
Thailand	✓	✓	Arbitration Act (BE 2545 (2002)) Civil Procedure Code	Thai Arbitration Institute (TAI)	Signed not ratified	x
Vietnam	✓ RCT	Based on Model Law but modified	Law on Commercial Arbitration 2011	Vietnam International Arbitration Centre (VIAC)	x	x

R = Will only recognise and enforce awards made in the territory of another contracting State

C = Will apply the Convention only to differences arising out of legal relationships, that are considered commercial under the national law

T = Will apply the Convention only to the extent to which those States grant reciprocal treatment concerning awards made in the territory of non-contracting States

## Appendix 2: Which institution / rules?

Default provisions	ICC	LCIA	HKIAC	SIAC	UNCITRAL
<b>No of arbitrators</b>	1 unless the dispute warrants 3	1 unless the dispute warrants 3	HKIAC to decide (1 or 3)	1 unless the dispute warrants 3	3
<b>Appointment process (3 arbitrators)</b>	Each party appoints 1 and ICC Court appoints the Chairman ICC confirms	LCIA Court appoints	Each party appoints 1 and the appointed arbs then appoint the Chairman HKIAC confirms	Each party appoints 1 and SIAC appoints the Chairman	Each party appoints 1 and the appointed arbs then appoint the Chairman
<b>Seat</b>	ICC Court determines	London unless LCIA Court determines otherwise	Hong Kong unless the Tribunal determines otherwise	Agreed between parties or determined by the Tribunal	Tribunal determines
<b>Fees</b>	Ad valorem scale ICC Court fixes	Schedule – hourly charge cap of GBP450 LCIA Court fixes	Choice of ad valorem scale or hourly charge Tribunal / HKIAC fixes	Ad valorem scale SIAC Registrar fixes	Tribunal fixes – appointing authority can review

Default provisions	ICC	LCIA	HKIAC	SIAC	UNCITRAL
<b>Confidentiality</b>	Yes	Yes	Yes	Yes	Private hearing
<b>Joinder of additional parties</b>	Yes – before the Tribunal is appointed (unless agreed b/w all parties)	Yes – by Tribunal and with consent from additional party and applicant party	Yes – by HKIAC/ Tribunal	Yes – by SIAC Court/ Tribunal and with consent of all parties	Yes – Tribunal determines
<b>Consolidation</b>	Yes – ICC Court determines	Yes – Tribunal determines with approval from LCIA Court	Yes – HKIAC determines	Yes – SIAC Court/ Tribunal determines	No
<b>Expedited procedure</b>	Yes (<USD2M or parties agree)	Expedited formation in exceptional urgency	Yes (<HKD25M or parties agree or exceptional urgency)	Yes (<SGD6M or parties agree or exceptional urgency)	No
<b>Emergency arbitrator</b>	Yes	Yes	Yes	Yes	No
<b>Award scrutiny</b>	Yes	No	No	Yes	No

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