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ASIA

ARBITRATION GUIDE

4th (Extended and Revised) Edition

DR. ANDREAS RESPONDEK
EDITOR



RESPONDEK & FAN

ASIA ARBITRATION GUIDE

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NOTICE

The information provided in this Arbitration Guide has been researched with the utmost diligence, however laws and regulations in the Asia Pacific Region are subject to change and we shall not be held liable for any information provided. It is suggested to seek updated detailed legal advice prior to commencing any arbitration proceedings.



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Amendments for the 4th edition

Each country report has been completely revised and updated and was finalized in February 2015. The 4th edition of the Asia Arbitration Guide includes now also new country reports for **Brunei** and **Pakistan**.

INTRODUCTION

MR. NEIL KAPLAN CBE QC SBS



Respondek and Fan are to be congratulated on providing every two years a most useful summary of the arbitration laws of Asian jurisdictions.

The 2015 edition contains a review of 20 jurisdictions. By including Brunei and Pakistan they have increased by two the number of jurisdictions covered in the last edition.

Each chapter is written by experts from the relevant jurisdiction who bring to bear their unique experience of their jurisdiction. The chapters are not overlong and give the salient features of the law, practice and institutions of each jurisdiction. Each chapter has identical headings and thus one immediately gets the comparison needed.

With the huge increase in the interest in arbitration in Asia which naturally coincides with the increase of economic activity in the region it is essential for practitioners to have a composite one volume guide to all these jurisdictions. This Guide is not meant to rival the ICCA publication which covers all jurisdictions worldwide but is meant to serve the growing number of practitioners in the Asian region itself.

In recent years we have seen arbitration cases in several new jurisdictions. New arbitration laws abound. Centres are being set up in several new jurisdictions. The more established Centres like Hong Kong, Singapore, Malaysia, China and Korea are attracting many cases and this may well have a “knock on” effect throughout Asia. The ICC has seen a huge growth of cases involving Asian parties as well as those cases seated in Asia.

This edition should also be of interest to in-house counsel as well as teachers and students of the subject. Its readable style will I am sure make it “a must have” for all practicing in this field in Asia.



Andreas Respondek, the managing editor and founding senior partner of the firm, is to be congratulated for masterminding all this and for getting together the necessary experts to write the chapters for this hugely useful work which I look forward to placing on my shelf.

Neil Kaplan CBE QC SBS

Dear Reader,

Following the global trend in dispute resolution, arbitration has in recent years become the preferred method of alternative dispute resolution within the Asia-Pacific region, particularly where international commercial transactions are concerned. There is hardly any significant cross-border contract that does not include an arbitration clause.



Parties to international contracts have certain fears and reservations to sue or being sued in a jurisdiction they are not familiar with. Differences in the various laws, language and legal and business culture are perceived as distinctive disadvantages. To those parties arbitration seems preferable as arbitration proceedings tend to be significantly more flexible than in the courts, with proceedings conducted according to familiar and well established arbitration laws that are usually held in a neutral location. Last not least due to the lack of the possibility to appeal against an arbitral award, arbitrations tend to be faster than court proceedings. The confidentiality of the arbitration proceedings that court proceedings do not enjoy is another factor that makes arbitration look attractive. In addition, arbitration offers the disputing parties to choose “their” arbitrators that have specific expertise in the disputed matter, thereby further enhancing a speedy conclusion of the disputed matter.

The goal of this guide is not to provide a scholarly treatise on Asian arbitration but rather to summarize the practical aspects of the rules and regulations applying to arbitration in various Asian countries. This guide is designed to provide arbitration practitioners, companies and their legal advisors with an understanding of the various Asian arbitration regulations and the legal issues related to arbitration in each country. For companies seeking to rely on arbitration clauses when doing business in Asia, it is important to have a good understanding of how the arbitral process works in each country. In addition, it is hoped that this guide will assist companies in selecting arbitration rules and facilitate the drafting of arbitration provisions for their international commercial contracts.

This guide is based on the joint efforts of leading arbitration practitioners in each country. Without their dedicated efforts this guide would not have materialized and I am especially grateful for their participation and excellent contributions. Special thanks go also to my secretary Ms. Avelin Kaur, to Ms. Jin Yujia and Ms. Amelie Sulovsky.

Singapore, February 2015

RESPONDEK & FAN

Dr. Andreas Respondek

Chartered Arbitrator (FCIArb)



ABOUT DR. ANDREAS RESPONDEK

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Andreas started his legal career in the US with two ground-breaking (winning) precedents from the Louisiana Supreme Court¹ in his own name in 1983. He is an American Attorney at Law, a German “Rechtsanwalt” as well as a Chartered Arbitrator (FCIArb).

After heading the Legal Department of an MNC in Europe, he moved to Singapore in 1994 to establish the Asia Pacific Legal Department of a leading international Healthcare Company. Thereafter he led multinational companies in Asia as Managing Director (Thailand; Greater China) and Regional Managing Director Asia Pacific. He established RESPONDEK & FAN in 1998 in Singapore and its counterpart in Bangkok in 2000.

Living and working since more than 20 years in Asia, Andreas advises successful corporate investors in the Asia Pacific region on their day-to-day legal issues and secures their continued growth on the legal side, focusing on International Arbitration, Corporate & Commercial Law, International Contracts, Health Care and Mergers & Acquisitions. He is on the panel of leading arbitral institutions, is regularly appointed as Arbitrator and Party Representative in international institutional and ad-hoc proceedings and publishes widely on international arbitration and other legal topics.

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¹ In re application of Andreas Respondek 434 So.2d 413 (La.1983); 442 So.2d 435 (La.1983)
<http://law.justia.com/cases/louisiana/supreme-court/1983/83-ob-2169-1.html>

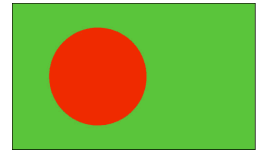
STRUCTURE OF EACH COUNTRY REPORT

To make the review of specific questions and issues for each country easier, each country report follows roughly the sequence of the following structure:

- 1.1 Which laws apply to arbitration in <Country>?
- 1.2 Is the <Country> arbitration law based on the UNCITRAL Model Law?
- 1.3 Are there different laws applicable for domestic and international arbitration?
- 1.4 Has <Country> acceded to the New York Convention?
- 1.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?
- 1.6 Does the <Country> arbitration law contain substantive requirements for the arbitration procedures to be followed?
- 1.7 Does a valid arbitration clause bar access to state courts?
- 1.8 What are the main arbitration institutions in <Country>?
- 1.9 Addresses of major arbitration institutions in <Country>?
- 1.10 Arbitration Rules of major arbitration institutions?
- 1.11 What is/are the Model Clause/s of the arbitration institutions?
- 1.12 How many arbitrators are usually appointed?
- 1.13 Is there a right to challenge arbitrators, and if so under which conditions?
- 1.14 Are there any restrictions as to the parties' representation in arbitration proceedings?
- 1.15 When and under what conditions can courts intervene in arbitrations?
- 1.16 Do arbitrators have powers to grant interim or conservatory relief?
- 1.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?
 - Formal requirements for arbitral awards
 - Deadlines for issuing arbitral awards
 - Other formal requirements for arbitral awards
- 1.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in <Country>?
- 1.19 What procedures exist for enforcement of foreign and domestic awards in <Country>?
- 1.20 Can a successful party in the arbitration recover its costs?
- 1.21 Are there any statistics available on arbitration proceedings in <Country>?
- 1.22 Are there any recent noteworthy developments regarding arbitration in <Country> (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?



1. BANGLADESH



BY: MR. AJMALUL HOSSAIN QC

1.1 Which laws apply to arbitration in Bangladesh?

Historically, arbitration has always been a form of dispute resolution in Bangladesh. Village elders would resolve disputes informally within their territories. However, “The Arbitration (Protocol and Convention) Act 1937” and the “Arbitration Act 1940” passed by the United Kingdom Parliament provided a legal framework for arbitrations in British India and Pakistan until their independence in 1947, as well as Bangladesh until its independence in 1971. These statutes were repealed by the Arbitration Act 2001 (“**the Act**”), which contains the present legal framework for all arbitrations in Bangladesh whether international or domestic.

The Act came into force on 10 April 2001² and became effective in respect of all disputes referred to arbitration since then³. However, it should be noted that in the context of interim preservatory orders under Section 7A, the courts have held that the provisions of the Act are not applicable to foreign arbitrations, namely, those where the place of arbitration is outside Bangladesh, except as provided in Section 3(2)⁴. Other legislation, for example the Contract Act 1872, Evidence Act 1872 and Code of Civil Procedure 1908 (“**CPC**”), may also be relevant to arbitrations.

1.2 Is the Bangladesh Arbitration Law based on the UNCITRAL Model Law?

Yes, the Act is based on the UNCITRAL Model Law. However, it does not contain exactly the same text used in the Model Law. Some unique provisions are derived from the Indian Arbitration and Conciliation Act 1996 and others from the English Arbitration Act 1996. There are some important articles of UNCITRAL which are adopted with modifications in

² S1 (3) of the Act; Notification No. SRO 87-Law/2001 dated 09.04.2001, Published in Bangladesh Gazette Extraordinary dated 10.04.2001

³ S 3(1) and S 3(4) *ibid*

⁴ *STX Corporation v Meghna Group of Industries Ltd & Others* 64 DLR (HCD) 550: The Act is only applicable to arbitrations held outside Bangladesh in respect of enforcement of foreign arbitral awards. See *Bhatia International v Bulk Traders* [2002] 4 SCC 105 and *Venture Global Engineering v Satyam* [2008] AIR SC 106 by which the Indian Supreme Court decided otherwise was overruled in *Bharat Aluminium v Kaiser Aluminium CA No. 7019 of 2005*



the Act, such as: Article 5⁵ Article 8⁶, Article 10⁷, Articles 11, 13, 14⁸, Article 16⁹, Article 17¹⁰ (as in the **Indian Arbitration and Conciliation Act 1996** (“**IACA**”), section 9 (ii)), Article 18¹¹, Article 34¹² Articles 35 and 36¹³ and several other articles.

1.3 Are there different laws applicable for domestic and international arbitration?

The Act is applicable to both domestic and ‘international commercial arbitration’¹⁴. As a general rule, as stipulated in s3(1) of the Act, the Act will apply when the place of arbitration is in Bangladesh. However, exceptions are made pursuant to s3(2), where certain provisions of the Act are nevertheless applicable even if “*the place of arbitration is outside Bangladesh*”¹⁵, namely those relating to enforcement of foreign arbitral awards. The provisions in the Act relating to interim preservatory orders¹⁶ will therefore be inapplicable to arbitrations seated outside Bangladesh. Any matter related to international commercial arbitral awards will be dealt directly by the High Court Division of the Supreme Court of Bangladesh under the Act. Domestic arbitrations, on the other hand, are considered by the District Judge in the District where the arbitration is pending.

⁵ No court shall intervene except where so provided in this Law

⁶ Enforcement of arbitration agreement

⁷ Number of arbitrators

⁸ The court should not intervene except in those instances relating to appointment, challenge and termination of the mandate of the arbitrators

⁹ In relation to arbitration clause in a contract

¹⁰ Empowers the tribunal to grant interim measures of protection over subject-matter in dispute, quite similar power is given in IACA Section 9(ii), interim measures ordered by a tribunal under Article 17, are always appealable to the courts, section 37 (2)(b) of

¹¹ Each party be given a full opportunity of presenting his case

¹² Setting aside of the arbitral award

¹³ Recognition and enforcement of awards

¹⁴ Section 2(c) of the Act defines International Commercial Arbitration as – an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in Bangladesh and where at least one of the parties is –

(i) an individual who is a national of, or habitually resident in , any country other than Bangladesh; or

(ii) a body corporate which is incorporated in any country other than Bangladesh; or

(iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than Bangladesh; or

(iv) the Government of a foreign country;

¹⁵ See Paragraph 1.1 and footnote 3 above.

¹⁶ S. 7A



A party must apply to the Dhaka District Court for the enforcement of all arbitral awards. The Court will then exercise its discretion in accordance with the list of situations provided in the Act to enforce the award.

1.4 Has Bangladesh acceded to the New York Convention?

Yes, Bangladesh acceded to the New York Convention on 6th May 1992. However, the convention was not ratified by way of enabling legislation in Bangladesh as a *signatory State to the New York Convention*. This was noted in the case of *Bangladesh Air Service (Pvt) Ltd v British Airways PLC* [(1997) 49 DLR (AD) 187]¹⁷ by the Supreme Court of Bangladesh. In Bangladesh, international treaties are not automatically applicable as law unless enacted as such by Parliament. However, the courts will so interpret the treaties as to give it effect within the framework of the existing law unless totally inconsistent with the treaty. The Act allows for recognition and enforcement of awards in situations similar to those contemplated by the New York Convention.

1.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

If both Parties are domiciled in Bangladesh, they can agree on foreign arbitration institutions. The same applies if one of the parties is domiciled in Bangladesh and the other abroad. The Act makes special provisions for “international commercial arbitrations”¹⁸ in contrast to domestic arbitrations. “International Commercial Arbitrations” are essentially arbitrations between a foreign party and a local party. The jurisdiction in respect of international commercial arbitrations is given to the High Court Division of the Supreme Court. Apart from specific and express arbitration agreements, the courts will infer the existence of an arbitration agreement from the exchange of letters, faxes and other similar correspondences between the parties¹⁹.

¹⁷ A summary of this case in the Yearbook Commercial Arbitration contains the following statement
"It was pointed out that though Bangladesh had acceded to the New York Convention, it had not passed implementing legislation. Thus the New York Convention could not be relied upon to enforce a foreign award in Bangladesh" [YB Comm Arb XXIII (1998) 624 at 625].

¹⁸ S 2 (c) of the Act

¹⁹ See *M/s Shakti Bhog Foods Limited v Kola Shipping Limited* [2009] AIR SC 12



1.6 Does Bangladesh arbitration law contain substantive requirements for the arbitration procedures to be followed?

For disputes arising out of an “arbitration agreement”²⁰, the Act stipulates various general procedural requirements to be followed, but only in the case where the parties’ agreement and rules of arbitration institutions are silent about the procedure.

The parties are given wide discretion to agree on the procedure to be followed by the tribunal.²¹ If the parties fail to reach an agreement, the tribunal shall decide the procedure in respect of time and place²² of holding the proceedings either in whole or partly,²³ the language of the proceedings,²⁴ time of submission of statement of claim, defense and range of amendments,²⁵ publication of the documents provided and the presentation thereof,²⁶ worthiness of the written or oral evidence, relevance and weight of any materials,²⁷ power of the arbitral tribunal in examining the issue of fact and issue of law etc.²⁸

Also, the tribunal is not bound by the CPC and the Evidence Act 1872.²⁹ The CPC is the codification of the procedural rules applicable in the Courts of Law in Bangladesh. The Evidence Act is a codification of the rules of evidence based upon the common law of England at the time of enactment. Both of these laws are supplemented by judicial decisions in this jurisdiction.

The law designated by the parties to the arbitration agreement shall be applicable³⁰ and in the absence of any such designation, the arbitration

²⁰ S 3(4) of the Act

²¹ S 25(1) of the Act

²² Similar situation in Section 3 of the English Arbitration Act 1996 which provides that, in the absence of agreement or determination by an arbitral institution or by the tribunal, the place of arbitration is to be determined ‘having regard to the parties agreement and all the relevant circumstances’. These wording are also similar to the UNCITRAL Model Law. Eventually court will identify the jurisdiction with which the arbitration has the closest connection, *Dubai Islamic Bank PJSC Vs Paymantech Merchant Services Inc* [2001] 1 Lloyd’s Rep 65.

²³ S 25(3)(a) *ibid*

²⁴ S 25(3)(b) *ibid*

²⁵ S 25(3)(c) *ibid*

²⁶ S 25(3)(d) *ibid*

²⁷ S 25(3)(f) *ibid*

²⁸ S 25(3)(g) *ibid*

²⁹ S 24 *ibid*

³⁰ S 36(1) *ibid*



tribunal shall follow the rules of law it considers appropriate³¹ and decide the dispute in accordance with the terms of the contract³².

As it was observed in India, the dispute must be justiciable in a civil action. Only such 'disputes' as are justiciable in a civil action under Indian Law can be subject to arbitration. *Matru Udesingh v. Dhunnilal Sitaram*, AIR 1951 Nag 287, *Prem Nath L. Ganesh Dass v. Prem Nath L. Ramnath*, AIR 1963 Punj 62; *Gaddipatti Laxminarayana v. Gangineni Venkatasubbaiah*, AIR 1958 AP 679. The disputes must be in respect of civil rights in respect of which civil remedies can be sought or claimed. The position is the same in Bangladesh.

1.7 Does a valid arbitration clause bar access to state courts?

Where any contractual dispute is covered by an arbitration clause contained in the contract providing for arbitration within Bangladesh, it must be resolved through arbitration. Writ Jurisdiction cannot be invoked against breach of contract without resort to arbitration³³. The court shall refer the matter to arbitration and stay the legal proceedings³⁴ unless the court finds the arbitration agreement void, inoperative or incapable of determination by arbitration³⁵. However, the court must refuse to stay proceedings when the claim in the suit is outside the scope of the arbitration agreement³⁶. If one party commences legal proceedings regarding a matter covered by the arbitration agreement, the other party can apply to the court to make an arbitral reference to an arbitration tribunal and stay the further proceedings of the suit before filing a written statement (defense).³⁷ However, if the parties intend to settle the dispute through arbitration, they may seek at any stage of the proceedings to withdraw the suit and refer the dispute to arbitration in accordance with the provisions of the Act under section 89B of the CPC.

Where the place of arbitration is outside Bangladesh, different considerations may apply. The wording in the Act making it applicable

³¹ S 36(2) ibid

³² S 36(3) ibid

³³ *Governor, Bangladesh Bank and Others Vs M/s. Shah Islam Construction Ltd.* 6 MLR (AD) 245

³⁴ Section 7 and 10 should be read together

³⁵ Article 8 of UNICTRAL model Law: 'refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed'. The English Court which contains equivalent provisions in section 9 of the Arbitration Act 1996, do not give the same primacy to the role of the arbitral tribunal, approaching the matter on a case by case basis having regard to 'all the circumstances...the dominant matters being the interest of the parties and the avoidance of unnecessary delay or expense', *Ahmad Al-Naimi Vs Islamic Press Agency Inc*[2000] 1 Lloyd's Rep 522 CA

³⁶ *Chittagong Port Authority Vs Crete Construction Company Ltd.* 31 DLR (AD) 138

³⁷ *Government of Bangladesh Vs Mashriqui Textiles* 35 DLR (AD) 123



“where the place of arbitration is in Bangladesh”³⁸ has been literally construed by the Courts to exclude all provisions except those relating to the enforcement of foreign arbitral awards³⁹. However, it is submitted that although the provisions of the Act may not be applicable to stay local court proceedings where there is an arbitration agreement to arbitrate a dispute outside Bangladesh⁴⁰, the parties’ agreement to choose a particular forum for the resolution of their disputes will be considered and upheld by the courts and proceedings that are in breach of the parties’ agreement to resolve the dispute by arbitration will be stayed permanently or dismissed by the courts.

In Bangladesh, there is always an option of recourse against an award if the requirements stipulated in the Act⁴¹ are fulfilled. Any agreement between the parties cannot bar parties from going to court as long as the court is satisfied that the applications challenging the award comes within the parameters set by law.

In the Indian jurisdiction, a similar approach is adopted: an arbitration agreement does not preclude the parties from seeking recourse in the courts of law. In *Sukanya Holdings Ltd. v. Jayesh Pandey* (2003) 5 SCC 531 the Supreme Court observed that an ‘arbitration agreement’ does not preclude the parties from pursuing remedies in courts of law. Thus, where a party to the arbitration agreement brings an action, the other party is not bound to ask for reference of the dispute for resolution by arbitration. If the Defendant does not apply for reference to arbitration, the court is relieved of the obligation under sec. 8 of the Act to refer the parties to arbitration and can decide the dispute itself.

1.8 What are the main arbitration institutions in Bangladesh?

There are various arbitration institutions running their activities, which are vastly used by the commercial sector of the country. Among them the following are notable:

- (a) Bangladesh International Arbitration Centre (“**BIAC**”) has been set up recently by the International Chamber of Commerce (Bangladesh) and the Metropolitan Chamber of Commerce & Industry (“**MCCI**”) as an arbitral institution with facilities to conduct domestic and international commercial arbitrations.

³⁸ S. 3(1)

³⁹ See 1.1 and footnote 3 above.

⁴⁰ *Union Traders Limited v Motorola Technology* 19 BLT (HCD) 396

⁴¹ Section 42 and 43



- (b) The Federation of Bangladesh Chambers of Commerce and Industry (“**FBCCI**”) has introduced the Bangladesh Council of Arbitration (“**BCA**”) for the resolution of commercial disputes.
- (c) The Metropolitan Chamber of Commerce and Industry (“**MCCI**”), Dhaka has been accepted in the international market as the only body in Bangladesh eligible and entitled to arbitrate on commercial disputes.
- (d) In order to assist the local business for settlement of commercial disputes, the International Chamber of Commerce Bangladesh (“**ICCB**”) has taken the lead role in the establishment of the Bangladesh International Arbitration Centre (“**BIAC**”) jointly with two main trade bodies of the country - namely, the MCCI, Dhaka and The Dhaka Chamber of Commerce & Industry (“**DCCI**”).

1.9 Addresses of major arbitration institutions?

Bangladesh International Arbitration Centre (BIAC)

69/1 Panthapath
Suvastu Tower (6th floor)
Dhaka-1205

Tel: +88 -02-862-9227 +88 -02-862-9227,
+88-02-967-1491 +88-02-967-1491
Fax: +88-02-862-4351
E-mail: info@biac.org.bd
Web: www.biac.org.bd

Bangladesh Council for Arbitration of the Federation of Bangladesh Chambers of Commerce and Industry:

Federation Bhaban (2nd Floor), 60, Motijheel C/A
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Homepage: <http://www.mccibd.org/index.php>
E-mail: info@mccibd.org

1.10 Arbitration Rules of major arbitration institutions?

BIAC Rules are available online: <http://www.biac.org.bd/biac-rules>

The **FBCCI's** arbitration rules are available at <http://www.jurisint.org/en/ctr/146.html>

The arbitration rules of the **MCCI** are not available online.

1.11 What is/are the Model Clause/s of the arbitration institutions?

Bangladesh International Arbitration Centre (BIAC)

BIAC Model Arbitration Clause:

“All disputes arising out of or in connection with the present contract shall be finally settled under the fast track Rules of Arbitration of the Bangladesh International Arbitration Centre by one or more arbitrator appointed in accordance with the said Rules. Unless otherwise agreed by the parties, the laws of Bangladesh shall apply and the seat of arbitration shall be Dhaka.”

Bangladesh Council for Arbitration (BCA)

The parties are free to construct their arbitration clause considering the nature of the contract and refer all or certain disputes which have arisen or which may arise to the BCA. The Bangladesh Council of Arbitration, however, recommends the following arbitration clauses to parties intending to refer arbitration to the Bangladesh Council of Arbitration:

- a. “Any dispute or difference whatsoever arising between the parties out of or relating to the construction, meaning, scope, operation or*



effect of this contract or the validity or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Bangladesh Council of Arbitration and the Award made in pursuance thereof shall be binding on the parties.” or

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

The dispute resolution clauses and rules of the ICC, SIAC and LCIA are also frequently used in Bangladesh.

1.12 How many arbitrators are usually appointed?

Chapter IV of the Arbitration Act deals with the composition of the Arbitral Tribunal and the number of arbitrators⁴² and the appointment⁴³ of arbitrators. Unless there is an arbitration clause in the contract, the court cannot appoint arbitrators and refer the dispute to arbitration⁴⁴. There must also be a dispute which is to be resolved by arbitration. Without a dispute, the courts will not appoint arbitrators⁴⁵.

It is up to the parties' discretion to determine the number of arbitrators.⁴⁶ If there is no agreement on the number of arbitrators, the tribunal shall consist of three arbitrators.⁴⁷ In case of an appointment of an even number of arbitrators by the parties, the appointed arbitrators are required to mutually appoint an additional arbitrator to act as a Chairman of the tribunal.⁴⁸ If there is no agreement as to the number of arbitrators, one party may request the other party in writing for an appointment of a sole arbitrator which has to be accepted by the other party within 30 days of receipt of the request.⁴⁹

⁴² S11 ibid

⁴³ S12 ibid

⁴⁴ *National Sports Council Vs A. Latif & Co* 6 MLR (HC) 327

⁴⁵ *Islamic Development Bank (IDB) Vs. Bangladesh Shilpa Bank (presently known as the Bangladesh Development Bank Limited)*
(Arbitration Application No. 13 of 2009)

⁴⁶ S 11(u1) ibid

⁴⁷ S 11(2) ibid

⁴⁸ S 11(3) ibid

⁴⁹ S 12(3)(a) ibid



In case of arbitration with three arbitrators, each party is required to appoint one arbitrator, and the two appointed arbitrators shall jointly appoint the third arbitrator to act as the Chairman of the arbitral tribunal.⁵⁰ The parties shall jointly decide on a procedure for the mode of appointing the arbitrator or arbitrators.⁵¹ A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.⁵² There is a default provision, which allows matters relating to the appointment of an arbitrator,⁵³ or a third arbitrator⁵⁴ to be referred to the appropriate court⁵⁵ within 30 days. Where parties have already agreed to appoint arbitrators, the default provisions for appointment are inapplicable⁵⁶. Our experience is that this can be a long drawn out process, which defeats the objective of an arbitration to be expeditious, particularly in cases which are not regarded as “international commercial arbitration”.

1.13 Is there a right to challenge arbitrators, and if so under which conditions?

Section 13⁵⁷ provides the grounds on which an arbitrator may be challenged. A person appointed as arbitrator shall disclose to the parties any circumstances likely to give rise to reasonable doubt about his impartiality and independence⁵⁸ without delay. Any party may challenge the authority of arbitrators:

- (a) if there are circumstances that give rise to justifiable doubts about the arbitrator’s independence or impartiality; or
- (b) if the arbitrator does not possess the qualifications agreed upon by the parties

It has been held in India that the composition of the Arbitral Tribunal can always be challenged if it is contrary to the arbitration agreement- O.N.G.C. v. Oilfield Instrumentation (2004) 3 Arb LR 362 (Bom). Pursuant to s34(2)(a)(v) of the Indian Arbitration and Conciliation Act, an award can be challenged if the composition of arbitral tribunal is not in accordance with the

⁵⁰ S12(3) (b) *ibid*

⁵¹ S 12(1) of the Act

⁵² S 12(2) *ibid*

⁵³ S 12 (4) (a) *ibid*

⁵⁴ S 12 (4) (b) *ibid*

⁵⁵ S 12 (4) (c) & (d) *ibid*

⁵⁶ *Ming Meng Vs. Trading Corporation of Bangladesh TCB Bhawan (Arbitration Application No. 13 of 2012)*

⁵⁷ the Act

⁵⁸ Section 13(1) and 13(2) of the Act



agreement between the parties. Where the parties have participated in the proceeding before the arbitrator and have acquiesced in the reference made to him, a party will be stopped from challenging the validity of the reference on the ground that it was not made on his behalf⁵⁹.

1.14 **Are there any restrictions as to the parties' representation in arbitration proceedings?**

A party shall be at liberty to make their representation before the tribunal either personally or by engaging a lawyer or any other person of his choice⁶⁰. Therefore, there is no bar or requirement of local counsel under the Arbitration Act unless otherwise agreed by the parties. However, it should be noted that only advocates enrolled by the Bangladesh Bar Council can legally provide legal services in Bangladesh. Therefore, it may be argued that the acting as representative of a party in an arbitration must also be an advocate. However, this approach has not been taken in any arbitration so far.

1.15 **When and under what conditions can courts intervene in arbitrations?**

Section 7 of the Arbitration Act bars a judicial authority from hearing any legal proceedings commenced by any party to the arbitration agreement against the other party except as provided under the Act. The court or the judicial authority shall stay the further proceedings thereof and refer the dispute to arbitration⁶¹. These provisions will apply where the place of arbitration is in Bangladesh. It is very likely that the courts will uphold the parties' agreement to arbitrate.

The High Court also has the powers of deciding on jurisdictional matters. Factors that will be considered include whether court proceedings will provide substantial savings in cost, whether the application was submitted without any delay, and whether there is good reason why the matter should be decided by the court.⁶²

⁵⁹ *Bangladesh Fisheries Research Institute & another Vs. MR Bhuiyan Ltd. and others* 61 DLR 400

⁶⁰ Section 31 of the Act provides: "Legal or other representation.-Unless otherwise agreed by the parties, a party to an arbitral proceeding may be represented in the proceedings by the lawyer or other person chosen by him"

⁶¹ *Brexco Bremer Export ContorBrand, West Germany & others Vs M/s. Popular Biscuit Ltd.* 6 MLR (HC) 281

⁶² S 20 (2) *ibid*



Judicial authority interferes with arbitration on public policy grounds. An illustrative case is the decision of the Supreme Court of Pakistan in Hubco v. WAPDA [Civil Appeal Nos. 1398 & 1399 of 1999], where the court refused to enforce an arbitration agreement providing for ICC arbitration in London and upheld the jurisdiction of the Pakistan courts to determine a major dispute. The central issue was whether allegations of fraud, illegality and corruption raised by one party (a government party) against the other (Project Company / foreign investors) precluded the resolution of disputes by arbitration as a matter of public policy and, as such, rendered them non-arbitrable.

Another relevant case is Saipem SpA v Bangladesh Oil Gas and Mineral Corporation MLR (2000) (AD) 245. In this case, the High Court Division of the Supreme Court of Bangladesh, held that where the district court acting under Sec. 5 of the Arbitration Act 1940 revoked the authority of an ICC arbitral tribunal constituted under the ICC Rules (ICC Arbitration case no. 7934/CK) at the request of one of the parties, the arbitrators could not render any award. The lower court held that the tribunal had conducted the arbitration proceedings improperly by refusing to determine the question of admissibility of evidence and the exclusion of certain documents from the record. Accordingly, the tribunal had acted in manifest disregard of law and the arbitral proceedings were likely to result in a miscarriage of justice. The High Court held that the award by arbitrators whose authority had been revoked acted without jurisdiction.

The Appellate Division of the Supreme Court declined to interfere with this order in the interests of justice. The decision caused some concerns in the international arbitration community. For example, the Editor of the ASA (Swiss Arbitration Association) Bulletin described it as "*in stark contrast with a number of principles of international arbitration*" such as Kompetenz-Kompetenz. The commentary maintained that there was nothing improper in the conduct of the arbitral tribunal. Its conduct was "*completely in line with public policy as well as with standard arbitration practice. The facts reported do not show that the Arbitral Tribunal has overstepped its discretion to freely assess and weigh the evidence...*". This case also led to the Italian party to file a claim before ICSID for compensation for breach of the Bangladesh-Italian Bilateral Investment Treaty. The decision has now been published holding that the actions of the Bangladeshi courts have infringed its treaty obligations (*Saipem S.p.A. v The People's Republic of Bangladesh ICSID Case No. ARB/05/7*).

There is no prominent case on the issue of "res judicata" or issue estoppel in relation to arbitral proceedings in Bangladesh, but it is anticipated that if such issues were to arise, they would be dealt with according to the



principle set by the CPC. However, reliance may be placed on an English case which would be regarded as persuasive authority. In *Good Challenger Navegante SA Vs Metalexportimport SA*⁶³, the Court of Appeal gave careful consideration to the issue of estoppel, but ultimately held that no estoppel arose. However, the award was challenged on the basis that the time permitted for enforcement under the English Limitation Act had expired.

In the case of *Mimetal's Germany GmbH vs Ferco Steel Ltd*, [1999] 1 All ER (Comm) 315, the plaintiff sought to enforce an arbitral award in England which was made in China, the defendant tried to invoke the following exceptions:

- (a) That it had been unable to present its case to the arbitrators;⁶⁴
- (b) That the awards were arrived at by an arbitral procedure not in accordance with the agreement of the parties;⁶⁵
- (c) That enforcement of the awards would be contrary to public policy.⁶⁶

It was only by concluding that none of the exceptions raised was satisfied that the English Court held that there were no grounds for refusing enforcement of the awards. A similar approach by the Bangladesh Court in recognition and enforcement of arbitral awards is highly likely.

The High Court Division in presiding over proceedings for setting aside an arbitral award cannot constitute itself a Court of Appeal sitting over the decision of an arbitrator. The Court was disinclined to interfere with the arbitral interim award made by the Arbitration Tribunal and directed the Respondent to return the Performance Guarantees to the Claimant⁶⁷.

1.16 Do arbitrators have powers to grant interim or conservatory relief?

⁶³ [2003] Lloyd's Rep 471 CA.

⁶⁴ English Arbitration Act, Section 103(2)(c) and corresponding to Model Law, Article 36 (1)(a)(iii) and the Convention, Article V (1)(b)

⁶⁵ English Arbitration Act, Section 103 (2)(e) and corresponding to Model Law, Article 36 (1)(a)(iv) and the Convention, Article V (1)(d).

⁶⁶ English Arbitration Act, Section 103 (3) and corresponding to Model Law, Article 36 (1)(b)(ii) and the Convention, Article V (2)(b).

⁶⁷ *Helm Duengemittel GmbH Vs. BCIC and another* 16 BLC (2011) 783



Arbitrators have full powers to grant interim or conservatory relief⁶⁸. Apart from the powers of the arbitrators, the new Section 7A⁶⁹ inserted into the Arbitration Act also gives powers to the District Court and High Court Division to make interim orders of protection. These powers include making interim orders appointing guardians for minors or insane persons to conduct arbitral proceedings on his or her behalf,⁷⁰ interim custody, sale or other protective measures regarding the goods or property of the arbitration agreement,⁷¹ injunctions restraining transfer of property or part thereof which may create impediments on way of enforcement of the award⁷² and appointing a receiver⁷³. However, these powers are restricted to arbitrations taking place within Bangladesh pursuant to s3 of the Act⁷⁴.

Section 9 of IACA has the same effect in India. In *Inox Air Products Ltd. v. Rathbi Ispat* (2007)3 RAJ 492 (Del) a suit was filed at Delhi by *Inox*. The court held that the suit could not be maintained at Delhi for lack of territorial jurisdiction. The plaintiff requested that the suit be treated as an Application under sec. 9 for interim measures of protection. He relied on *Sameer Berai v. Ratan Jam* (2006)1 SCC 479: (2006)1 RAJ 116, which held that:

“Even if civil court feels that because of existence of arbitration clause a suit is not maintainable, it can treat the ‘Application’ (sic should be suit) to be one (Application) under sec. 9 of the Act.”

The power of the Bangladesh Court to make an order for an interim mandatory injunction is similar to that of an English Court. In *Cetelem SA Vs Roust Holdings Ltd* [2005] EWCA Civ 618 CA, the English Court granted an interim mandatory order requiring the defendant to provide to a foreign government authority the necessary documentation for an application for authorization of a share sale.

The Act empowers the tribunal to make interim orders upon request of a party, requiring a party to take protective measures regarding the subject matter of the dispute with no provision of appeal against such order,⁷⁵ subject to furnishing security as the tribunal may consider appropriate.⁷⁶ Before the passing of such an order, notice must be served to the other

⁶⁸ S.21; the Act empowers the court to enforce these orders as well.

⁶⁹ Section 7A has been inserted by Arbitration (Amendment) Act, 2004 (Act No. 4 of 2004) published in Bangladesh Gazette extraordinary dated 19.02.2004 with effect from 19.02.2004

⁷⁰ S7A (1)(a) *ibid*

⁷¹ S7A (1)(b) *ibid*

⁷² S7A (1)(c) *ibid*

⁷³ S7A (1)(f) *ibid*

⁷⁴ See 1.1 and footnote 3 above.

⁷⁵ S21 (1) *ibid*

⁷⁶ S21 (2) *ibid*



party.⁷⁷ The powers conferred upon the tribunal under section 21 are in addition to and not in derogation to the provision of section 7A.⁷⁸

It has been held by the English courts that the power of arbitrators is based upon contract and is unlike the inherent powers of the courts. Accordingly, unlike a court, the arbitrator has no general powers, which would be effective against third parties to the arbitration agreement. He cannot, for instance, freeze the accounts of one party, as this would involve making orders to bind the bank, which holds the account⁷⁹. The situation is the same in Bangladesh under the Act⁸⁰.

The English High Court in *Petroleum Investment Co Ltd Vs Kantupan Holdings Co Ltd* [2002] 1 All ER (Comm) had to consider whether to uphold an ex parte order for a Mareva injunction passed by arbitrators. It was never argued at any point that the court had no power under Section 44 of the Arbitration Act 1996 to make such an order. A Bangladesh Court will have similar powers to uphold an interim order passed by arbitrators pursuant to s21(4) of the Act.

Problems may arise where parties assert that the arbitration agreement itself is null and void. There is a guideline provided by Coleman J in the case of *Vee Networks Ltd Vs Econet Wireless International Ltd* [2004] EWHC 2909 (Comm)⁸¹ where he referred to section 30 of the Arbitration Act 1996 which provides that the arbitrators are free to rule on their own substantive jurisdiction, including in particular ‘whether there is a valid agreement’. However, stating the ruling under section 30 as purely provisional, he again referred to Section 67 of the 1996 Act, whereby a party to the arbitration who has registered an objection to jurisdiction at the earliest possible stage is free to challenge the ruling on jurisdiction.

A similar provision exists in India, namely, Section 17⁸², which deals with interim measures ordered by an arbitral tribunal.⁸³ Cases decided on this provision are *M.D.Army Hsg. Orgn. V. Sumangal Services*, (2003) 3 Arb LR

⁷⁷ S21 (3) ibid

⁷⁸ S21 (5) ibid

⁷⁹ In *The Vasso* [1983] 2 Lloyd's Rep 346 the court enforced an arbitrators' award of inspection of property but held that ‘... the property in question is the property of one of the parties to the arbitration. If it had been the property of a third party, the result might well have been different, though it is unnecessary so to decide.

⁸⁰ S 43 (a)(v)

⁸¹ Reported in Arbitration Law Monthly August 2005, Vol. 5, No. 7

⁸² IACA

⁸³ Section 17 states: (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.

(2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1).



61⁸⁴, H.M. Ansari v. U.O.I., AIR 1984 SC 29⁸⁵, Skoda Export Co. Ltd. v. I.O.C. (1997) 1 Arb LR De⁸⁶

1.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

The making of an arbitral award and the requirements for an arbitral award are set out in Sections 36 to 41⁸⁷ of the Act. For making an arbitral award, the law designated by the parties to the arbitration agreement shall be applicable⁸⁸ and in the absence of any such designation, the arbitration tribunal shall follow the rules of law it considers appropriate⁸⁹ and decide the dispute in accordance with the terms of the contract⁹⁰. Decisions in the case where the arbitration tribunal consists of more than one arbitrator shall be made by a majority⁹¹ of all the members of the tribunal.

• Formal requirements for arbitral awards

An award must be in writing and signed by the arbitrators⁹². In case of the arbitration tribunal consisting of more than one arbitrator, the award shall be considered and deliberated upon by all the arbitrators even if opinions may be divided⁹³. The award must be signed by all the arbitrators or by the majority members of the tribunal. In case of dissent, reasons for an omitted

⁸⁴ Supreme Court has observed, “Under Section 17 the power of the arbitrator is a limited one. It cannot issue any direction which would go beyond the ‘reference’ or the ‘arbitration agreement’. The order under Sec. 17 may be addressed only to the parties to the arbitration agreement. It cannot be addressed to other parties.. No power is conferred upon the Tribunal to enforce the order, nor does it provide judicial enforcement thereof.”

⁸⁵ It was held, “the arbitrator will have power to make an interim order directing a party to do certain things before the final award is made” unless this power is expressly excluded. But the arbitrator cannot give a direction to compel the party to perform his part. [Relied on *Hounslow Council v. Twickenham*, (1970) 2 All ER 326]

⁸⁶ It was held “under the new Act, during arbitration proceedings, the tribunal has been empowered to give interim measure of protection... The plaintiff may therefore even approach the arbitrator.

⁸⁷ the Act

⁸⁸ S 36(1) *ibid*

⁸⁹ S 36(2) *ibid*

⁹⁰ S 36(3) *ibid*

⁹¹ S 37 of the Act

⁹² Section 38 of the Act/ *AIR 1962 Raj 231 (DB)*

⁹³ *M/S. Saudi-Bangladesh Services Company Limited Vs. Saudi Arabian Airlines Corporation* 14 MLR (HCD) 441; *upheld by the Appellate Division: 15 MLR (AD) 153*



signature must be stated. The award shall not be invalid because dissenting minority members do not sign it⁹⁴.

Unless otherwise agreed by the parties, the tribunal shall give its reasons in the award. However, where the award is made as agreed upon by the parties as provided under Section 22⁹⁵, there will be no need to give reasons by the tribunal. The award must be dated and the place of making the award shall be mentioned thereon as required under Section 26⁹⁶.

- **Deadlines for issuing arbitral awards**

There is no deadline for issuing the arbitral award but it is presumed that the award will be issued as soon as possible after it is made and signed by the arbitrator or arbitrators. In some institutional arbitration, the award has to be considered and approved by the court or a designated body of the institution before it is issued.

- **Other formal requirements for arbitral awards**

After an award is made, a copy duly signed by the arbitrator(s) shall be delivered to each party. However, a party may apply to the arbitration tribunal within 14 days upon receipt of the award for correction of any clerical errors⁹⁷ or to modify the award. If the tribunal finds the request justified it shall correct or modify the award within 14 days of the receipt of the request. The arbitration tribunal may also make an additional award on points omitted on the request of a party within 60 days from the date of the receipt of the request.

The arbitration tribunal is empowered in the case of an award for payment of money⁹⁸, to allow interest at the rate it considers reasonable on the award money for the period from the date of cause of action and to the date of making the award. However, if the agreement between the parties prohibits the payment of interest, no interest shall be payable⁹⁹. The award money - unless otherwise directed by the tribunal - shall carry 2% interest per annum above the Bank rate as may be determined from time to time by the

⁹⁴ 1977 SCMR 154.

⁹⁵ The Act

⁹⁶ *ibid*

⁹⁷ Section 40 of the Act

⁹⁸ Under sub-section (6) of Section 38 of the Act

⁹⁹ *Ms. Madnani Construction Corporation (P) Limited Vs. Union of India and others AIR 2010 SC 383; M/S Sree Kamatchi Amman Constructions Vs. Divisional Railway Manager (Works), Palghat and others AIR 2010 SC 3337*



Bangladesh Bank, from the date of the award to the date of the payment¹⁰⁰. Where in a case the arbitration agreement is illegal, the award given because of such agreement is also illegal, and as such, a party to it is not stopped from challenging the same¹⁰¹.

The court shall take judicial notice of the award, which is void, and without jurisdiction, though no objection is filed¹⁰². The tribunal shall determine the costs of the arbitration including the arbitrators' remuneration and witness cost etc.

1.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded?

An application¹⁰³ may be made to the District Court¹⁰⁴ or High Court Division¹⁰⁵ for setting aside an arbitral award on some very specific grounds¹⁰⁶. There is no provision for any appeal to be filed against an arbitration award¹⁰⁷.

An award may be set aside if¹⁰⁸ a party to the arbitration agreement was under some legal incapacity;¹⁰⁹ that the arbitration agreement was not valid under the law to which parties have subjected it;¹¹⁰ that the applicant was not given any notice of the appointment of an arbitrator or of the arbitral proceedings;¹¹¹ or that a party was prevented by sufficient reason from presenting his case before tribunal; or that the award is made on matters not submitted to the tribunal;¹¹² or that the composition of the tribunal was not in accordance with the provisions of the Act¹¹³.

¹⁰⁰ *Bax Shipping Line Vs. Bangladesh Water Development Board & another*, 7 MLR (AD) 37

¹⁰¹ *AIR 1962 SC 1810*

¹⁰² *Hashmat Ali Vs. Asmat Ali Jamaddar*, 6 DLR, 478.

¹⁰³ Section 42 of the Act

¹⁰⁴ S 42(1) *ibid*

¹⁰⁵ S 42(2) *ibid*

¹⁰⁶ *Bangladesh Power Development Board and others Vs. M/S. Arab Contractors (BD) Limited and others* 15 MLR (HCD) 185; *Startus Construction Company Vs. Roads and Highways Department* 17 BLC 662; *Bangladesh Power Development Board and others Vs. M/S. Arab Contractor (BD) Limited and others* VI ADC (2009) 952; *State of Rajasthan Vs. M/S Nav Bharat Construction Company* AIR 2010 SC 739; *State of Rajasthan Vs. M/S Nav Bharat Construction Company* AIR 2010 SC 739; *Bangladesh Railway Vs. Pamkaya (M) SDN. BHD. (Arbitration Application No. 07 of 2010[HCD])*

¹⁰⁷ *M/S Sumitomo Heavy Industries Ltd. Vs. Oil and Natural Gas Company* AIR 2010 SC 3400

¹⁰⁸ S 43(1) *ibid*

¹⁰⁹ S 43(1)(a)(i) *ibid*

¹¹⁰ S 43(1)(a)(ii) *ibid*

¹¹¹ S 43(1)(a)(iii) *ibid*

¹¹² S 43(1)(a)(iv) of the Act

¹¹³ S 43(1)(a)(v) *ibid*; *Joinal Abedin Jamal and others Vs. Noor Afza* 63 DLR 432; party waived right to object to tribunal.



When it is established to the satisfaction of the court that the subject matter of the dispute is not capable of settlement by arbitration under the law in force in Bangladesh, or that the award is *ex facie* opposed to the public policy or the law of Bangladesh, or that the award is induced or procured by corruption or fraud, the award may be set aside.

In relation to the conduct of the arbitration, the tribunal would deal with the dispute submitted to it fairly and impartially¹¹⁴ and each party shall be given reasonable opportunity to present its case¹¹⁵ and examine all the documents and other relevant materials filed by the other party or any other person concerned before the tribunal¹¹⁶. If such opportunity is not given, this offends the principle of natural justice rendering the award unsustainable in law.¹¹⁷

The applicant, while making an application for setting aside an award, is required under s43(2)¹¹⁸ to deposit the amount of money payable under the award in the court or furnish security therefore as may be directed by the Court¹¹⁹

The court is not required to examine the evidence beyond the award. The Court can set aside an award if it finds the award erroneous on points of law, or bad on the face of it by mere perusal¹²⁰. In proceedings arising out of an arbitration, the court cannot sit as court of appeal against the decision of the arbitrator¹²¹.

The High Court Division may set aside any arbitral award made in an international commercial arbitration held in Bangladesh on the application of a party within sixty days from the receipt of the award.¹²²

The Act provides for appeal only to the High Court Division against certain specific orders passed by the court of District Judge which includes (i) an order¹²³ setting aside or refusing to set aside an arbitral award other than an international commercial award. (ii) An order¹²⁴ refusing to enforce an arbitral award under section 44¹²⁵. (iii) An order refusing or enforce any foreign arbitral award. Further appeal lies to the Appellate Division of

¹¹⁴ S 23 (1) *ibid*

¹¹⁵ S 23 (1)(a) *ibid*

¹¹⁶ S 23 (1)(b) *ibid*

¹¹⁷ Khan Bahadur Alla Buksh Gabor vs Mrs. Razia Begum, PLD 1960 Karachi 455

¹¹⁸ The Act

¹¹⁹ A Latif and Company Ltd. Project Director P.L. 480 LGED & others 9MLR (HC) 137, Chittagong Steel Mills Ltd. & another Vs. M/s. MEC, Dhaka & others, 10 MLR (HC) 113

¹²⁰ Adamjee Sons Ltd. Vs Jiban Bima Corporation, 45 DLR 89.

¹²¹ Bangladesh T & T Board Vs Lili Enterprise Ltd. 46 DLR 122. 50 DLR (AD) 63

¹²² S 42(2) *ibid*

¹²³ Section 48(a) of the Act

¹²⁴ Section 48(b) *ibid*

¹²⁵ *ibid*



Supreme Court against decision of High Court Division subject to the provision of article 103 of the Constitution of Bangladesh.

In India, there are similar provisions for setting aside arbitral awards¹²⁶ and also for an appeal from an order¹²⁷.

Where an award is illegal and void for want of jurisdiction apparent on the face of it, it is not necessary that the parties should file objection to the award within the time prescribed under Article 158 of the Limitation Act 1908¹²⁸.

1.19 What procedures exist for enforcement of foreign and domestic awards?

An arbitral award under the Act shall be final and binding upon the parties and on any person claiming under them. However, the parties still have the right to challenge¹²⁹ an arbitral award in the manner and on the grounds set out in the Act¹³⁰.

Domestic Award: The Act provides for enforcement of an award by the Court according to the provisions of the Code of Civil Procedure¹³¹. After the expiry of the period for filing an application to set-aside an award under section 42¹³² has expired or where no such application is filed or if filed is refused, the award becomes enforceable in the same manner as if it were a decree of the court.¹³³

Foreign Award: An application¹³⁴ for enforcement must be made by the parties to the Court¹³⁵. Upon successful application, the award will be enforced by execution by the Court under the Code of Civil Procedure, in

¹²⁶ Section 34 of IACA

¹²⁷ Section 37 of IACA which states that: (1)An appeal shall lie from the following order (and from no others) to the court authorized by law to hear appeals from original decrees of the court passing the order, namely:-

(a) granting or refusing to grant any measure under section 9;
(b) setting aside or refusing to set aside an arbitral award under section 34.

¹²⁸ *Bangladesh Vs. Abdul Aziz and others* 63 DLR (HCD) 405

¹²⁹ Section 42 and 43 of the Act.

¹³⁰ *Smith Co-Generation (BD) Private Limited Vs. Bangladesh Power Development Board and another* 15 BLC 704; 17 BLT (HCD) 261: *there being a specific provision under S.46 of the Act, challenge under Order 21, rule 29 of the Code of Civil Procedure is not tenable.*

¹³¹ S 44 of the Act

¹³² Loc Cit

¹³³ S 44 *ibid*

¹³⁴ Section 45 (1)(b) of the Act

¹³⁵ Section 45 of the Act



the same manner as if it were a decree. This application for the execution of an arbitral award must have: the original arbitral award or a copy thereof which is duly authenticated in the manner required by the law of the country in which it was made¹³⁶; the original agreement for arbitration or a duly certified copy¹³⁷; and such evidence as may be necessary to prove that the award is a foreign award¹³⁸. The award or the agreement with application must be in English or Bengali or translated into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in Bangladesh¹³⁹. However, foreign arbitral awards exclude those made in the territory of a specified state as declared by the Government under Section 47¹⁴⁰.

Grounds for refusing recognition or execution of foreign arbitral awards are set out in Section 46¹⁴¹.

In the case of *ABCI Vs Banque Franco-Tunisienne & Ors*¹⁴², the plaintiff had received an arbitral award in its favour which was sought to be enforced against the defendant in England. The defendant resisted enforcement on the grounds, inter alia, that the arbitration agreement had been entered into, and the arbitration proceedings had been made and conducted, on its behalf by persons without authority to represent it, and the plaintiff knew that these putative agents lacked the necessary authority. These same grounds were raised in a French court which dismissed them eventually.

It is stated in the case that the *Henderson Vs Henderson* principles of issue of estoppel as modified by the House of Lords in *Johnson Vs Gore Wood & Co*¹⁴³ could be applied to foreign judgments, before this could be done, it must be established that such an estoppel must also arise under the law of the court where the decision was made. The Court relied on *Minmetals Germany GmbH Vs Ferco Steel Ltd*¹⁴⁴. English Courts accepted that, in principle, res judicata and issue estoppel principles applied to foreign judgments on the setting aside of awards in the same manner as they would apply to any other foreign judgment.

Section 36¹⁴⁵ specifies how an award can be enforced. Where the time for making an application to set aside the arbitral award under Section 34 has

¹³⁶ S 45 (2)(a) ibid

¹³⁷ S 45 (2)(b) ibid

¹³⁸ S 45 (2)(c) ibid

¹³⁹ S 45 (3) of the Act

¹⁴⁰ The Act

¹⁴¹ The Act

¹⁴² [2002] 1 Lloyd's Rep 511 (England, High Court)

¹⁴³ [2001] 2 WLR 72 (England, House of Lords)

¹⁴⁴ Loc Cit

¹⁴⁵ IACA



expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.

In *Morgan Securities v. Modi Rubber Ltd.* AIR 2007 SC 183: (2007) 1 RAJ 133(SC): (2007) 136 Comp Cas 113(SC) their Lordships in the Indian Supreme Court observed: “In terms of sec. 36, an award becomes enforceable as if it were a decree where the time for setting it aside under sec. 34 has expired or such Application having been made is rejected”.¹⁴⁶

An arbitral award, if not challenged under sec 34 or if not set aside when challenged, “attains the character of ‘decree’ without any further approval of the court”. *City Scope Developers Ltd. v. Alka Builders*, (2000) 1 Cal HN 381.

1.20 Can a successful party in the arbitration recover its costs?

The Arbitral Tribunal will fix the costs of arbitration unless the parties agreed otherwise¹⁴⁷. The arbitral tribunal shall specify¹⁴⁸ the following related to costs in an arbitral award: (i) the party entitled to costs (ii) the party who shall pay the costs (iii) the amount of costs or method of determining that amount, and (iv) the manner in which the cost shall be paid. However the arbitral tribunal may fix the amount of the deposit as an advance for the costs which it expects to incur in respect of the claim submitted to it¹⁴⁹. Section 49¹⁵⁰ and sub-section (7) of section 38¹⁵¹ shall be read together while determining by the arbitral tribunal the amount of arbitration cost and deposit thereof by the parties in equal share and the mode of payment and refund of any balance.

1.21 Are there any statistics available on arbitration proceedings in Bangladesh?

No. There are no statistics readily available in Bangladesh about arbitration proceedings.

¹⁴⁶ The court explained, “Section 36 of the Arbitration Act, 1996 merely specifies as to how an award can be enforced by laying down that it “can be enforced as if it were a decree. An award is thus treated to be a decree even without intervention of the court for the only purpose of enforceability.

¹⁴⁷ Section 38(7)(a) of the Act

¹⁴⁸ Section 38(7)(b) of the Act

¹⁴⁹ Section 49(1) of the Act

¹⁵⁰ *ibid*

¹⁵¹ *ibid*



1.22 Are there any recent noteworthy developments regarding arbitration in Bangladesh?

The environment for arbitration in Bangladesh was intended to, and has indeed, changed following the introduction of the Act and it appears to be more "arbitration friendly" now. The courts have started to deal with all arbitration applications and challenges more expeditiously and interfere in arbitration matters less frequently than before.

One major development in Bangladesh is the courts' decision in India (?) and Bangladesh to limit the scope of the Act to arbitrations held within Bangladesh only.¹⁵²

The ICSID decision in *Saipem v Bangladesh* was not challenged by Bangladesh but that decision at the moment makes the courts of Bangladesh and in the developing countries in South and South East Asia more vulnerable when dealing with international commercial arbitrations. Anything perceived as interference with international commercial arbitrations can potentially be regarded as a breach of treaty obligations, causing serious adverse consequences to the state.

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¹⁵² This was the situation in Singapore as well but a change in the law was made to extend the scope of the International Arbitration Act (Cap 1431A) to arbitrations outside Singapore.



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2. BRUNEI



BY: MR. AHMAD JEFRI ABD RAHMAN

2.1 Which laws apply to arbitration in Brunei Darussalam?

The Arbitration Order, 2009 (“AO”), regulates domestic arbitrations, and the International Arbitration Order, 2009 (“IAO”), regulates international arbitrations in Brunei Darussalam. Both the AO and the IAO require that the arbitration agreement should be in writing and that they be based on the legal requirement of an arbitration agreement as stipulated in Article 7 of the UNCITRAL Model Law on International Commercial Arbitration (“Model Law”).

2.2 Is the Brunei Darussalam arbitration law based on the UNCITRAL model law?

The IAO adopts and enacts the Model Law in its First Schedule. Section 3(1) of the IAO does stipulate that subject to the modifications made by the IAA, with the exception of Chapter VIII (which provides for Recognition & Enforcement of Awards), the Model Law would have the force of law in Brunei Darussalam.

The New York Convention on Recognition & Enforcement of Foreign Arbitral Awards is set out in the Second Schedule of the IAO. Some of the differences between the Model Law and IAA are as follows:

- i. The AO allows the Brunei court a slightly greater degree of supervision over arbitrations than under the IAO. The AO allows appeals against arbitral awards (in limited circumstances) whilst there is no right to appeal under the IAO.
- ii. Unlike Article 10 of the Model Law which provides for 3 Arbitrators; Section 10 of the IAO provides that there is to be a single arbitrator.



In addition to the grounds under Article 34(2) of the Model Law, the IAO allows for two additional grounds of challenge under Section 36: where the making of the award was induced or affected by fraud or corruption; or where a breach of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

2.3 Are there different laws applicable for domestic and international arbitration?

Brunei has two separate laws for arbitration. The IAO applies to international arbitrations while the AO applies to domestic arbitrations. Section 5(2) of the IAO sets out the criteria required for a matter to be deemed as international arbitration. There is no definition of the term 'domestic' under the AO and as such the AO automatically acts as the default statutory regime whenever an arbitration falls outside the criteria of Section 5(2) of the IAO. However, parties to a domestic arbitration may opt into the IAO by express agreement and, on a similar basis, parties to an international arbitration may also opt into the AO if they mutually choose to do so.

2.4 Has Brunei Darussalam acceded to the New York Convention?

Brunei Darussalam is a signatory to and has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and has made a reservation of reciprocity.

2.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

There are no restrictions for parties to use foreign arbitration institutions in the circumstances stated above.



2.6 Does the Brunei Darussalam arbitration law contain substantive requirements for the arbitration procedures to be followed?

Brunei Darussalam adopts procedural steps which are similar to other Model Law countries. The arbitration process is commenced by a request or notice of arbitration sent by a Claimant to the Respondent. A Reply to the Notice of Arbitration will usually follow. The arbitral tribunal is then constituted by the parties or by the appointing authority, in the event that the parties fail to agree. The arbitral tribunal will then give directions for the further conduct of the case including filing of statements of case and defence and counterclaim (if any). There may also be a request for further and better particulars, interrogatories or discovery. Hearings on interlocutory applications also generally take place. The final stage is the main hearing followed by closing submissions and then the written award.

2.7 Does a valid arbitration clause bar access to state courts?

A validly constituted arbitration clause bars access to the state courts.

2.8 What are the main arbitration institutions in Brunei Darussalam?

On 25th December 2014, His Majesty the Sultan of Brunei Darussalam approved the establishment of the Brunei Darussalam Arbitration Centre. The Centre will promote the adoption of arbitration and mediation services in resolving commercial issues and disputes as a speedier alternative to court proceedings.

The Centre will provide arbitration facilities as well as administrative services and mediation to meet the needs of domestic and international consumers. Established an independent and non-profit centre with a broad mandate necessary to administer domestic and international arbitration in Brunei Darussalam, the Centre will also have its own board of directors and will be located on the 8th Floor of the Brunei Economic Development Board headquarters on Jalan Kumbang Pasang.



In addition to the recent establishment of the Brunei Darussalam Arbitration Centre, the Arbitration Association of Brunei Darussalam (“AABD”) is the sole arbitration association in Brunei Darussalam and plays an important role in promoting arbitration in Brunei Darussalam. The President of the AABD is also the statutory appointing authority under the AO (Section 8(2)) and the IAO Section 13(8).

2.9 Addresses of major arbitration institutions in Brunei Darussalam?

The address for the Brunei Darussalam Arbitration Centre and AABD is at:

Brunei Darussalam Arbitration Centre

Level 8, BEDB Building
Jalan Kumbang Pasang
Bandar Seri Begawan BA 1311
Brunei Darussalam

Arbitration Association of Brunei Darussalam

P.O Box 354
Bandar Seri Begawan BS8670
Brunei Darussalam

Tel: +673 2423871

Fax: +673 2323870

2.10 Arbitration Rules of major arbitration institutions?

The Brunei Darussalam Arbitration Centre is in the process of being set up and is expected to publish its rules as part of its establishment process.

In practice, the AABD actively promotes the adoption of the UNCITRAL Model Law and strongly promotes for the usage of the UNCITRAL rules of arbitration.



2.11 What is/are the Model Clause/s of the arbitration institutions?

This is not available yet.

2.12 How many arbitrators are usually appointed?

Parties are free to allocate the number of arbitrators and to choose who they wish to have as arbitrator including any special qualifications of the arbitrators they may wish to appoint.

In practice, parties in Brunei Darussalam tend to select lawyers as arbitrators for cases where a sole arbitrator is called for and occasionally non-lawyers as arbitrators in 3-member arbitral tribunals where specialist skills are required.

It is useful to note that Section 10 of the IAO provides that there is to be a single arbitrator which differs from Article 10 of the Model Law.

2.13 Is there a right to challenge arbitrators, and if so under which conditions?

Under both the IAO (at Article 16(3) of the Model Law) and the AO (at Section 31(9)), a party wishing to challenge the arbitral tribunal on jurisdiction has to make an appeal to the Brunei High Court within 30 days of receipt of such a decision.

A further appeal to the Brunei Court of Appeal is permitted only with leave of the High Court, however, the arbitral tribunal may continue with the arbitration proceedings and may make an award under both the AO and the IAO pending the appeal on the issue of jurisdiction.

Further to the grounds under Article 34(2) of the Model Law, the IAO allows for two additional grounds of challenge under Section 36 namely, where the making of the award was induced or affected by fraud or corruption; or where a breach of natural justice occurred in connection with



the making of the award by which the rights of any party have been prejudiced.

It should be noted that although the Brunei courts have the power to hear applications of challenge against an arbitrator under the IAO (Article 13(3) of the Model Law) and under the AO (Section 15(4)) and may also remove an arbitrator for failure or impossibility to act under the IAO (Article 14(1) of the Model Law) and under the AO (Section 16), the court will not intervene at the stage of selection of an arbitrator.

2.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

Currently under the Legal Profession Act (Cap. 132 of the Laws of Brunei) any person who appears and acts as an advocate and solicitor in any legal matters in Brunei, must hold a valid Practicing Certificate.

2.15 When and under what conditions can courts intervene in arbitrations?

The courts in Brunei Darussalam have the power to hear applications of challenge against an arbitrator under the IAO (Article 13(3) of the Model Law) and under the AO (Section 15(4)) and may also remove an arbitrator for failure or impossibility to act under the IAO (Article 14(1) of the Model Law) and under the AO (Section 16).

The court however, does not intervene at the stage of selection of an arbitrator as this is left to the President of the AABD who is the default appointing authority under both the AO and IAO.

In procedural matters, the Brunei courts may make orders requiring a party to comply with a peremptory order made by the tribunal. Unless otherwise agreed by the parties, the courts may exercise powers in support of arbitral proceedings including preservation of evidence and property and may also make orders for inspection, preservation, detention or sampling of property that is the subject of the proceedings.



2.16 Do arbitrators have powers to grant interim or conservatory relief?

An arbitral tribunal may award interim relief and is not required to seek the assistance of the courts to order interim relief. Any orders or directions made by an arbitral tribunal in the course of an arbitration shall, by leave of the court be enforceable in the same manner as if they were orders made by the court and, where leave is so given, judgment may be entered in terms of the order or direction.

The IAO and the AO provide for the powers to the arbitral tribunal to make orders or give directions to any party for:

- a) security for costs;
- b) discovery of documents and interrogatories;
- c) preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;
- d) giving of evidence by affidavit;
- e) samples to be taken from any property which is or forms part of the subject-matter of the dispute; and
- f) the preservation and interim custody of any evidence for the purpose of the proceedings.

In addition to the above, Brunei Darussalam has adopted the recommendations of the UNCITRAL in 2006 and has stipulated in the IAO powers for the arbitral tribunal to give interim measures to:

- a) maintain or restore the status quo pending determination of the dispute;
- b) prevent a party from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings itself;
- c) provide a means of preserving assets out of which a subsequent award may be satisfied; and



- d) preserve evidence that may be relevant and material to the resolution of the dispute.

2.17 **Arbitral Awards: (i) contents; (ii) deadlines; (iii) other requirements?**

- **Formal requirements for arbitral awards**

The legal requirements of an arbitral award are set out in the IAO (at Article of the 31 Model Law) and in the AO (at Section 38) and are as follows:

- a) the award must be in writing;
- b) the award must be signed by all the arbitrators (where there is more than one arbitrator) or by the majority of the arbitrators, unless the reason for omission of signature of any arbitrator is stated);
- c) the award has to state the reasons upon which it was based, unless parties have agreed that no grounds are to be stated or the award is on agreed terms pursuant to a settlement;
- d) the date of the award and the place of arbitration must be stated; and
- e) a copy of the signed award must be delivered to each of the parties.

- **Deadlines for issuing arbitral awards**

Parties are free to stipulate the time within which an award is to be made by the arbitrator(s).

Under Section 36(1) of the AO, an extension of time may be applied for. The court will not make such an order unless it is satisfied that



substantial injustice would otherwise be done and unless all available tribunal processes for the application of extension of time have been exhausted.

- **Other formal requirements for arbitral awards**

The requirements for arbitral awards are as set out in the IAO at Article of the 31 Model Law and in the AO at Section 38.

2.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in Brunei Darussalam?

There is no right of an appeal against an award made in an international arbitration under the IAO. However, a party may apply to set aside an award on the limited grounds provided under Article 34 of the Model Law and under the two additional grounds under Section 36 of the IAO on the grounds that the award was induced or affected by fraud or corruption or that breach of the rules of natural justice has occurred in connection with the making of the award.

For domestic arbitration under the AO, a party may appeal against an award on a question of law (Section 49). Section 49(3) of the AO provides that an appeal shall only be brought (a) with the agreement of all the other parties to the proceedings, or (b) with the leave of the court.

Section 49(5) of the AO then provides that leave to appeal shall be given only if the court is satisfied that:

- a) the determination of the question will substantially affect the rights of one or more of the parties;
- b) the question is one which the arbitral tribunal was asked to determine;
or
- c) on the basis of the findings of fact in the award:



- d) the decision of the arbitral tribunal on the question was obviously wrong;
- e) the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and
- f) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

There are provisions under the AO that allow for the parties to agree to exclude the jurisdiction of the court to hear an appeal against awards. Additionally, an express agreement to dispense with reasons for the arbitral tribunal's award shall be treated as an agreement to exclude the jurisdiction of the Brunei court in the AO.

Parties are not free to agree to exclude the jurisdiction of the court to hear an application to set aside an award(s) and parties have no power to agree to expand the scope of appeal of an arbitral award beyond the grounds available in the AO.

2.19 What procedures exist for enforcement of foreign and domestic awards in Brunei Darussalam?

Brunei has both signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the only reservation is reciprocity.

Order 69 Rule 7 of the Rules of the Supreme Court provide that an application for leave to enforce an award may be made ex parte but the court hearing the application may require an inter parte summons to be issued. In practice, the courts do not generally give permission to proceed ex parte, unless the enforcing party can demonstrate exceptional circumstances such as a real danger and likelihood that the party against whom the award has been made will attempt or is likely to remove assets from the jurisdiction as soon as it is notified of the enforcement proceedings.



2.20 Can a successful party in the arbitration recover its costs in Brunei Darussalam?

A successful party in an arbitration will generally be awarded costs and expenses in the award at the discretion of the arbitral tribunal. The general practice of awarding shifting fees will be at the discretion of the arbitral tribunal.

2.21 Are there any statistics available on arbitration proceedings in Brunei Darussalam?

These are not currently available.

2.22 Are there any recent noteworthy developments regarding arbitration in Brunei Darussalam (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

Brunei Darussalam recognises arbitration as a valuable alternative dispute resolution mechanism, particularly for government contracts. In this context, efforts are underway in the setting up of an arbitration institution (see No. 2.8 above) which will provide a platform for the holding of arbitrations in Brunei Darussalam and also serve to train and develop local capabilities in the area of arbitration and other methods of dispute resolution.

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3. CAMBODIA



BY: DR. NARYTH H. HEM

3.1 Which laws apply to arbitration in Cambodia?

The Cambodian government officially opened the National Commercial Arbitration Center in 2013, but the Center has not yet accepted a case. As of today, only collective labor disputes have been arbitrated in Cambodia. Collective labor disputes are governed principally by the Labor Law of 1997. Under this law, the Arbitration Council was created to resolve labor disputes.

Furthermore, in July 2001 Cambodia adopted the “Law on the Approval and Implementation of the United Nation Conventions on Recognition and Enforcement of Foreign Arbitral Awards” and in March 2006 the “Law on Commercial Arbitration”. In addition, on August 12, 2009, the Sub-Decree No 124 on the Organization and Functioning of the National Commercial Arbitration Center was adopted by the Royal Government of Cambodia. This Sub-Decree establishes the National Commercial Arbitration Centre (NCAC) and provides for mechanisms as to how the Centre will regulate private arbitration and the procedure for the admission of arbitrators. The NCAC has recruited and trained arbitrators, and it is expected that the center could begin hearing cases shortly.

The government adopted the “*Arbitration Rules of the National Arbitration Center of Kingdom of Cambodia*” in July 2014. This was an important step for the NCAC to become a fully functioning arbitral institution. In principle, the Cambodian Code of Civil Procedure does not apply to arbitration. However, when an arbitral award comes into effect, the execution of the awards must comply with the provisions of the Code of Civil Procedure.

3.2 Is Cambodia’s arbitration law based on the UNCITRAL Model Law?



The Law on Commercial Arbitration 2006 is based on the UNCITRAL Model Law. Although most of the provisions of the Law on Commercial Arbitration are *in pari materia* with the UNCITRAL Model Law, Cambodian legislators adapted certain provisions to Cambodian society and international business requirements.

3.3 Are there different laws applicable for domestic and international arbitration?

The Law on Commercial Arbitration applies to both domestic and international arbitration. The Labor Law is applicable only for domestic arbitration resulting from labor disputes.

3.4 Has Cambodia acceded to the New York Convention?

Yes, Cambodia is a party to the United Nations Convention of Recognition and Enforcement of Foreign Arbitral Awards in 1958, which came into force in Cambodia in 2001 by adopting the “Law on the Ratification and the Implementation of the UN Recognition and Enforcement of Foreign Arbitral Awards”.

3.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

The provisions of the Arbitration Law do not restrict the parties’ choice of arbitration institutions. Hence parties have free reign to contract and select an arbitration institution of their choice, including foreign arbitration institutions. The place of the arbitration is based on the terms of the arbitration agreement.

3.6 Does the Cambodian Arbitration Law contain substantive requirements for the arbitration procedures to be followed?



Yes, the Law on Commercial Arbitration contains detailed substantive requirements for the procedures to be followed during arbitration that generally reflect the UNCITRAL requirements. See Chapters 5, 6 and 7 of the Commercial Arbitration Law (2006) and Chapters 2, 3 and 4 of the NCAC Rules (2014).

3.7 Does a valid arbitration clause bar access to state courts?

Cambodia has only municipal and provincial courts of first instance. Technically, a valid arbitration clause should bar access to the courts, with the exception of cases involving public policy.

However, in Cambodia arbitration is a relatively new concept and the courts are not clear regarding their role vis-à-vis arbitration.

3.8 What are the main arbitration institutions in Cambodia?

In Cambodia, there are two arbitration institutions: the Arbitration Council and the National Commercial Arbitration Center.

3.9 Addresses of major arbitration institutions in Cambodia?

Arbitration Council:

No.72, Street 592 (Conner of St.327),
Sangkat Boeung Kak II, Khan Tuol Kork
Phnom Penh, Cambodia. PO Box. 1180
Tel: +855 23 881 814/815
Email address: info@arbitrationcouncil.org
Website: www.arbitrationcouncil.org

NCAC General Secretariat:

18th Floor, Canadia Tower No. 315, Preah Ang Duong (St. 110), corner of
Preah Monivong (St. 93), Phnom Penh, Cambodia
Tel: +855 9572 7277/ +855 1244 0022



3.10 Arbitration Rules of major arbitration institutions?

The **National Arbitration Center** released their arbitration rules on 11 July 2014. They can be found online at:

http://ncac.org.kh/items/Abitration_Rules_%28NCAC%29_Adopted_Jul_2014_E.pdf

The **Labor Arbitration Council's** rules can be found online at:

<http://www.arbitrationcouncil.org/en/>

3.11 What is/are the Model Clause/s of the arbitration institutions?

There is no model clause yet.

3.12 How many arbitrators are usually appointed?

Under the 2006 law, there is no restriction on the number of arbitrators. The parties are free to decide the number of arbitrators, so long as it is an odd number. In the absence of an agreement on the number of arbitrators, the default rule would set the number at three. See Article 18 of the Commercial Arbitration Law (2006) and Rules 9 and 10 of the NCAC (2014).

3.13 Is there a right to challenge arbitrators, and if so under which conditions?

Yes there is a right to challenge arbitrators. This right is enshrined in Art. 20 of the 2006 law. According to this article an arbitrator may be challenged only if circumstances give rise to justifiable doubts as to his impartiality or independence, or if he does not possess the qualifications agreed to by the parties. See also Rule 13.1 of the NCAC (2014).



3.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

There are no restrictions as to the parties' representation in arbitration proceedings. None of the provisions of the 2006 law and the Sub-Decree No.124 restrict the parties' representation in arbitration proceedings. In addition, Art. 26 of the 2006 law and Rule 3 of the NCAC (2014) allow the parties to freely choose their representatives.

3.15 When and under what conditions can courts intervene in arbitrations?

The Courts can intervene in the arbitrations when:

there is no arbitral agreement or when it becomes null and void (Art. 8 of the 2006 Law); the parties fail to appoint the arbitrator(s) (Art. 19 (8) of the 2006 Law); there is a motion to challenge the arbitrator(s) (Art. 21 (3) of the 2006 Law); there is conflict of interest of the arbitrator(s); the request from the arbitration, for example the request for assistance in taking evidence; (Art. 35 of the 2006 Law) or the conditions described in section 3.18 are met.

According the NCAC rules, the court can intervene at the request of the parties to:

- decide on the question of the tribunal's jurisdiction (Rule 19.2 NCAC Rules),
- take interim measures (Rule 28.8 NCAC Rules).

3.16 Do arbitrators have powers to grant interim or conservatory relief?

Yes, arbitrators have powers to grant interim or conservatory relief unless otherwise agreed by the parties. See Article 9 of the Commercial Arbitration Law (2006) and Rule 28.2 of the NCAC (2014).



3.17 What are the formal requirements for an Arbitral Award (form; contents; deadlines; other requirements)?

- **Formal requirements for arbitral awards**

Arbitral awards must be in writing and signed by the arbitrators. See Article 39 (1) of the Commercial Arbitration Law (2006) and Rule 34.3 NCAC (2014).

- **Deadlines for issuing arbitral awards**

There are no deadlines for issuing arbitral awards stated in the law.

In the case of a commercial dispute referred to the NCAC, The award must be scrutinized and approved by the General Secretariat as to its form (Rule 34.5). The tribunal must submit the award to the NCAC 45 days after the proceeding was declared closed (Rule 35.1).

- **Other formal requirements for arbitral awards**

The award shall state the reasons upon which it is based; it shall allocate among the parties the costs of arbitration, including the fees of the arbitrators and incidental expenses; the award shall further state the date of the award and the place of arbitration; and copies of the award shall be signed by the arbitrator(s) and delivered to each party.

See Article 39 of the Commercial arbitration Law (2006) and Rules 34 and 18.3 of the NCAC rules (2014).

3.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in Cambodia?

Arbitral awards can be appealed or rescinded in Cambodia when the recognition of the award is against public policy or the subject matter of the dispute is not capable of settlement by arbitration under the law of Cambodia.



There are also other conditions under which the Appeals Courts or the Supreme Court can intervene, such as (1) the agreement is invalid, (2) insufficient notice of the appointment of arbitrators or the proceeding, (3) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, (4) the composition of the arbitral panel or the procedure was not in accordance with the agreement of the parties.

3.19 What procedures exist for enforcement of foreign and domestic awards in Cambodia?

An arbitral award is binding and can be executed in the country in which it is made. For the execution and recognition of an arbitration award, the party must submit a motion to the respective court along with supporting documentation, such as the duly authenticated original arbitration award or duly certified copy, or the original arbitration agreement or a duly certified copy. Moreover, a motion seeking execution of a domestic arbitration award shall fall within the jurisdiction of the Court of First Instance. However, the Court of Appeal shall have jurisdiction over a motion seeking execution of a foreign arbitration award. Chapter 8 Section 3 of the Commercial Arbitration Law (2006). See also Rule 37 of the NCAC (2014) on the binding effect of the award.

3.20 Can a successful party in the arbitration recover its costs in Cambodia?

If the parties have so agreed, or the arbitrator(s) deem it appropriate, the award may also provide for recovery by the prevailing party of reasonable counsel fees. See Article 39 (3) of the Commercial Arbitration Law (2006) and Rule 41.3 of the NCAC (2014).

3.21 Are there any statistics available on arbitration proceedings in Cambodia?

So far only for labor related disputes: During the period, 1 January – 31 December 2013, the Arbitration Council received 285 cases which is the



highest caseload in its history. (According to the Annual Report 2013 from the Arbitration Council;

http://www.arbitrationcouncil.org/uploads/a6ce7-annual-report_english.pdf).

The NCAC has not yet accepted any cases.

3.22 Are there any recent noteworthy developments regarding arbitration in Cambodia (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

The National Commercial Arbitration Center of Kingdom of Cambodia is in the process of being established to deal with commercial disputes. As stated above, enabling legislation has recently been passed. The Nation Commercial Arbitration Center (NCAC) was officially launched on 04 March 2013 and after many years of preparation the NCAC rules were adopted on 11 July 2014. The NCAC consists of a seven-member executive board, 43 arbitrators and 11 representatives from the private sector.

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4. CHINA



BY: DR. BJOERN ETGEN

4.1 Which laws apply to arbitration in China?

The PRC Arbitration Law (“Arbitration Law”), effective as of 1 September 1995, applies to arbitration in the People’s Republic of China (“PRC”). This law is not applicable in the Special Administrative Regions of Hong Kong and Macau.

4.2 Is the Chinese arbitration law based on the UNCITRAL Model law?

No, the Chinese Arbitration Law is not based on the UNCITRAL Model Law.

4.3 Are there different laws applicable for domestic and international arbitration?

The Arbitration Law applies to domestic and international arbitration. However, the Arbitration Rules of the China International Economic and Trade Arbitration Commission (“CIETAC Rules 2015” - see below) distinguish in certain aspects between international and domestic arbitration (fees, list of arbitrators, deadline to render an award).

4.4 Has China acceded to the New York Convention?

Yes, the PRC has been a member state since 22 April 1987.

4.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?



Under Article 128 of the PRC Contract Law, parties to a contract with a “foreign element” can opt for arbitration before Chinese arbitral institutions or at a foreign arbitral institution. Conversely, parties to a contract without a “foreign element” will have no choice but to choose arbitration at a Chinese arbitral institution. The Supreme People’s Court has published two interpretations which indicate disputes with one or more of the following three elements are “foreign related”.

- At least one of the parties is “foreign”. In case of companies, the place of incorporation is relevant. Thus, no companies incorporated under the laws of Mainland China - including foreign invested entities and wholly foreign owned enterprises - are treated as “foreign”, whereas all companies outside Mainland China (including Hong Kong, Macau and Taiwanese companies) are treated as “foreign”. For individuals, PRC citizens are usually not considered “foreign” unless their habitual residence is located outside PRC territory. Conversely, all non-PRC citizens are considered “foreign”.
- The second element is whether the subject matter of the contract is or will be wholly or partly outside Mainland China. For example, if the contract concerns land or goods outside Mainland China, or goods which will cross the border of Mainland China pursuant to the contract, then it is likely to be treated as “foreign related”. If the Chinese court considers the cross border element artificial or minor, however, there is a significant risk that the court will treat the matter as purely domestic.
- The third element is whether there are other legally relevant facts “as to occurrence, modification or termination of civil rights and obligations” that occurred outside of Mainland China. The meaning of this factor in practice remains highly uncertain. However, the fact that the contract was signed outside of Mainland China may not be enough to constitute such foreign related element.

In short, if no “foreign element” exists, the parties are barred from selecting a foreign arbitration institution. They may only do so if a foreign element is established according to the above criteria.



4.6 Does the Chinese arbitration law contain substantive requirements for the arbitration procedures to be followed?

According to the Arbitration Law, a party must meet the following conditions when it applies for arbitration in China:

There must be an arbitration agreement in existence, the party must make a specific arbitration claim, such arbitration claim must be based on certain facts and reasons and the application must fall within the scope of cases accepted by the arbitration commission. For example, with respect to the last criteria, labor disputes cannot be arbitrated before commercial arbitration commissions in the PRC.

The claimant must then submit to the arbitration commission the arbitration agreement and application together with relevant copies. The application for arbitration must specify the following: (1) the name, sex, occupation, work unit and domicile of the party, the name and domicile of the legal representatives or other organizations and the name and duties of the legal representatives or persons in charge; (2) the arbitration claim and the facts and reasons on which the claim is based and (3) evidence, sources of such evidence and the names and domiciles of witnesses.

4.7 Does a valid arbitration clause bar access to state courts?

Yes, a valid arbitration clause will generally bar access to the courts. However, there is an exception to this rule if a party institutes an action at a People's Court without declaring the existence of an arbitration agreement.

If the People's Court accepts the case, two possible scenarios could occur. First, if the other party objects to this acceptance prior to the first hearing, the Court has the power to declare the arbitration agreement to be void and the arbitration may no longer proceed. Second, if the other party does not object to the Court's acceptance of the case prior to the first hearing, he is deemed to have renounced the arbitration agreement, and the Court can proceed with the trial.



4.8 What are the main arbitration institutions in China?

The main arbitration institution in China is the “China International Economic and Trade Arbitration Commission (“CIETAC”)”.

On 4 November 2014 CIETAC issued the new CIETAC Rules 2015, which came into effect on 1 January 2015 (For more information about the revised rules please refer to 4.22).

CIETAC has its central office in Beijing and has now three sub-commissions in Tianjin, Chongqing and Hong Kong. Further, CIETAC maintains a South China office in Shenzhen and a Shanghai office.

Differences arose between CIETAC Beijing and its Shanghai and South China branches, over the introduction of its CIETAC Rules 2012, which came into effect on 1 May 2012.

After several months of discussions, finally the Shanghai and Shenzhen sub-commissions refused to follow the CIETAC Rules 2012 and declared themselves independent arbitral institutions with separate arbitration rules.

CIETAC South China renamed itself as South China International Economic and Trade Arbitration Commission or Shenzhen Court of International Arbitration (“SCIA”) and issued new arbitration rules and named a new panel of arbitrators, both effective 1 December 2012.

Later on, CIETAC Shanghai also changed its name to Shanghai International Economic and Trade Arbitration Commission or Shanghai International Arbitration Center (“SHIAC”) and issued its own arbitration rules and named a new panel of arbitrations, both effective 1 May 2013.

Furthermore, SHIAC established the China (Shanghai) Pilot Free Trade Zone (“FTZ”) Court of Arbitration on 22 October 2013. Recently, SHIAC modified its arbitration rules in order to match the promulgation and implementation of China (Shanghai) Pilot Free Trade Zone Arbitration Rules (the “FTZ Rules”), and also to improve arbitrations provided by SHIAC. The new arbitration rules (Rules 2014) and the FTZ Rules came both into force on 1 May 2014.



These developments were unfortunate and introduced some degree of uncertainty over CIETAC clauses, especially where they expressly referred to the CIETAC Shanghai or Shenzhen sub-commissions. As a response, the Supreme People's Court ("SPC") issued a Notice on Certain Issues Relating to Correct Handling of Judicial Review of Arbitration Matters (Fa [2013] No.194) on 4 September 2013, which requires the relevant lower court to make a report on a case arising out of the breakaway of the former CIETAC Shanghai and South China sub-commissions to the SPC "level by level". The SPC is the only competent authority to make the decision on reviewing the validity of a CIETAC arbitration agreement or hearing an application to set aside or not enforcing an arbitral award made by CIETAC, SHIAC or SCIA.

In addition to the three arbitration institutions, there are multiple arbitration commissions established in cities, provinces and autonomous regions. The most well-known institutions are the Beijing and Shanghai Arbitration Commissions.

4.9 Addresses of major arbitration institutions in China?

CIETAC Beijing

6/F, CCOIC Building,
2 Huapichang Hutong,
Xicheng District, Beijing 100035
P.R. China
Tel: +86 10 8221 7788
Fax: +86 10 6464 3500/86 10 82217766
E-mail: info@cietac.org
Website: <http://www.cietac.org>

Beijing Arbitration Commission

16/F, China Merchants Tower
No.118 Jianguo Road
Chaoyang District, Beijing 100022
P.R. China
Tel: +86 10 6566 9856
Fax: +86 10 6566 8078
Email: bjac@bjac.org.cn



RESPONDEK & FAN

Website: <http://www.bjac.org.cn>

Shanghai International Economic and Trade Arbitration Commission

(Shanghai International Arbitration Center) ("SHIAC")

7/F, Jinling Mansion, 28 Jinling West Road,
Shanghai 200021, P.R.China

Tel: +86 21 6387 5588; Fax: +86 21 63877070

Email: info@shiac.org

Website: <http://www.shiac.org>

China (Shanghai) Pilot Free Trade Zone Court of Arbitration

Suite 1101-1105, Waigaoqiao Mansion, 6 Jilong Road,
Shanghai 200131, P.R.China

Tel: +86 21 6896 1702; Fax: +86 21 6896 1703

Email: infoftz@shiac.org

Website: <http://www.shiac.org>

Shanghai Arbitration Commission

23/F Wenxin Mansion, 755 Weihai Road,
Shanghai 200041, P.R.China

Tel: +86 21 5292 1235; Fax: +86 21 2231 3981

Website: <http://www.accsh.org.cn>

South China International Economic and Trade Arbitration Commission

(Shenzhen Court of International Arbitration) ("SCIA")

19/F, Block B, Zhongyin Building 5015, Caitian Road, Futian District,
Shenzhen 518026, P.R.China

Tel: +86 755 83501700; Fax: +86 755 8246 8573

Email: info@scia.com.cn

Website: <http://www.scia.com.cn>

CIETAC Tianjin

(Tianjin International Economic and Financial Arbitration Center)

4/F, E2-ABC, Financial Street, No. 20 Guangchangdong Road
Tianjin Economic -Technological Development Zone
Tianjin 300457, P.R. China

Tel: +86 22 6628 5688; Fax: +86 22 6628 5678

Email: tianjin@cietac.org

Website: www.cietac-tj.org

**CIETAC Southwest Sub-Commission**

1/F, Bld B, Caifu 3, Caifu Garden, Cai fu Zhongxin, Yubei,
Chongqing 401121 P.R. China

Tel: +86 023 86871307; Fax: +86 023 86871190

Email: cietac_sw@cietac.org

Website: <http://www.cietac-sw.org>

CIETAC Hong Kong Arbitration Center

Unit 4705, 47th Floor, Far East Finance Center, No. 16 Harcourt Road,
Hong Kong

Tel: +852 2529 8066; Fax: +852 2529 8266

Email: hk@cietac.org

Website: <http://www.cietachk.org>

4.10 Arbitration Rules of major arbitration institutions?

CIETAC Beijing:

http://cn.cietac.org/rules/rule_E.pdf

Beijing Arbitration Commission:

<http://arbitrator.bjac.org.cn/en/Arbitration/index.html>

**Shanghai International Economic and Trade Arbitration
Commission**

(Shanghai International Arbitration Center)

<http://www.shiac.org/140418EN.pdf>

China (Shanghai) Pilot Free Trade Zone Court of Arbitration

<http://www.shiac.org/English/FreeTradeZoneRuleEN.pdf>

Shanghai Arbitration Commission:

<http://www.accsh.org/accsh/english/node67/node68/index.html>

**South China International Economic and Trade Arbitration
Commission**

(Shenzhen Court of International Arbitration)

http://www.scia.com.cn/web/doc/view_rules/743.html

CIETAC Tianjin:

http://cn.cietac.org/rules/rule_E.pdf

CIETAC Southwest Sub-Commission:



http://cn.cietac.org/rules/rule_E.pdf

CIETAC Hong Kong Arbitration Center:

http://cn.cietac.org/rules/rule_E.pdf

4.11 What is/are the Model Clause/s of the arbitration institutions?

Model arbitration clause - **CIETAC**

“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.”

4.12 How many arbitrators are usually appointed?

Unless otherwise agreed by the parties or otherwise provided by the CIETAC Rules (see below), three arbitrators are appointed. If the parties have not agreed on the number of arbitrators, the chairman of the arbitration commission shall make a decision. Further, according to the CIETAC Arbitration Rules 2015, unless otherwise agreed by the parties, a summary procedure applies to any case where the amount in dispute does not exceed RMB 5,000,000.00 (approx. USD 816,500.00), or one party applies for arbitration under the summary procedure and the other party agrees in writing. In such cases, an arbitral tribunal of a sole arbitrator shall be formed.

In multi-party arbitrations the CIETAC Rules 2015 stipulate that where either the claimant’s side or the respondent’s side fails to jointly nominate one arbitrator, the Chairman of CIETAC shall appoint all three members of the arbitral tribunal and designate one of them to act as the presiding arbitrator.



4.13 Is there a right to challenge arbitrators, and if so under which conditions?

According to the Arbitration Law, parties may challenge the appointment of an arbitrator if circumstances exist that give rise to justifiable doubts about his impartiality or independence. Some examples of possible grounds of challenge include: the arbitrator is a party involved in the case or a blood relation or he/she is a relative of the parties concerned or their attorneys; the arbitrator has vital personal interests in the case; the arbitrator has other relations with the parties or their attorneys involved in the case that might affect the fair ruling of the case; the arbitrator meets the parties or their attorneys in private or accepts gifts or attends banquets hosted by the parties or their attorneys. A party may challenge an arbitrator before the first hearing of the arbitral tribunal. If the reason is known only after the first hearing, the party may state the challenge before the end of the last hearing. The chairman of the arbitration commission shall decide whether to withdraw the challenged arbitrator. If the chairman of the arbitration commission serves as an arbitrator in such a case, the decision shall be made by the arbitration commission collectively.

4.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

According to the CIETAC Rules 2015 (and also in line with the rules of other arbitration commissions in China), Chinese as well as a foreign citizens may accept the authorization to act as a so-called "arbitration agent" in arbitration proceedings. Therefore, foreign lawyers/law firms may appear as party representatives in arbitration proceedings. There is therefore no requirement for foreign lawyers to be joined by local counsel. However, as foreign law firms/foreign lawyers are not permitted to advise on Chinese law, there is a certain risk, in case the arbitration award will have to be enforced at a People's Court, that the Chinese party to the proceedings may raise objections with regard to that matter. Therefore, in case Chinese law is applicable to the dispute, a foreign party should retain a Chinese lawyer to work with foreign counsel as its representatives.



4.15 When and under what conditions can courts intervene in arbitrations?

As mentioned above, the courts may intervene in the arbitration if one party applies to the People's Court claiming that the arbitration agreement is void. In such cases, the People's Court will make a ruling. In cases where one party requests an arbitration commission to make a decision on the validity of the arbitration agreement, but the other approaches the People's Court for a ruling, the Court's decision takes precedence, pursuant to the Arbitration rules.

4.16 Do arbitrators have powers to grant interim or conservatory relief?

According to the Arbitration Law and the PRC Civil Procedure Law, only the Chinese courts have the power to grant interim orders including preservation of property and evidence. The CIETAC Rules 2015 comply with these mandatory provisions.

However, where a procedural law other than PRC law applies (for example if the parties agree to a seat of arbitration outside the PRC), the CIETAC Rules 2015 expressly empower an arbitration tribunal upon a party's application to grant interim measures in accordance with applicable laws.

Furthermore, according to the appendix III of the CIETAC Rules 2015, emergency relief may be granted by an emergency arbitrator procedures based upon the applicable law (e.g. Hong Kong Law) or the agreement of the parties, provided however procedure law other than PRC law applies. Interim or conservatory relief can also be granted by an emergency tribunal under the FTZ Rules 2014. For details please refer to 1.22 below.

4.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?



- **Formal requirements for arbitral awards**

The arbitral award shall specify the arbitration claims, facts in disputes, reasons for the award, result of the award, arbitration expenses, and the date on which and the place at which the award is made.

Upon the agreement of the parties or according to the settlement between the parties, the facts of the dispute and the reasons on which the award is based may not be stated in the award.

The arbitral award shall be signed by the arbitrators and affixed with the seal of the arbitration commission. An arbitrator who holds a different opinion may or may not sign the award.

- **Deadlines for issuing arbitral awards**

There is no deadline stipulated in the Arbitration Law. However, according to the CIETAC Rules 2015, the arbitral tribunal shall render an arbitral award within six (6) months (three (3) months for summary procedures/four (4) months for domestic cases) from the date on which the arbitral tribunal is formed (any suspension period shall be excluded). Upon the request of the arbitral tribunal, the president of the arbitration court may extend the time period if he/she considers it truly necessary and has justified reasons for the extension.

- **Other formal requirements for arbitral awards**

According to the Arbitration Law, there is no other formal requirement for arbitral awards. On the other hand, the CIETAC Rules 2015 request the arbitral tribunal to submit its draft award to CIETAC for scrutiny before signing the award. CIETAC may remind the arbitral tribunal of issues in the award on the condition that the independence of the arbitral tribunal in rendering the award is not affected.



4.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded?

The arbitral award is final. Therefore, as a general rule, no appeal is allowed.

If parties concerned have evidence to substantiate one of the following, they may apply for a rescission of the award with the Intermediate People's Court at the place where the arbitration commission resides.

- There is no agreement for arbitration (including an invalid or revoked arbitration agreement).
- The matters ruled were out of the scope of the agreement for arbitration or the limits of authority of an arbitration commission.
- The composition of the arbitral tribunal or the arbitral proceedings violated the legal proceedings.
- Evidence on which the ruling is based was forged.
- Things that have a substantial impact on the impartiality of the ruling have been discovered that were concealed by the opposing party.
- Arbitrators have accepted bribes, resorted to deception for personal gain or perverted the law in the ruling.

The People's Court will form a collegial bench to review the case, and can rescind an award on the basis of one of the above reasons. It will also rescind an award that contravenes the public interest.

In domestic cases, the Court may notify the arbitration commission to re-arbitrate within a fixed period if evidence on which the ruling is based is forged or evidence that has a substantial impact on the impartiality of the ruling has been discovered that was concealed by the opposing party. If the arbitration tribunal refuses to re-arbitrate the case, the Court shall resume the rescission procedure.

The application for rescission must be made within six (6) months from the date of the arbitral award. The People's Court will decide to rescind the arbitral award or reject the application for rescission within two (2) months after accepting the case.



4.19 What procedures exist for enforcement of foreign and domestic awards?

The Arbitration Law states that parties shall execute the arbitral award. If one of the parties refuses to execute the arbitral award, the other party may apply for enforcement with the People's Court according to the relevant provisions of the Civil Procedure Law. The People's Court with which the application is filed should enforce it.

The prevailing party may seek to have the arbitral award enforced by applying to the Intermediate People's Court where the losing party resides or has property in the PRC. If the losing party resides or has property outside the PRC in a country that has acceded to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), the prevailing party may apply to the competent court in that country for enforcement in accordance with the provisions of the New York Convention.

According to a circular issued in 1995 regarding foreign-related arbitration and foreign arbitration matters undertaken by a People's Court, if an Intermediate People's Court intends to refuse an application for enforcement of an arbitral award issued by a foreign-related arbitration commission in China or a foreign arbitral award, it must refer the application to the Higher People's Court for review before making the ruling. If the Higher People's Court is of the same view as the Intermediate People's Court, it must further refer the application to the Supreme People's Court in Beijing.

4.20 Can a successful party in the arbitration recover its costs?

The Arbitration Law does not address this issue. However, the CIETAC Rules 2015 state that the arbitral tribunal has the power to decide, according to the specific circumstances of the case, that the losing party shall compensate the winning party for expenses reasonably incurred in pursuing its case. In deciding whether the winning party's expenses are reasonable, the arbitral tribunal shall consider such factors as the outcome



and complexity of the case, the workload of the winning party and/or its representative(s), and the amount in dispute.

4.21 Are there any statistics available on arbitration proceedings in China?

In 2013, there were 104,257 arbitration cases handled by 225 arbitration institutions nationwide, with an increase of 8% compared to 2012. In 2014 CIETAC accepted a total of 1,610 new arbitration cases, up by 28% year-on-year and concluded a total of 1,432 cases, with an increase of 37% compared to 2013. The parties were from more than 48 countries and regions. The disputed amounts reached 37.8 billion RMB in 2014, an increase of 55% compared to the corresponding period of 2013.

4.22 Are there any recent noteworthy developments regarding arbitration in the country (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

- **CIETAC Rules 2015**

The CIETAC Rules 2015 contain the following noteworthy revisions:

1. Special Provisions for Hong Kong Arbitrations

Chapter 6 (articles 73-80) of the CIETAC Rules 2015 specify special provisions for Hong Kong Arbitrations concluding the applicability, place of arbitration and law applicable, decision on jurisdiction, nomination/appointment of arbitrator, interim measures and emergency relief and special fee schedule.

For an arbitration administered by the CIETAC Hong Kong Arbitration Center, the place of arbitration shall be Hong Kong, the law applicable to the arbitral proceedings shall be the arbitration law of Hong Kong, and the arbitral award shall be a Hong Kong award, unless otherwise agreed by the



parties. Thus, the arbitral tribunal has the power to grant interim measures at the request of a party, which is explicitly stipulated in article 77 (1) of the CIETAC Rules 2015.

2. Emergency Arbitrator Procedures

The new rules introduce the emergency arbitrator procedure. According to article 1 of the appendix III, either party requiring emergency relief may apply for the emergency arbitrator procedures. If the arbitration court makes a positive decision, an emergency arbitrator will be appointed within one (1) day from the date all the conditions are satisfied: (i) the application contains all the information as requested, e.g. basic information of the parties and the dispute, kind of emergency relief, the reason for the emergency relief and other necessary information, (ii) the application is submitted prior to the formation of the arbitral tribunal, (iii) the relevant documentary and evidence on which the application is based are attached, and (iv) the costs for the emergency arbitrator procedures is paid. The emergency arbitrator has the power to make an order on necessary emergency measures and such order shall be made within fifteen (15) days from the date of that arbitrator's acceptance of the appointment.

In addition, it is important to note that the application for the emergency arbitrator under the CIETAC Rules 2015 must be based on the applicable law or the agreement of the parties. This means that the emergency arbitrator has no power to make an order on necessary emergency measures, if the arbitration case is governed by Chinese law, as only the competent PRC courts have the power to grant such orders under the PRC Civil Procedure Law. Therefore, the emergency arbitrator procedure will mainly apply to the CIETAC Hong Kong Arbitration Center, as well as other cases where an order on interim measures made by an emergency arbitrator will be recognized.

Due to the lack of a legal basis and lack of precedents in the PRC it remains unclear, whether such orders on interim measures made by an emergency arbitrator could be recognized or enforced in Mainland China.

3. Summary Procedure



The CIETAC Rules 2015 raise the threshold value for applicability of summary procedures from 2 million RMB to 5 million RMB.

4. Consolidation/Multiple Contracts/Joinder

CIETAC may consolidate two or more arbitrations pending into a single arbitration at the request of a party. This means that for consolidation of several arbitration proceedings the agreement of all parties is no more obligatory.

The new rules also introduce that the claimant may initiate a single arbitration concerning disputes arising out of or in connection with multiple contracts, if all of the following conditions are met: (i) the contracts are principal contract and ancillary contract(s), or such contracts involve the same parties as well as legal relationships of the same nature, (ii) the disputes arise out of the same transaction or the same series of transactions, (iii) the arbitration agreements in such contracts are identical or compatible.

The CIETAC Rules 2015 contain further a provision regarding the joinder of additional parties. During the arbitral proceedings, CIETAC may at the request of a party decide to join an additional party to the proceedings if the requesting party can establish a *prima facie* case that the third party is also bound by the arbitration agreement. If the request for joinder is filed after the formation of the arbitral tribunal, CIETAC shall make the decision after hearing from all the parties including the joinder.

• FTZ Rules 2014

The FTZ Rules, which consist of 10 chapters and 85 articles, are tailor made for the FTZ. However, these rules shall not be considered as mandatory arbitration rules or limitation of the scope of application for cases related to the FTZ. In accordance with Article 3, these rules do not only apply where parties have agreed to refer their disputes to SHIAC and the parties or the subject matter to a dispute or the legal facts lead to the establishment, change or termination of civil and commercial relationship are connected with the FTZ, but they may also apply to the cases where



parties have agreed to apply the FTZ Rules, regardless of the nature of the dispute.

The FTZ Rules 2014 contain some innovations as follows:

Open Panel of Arbitrators

The parties may choose arbitrators outside the panel of arbitrators, because professionals from the specific industries may have more experience on many new types of cases which may occur in the FTZ, such as offshore finance and e-finance. In comparison to the CIETAC Rules 2015, which require the nomination by parties or the nomination according to the agreement of the parties as a necessary condition, any party according to the FTZ Rules may recommend person(s) from outside the panel of arbitrators as arbitrator, provided the relevant person is confirmed by the Chairman of SHIAC.

Emergency Tribunal

The rules provide for the possibility of the establishment of an emergency tribunal in the PRC. Either party, who intends to apply for interim measure(s), such as preservation of assets, preservation of evidence, requesting and/or prohibiting a party to perform, may apply for an emergency tribunal, if the following requirements are satisfied: (i) during the period between the acceptance of a case and the constitution of the tribunal, (ii) submit an application in written form, (iii) submit reasons therefor in written form, (iv) in accordance with the laws in the jurisdiction where the interim measure(s) is sought, and (v) pay the fees after approval.

The final decision, whether an emergency tribunal should be constituted, rests with SHIAC. If SHIAC decides to constitute an emergency tribunal, an arbitrator from the panel of arbitrators will be appointed by the chairman of SHIAC within three (3) days after the application.

However, the emergency tribunal can only render its decision on interim measures in the jurisdictions where they are authorized to do so. In other words, if the interim measures need to be enforced outside the mainland of



China (e.g. Hong Kong) and in these jurisdictions interim measures are recognized in accordance with applicable laws, the emergency tribunal may directly render a decision.

- **Significant court judgments affecting arbitration**

In a landmark decision the Ningbo Intermediate Court enforced in 2009 two PRC seated awards granted by a foreign arbitral institution. In the past there had been considerable uncertainty with regard to the enforcement of arbitral awards rendered by foreign arbitration institutions with its seat in China. In the specific cases a Swiss steel company successfully enforced two International Chamber of Commerce ("ICC") awards (14005/MS/JB/JEM and 14006/MS/JB/JEM) against two Ningbo companies. The disputes between the Ningbo companies and the Swiss steel company had been with respect to sale and purchase contracts, in which an English arbitration clause provided that all disputes shall be submitted to the arbitration of the ICC in China in accordance with the United Nations convention on the International Sale of Goods ("CISG").

This was the first reported instance of a PRC court granting enforcement of ICC awards made in the PRC.

Anhui Longlide vs. BP Aganati S.R.L. (2013)

In March 2013, the SPC confirmed in its reply regarding the Dispute on the Validity of an Arbitration Agreement between Anhui Longlide Packing and Printing Co., Ltd. and BP Agnati S.R.L. ([2013] Min Si Ta Zi No.13) that the selection of the ICC International Court of Arbitration with the "place of jurisdiction" at Shanghai is valid. By declaring the validity of an arbitration agreement selecting a foreign arbitration institution such as ICC, the SPC removed a main legal obstacle for offshore arbitration institutions in Mainland China.

Zhejiang Yisheng vs. INVISTA (2014)



In the case of Zhejiang Yisheng Petrochemical Co.,Ltd. ("Zhejiang Yisheng") and INVISTA Technologies S.à.r.l. ("Invista"), which related to a dispute regarding the validity of an arbitration agreement providing for arbitration at CIETAC under UNICITRAL rules, the Ningbo Intermediate People's Court confirmed that this "hybrid" agreement is valid.

Disputes arose because of two technology licensing agreements. Under the agreements, the parties agreed that "The arbitration shall take place at CIETAC, Beijing, P.R. China and shall be settled according to the UNICITRAL Arbitration Rules as at present in force". In July 2012, Invista commenced arbitration proceedings and Yisheng subsequently challenged the validity of the arbitration clause arguing that the arbitration clause provided for in China did not permit *ad hoc* arbitration. According to the internal Chinese reporting system, the Intermediate People's Court of Ningbo and the High People's Court of Zhejiang reported the case to the SPC. After 18 months' procedure, the Ningbo Intermediate People's Court followed the instruction of the SPC and rejected Yisheng's application on 18 March 2014, which is an important affirmation of the validity of CIETAC/UNICITRAL hybrid arbitration clauses under the PRC law.

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5. THE CHINESE EUROPEAN ARBITRATION CENTRE – HAMBURG



**BY: Prof. Dr. Eckart Brödermann, LL.M. (Harvard),
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Dr. Christine Heeg, LL.M. (Sydney), KPMG Law**

5.1 Introduction to the Chinese European Arbitration Centre

The Chinese European Arbitration Centre (CEAC) is an arbitration institution founded in 2008 and specialized in Sino-European disputes which has its seat in Hamburg, Germany.

The idea to build up an arbitration institution that is specialized in China-related disputes arose in 2004 after the Hamburg Bar Organisation had closed a cooperation agreement with the Tianjin Bar Association. Preparing the visit of Hamburg's then Mayor Ole von Beust to China, the City asked the Hamburg Bar Organisation to contribute to improve relations with China.

The first discussions took place at the Conference of World City Bar Leaders in Shanghai in September 2004. This and further discussions at the Annual Meeting of the Inter Pacific Bar Organisation in Beijing in April 2008 led to worldwide support among arbitration experts and to numerous further discussions. The project was finally supported by more than 470 law firms, lawyers, academics, scientists, business men and women and companies from 47 nations.

In July 2008, the non-profit Chinese European Legal Association e.V. (CELA) was founded to support the exchange between China and Europe in legal and legal cultural issues as well as education in these topics. This also included the foundation of CEAC which was finally inaugurated on 18 September 2008. Ever since, CEAC arbitration clauses were integrated in Sino-European business contracts worldwide, CEAC has been perceived as a good alternative for neutral dispute resolution between Chinese and



European parties in China and in Europe and CEAC has built good ties with CIETAC, the Beijing Arbitration Commission (BAC), HKIAC and KLRCA.

Since March 2012, the first CEAC arbitration proceedings are pending. CEAC within its fourth year since foundation of CEAC as arbitration institution tailored to China related disputes and its first year in business, has received its first seven cases with a total amount in dispute of approximately EUR 60 Mio. The caseload to date is 10 cases which are spread across different fields of industries.

The reason for establishing the Chinese European Arbitration Centre was to create a specialized arbitration institution dealing with China-related matters.

Since China has become the largest economy in the world measured by purchasing power (since 2010), more and more companies are interested and involved in contracts for China-related trade and investments. In case of conflicts between the contracting parties, a neutral arbitral institution is necessary to resolve such disputes. The same applies to post M&A disputes on the rise, also in China related transactions, as the number of M & A transactions involving Chinese investors is steadily growing:

It is not only the Chinese party which may be interested in solving the problem without a judgement of a national or foreign court and rather allowing the losing party to save her face in general, but also that both parties may be interested in avoiding hearing a case in front of a foreign court.

Moreover, dispute resolution by institutional arbitration is the only effective way for parties in China and in Europe as judgements of ordinary courts of law are generally not enforceable in the other parties' country due to lack of reciprocity.

However, already more than 150 states including China and all EU states have signed the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in order to guarantee the recognition and enforcement of arbitral awards in member states. This gives the parties the opportunity to get an arbitral award recognised and enforced.

CEAC, however, is an excellent neutral solution for China-related matters as it has rules tailor-made for China-related disputes and guarantees the



principles of party autonomy and neutrality in its CEAC Rules, which are based on the UNCITRAL Arbitration Rules in their revised 2010 version. The CEAC Arbitration Rules were marginally revised again in 2012 to adopt these further to specifics of China-related arbitration based on observations of CEAC management in the initial phase of administering the first CEAC cases. These issues comprise a clarification of the number of briefs for initiating CEAC arbitration and providing copies of all documents to CEAC as arbitration institution, the other parties, attorneys involved as counsel and the arbitrators, further a clarification of deadlines as e.g. in Art. 31a CEAC Rules for the rendering of the arbitral award (now starting to run as of the constitution of the tribunal) as well as questions of VAT. The most important amendment concerns Art. 1 para. 1a CEAC Rules, which now stipulates that references to the CEAC Rules shall be deemed to be references to arbitration administered by CEAC under the CEAC Arbitration Rules where it is likely that parties not represented by lawyers familiar with the specifics of arbitration at the time of negotiation of a Sino-European business contract have a risk to agree on a clause with ambiguities when drafting an arbitration clause which is not exactly identical to the CEAC Model Clause.

During the process of negotiating an international contract related to China, the parties can refer to a CEAC Arbitration Clause to agree on CEAC arbitration, on a neutral place of arbitration, on the languages to be used in the arbitral proceedings and on the number of arbitrators as well as on issues of confidentiality.

5.2 CEAC Model Arbitration Clause and Model Choice of Law Clause

In order both to simplify discussions of the contracting parties about the applicable law, the rules for the arbitral proceedings and the place of arbitration, for example, as well as to remind the parties of important issues that should be dealt with in international commercial arbitration, CEAC provides both a Model Arbitration Clause and a Model Choice of Law Clause. Both clauses are already available in various languages (English,



German and Mandarin). See www.ceac-arbitration.com under CEAC Download Centre. Further languages will follow.

The **Model Arbitration Clause** in which the parties can decide on the formalities of the arbitral process reads:

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by institutional arbitration administered by the Chinese European Arbitration Centre (CEAC) in Hamburg (Germany) in accordance with the CEAC Hamburg Arbitration Rules.”

This basic clause can be supplemented by a number of options which the CEAC Rules propose. They correspond to a number of practical issues which are useful to determine at the moment of the conclusion of an arbitration agreement (the last option refers to the special issue that, in view of expected changes in the process of implementation of the reformed UNCITRAL Arbitration Rules, the UNCITRAL based CEAC Rules may change between the date of the arbitration agreement and the commencement of the arbitration proceedings). The provisions in lit. a) through g) (below) are intended as a service element to remind the parties of important issues to be dealt with related to arbitration proceedings. This is of vital importance as China related contracts involving smaller and medium sized companies often lack professional legal advice and input. The options read:

- a) ***“The number of arbitrators shall be ____ ((i) one or (ii) three or unless the amount in dispute is less than € ____ [e.g. 100.000 €] in which case the matter shall be decided by a sole arbitrator).***
- b) ***Regardless of the seat of arbitration, the arbitral tribunal is free to hold hearings in _____ (town and country).***
- c) ***The language(s) to be used in the arbitral proceedings shall be _____.***
- d) ***Documents also may be submitted in _____ (language).***
- e) ***The arbitration shall be confidential.***



- f) *The parties agree that also the mere existence of an arbitral proceeding shall be kept confidential except to the extent disclosure is required by law, regulation or an order of a competent court.*
- g) *The arbitral tribunal shall apply the CEAC Hamburg Arbitration Rules as in force at the moment of the commencement of the arbitration unless one of the parties requests the tribunal, within 4 weeks as of the constitution of the arbitral tribunal, to operate according to the CEAC Hamburg Arbitration Rules as in force at the conclusion of this contract."*

Furthermore, the parties can use the **Model Choice of Law Clause** to agree on the substantive law that shall apply. It reads:

"The Arbitration Tribunal shall apply the law or rules of law designated by the parties as applicable to the substance of the dispute. The parties may wish to consider the use of this model clause with the following option by marking one of the following boxes:

The contract shall be governed by

- a) *the law of the jurisdiction of _____ [country to be supplemented], or*
- b) *the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) without regard to any national reservation, supplemented for matters which are not governed by the CISG, by the UNIDROIT Principles of International Commercial Contracts and these supplemented by the otherwise applicable national law, or*
- c) *the UNIDROIT Principles of International Commercial Contracts supplemented by the otherwise applicable law.*

In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate."

In the event, that none of the parties succeeds or wishes to insist on its own law, the model clause offers the reference to well-known international neutral legal rules. The CISG is part of Chinese law and of about 72 other laws around the globe. Thus, for example, the international law of sales in China, Germany, Italy, New York and Russia is identical (except for



national reservations which the model clause excludes to provide for an international neutral ground). The UNIDROIT Principles are also well known worldwide. They provide an excellent neutral ground and have inspired not only the Chinese legislator but also numerous other legislators including Germany.

Both model clauses can be found at www.ceac-arbitration.com under CEAC Download Centre.

5.3 How many Arbitrators are usually appointed?

Pursuant to Art. 7 para. 1 of the CEAC Arbitration Rules, the parties can freely determine the number of arbitrators. If the parties have not agreed on a sole arbitrator within 30 days after receipt of the notice of arbitration by the respondent, three arbitrators shall be appointed unless special circumstances of the case exist which make appointment of a sole arbitrator more appropriate (Art. 7 para. 2 CEAC Rules).

The way of appointment varies depending on the number of arbitrators. If three arbitrators have to be appointed, a general rule is that each party shall appoint one arbitrator and the two party-appointed arbitrators shall appoint the presiding arbitrator (Art. 9 para. 1 CEAC Rules). If the party appointed arbitrators cannot agree on the presiding arbitrator (or if the parties cannot agree on a sole arbitrator) the Appointing Authority shall decide (Art. 8 and 9 para. 3 CEAC Rules).

The Appointing Authority of the CEAC is divided in chambers, whereas each chamber is responsible for countries whose names begin with certain letters of the alphabet to preserve its neutrality. The Appointing Authority is always a neutral body to decide on the arbitrator to be appointed as its chambers shall always consist of three members, one from China, one from Europe and one from other parts of the world beyond China and Europe. This leads to a division of power between China, Europe and the world with the consequence that there is always one neutral member coming from a different region than the parties concerned. The Appointing Authority is committed to observe a high level of transparency. Thus, as a matter of policy, it cannot appoint as arbitrator those who serve on the Advisory Board of CEAC.



Pursuant to § 1025 ZPO (German Civil Procedure Code) – which corresponds to Art. 1 of the UNCITRAL Model Law on International Commercial Arbitration – the award is considered to be a German award if the place of the arbitral proceedings is in Germany. Therefore, German Civil Procedural Law applies. For this reason, a rough comparison to the UNCITRAL based German Civil Procedural Law will be given at the end of each question.

In German Civil Procedural Law, the parties can also agree on the numbers of arbitrators as well as the rules of appointment (§§ 1034, 1035 ZPO). If they have not done so, three arbitrators shall be appointed by the arbitral tribunal.

5.4 Is there a Right to challenge Arbitrators, and if so under which Conditions?

Generally, each arbitrator giving a reason to doubt his impartiality or independence can be challenged, Art. 11 - 13 CEAC Arbitration Rules. For any reason that occurs after the appointment or after the party having appointed the arbitrator learns about them, he can be challenged by the respective party (Art. 12 para. 2 CEAC Rules). All other parties, the appointed arbitrator and the other members of the arbitral tribunal shall be notified by a written statement including the reasons for the challenge (Art. 13 para. 2 CEAC Rules).

If within 15 days from the notice of challenge the other parties, however, do not agree to the challenge and if the challenged arbitrator does not withdraw, the CEAC Appointing Authority shall decide (Art. 13 para. 4 CEAC Rules). In case of confirmation of the challenge, a new arbitrator will be appointed according to the general rules (e.g. a party whose party appointed arbitrator was successfully challenged can appoint a new arbitrator, Art. 14 para. 1 CEAC Rules).

This procedure also complies with German Civil Procedural Law.



5.5 Are there any Restrictions as to the Parties' Representation in Arbitration Proceedings?

Pursuant to Art. 5 of the CEAC Arbitration Rules, the parties may be represented or assisted by persons of their choice. There is neither a requirement that the representing party is a lawyer nor that foreign lawyers as representing persons have to be joined by a local counsel. The names and addresses of such persons, however, must be communicated to all parties, the arbitral tribunal and the Chinese European Arbitration Centre; such communication must specify whether the appointment is being made for purposes of representation or assistance. The German Civil Procedural Law, however, does not provide any rules concerning the representation of the parties in arbitration proceedings.

5.6 Do Arbitrators have Powers to grant Interim or Conservatory Relief?

In addition to making the final award, the arbitral tribunal is entitled to grant interim measures, Art. 26 CEAC Arbitration Rules. At the request of any party, the arbitral tribunal may take any interim measures it deems appropriate in respect of the subject matter of the dispute, including measures in order to maintain or restore the status quo pending determination of the dispute, in order to prevent current or imminent harm or prejudice to the arbitral process itself, for the preservation of assets out of which a subsequent award may be satisfied or in order to preserve relevant and material evidence (Art. 26 para. 2 CEAC Rules). The arbitral tribunal is entitled to require security for the costs of such measures (Art. 26 para. 6 CEAC Rules). A party requesting an interim measure may be held liable for any costs or damages caused by the measure if the arbitral tribunal later determines that the measure should not have been granted according to the circumstances then prevailing. Such costs and damages may be awarded to the other party at any point during the arbitral proceedings (Art. 26 para. 8 CEAC Rules).



A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement (Art. 26 para. 9 CEAC Rules).

The German Civil Procedure Code also provides for interim relief in § 1041 ZPO – which corresponds to Art. 17 of the UNCITRAL Model Law on International Commercial Arbitration. According to this provision, the arbitral tribunal may take any measures to secure any claims. Therefore, it can ask each party for any security in connection with such interim measures. The right to be heard, however, has to be observed.

5.7 What are the formal Requirements for an Arbitral Award (Form; Contents; Deadlines; other Requirements)?

• Formal Requirements for Arbitral Awards

The arbitral tribunal may make separate awards on different issues at different times (Art. 34 para. 1 CEAC Rules). Pursuant to Article 34 para. 2 CEAC Rules, an award shall be made in writing and shall be final and binding on the parties who shall carry it out without delay. The award shall contain the reasons upon which the award is based unless the parties have agreed that no reasons shall be given (Art. 34 para. 3 CEC Rules). The award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made (Art. 34 para. 4 CEAC Rules). The award may be made public only with the consent of both parties or where and to the extent required by mandatory rules of law (Art. 34 para. 5 CEAC Rules). Copies of the award signed by the arbitrators shall be communicated to the parties and to CEAC by the arbitral tribunal (Art. 34 para. 6 CEAC Rules).

However, if the parties agree on a settlement of the dispute before the award is made, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms (Art. 36 para. 1 CEAC Rules).



Also according to § 1054 of the German Civil Procedure Code (ZPO) – which corresponds to Art. 31 of the UNCITRAL Model Law on International Commercial Arbitration – the award has to be in a written form signed by the arbitrator(s). Unless otherwise agreed by the parties, the arbitral award shall state reasons. Furthermore, it has to indicate when and where the award was made. A registration of the award is not required by German law.

- **Deadlines for issuing Arbitral Awards**

Unless otherwise agreed upon by the parties, according to Art. 31a CEAC Arbitration Rules the time limit within which the arbitral tribunal shall render its final award is nine months. This time limit runs from the date of constitution of the arbitration tribunal on which the Notice of Arbitration is received by CEAC. However, the management of CEAC may extend this time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides this to be necessary.

- **Other Formal Requirements for Arbitral Awards**

There are no other additional formal requirements for the arbitral awards.

5.8 **On what Conditions can Arbitral Awards be (i) appealed or (ii) rescinded?**

The CEAC Rules itself do not provide any rules for an appeal or rescission of the arbitral award. The arbitration process at CEAC is a single-level arbitration procedure.

According to German Civil Procedural Law an award can be rescinded, for example,

- if it is not possible to dispute this issue in an arbitral proceeding,
- if the recognition and enforcement of the arbitral award would violate the *ordre public*,



- if the constitution of the arbitral tribunal or the arbitral proceeding violated German Civil Procedural Law (which is based on the UNCITRAL Model Law on International Commercial Arbitration), or
- if the petitioner claims that he had not been properly informed about the appointment of an arbitrator or the arbitral proceeding (§ 1059 ZPO).

An arbitral award cannot be appealed.

5.9 Can a Successful Party in the Arbitration recover its Costs?

Pursuant to Art. 42 CEAC Rules, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case. The costs of legal representation and assistance of the successful party generally have to be claimed during the arbitral proceeding to be recoverable.

Unless otherwise agreed by the parties, the arbitral tribunal shall decide what proportion of the costs each party shall bear as far as German Civil Procedural Law is applicable (§ 1057 ZPO). It shall consider the circumstances of each individual case, especially regarding the outcome of the process.

5.10 Further Information about the Chinese European Arbitration Centre

Further information about the Chinese European Arbitration Centre can be obtained under www.ceac-arbitration.com.

The Chinese European Arbitration Centre can be reached under:

Chinese European Arbitration Centre
Adolphsplatz 1



RESPONDEK & FAN

D-20354 Hamburg / Germany
 Phone: +49-40-6686 4085
 Fax: +49-40-6686 40699
 Email: contact@ceac-arbitration.com

The Managing Directors are Prof. Dr. Eckart Brödermann and Dr. Ma Lin. Dr. Christine Heeg is Secretary General of the CEAC.

Further information on the supporting association of CEAC, the Chinese European Legal Association (CELA), can be found under www.cela-hamburg.com.

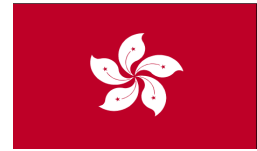
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Brief Profile:	The Chinese European Arbitration Centre (CEAC) is a global arbitration institution founded in 2008 specialized in disputes dealing with China-related matters. Prof. Dr. Eckart Brödermann is one of the initiators and Managing Director of the Chinese European Arbitration Centre. Dr. Christine Heeg besides her fulltime practise with KPMG Law serves as CEAC Secretary General and is responsible for marketing and representing the institution.
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6. HONG KONG



**BY: DR. NILS ELIASSON
MS. ÅSA RYDSTERN**

6.1 Which laws apply to arbitration in Hong Kong?

Arbitration in Hong Kong is primarily governed by the Hong Kong Arbitration Ordinance (Cap. 609) (the “Arbitration Ordinance”), which came into effect on 1 June 2011 and replaced the old Arbitration Ordinance (Cap. 341). Under the old Arbitration Ordinance, there was a clear distinction between foreign and domestic arbitration, for which different regimes applied. The current Arbitration Ordinance has a unitary regime for foreign and domestic arbitration, based on the UNCITRAL Model Law. Most of the 2006 amendments to the Model Law have been incorporated in the Arbitration Ordinance.

There is a well-developed body of case law by the Hong Kong courts on arbitration related issues that should be taken into account in addition to the provisions of the Arbitration Ordinance.

The High Court Ordinance (Cap. 4) and the Rules of the High Court (Cap. 4A) also contain certain provisions relevant to arbitration-related court proceedings.

6.2 Is the Hong Kong Arbitration Law based on the UNCITRAL Model Law?

Yes. With respect to international arbitration, the Model Law has been in effect in Hong Kong since 1990, and with the introduction of the new Arbitration Ordinance in 2011, the Model Law applies also to domestic arbitration.

Section 4 of the Arbitration Ordinance states that the provisions of the Model Law that are expressly stated in the Ordinance as having effect, have



the force of law in Hong Kong, subject to the modifications and/or additions expressly provided for in the Ordinance. To a significant extent, the Arbitration Ordinance reproduces the full text of the Model Law.

Where the Arbitration Ordinance modifies or supplements the Model Law, this is expressly set out in the relevant Section of the Arbitration Ordinance. For further clarity, Schedule 1 of the Arbitration Ordinance also reproduces the Model Law in its entirety, with Sections that are not applicable having been underlined.

The following changes to the Model Law should be noted:

- There is no provision in the Arbitration Ordinance providing that the default number of arbitrators is three. In absence of an agreement between the parties, the Hong Kong International Arbitration Centre (the “HKIAC”) is authorised to determine whether the number of arbitrators shall be one or three (Section 23(3) of the Arbitration Ordinance);
- The Arbitration Ordinance:
 - provides that the parties shall have a “reasonable opportunity” to present their case (Section 26(3) of the Arbitration Ordinance), rather than a “full opportunity”, as stated in Article 18 of the Model Law;
 - contains provisions on confidentiality (Section 18 of the Arbitration Ordinance);
 - allows the Hong Kong courts to enforce relief granted by an emergency arbitrator whether made in or outside Hong Kong (Sections 22A and 22B of the Arbitration Ordinance);
 - contains provisions on mediators-arbitrators (Section 33 of the Arbitration Ordinance);
 - allows arbitrators to limit the amount of recoverable costs (Section 57 of the Arbitration Ordinance); and
 - contains a provision that limits the liability of the arbitrators (Section 104 of the Arbitration Ordinance).



Sections 22A and 22B of the Arbitration Ordinance came into force on 19 July 2013 and were introduced in response to the new emergency arbitrator procedure included in the updated version of the HKIAC's Administered Arbitration Rules (see further Sections 5.10 and 5.22 below).

In addition, Schedule 2 of the Arbitration Ordinance contains provisions to which the parties can opt in or opt out.

Article 6 of the Model Law provides that each state enacting the law is to specify the court, courts or other authority competent to perform certain functions under the law, such as appointing arbitrators, deciding on challenges of arbitrators, deciding on the termination of an arbitrator's mandate, making decisions on jurisdiction and deciding on the setting aside of awards. Section 13 of the Arbitration Ordinance divides the responsibility for the functions listed in Article 6 of the Model Law between the Court of First Instance and the HKIAC.

6.3 Are there different laws applicable for domestic and international arbitration?

No. The Arbitration Ordinance applies both to domestic and international arbitration. Moreover, as mentioned above, as opposed to the old Arbitration Ordinance (Cap. 341), the Arbitration Ordinance provides a unitary regime for domestic and international arbitration based on provisions that closely follow the Model Law.

That being said, however, Schedule 2 of the Arbitration Ordinance contains certain provisions that previously applied to domestic arbitration. Amongst other things, Schedule 2 enables parties to challenge awards on grounds of serious irregularity, makes it possible to appeal awards on questions of law and authorises Hong Kong courts to determine preliminary questions of law. Schedule 2 only applies (i) if the parties have expressly opted-in for these provisions, or (ii) where the arbitration agreement provides for domestic arbitration and has been entered into either before or within a period of six years after the entry into force of the Arbitration Ordinance.



Since the Model Law provisions of the Arbitration Ordinance applies to international as well as domestic arbitration, the provisions of Schedule 2 will, when applicable, apply *in addition* to the Model Law provisions.

6.4 Has Hong Kong acceded to the New York Convention?

Yes. Hong Kong adopted the New York Convention in 1977 by virtue of the United Kingdom having acceded the Convention on Hong Kong's behalf. Following the hand-over of Hong Kong to the Peoples' Republic of China (the PRC) in 1997, the PRC extended its application of the New York Convention to Hong Kong. For this reason, the Convention now applies in Hong Kong with the standard reservations to its application made by the PRC, *i.e.* that it applies only with respect to recognition and enforcement of awards made in the territory of another contracting State and to disputes arising out of a commercial legal relationship.

However, as further explained below, provided that the Court of First Instance grants leave, arbitral awards are enforceable in Hong Kong, irrespective of whether they are domestic or foreign, and irrespective of whether they are issued in a country which is a party to the New York Convention.

6.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

Yes (both in case of i and ii above). There are no limitations for Hong Kong parties to agree on arbitration at a foreign institution, irrespective of whether the dispute is domestic or international. This is a reflection of the principle of party autonomy, which is a fundamental principle of Hong Kong arbitration law.

6.6 Does the Hong Kong Arbitration Law contain substantive requirements for the arbitration procedures to be followed?



No. Like the Model Law, the Arbitration Ordinance does not provide detailed rules for arbitral proceedings. Instead, parties to Hong Kong arbitrations typically agree that a set of institutional or ad hoc rules is to apply. Ad hoc proceedings have traditionally been, and are still, popular in Hong Kong, but in recent years, institutional arbitration has gained increasing popularity. Failing any agreement on the procedural rules to be applied, the tribunal has a wide discretion to conduct the arbitration in such manner that it deems appropriate subject only to certain fundamental principles that govern Hong Kong arbitration, e.g. the following:

- The parties are free to agree on how the dispute should be resolved, subject to the observance of safeguards that are necessary in the public interest (Section 3(2)(a) of the Arbitration Ordinance);
- Courts are only allowed to interfere in the arbitration where it is expressly provided for in the Arbitration Ordinance (Sections 3(2)(a) and 12 of the Arbitration Ordinance);
- The arbitrators must treat the parties equally (Section 46(2) of the Arbitration Ordinance);
- The parties are to be given a reasonable opportunity to present their case and deal with the case of their opponents (Section 46(3)(b) of the Arbitration Ordinance); and
- The tribunal is to use procedures that are appropriate to the particular case and avoid unnecessary delay or expense (Section 46(3)(c) of the Arbitration Ordinance).

6.7 Does a valid arbitration clause bar access to state courts?

Yes. Where a party initiates court proceedings despite the existence of an arbitration agreement, the other party may request the court to refer the parties to arbitration under Section 20(1) of the Arbitration Ordinance (Article 8 of the Model Law). The court shall grant such a request and permanently stay the court proceedings, provided that:

- the request is not made later than in the defendant's first statement on substance in the court proceedings, and



- the court does not find the arbitration agreement null and void, inoperative, or incapable of being performed.

Arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

6.8 What are the main arbitration institutions in Hong Kong?

The HKIAC is the leading arbitration institution in Hong Kong. It was established in 1985 and is an independent, non-profit organization. The HKIAC administers arbitrations, keeps lists of local and international arbitrators, maintains modern hearing facilities and provides other support services to arbitrations conducted in Hong Kong. Moreover, the Arbitration Ordinance vests certain powers in the HKIAC, such as the authority to determine the number of arbitrators and appoint arbitrators when there is no agreement between the parties on such issues.

The HKIAC has several sub-divisions, including the Hong Kong Maritime Arbitration Group, the Asian Domain Name Dispute Resolution Centre and the Hong Kong Mediation Council.

In addition to the HKIAC, since 2008, the Secretariat of the International Court of Arbitration of the International Chamber of Commerce (the “ICC”) has an office in Hong Kong. The Hong Kong office was the first office of the ICC Secretariat outside of Paris.¹⁵³ The case management team at the ICC office in Hong Kong administers cases under the ICC Rules taking place in the Asia-Pacific region.

In September 2012, China International Economic and Trade Arbitration Commission (CIETAC) opened the CIETAC Hong Kong Arbitration Centre, which is its first arbitration centre outside Mainland China.

Ad hoc arbitration also has a strong position in Hong Kong. The UNCITRAL Arbitration Rules and the HKIAC Domestic Arbitration Rules

¹⁵³ The (so far) only other ICC Secretariat office outside of Paris is the ICC North America office in New York, opened in September 2013.



are popular sets of rules for parties that choose to arbitrate on an ad hoc basis.

The Chartered Institute of Arbitrators (East Asia Branch), the Hong Kong Institute of Arbitrators and the HK45 are other organisations that have a prominent role in the Hong Kong arbitration community.

6.9 Addresses of major arbitration institutions in Hong Kong?

Hong Kong International Arbitration Centre

38th Floor Two Exchange Square
8 Connaught Place
Central
Hong Kong
Telephone: +852 2525 2381
Fax: +852 2524 2171
Email: adr@hkiac.org
Website: www.hkiac.org

Secretariat of the International Court of Arbitration of the International Chamber of Commerce

Asia Office
Suite 2, 12/F, Fairmont House
8 Cotton Tree Drive
Central
Hong Kong
Telephone: +852 3607 5600
Fax: +852 2523 1619
Email: ica8@iccwbo.org
Website: www.iccwbo.org

6.10 Arbitration Rules of major arbitration institutions?

The main set of rules issued by the HKIAC is the HKIAC Administered Arbitration Rules (the “HKIAC Rules”). The HKIAC Rules are based on the UNCITRAL Arbitration Rules and provides for a “light-touch administration” by the HKIAC that mainly consists of getting the arbitration started and lending its support to the parties and the arbitrators



with respect to the conduct of the proceedings. The HKIAC Rules do not provide for terms of reference or scrutiny of the award as provided for in the ICC Rules.

The current version of the HKIAC Rules came into force on 1 November 2013, after a revision aimed to reflect the latest trends in international commercial arbitration and to further strengthen the HKIAC's service to parties and professionals. Key changes under the revised HKIAC Rules include new provisions on joinder of parties and consolidation of arbitrations, increasing the powers of tribunals and the HKIAC to manage multi-party and multi-contract disputes. Other important changes include the introduction of emergency arbitrators and standard terms of the appointment of arbitrators. The provisions on the fees to the arbitral tribunal and on interim measures of protection were also revised. The revised HKIAC Rules apply to arbitrations initiated on or after 1 November 2013. However, the provisions on emergency arbitrators in Schedule 4 of the revised Rules only apply where the arbitration agreement has been concluded after the entry into force of the revised Rules. It is also possible for the parties to agree to exclude the application of the provisions on emergency arbitrators.

In addition to arbitrations under its own rules, the HKIAC is also frequently called upon to administer arbitrations that are governed by the UNCITRAL Arbitration Rules pursuant to the HKIAC Procedures for the Administration of International Arbitration.

The HKIAC has further issued a number of other sets of rules for various types of proceedings, such as the HKIAC Domestic Arbitration Rules, the HKIAC Short Form Arbitration Rules, the HKIAC Small Claims and Documents Only Procedure, the HKIAC Securities Arbitration Rules and the HKIAC Electronic Transactions Arbitration Rules.

The HKIAC Rules can be found on the following website: www.hkiac.org.

6.11 What is/are the Model Clause/s of the arbitration institutions in Hong Kong ?



The model clause for administered arbitration under the HKIAC Rules is as follows:

"Any dispute, controversy, difference or claim arising out of or relating to this contract, including the existence, validity, interpretation, performance, breach or termination thereof or 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.

Optional:

"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/three]. The arbitration proceedings shall be conducted in [insert language]."

The model clause was recently amended to include specific wording to encourage parties to consider agreeing on an appropriate law to govern their arbitration agreement. This amendment was made in response to recent case law in Hong Kong, England, India and Singapore which demonstrate that there is no unanimous view as to the question of which law should govern the arbitration agreement in the absence of an express choice by the parties. Such uncertainty, and with that potential complications at the enforcement stage, can be overcome if the parties expressly agree on a law to govern their arbitration agreement.

6.12 How many arbitrators are usually appointed?

The parties usually agree to have their dispute resolved by three arbitrators, especially when the value of the dispute is substantial.

6.13 Is there a right to challenge arbitrators, and if so under which conditions?

An arbitrator may be challenged if there are circumstances that give rise to justifiable doubts as to the arbitrator's impartiality and independence, or if



he or she does not possess the qualifications agreed upon by the parties. A party can only challenge an arbitrator that it has itself appointed if the reasons for the challenge were unknown to such party at the time of the appointment. Challenge of arbitrators is dealt with in Sections 25 and 26 of the Arbitration Ordinance.

Section 26(1) of the Arbitration Ordinance gives effect to Article 13 of the Model Law and provides that the parties are free to agree on a procedure for challenging an arbitrator. Failing such agreement, the arbitral tribunal shall decide on the challenge. If a challenge is unsuccessful, the challenging party may request the Court of First Instance to decide on the challenge.

Section 26(2) of the Arbitration Ordinance provides that the court may, while a challenge is pending before it, refuse to grant leave to enforce any award made by the tribunal that includes the challenged arbitrator. Section 26(3) further provides that a challenged arbitrator is entitled to withdraw from his office as an arbitrator. Section 26(4) sets out four situations in which the mandate of a challenged arbitrator is terminated, namely (i) where the arbitrator withdraws from office, (ii) where the parties agree on the challenge, (iii) where the arbitral tribunal upholds the challenge and no request is made for the court to decide on the challenge, or (iv) the court, upon request to decide on the challenge, upholds the challenge.

6.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

No. Pursuant to Section 63 of the Arbitration Ordinance, certain provisions of the Legal Practitioners Ordinance (Cap. 159), which otherwise could restrict persons that are not Hong Kong qualified solicitors and barristers to act as arbitration counsel, do not apply to arbitral proceedings and advice and measures related thereto. Such principle is also reflected in Article 13.6 of the HKIAC Rules, which provides that parties in arbitral proceedings may be represented or assisted by persons of their choice.

In the Hong Kong courts, only Hong Kong-admitted barristers and solicitors may appear and represent parties. In any court proceeding that



may arise out of an arbitration agreement or which result from arbitral proceedings, local counsel must, thus, be retained.

6.15 When and under what conditions can courts intervene in arbitrations?

One of the fundamental principles underlying the current Arbitration Ordinance is to reduce court intervention and give as much power as possible to the arbitral tribunal. Section 12 of the Arbitration Ordinance gives effect to Article 5 of the Model Law, which provides that “[i]n matters governed by this Law, no court shall intervene except where so provided in this Law.” This fundamental principle embodies the principle of party autonomy at the same time as it recognizes the courts’ importance in supporting and supervising arbitral proceedings where the Arbitration Ordinance expressly allows them to do so.

As mentioned above in Section 5.2, Article 6 of the Model Law provides that each state enacting the law is to specify the court, courts or other authority competent to perform certain functions under the law. Section 13 of the Arbitration Ordinance gives effect to Article 6 and divides the responsibility for the different functions listed therein between the Court of First Instance and the HKIAC. By reserving some of the functions to the HKIAC, Hong Kong is one of the few Model Law jurisdictions which has designated functions under this Article to a non-judicial authority.

Functions that have been entrusted to the HKIAC include determination of the number of arbitrators in absence of an agreement between the parties (Section 23(3) of the Arbitration Ordinance), appointment of arbitrators where parties or arbitrators fail to do so unless the parties have agreed on another mechanism for their appointment (Section 24 of the Arbitration Ordinance), and appointment of mediators (Section 32(1) of the Arbitration Ordinance).

Powers reserved for the Court of First Instance include, for example, the power to decide on challenges of arbitrators where a challenge has not been successful before the arbitral tribunal (Section 26 of the Arbitration Ordinance), the power to terminate an arbitrator’s mandate, where the



arbitrator is unable to perform his functions (Section 27 of the Arbitration Ordinance), the power to make decisions on the jurisdiction of the tribunal, where the tribunal has ruled on its jurisdiction as a preliminary question in the arbitration (Section 34 of the Arbitration Ordinance), the power to set aside awards (Section 81 of the Arbitration Ordinance) and the power to offer assistance in the taking of evidence (Section 55).

The Court of First Instance's power to offer assistance in the taking of evidence includes the power of the Court to order a person to attend proceedings before a tribunal to give evidence or to produce documents or other evidence (Section 55(2) of the Arbitration Ordinance).

Further powers of the courts include referring a dispute to arbitration upon request by one of the parties, where there is a valid arbitration agreement (Section 20 of the Arbitration Ordinance and Article 8 of the Model Law) and to order interim measures of protection in support of arbitration proceedings taking place in or outside of Hong Kong (Section 21 of the Arbitration Ordinance and Article 9 of the Model Law).

6.16 Do arbitrators have powers to grant interim or conservatory relief?

Yes, Hong Kong has adopted the Model Law regime on tribunal ordered interim measures of protection, including its 2006 amendments.

Section 35 of the Arbitration Ordinance gives effect to Article 17 of the Model Law. Article 17 provides that, unless otherwise agreed by the parties, the arbitral tribunal may grant interim measures at the request of a party. The conditions for granting interim measures are set out in Section 36 of the Arbitration Ordinance, which gives effect to Article 17A of the Model Law. In order for an interim measure to be granted, there must be a reasonable possibility that the party seeking the measure will succeed on the merits of the claim. The party seeking the measure must also convince the tribunal that unless the measure is taken, the result would be harm that is not reparable by an award of damages. The potential irreparable harm must outweigh the harm that is likely to be inflicted on the party against whom the measure is taken.



Section 35 (Article 17(2) of the Model Law) defines an interim measure as any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to (i) maintain or restore the status quo, (ii) take action to prevent harm or prejudice to the arbitral process, (iii) provide a means of preserving assets or (iv) preserve relevant and material evidence.

Pursuant to Section 35, the interim measure may be in the form of an award or in another form. The making of the order in the form of an award may increase its enforceability in such jurisdictions where only awards, and not orders, are enforceable.

Hong Kong is one of the few jurisdictions that has implemented provisions for the recognition and enforcement of tribunal ordered interim measures. The recognition and enforcement of interim measures in the form of *orders or directions* is governed by Section 61 of the Arbitration Ordinance. Under Section 61, an order or direction made in or outside Hong Kong is enforceable in the same manner as an order or direction of the Court of First Instance that has the same effect, provided that the Court has granted leave to enforcement. The Court is, thus, empowered to turn orders and directions of an arbitral tribunal into court orders on the same terms. Leave to enforce will be granted where the party seeking leave can demonstrate that the order or direction in question belongs to a type or description of an order or direction that may be made in Hong Kong arbitration (Section 61(2) of the Arbitration Ordinance).

Section 84 of the Arbitration Ordinance governs the enforcement of interim measures in the form of awards. Like orders or directions, provided that the Court of First Instance has granted leave, awards ordering interim measures are enforceable in the same manner as a judgment of the Court that has the same effect. Following a recent amendment of the Arbitration Ordinance, Hong Kong courts are moreover allowed to enforce relief granted by an emergency arbitrator, whether made in or outside Hong Kong (Sections 22A and 22B of the Arbitration Ordinance).



6.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

- **Formal requirements for arbitral awards**

Under Section 67 of the Arbitration Ordinance (Article 31 of the Model Law), the award must be made in writing and signed by the arbitrator/s. If there is more than one arbitrator, it is sufficient that the award is signed by a majority of the arbitrators, provided that the reasons for omitting any of the signatures are given. The date and place of arbitration must be stated in the award. The award will be deemed to have been made at the place stated therein.

The award is to contain the reasons upon which it is based, unless the parties have agreed that no reasons are to be given, or the award is an award on agreed terms pursuant to Article 30 of the Model Law.

If the award is issued in an arbitration governed by the HKIAC Rules, then the award is also to be affixed with the seal of the HKIAC.

- **Deadlines for issuing arbitral awards**

Neither the Arbitration Ordinance, nor the HKIAC Rules set out any time limit for the rendering of an award. However, if an arbitrator fails to act in a timely manner, such arbitrator can be removed by an agreement of both parties or by an order of the court. A substitute arbitrator will then be appointed in the place of the removed arbitrator.

- **Other formal requirements for arbitral awards**

There are also additional basic common law requirements for the award, such that it has to be final in relation to the issues dealt with, that it has to be consistent, clear and unambiguous, that it must resolve a substantive, rather than a procedural issue, and that it must be capable of being enforced by a court.



A dissenting arbitrator's opinion will not be included as a formal part of the award, unless this is provided for in the arbitration agreement or the applicable arbitration rules. In practice, dissenting opinions are, however, are usually enclosed with the award.

6.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded?

Unless the parties agree otherwise, an award made by an arbitral tribunal is final and binding (Section 73 of the Arbitration Ordinance). The only exceptions to this rule are set out in Section 81 of the Arbitration Ordinance, which gives effect to Article 34 of the Model Law. Pursuant to Section 81(1), an arbitral award made in Hong Kong may be set aside by the Court of First Instance if:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement is not valid under the law applicable to it;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;
- the award deals with a dispute or contains decisions on matters that does not fall within the terms and scope of the submission to arbitration;
- the composition of the tribunal or the arbitral process was not in accordance with the parties' agreement;
- the subject matter of the dispute is not capable of settlement by arbitration under the laws of Hong Kong; or
- the award is in conflict with Hong Kong public policy.

These grounds are exhaustive and the only grounds on which an award may be set aside. An award may thus not be set aside on the ground of errors of fact or law.

Section 81(2) of the Arbitration Ordinance sets out three exceptions to Section 81(1) of the Arbitration Ordinance and Article 34 of the Model Law.



First, an award may be challenged where it has been made by a challenged arbitrator, and such challenge has been upheld by the court.

Second, in arbitrations where Schedule 2 of the Arbitration Ordinance applies, an award may be set aside on grounds of serious irregularity affecting the tribunal, the arbitration proceedings or the award (Section 4 of Schedule 2 of the Arbitration Ordinance).

Third, in arbitrations where Schedule 2 of the Arbitration Ordinance applies, an appeal can further be made on a question of law arising out of an award (Section 5 of Schedule 2 of the Arbitration Ordinance).

In this context, it should be noted that the provisions of Schedule 2 only applies if the parties have expressly “opted-in” to these provisions, or if the arbitration is a domestic arbitration arising from an arbitration agreement entered into before, or within six years of, the entry into force of the Arbitration Ordinance. This means that in practice, Schedule 2 will rarely apply to international arbitrations.

The time limit for an application for the setting aside of an award is three months from the date when the party making the application receives the award.

6.19 What procedures exist for enforcement of foreign and domestic awards?

Pursuant to the Arbitration Ordinance, arbitral awards, made either within or outside Hong Kong, are enforceable in the same manner as a judgment by the Court of First Instance, provided that leave is granted by the Court. If leave is granted, the Court of First Instance may render a judgment in terms of the award. This general rule on enforcement is found in Section 84 of the Arbitration Ordinance. This means that as a matter of principle all awards irrespective of whether they are domestic or foreign, and irrespective of whether foreign awards are New York Convention awards, are enforceable in Hong Kong. In case of non-Convention awards, however, the Court has a wider power to refuse enforcement than under the New York Convention.



Chapter VIII of the Model Law (i.e. Articles 35 and 36) has not been reproduced in the Arbitration Ordinance and does not have effect in Hong Kong.

As explained above, the PRC extended the application of the New York Convention to Hong Kong and Macau in connection with the hand-over of these regions to the PRC in 1997. As a consequence of Hong Kong becoming a part of the PRC, the New York Convention no longer applies as between Hong Kong and Mainland China. Awards made in Mainland China are, however, enforced in Hong Kong and Hong Kong awards in the Mainland pursuant to *the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region* of 21 June 1999 (Sections 92-98 of the Arbitration Ordinance). This Arrangement reflects the provisions in the New York Convention and restores the order that applied between the two countries before the hand-over. One difference, however, is that a Mainland award is not enforceable in Hong Kong if enforcement proceedings are simultaneously taking place in the Mainland (Section 93 of the Arbitration Ordinance).

In January 2013, Hong Kong and Macao signed a similar agreement; *the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards between the Hong Kong SAR and the Macao SAR*. The regime under this arrangement is broadly the same as the arrangement in force between Hong Kong and Mainland China and is, thus, likewise drafted in the spirit of the New York Convention.

In addition to the enforcement procedure set out in Section 84, awards made in a New York Convention country or in Mainland China can be enforced by a common law action in the Court of First Instance pursuant to Section 87 and Section 92 of the Arbitration Ordinance. A common law action would normally be based on a claim that the respondent has breached an implied agreement to comply with the award. Since the burden of proof will lie with the applicant in such a proceeding, an action under Section 84 is usually preferable for the claimant.

The grounds for refusing enforcement of an award are the same for all types of award (awards issued in Hong Kong, Mainland awards, New York



Convention Awards and foreign non-Convention awards) and largely correspond to the grounds for refusal set out in the New York Convention.

An award can only be refused enforcement if:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement was not valid;
- proper notice has not been given;
- a part has not been able to present its case;
- the award is outside the scope of the arbitration;
- the composition of the tribunal or the process has not been in accordance with the parties' agreement or the law of the country where the arbitration took place;
- the award is not yet binding or has been set aside or suspended;
- the dispute was not arbitrable; or
- it would be contrary to public policy to enforce it.

It should be noted, however, that in case of foreign awards that are neither made in a Convention country, nor in the Mainland, enforcement may also be refused if the enforcement court considers it just to do so (Section 86(2)(c) of the Arbitration Ordinance).

Hong Kong courts are pro-enforcement and have generally shown a very reluctant attitude towards refusing enforcement of arbitral awards. The term public policy has been interpreted narrowly in practice and can only be said to apply in the most exceptional circumstances.

6.20 Can a successful party in the arbitration recover its costs?

Yes. Section 74 of the Arbitration Ordinance provides that an arbitral tribunal may include directions with respect to the costs of arbitral proceedings in an award. The arbitral tribunal thus have the discretion to determine how the costs should be divided between the parties. The tribunal can do so in the final award, but also in partial and interim awards rendered during the course of the arbitration.



The costs referred to in Section 74 include the parties' legal costs, the fees and expenses of the arbitral tribunal and the fees and expenses of any arbitral institution. The tribunal may also award costs incurred in the preparation of the arbitral proceedings prior to the commencement of the arbitration (Section 74(7)(b)). An overall requirement is that the costs must be reasonable in the circumstances (Section 74(7)(a)).

As a means of controlling the costs of the proceeding, the tribunal has been given the power to cap the level of costs that the parties can recover (Section 57 of the Arbitration Ordinance). Parties that are aware that the recoverable costs are limited will likely try to avoid excessive and unreasonable costs. Under Section 56(1)(a) of the Arbitration Ordinance, the tribunal has also the possibility to make an order requiring a claimant to provide security for costs.

The HKIAC Rules also address the issue of costs. Article 33.2 of the Rules provides that the tribunal may apportion all or part of the costs of the arbitration, taking into account the circumstances of the case. Article 33.3 of the HKIAC Rules further provides that with respect to costs of legal representation and assistance, the tribunal may direct that the recoverable costs shall be limited to a specified amount.

The Hong Kong courts have further held that a party making an unsuccessful challenge of an arbitral award will, unless there are special circumstances, be ordered to reimburse the other party's costs.

6.21 Are there any statistics available on arbitration proceedings in Hong Kong?

The HKIAC handled 463 dispute resolution matters in 2013, of which 260 were arbitration matters, 170 were domain name disputes and 33 were mediation matters.¹⁵⁴ In 2000, the HKIAC managed 298 dispute resolution matters.¹⁵⁵ There has thus been a clear increase in the number of the arbitrations handled by the HKIAC in the last decade.

¹⁵⁴ <http://www.hkiac.org/en/hkiac/statistics>.

¹⁵⁵ <http://www.hkiac.org/en/hkiac/statistics/39-hkiac/statistics/226-statistics-1998-2003>.



Of the 260 new arbitration cases handled by the HKIAC in 2013, 75% were international and 25% were domestic. Apart from Hong Kong parties, the most frequent users of the HKIAC came from Mainland China, Taiwan, the US, Singapore, the British Virgin Islands, Korea, the Cayman Islands, Germany, Japan, and the Philippines.¹⁵⁶

The HKIAC appointed arbitrators on 193 occasions in 2013 and the HKIAC Maritime Arbitration Group reported that its members had been appointed on 157 occasions in 2013.¹⁵⁷

Year	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
No. of cases	307	320	287	280	281	394	448	602	649	624	502	456	463

6.22 Are there any recent noteworthy developments regarding arbitration in Hong Kong (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

Being recognised as a neutral, reliable and convenient place of arbitration with an excellent arbitral infrastructure, Hong Kong is an attractive seat of arbitration for parties from all over the world. The entry into force of the 2011 Arbitration Ordinance made the Hong Kong arbitration legislation more user-friendly and introduced a unitary regime for both domestic and international arbitration.

The Arbitration Ordinance was further amended in 2013. Following these amendments, Hong Kong courts are allowed – as the first national courts in the world – to recognise and enforce decisions of emergency arbitrators. As explained above in Section 5.16 above, interim measures ordered by a tribunal (irrespective of the seat of arbitration) are already enforceable in

¹⁵⁶ <http://www.hkiac.org/en/hkiac/statistics>.

¹⁵⁷ <http://www.hkiac.org/en/hkiac/statistics>.



Hong Kong. The recent amendment clarified that this now applies also to interim measures ordered by an emergency arbitrator.

In January 2013, Hong Kong and Macao signed *the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards between the Hong Kong SAR and the Macao SAR*. The arrangement is broadly similar to the corresponding arrangements in force between Hong Kong and Macao, respectively, and Mainland China, and provides for enforcement in the spirit of the New York Convention. The signing of the arrangement was reflected in the Arbitration Ordinance with the inclusions of new Sections 98A-98D, providing for the enforcement in Hong Kong of a Macao award (i) by action in the Court of First Instance, or (ii) in the same manner as a Hong Kong or other non-Convention award with leave of the Court of First Instance. The signing of the arrangement and the amendment of the Arbitration Ordinance will of course facilitate for parties that seek to enforce a Hong Kong award against assets in Macao, something which is not unusual.

The 2013 amendments further confirmed the legislature's ambition to keep Hong Kong at the forefront among modern arbitration jurisdictions.

As mentioned in Section 6.10 above, the amendments of the Arbitration Ordinance coincided with a revision of the HKIAC Rules, effective as of 1 November 2013. In addition to bringing the Rules up to date with the latest developments in international commercial arbitration on a general level, the amendments included some notable changes such as the introduction of comprehensive rules on joinder and consolidation and the introduction of emergency arbitrator procedures (the latter prompting the above-mentioned amendments of the Arbitration Ordinance).

In recent years, a number of Hong Kong court judgments on arbitration related issues have reaffirmed the Hong Kong judiciary's arbitration friendly and non-interventionist attitude. The Court of Appeal's decisions in *Gao Haiyan and Xie Heping v. Keeneye Holdings* of 2 December 2011, *Shandong Hongri Acron v. PetroChina* of 25 July 2011 and *Pacific China Holdings v. Grand Pacific Holdings* of 9 May 2012 are some examples of this view.



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7. INDIA



**BY: MRS. ZIA MODY
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7.1 Which laws apply to arbitration in India?

The Arbitration and Conciliation Act, 1996 (“Arbitration Act”)¹⁵⁸, is the principal legislation that applies to arbitration. Principles from the Indian Contract Act, 1872 may be applied to the construction of an arbitration agreement and provisions of the Code of Civil Procedure, 1908 govern the enforcement of arbitral awards and applications to court in support of arbitral proceedings, in addition to the Arbitration Act. Various High Courts have notified rules governing the conduct of judicial proceedings in support of arbitration. Institutional arbitration is gaining ground in India and thus the rules of arbitration institutions will apply to arbitration proceedings.

7.2 Is the Indian Arbitration and Conciliation Act based on the UNCITRAL Model Law?

Yes. The Arbitration Act is based largely on the UNCITRAL Model Law on International Commercial Arbitration, 1985 and the UNCITRAL Conciliation Rules, 1980, (together, “Model Law”), but deviates from the Model Law in certain aspects.

7.3 Are there different laws applicable for domestic and international arbitration?

Currently, India has a consolidated legislation i.e. the Arbitration Act, under which Part I applies to domestic arbitrations held in India, and Part II relates to the enforcement of certain foreign awards, such as awards under

¹⁵⁸ <http://www.wipo.int/edocs/lexdocs/laws/en/in/in063en.pdf>



the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), 1958 and the Convention on the Execution of Foreign Awards, 1923 (“Geneva Convention”).

7.4 Has India acceded to the New York Convention?

India signed the New York Convention on June 10, 1958 and ratified it on July 13, 1960 subjecting its applicability to the following conditions:

- (i) Only awards made in the territory of another contracting state that are also notified as reciprocating territories by India would be recognised and enforced;
- (ii) Only differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law would be considered arbitrable.

7.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

The Arbitration Act provides that parties may contractually agree on the procedure for arbitration and does not stipulate restrictions on the choice of arbitration institutions even if both parties are domiciled in the country or one party is domiciled in the country and the other party abroad. Therefore, parties may choose to agree on a foreign arbitration institution.

7.6 Does the Indian arbitration law contain substantive requirements for the arbitration procedures to be followed?

The Arbitration Act permits the parties to agree on the procedure to be followed by the arbitral tribunal. There are no substantive requirements for the procedure to be followed under the Arbitration Act. In the event that parties are unable to agree on the procedure to be followed, the procedure



may be decided by the arbitral tribunal. Proceedings conducted by arbitration institutions will be governed by the procedure laid down in the institutional rules.

7.7 Does a valid arbitration clause bar access to state courts?

An arbitration clause does not operate as an absolute bar. If a dispute in a matter covered by a valid arbitration clause is brought to court, the court is required to refer that to arbitration, if an application to that effect is made by the defendant.

In addition parties may be able to approach the courts (i) for appointment and removal of arbitrators, (ii) seeking interim relief pending arbitration, (iii) seeking to set aside awards and (iv) enforcement of awards.

The jurisdiction of Indian courts is different in cases where the arbitration is seated in India and where it is seated abroad.

7.8 What are the main arbitration institutions in India?

There are several arbitration institutions in India. Apart from the London Court of International Arbitration, India (“**LCIA India**”) there are arbitration institutions attached to various High Courts such as Karnataka, Delhi, Punjab and Haryana, to name a few. Apart from these, there are arbitration institutions run by the Chambers of Commerce in different states such as the Bombay Chambers of Commerce and Madras Chambers of Commerce. The Singapore International Arbitration Centre has also opened an offshore office in Mumbai given the increasing number of commercial arbitrations in India, although this office does not directly administer any India related arbitrations.

7.9 Addresses of major arbitration institutions in India?

LCIA India

301-A World Trade Tower
Barakhamba Lane



New Delhi- 110 001

Phone: +91 11 4536 2222

Fax: +91 11 4536 2299

Email: info@lcia-india.org

Website: www.lcia-india.org

7.10 Arbitration Rules of major arbitration institutions?

The above mentioned arbitration institutions have a specific set of rules which are available on their respective websites, as provided above.

7.11 What is/are the Model Clause/s of the major arbitration institutions?

The model clauses of the arbitration institutions are available on their respective websites. For the LCIA¹⁵⁹:

“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 India Arbitration 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 arbitration shall be [].

The governing law of the contract shall be the substantive law of [].”

¹⁵⁹ http://www.lcia-india.org/Arbitration_Clauses.aspx

**7.12 How many arbitrators are usually appointed?**

Under Section 10 of the Arbitration Act, the parties may choose to determine the number of arbitrators. However such number must be an odd number. In the absence of any agreement between the parties on the number of arbitrators, a sole arbitrator is appointed.

7.13 Is there a right to challenge arbitrators, and if so under which conditions?

Under Section 12 of the Arbitration Act, an arbitrator may be challenged on the following grounds:

- (i) if circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or
- (ii) if he does not possess the qualifications agreed to by the parties.

7.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

The Arbitration Act does not impose any restrictions on the representation of parties during proceedings. However, the specific rules of the arbitration institution may prescribe certain restrictions.

7.15 When and under what conditions can courts intervene in arbitrations?

For arbitrations seated in India, under the Arbitration Act, a court may not intervene in an arbitration proceeding except on application by either of the parties under the following circumstances:

- (i) application for dispute to be referred to arbitration under section 8 and 45;
- (ii) application for interim measures under Section 9;



- (iii) application for court to appoint arbitrator under Section 10;
- (iv) application challenging the appointment of an arbitrator under Section 13;
- (v) application to determine the termination of mandate of an arbitrator under Section 14;
- (vi) application for assistance in taking evidence under Section 27;
- (vii) application to set aside an arbitral award under Section 34;
- (viii) enforcement of the award under Section 36;
- (ix) appeals from certain orders of to court under Section 37;
- (x) application to order the tribunal to deliver the award to the applicant on payment to the court under Section 39;
- (xi) application for jurisdiction under Section 42;
- (xii) extension of time period under Section 43;
- (xiii) enforcement.

In relation to arbitrations seated outside India, a court in India may intervene only in relation to the enforcement of such foreign award delivered outside India under Section 48. However, Indian courts retain jurisdiction to intervene in respect of arbitrations arising out of clauses executed before September 6, 2012.

7.16 Do arbitrators have powers to grant interim or conservatory relief?

Under Section 17 of the Arbitration Act, the arbitral tribunal may, at the request of a party, grant interim relief in respect of the subject matter of the dispute or require a party to furnish appropriate security for the relief granted.

Furthermore, the rules of certain arbitration institutions also allow an arbitral tribunal to grant interim relief. For instance, under the LCIA Rules, Article 25 allows an arbitral tribunal to issue orders for safeguarding, interim custody, preservation or protection of the subject matter of the dispute.



7.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

• Forms and Contents

The form and contents of an arbitral award have been set out under Section 31 of the Arbitration Act. The following are the key requirements under the above provision:

- An arbitral award has to be in writing and must be signed by the members of the arbitral tribunal.
- The arbitral award must state the reasons upon which it is based, unless:
 - the parties have agreed that no reasons are to be given, or
 - the award is an arbitral award on agreed terms in the form of a settlement under Section 30.
- The arbitral award must provide the date and the place of arbitration.
- In the event that the arbitral award contemplates the payment of money, the award must include the sum, the rate of interest as considered reasonable by the tribunal and the duration for the interest to be paid.

The arbitral tribunal will also specify unless agreed by the parties, the party entitled to costs and the amount of cost and the manner in which the costs are to be paid.

• Deadlines for issuing arbitral awards

The Arbitration Act does not stipulate a time frame within which the arbitral tribunal is to render its award.

• Other formal requirements for arbitral awards

An arbitral award may require to be stamped in accordance with applicable stamping statutes.

**(a) Stamp Duties requirements**

The Arbitration Act is silent on the stamping and registration of an award. However, stamping is required pursuant to Section 35 of the Indian Stamp Act 1899. This provision states that documents which are required to be stamped but are nevertheless inadequately or not stamped will not be admissible in evidence “for any purpose”. In addition, they may also be subject to penal duties. Although this Act is a Central Legislation, different states have issued their own schedules of applicable stamp duties. Therefore, stamp duties vary from state to state.

(b) Registration requirements

Pursuant to the 1908 Registration Act, non-testamentary documents that “purports or operates to create, declare, assign limit or extinguish...any title, right or interest in any immovable property”¹⁶⁰ will be considered invalid unless registered. Hence, if the award purports to impact immovable property, it has to be registered and the registration fees vary depending on the state.

7.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded?

There are no appeals against arbitral awards. However, Section 34 of the Arbitration Act permits a party to make an application to a court to challenge an arbitral award under the following circumstances:

- (i) if a party was under some incapacity;
- (ii) the arbitration agreement is not valid under law;
- (iii) the party making the application was not given proper notice as required;
- (iv) the arbitral award deals with a dispute not contemplated in the submission; or

¹⁶⁰ Section 17(d) of the 1908 Registration Act



- (v) the composition of the tribunal was not in accordance with the agreement of the parties.

Section 34 also permits a court to set aside an arbitral award if the court finds that the subject matter is not capable of settlement by arbitration or if the arbitral award is in conflict with the public policy of India.

Similarly, Section 48 states that the enforcement of a foreign award may be refused under the following conditions:

- (i) if the parties were under some incapacity or the agreement was not valid under the law of the country where the award was made or the agreement was subject to;
- (ii) the party against whom the award is invoked was not given proper notice as required;
- (iii) the award deals with a difference not contemplated by the submission to arbitration;
- (iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties;
- (v) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country under the law of which that award was made;
- (vi) the subject matter of the dispute is not capable of being settled under the laws of India;
- (vii) if the enforcement of the award would be contrary to the public policy of India.

7.19 What procedures exist for enforcement of foreign and domestic awards?

i. Enforcement of Domestic Awards

Under Section 36, an award shall be executed under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court.

ii. Enforcement of Foreign Awards



If the court is satisfied that the foreign award is enforceable, it will be deemed to be a decree of the court. Enforcement of a foreign award may be refused on the grounds mentioned above. In any event, the party applying for the enforcement of the foreign award must produce the following: (a) the original award or authentic copy; (b) original agreement or authentic copy; (c) evidence necessary to prove that it is a foreign award. Further, if the award is in a foreign language, the party must produce a copy of the award that has been translated into English that is also certified by the diplomatic or consular agent of such country.

7.20 Can a successful party in the arbitration recover its costs?

Although there is no specific provision allowing a successful party to recover costs, the successful party may request the arbitral tribunal and be awarded such costs (along with interest, if required) at the sole discretion of the tribunal. Each arbitration institution will also have separate rules governing costs. For instance, under the LCIA Rules, Article 28, *inter alia*, provides that the costs of the reference and the award including charges, fees and other expenses shall be in the discretion of the arbitral tribunal, which may direct the proportion of costs, charges, fees and other expenses to be paid by the party/parties.

7.21 Are there any statistics available on arbitration proceedings in the country?

The available statistics are somewhat dated¹⁶¹:

1. Domestic awards

¹⁶¹ [http://www.kaplegal.com/upload/pdf/AIAJ_V4_N1_2008_Book_\(Sumeet_Kachwaha\).pdf](http://www.kaplegal.com/upload/pdf/AIAJ_V4_N1_2008_Book_(Sumeet_Kachwaha).pdf)



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High Court (Domestic Awards)

Sl No	Grounds	Total No of Challenges	Allowed	Rejected	Modified
1	Jurisdiction	246 43.53%	43 17.47%	197 80.08%	6 2.43%
2	Public policy	151 26.72%	25 16.55%	112 74.17%	14 9.27%
3	Limitation	77 13.62%	9 11.68%	66 85.71%	2 2.59%
4	Violation of natural justice	37 6.54%	8 21.62%	24 64.86%	5 13.51%
5	Bias	22 3.89%	1 4.54%	21 95.45%	-
6	Non-appreciation of facts/evidence	14 2.47%	1 7.14%	13 92.85%	-
7	Not a reasoned award or no grounds	9	-	9	-
8	Not signed/stamped	3	-	3	-
9	Not a party	1	1	-	-
10	Non-application of mind	1	1	-	-
11	Wrongful rejection of defence (filing beyond time)	1	-	-	1
12	No arbitration agreement	1	1	-	-
13	Typographical error	1	-	1	-
14	Withdrawn (challenge not pursued)	1	-	1	-
	Total	565 (1996 to Sept 2007)	94 (16.63%)	443 (78.41%)	28 (4.96%)

Supreme Court (Domestic Awards)

Sl No	Grounds	Total No of Challenges	Allowed	Rejected	Modified
1	Jurisdiction	11 68.75%	2 12.5%	7 43.75%	2 12.5%
2	Public policy	2 12.5%	1 50%	1 50%	-
3	Limitation	1 6.25%	1 100%	-	-
4	Non-appreciation of facts/evidence	2 12.5%	-	1 50%	1 50%
	Total	16 (1996 to Sept 2007)	5 (31.25%)	8 (50%)	3 (18.75%)

2. Foreign awards

High Court and Supreme Court (1996 to September 2007) (Foreign Awards)

SI No	Grounds	Total No of Challenges	Allowed	Rejected	Modified
1.	Jurisdiction	5 29.41%	-	5	
2	Public policy	3 17.64%		2	1
3	Technical grounds (petition to be made under s 48 not under s 34)	3 17.64%	-	3	
4	Requirement of separate execution proceedings	2	-	2	
5	No grounds or reasons in award	1	-	1	
6	Petition filed for winding up on the basis of foreign award	1	-	1	
7	No arbitration agreement	1	1	-	
8	1996 Act does not apply	1	-	1	

The breakdown of challenges Institution-wise is as follows:

SI No	Institutions	Total No of Challenges	Allowed	Rejected	Modified
1	Ad hoc	10	-	10	
2	ICC	2	-	1	1
3	LCIA	2	-	2	
4	IGPA (International General Produce Association)	1	-	1	
5	ICA	1	-	1	
6	Korean Commercial Arbitration Board	1	1	-	-
	Total	17	1 5.88%	15 88.23%	1 5.88%

7.22 Are there any recent noteworthy developments regarding arbitration in the country (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

Notable recent decisions of the Supreme Court involving pertinent issues in Indian arbitration include the following:



- (i) *Shri Lal Mahal v. Progetto Grano Spa*¹⁶²: The Supreme Court decided to narrow down the definition of ‘public policy’ in connection with the enforcement of a foreign award. The court held that while ‘public policy’ included the fundamental policies of Indian law, interests of India or justice and morality, ‘patent illegality’ could not be included within the definition of public policy.
- (ii) *Oil and Natural Gas Corporation Ltd. v. Western Geco International Ltd.*¹⁶³: The issue under consideration was whether the court had the jurisdiction to set aside an arbitral award which imposed damages for a delay in the timelines stipulated in the contract/on the ground that the arbitral tribunal had incorrectly applied the law of liquidated damages. The court held that the award was substantively flawed in light of its incorrect application of the law on liquidated damages, thus accepting substantive law as a valid ground of challenging an award. The court, while discussing the ‘public policy’ ground for setting aside an award, stated that the ‘fundamental policy of Indian law’ also included the principles of natural justice and reasonableness. This decision has come under extensive criticism in subsequent cases for allowing an award to be challenged on its merits because this indefinitely expands the scope of judicial review for arbitration.
- (iii) In *World Sporting Group (Mauritius) Ltd. v MSM Satellite (Singapore) Pte. Ltd.*¹⁶⁴ the Supreme Court held: **(a)** Courts in India have the jurisdiction to try all suits of civil nature except those expressly or impliedly barred and therefore when a cause of action has arisen within the jurisdiction of the relevant Court, it acquires territorial jurisdiction to entertain the suit. An Indian court could therefore pass an order of injunction restraining arbitration proceedings in Singapore; and **(b)** an arbitration agreement does not become inoperative or incapable of being performed merely because parties are alleging fraud and misrepresentation and courts cannot refuse to refer the parties to arbitration on this ground.

¹⁶² 2013(8)SCALE 489

¹⁶³ 2014(10)SCALE328

¹⁶⁴ AIR2014SC968



- (iv) *Enercon (India) Ltd. And Ors. v. Enercon GMBH and Anr.*:¹⁶⁵ The Supreme Court has held that when faced with an unworkable arbitration clause, it is the duty of the court to respect the intention of the parties to arbitrate and make the clause workable within the contours of law. The case involved a clause that stated '*London will be the venue*'. The Supreme Court concluded that by applying Indian law to the curial aspects, the parties have chosen India as the seat, and London was merely the venue of the arbitration. Separately, the issue of whether English courts would have concurrent jurisdiction was also discussed. It was further held that an agreement as to the seat is analogous to an exclusive jurisdiction clause, therefore only Indian courts had jurisdiction.

Separately, the Law Commission of India in its 246th Report on Amendments to the Arbitration Act has suggested certain changes, including: **(i)** a model schedule of fees for fixation of fees for arbitrators; **(ii)** the addition of the second proviso to Section 24(1) to discourage the practice of baseless adjournments; **(iii)** the addition of Section 34(5) and Section 48(4) which would require that applications made under those sections to be disposed of within a period of one year from the date of service of notice; and **(iv)** an amendment to Section 16 to make issues of fraud expressly arbitrable.

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¹⁶⁵ (2014)5SCC1



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8. INDONESIA



**BY: MS. KAREN MILLS
MR. ILMAN RAKHMAT
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8.1 Which laws apply to arbitration in Indonesia?

Arbitration has long been recognized and applied as a formal means of dispute resolution in Indonesia. Arbitration was introduced since the Dutch colonial era in Indonesia by the enactment of the *Reglement op de Rechtsreglement (RV)*¹⁶⁶, *Het Herzien Indonesisch Reglement (HIR)*¹⁶⁷ and *Rechtsreglement Buitengewesten (RBg)*¹⁶⁸ and for more than 150 years all arbitrations in Indonesia were governed under these laws. There was no specific law which governs arbitration in Indonesia, until at last in late 1999 Indonesia promulgated Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution that superseded the former Dutch laws.

8.2 Is the Indonesian arbitration law based on the UNCITRAL Model Law?

Arbitration in Indonesia is governed under Law No. 30 of 1999 (“The Arbitration Law”) on Arbitration and Alternative Dispute Resolution. Although there are more similarities than differences, the Indonesian Arbitration Law is not based upon the UNCITRAL Model Law.

8.3 Are there different laws applicable for national and international arbitration?

Unlike such jurisdictions as Malaysia and Singapore, Indonesia only has one law which governs both domestic and international arbitration. As with the

¹⁶⁶ Article 615 – 651, *Reglement op de Rechtsreglement (RV)*

¹⁶⁷ Article 377, *Herzien Inlandsch Reglement (H.I.R)*

¹⁶⁸ Article 705, *Rechtsreglement Buitengewesten (RBg)*



prior legislation under the RV, as referred to above, the Arbitration Law makes it clear that all arbitrations held within Indonesia are considered “domestic”, and all those held outside of this archipelago are characterized as “international” arbitrations, regardless of the nationality of the parties, location of the subject of the dispute, governing law, etc. Thus, there is, and need be, only the one Arbitration Law, which applies to all arbitrations held within Indonesia, and to enforcement in Indonesia of any international award as well.

8.4 Has Indonesia acceded to the New York Convention?

Indonesia ratified the New York Convention in 1981 with the issuance of Presidential Decree No. 34 of 1981.¹⁶⁹ However it was not until 1990 that the Supreme Court issued Supreme Court Regulation No. 1 of 1990 to facilitate the enforcement of international arbitration awards. Enforcement of foreign awards was problematic in the interim. In its Regulation No. 1 the Supreme Court reserved to itself the authority to issue execution orders. This proved to cause considerable delay and thus the new 1999 Arbitration Law designated the District Court of Central Jakarta as the court authorized to issue execution orders, except where the state is a party, in which case such order must be issued by the Supreme Court. Most of the other problems encountered by some of the provisions of Supreme Court Regulation No. 1 of 1990, have also been eliminated with the promulgation of the Arbitration Law, which does not repeal the Regulation but reflects and improves upon it.

8.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

Yes. Article 34 (1) of the Arbitration Law provides:

¹⁶⁹ Published in the state Gazette of 1981, as No. 40, of 5 August, 1981. Indonesia made both the commerciality and the reciprocity reservations in its accession.



“Resolution of a dispute through arbitration may be referred to a national or international arbitration institution if so agreed upon by the parties.”

Regardless of where the parties are domiciled, the Arbitration Law allows the choice of any arbitral institution, foreign or domestic, or any other rules to be applied, to resolve a dispute by arbitration.

8.6 Does the Indonesian arbitration law contain substantive requirements for the arbitration procedures to be followed?

The Arbitration Law provides some skeletal procedural rules which will apply to arbitrations held in Indonesia if the parties have not designated other rules or administering institutions. These basic procedural rules can be found in Articles 27 through 51 of the Arbitration Law.

The substantive requirements for the procedures as set out in the Law are basically as follows:

1. Submissions shall be made in writing (this would be mandatory, whatever rules are followed);
2. The Statement of Claim shall include at least, the full name and address or the parties' domicile;
3. The examination of witnesses and experts shall be governed by the provisions contained in the Civil Procedural Law;
4. The hearing shall be completed within 180 days from the date the arbitrator is confirmed or the tribunal is established. This is mandatory, unless the parties specifically waive it;
5. The award shall be issued within 30 days as of the close of the hearings. This is also mandatory, but also may be specifically waived.

8.7 Does a valid arbitration clause bar access to state courts?

Yes, Article 3 of the Arbitration Law clearly states that the District Court has no jurisdiction to try disputes between parties bound by an arbitration agreement. Further, Article 11 of Arbitration Law upholds the provision



under Article 3 which states that the existence of a written arbitration agreement eliminates the right of the parties to submit resolution of the dispute or difference of opinion contained in the agreement to the District Court. The District Court also must refuse to and must not interfere in any dispute settlement which has been determined by arbitration.

8.8 What are the main arbitration institutions in Indonesia?

There are a number of arbitration institutions in Indonesia, most of them industry specific but also some are general. Probably the most commonly used arbitral body is *Badan Arbitrase Nasional Indonesia* (BANI),¹⁷⁰ which maintains a panel of local and international arbitrators and utilizes relatively modern rules of procedure, which are available in both Indonesian and English, although some of its less conventional policies are not provided to prospective arbitrants, so some due diligence is recommended.

Other established institutions include the Capital Market Arbitration Board (*Badan Arbitrase Pasar Modal Indonesia*, or BAPMI)¹⁷¹, set up in 2002 to administer arbitrations relating to capital market disputes and the National Sharia Arbitration Board (*Badan Arbitrase Syariah Nasional*, or Basyarnas), established by the Indonesian Ulema Council in 1993, originally under the name of *Badan Arbitrase Muamalat Indonesia*, to resolve disputes arising out of *shariah* transactions or transactions based on Islamic principles. There is also an arbitration institution to settle disputes in futures exchanges, called *Badan Arbitrase Perdagangan Berjangka Komoditi* (BAKTI)¹⁷² which was established on 7 November 2008. Each of these bodies maintains its own panel of approved arbitrators and has its own rules of procedure and arbitrator conduct but only the official Indonesian version of this set of rules is available online. So far the services of these institutions have not been widely used in practice, but their case loads are growing.

There is also an Indonesian Chapter of the Chartered Institute of Arbitrators based in Jakarta. The Chapter is involved primarily in the

¹⁷⁰ See <http://www.bani-arb.org>

¹⁷¹ See <http://www.bapmi.org>

¹⁷² See <http://www.bakti-arb.org>



training of arbitrators and does not administer cases, although it can act as appointing authority if so designated.

While most local arbitrations between or among Indonesian parties only, are held at BANI, the majority of those with a more international character, unless held offshore (and the majority of these would be in Singapore) tend to apply the UNCITRAL rules or opt for ICC administration.

8.9 Addresses of the major arbitration institutions in Indonesia?

BANI's address is as follows:

Head office: Wahana Graha, 2nd Floor
Jl. Mampang Prapatan No.2
Jakarta, 12760
Tel: +6221 7940542
Fax: +6221 7940543
Website: www.bani-arb.org
E-mail: bani-arb@indo.net.id

BAPMI's address is as follows:

Head office: Indonesia Stock Exchange Building Tower 1, 28th
Floor, Jl. Jenderal Sudirman Kav. 52-53, Jakarta
12190
Tel: +6221 5150480
Fax: +6221 5150429
Website: www.bapmi.org
E-mail: secretariat@scbd.net.id

BASYARNAS' address is as follows:

Head office: MUI Building, Jl. Dempo No. 19, Central Jakarta,
10320
Tel: +6221 31904596
Fax: +6221 3924728
E-mail: basyarnas-pusat@commerce.net.id

BAKTI's address is as follows:

Head office: Graha Mandiri 3rd Floor, Jl. Imam Bonjol No.61
Central Jakarta, 10340
Tel: +6221 39833066 (ext. 706)
Fax: +6221 39833715



Website: www.bakti-arb.org
 E-mail: secretariat@scbd.net.id

8.10 Arbitration Rules of major arbitration institutions in Indonesia?

As the most commonly used arbitration institution, BANI has its own rules in administering an arbitration case, the rules known as BANI's "Rules of Arbitral Procedure". These rules can be found in both Indonesian and English on BANI's website.¹⁷³

The Rules of BAPMI can be found on www.bapmi.org/in/rules.php.

The Rules of BAKTI can be found on www.bakti-arb.org/rule.html.

The rules of BASYARNAS are not available online. These can be obtained by sending a request to BASYARNAS' e-mail at basyarnas-pusat@commerce.net.id

8.11 What is/are the Model Clause/s of the arbitration institutions?

BANI recommends the use of the following model clause for parties wishing to settle their dispute through their institution:

"All disputes arising from this contract shall be binding and be finally settled under the administrative and procedural Rules of Arbitration of Badan Arbitrase Nasional Indonesia (BANI) by arbitrators appointed in accordance with said rules".

But the writers would recommend that parties wishing to avail themselves of BANI arbitration also specify the language of the arbitration, as the Arbitration Law requires arbitrations to be held in Indonesian if not otherwise agreed upon the parties. Other provisions might also be included

¹⁷³ See www.bani-arb.org/bani_prosedur_ind.html (Indonesian version) and www.bani-arb.org/bani_prosedur_eng.html (English version)



to counteract some of BANI's policies, such as a provision to the effect that transcripts or other records must be made available to the parties and not only the arbitrators, and also that the parties shall have the absolute right to appoint whomsoever they wish to act as arbitrator, subject only to conflicts of interest and misconduct and that the two party appointed arbitrators (or the parties jointly) have the unimpeded right to designate a qualified Chair.

8.12 How many arbitrators are usually appointed?

Under the prior legislative regime of the RV, parties were free to designate any number of arbitrators, so long as it was an odd number. This restriction is continued by the new Arbitration Law, but only where the parties have not previously agreed upon a certain number of arbitrators. Article 8 (2) (f) of the Arbitration Law, in setting out the requirements for the notice of arbitration, requires such notification, among other things to include:

“The agreement entered into by the parties concerning the number of arbitrators or, if no such agreement has been entered into, the Claimant may propose the total number of arbitrators, provided such is an odd number.”

Under the BANI Rules, parties may appoint either a sole arbitrator or three arbitrators to sit at the arbitral tribunal adjudicating their dispute. If the parties have not previously agreed as to the number of arbitrators, the Chairman of BANI shall rule whether the case in question requires one or three arbitrators, depending on the nature, complexity, and scale of the dispute in question. However, in special circumstances where there are multiple parties in dispute, and if so requested by the majority of such parties, the BANI rules allow the Chairman of BANI to approve the formation of a tribunal comprising of five arbitrators.¹⁷⁴

As to the arbitrators' qualifications, there is no restriction on the nationality or profession of arbitrators. The Arbitration Law only requires that arbitrators be competent and over the age of 35 years, have at least 15 years of experience in the “field” (not defined) and have no conflict of interest or

¹⁷⁴ BANI Rule No.10



ties with either party. Furthermore, judges, prosecutors, court clerks or other officials of justice may not be appointed or designated as arbitrators.¹⁷⁵

8.13 Is there a right to challenge arbitrators, and if so under which conditions?

Article 22 of the Arbitration Law states that the parties are allowed to challenge, or request for a recusal of, an arbitrator if there is found sufficient cause and authentic evidence to give rise to doubt that the arbitrator will not perform his/her duties independently, or will be biased in rendering an award. Demands to recuse an arbitrator may also be made if it is proven that there is any family, financial or employment relationship with one of the parties or its counsel.

This stipulation under Article 22 is further supported by Article 26 Paragraph 2 which states that an arbitrator may be dismissed from his/her mandate in the event that he/she is shown to be biased or demonstrates disgraceful conduct, which must be legally proven.

8.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

The Arbitration Law does not impose any conditions as to what counsel may represent a party in an arbitration, as long as such counsel is given power of attorney to do so. Thus there is no impediment to foreign counsel appearing on behalf of any party, whether foreign or Indonesian.

In arbitrations before BANI, however, Indonesian counsel will be required to accompany any foreign counsel if Indonesian law governs the merits of the dispute.¹⁷⁶ Although this is not a legal requirement for non-BANI arbitration, it would certainly be foolhardy of any party not to engage

¹⁷⁵ Article 12 Law No.30 of 1999

¹⁷⁶ BANI Rule No.5



counsel conversant with the governing law wherever their arbitration is held.

8.15 When and under what conditions can courts intervene in arbitrations?

According to Article 3 and 11 of the Arbitration Law the court has no jurisdiction over a dispute if the parties have agreed to settle their dispute through the arbitration. Application to a court may be made only if the appointment of an arbitrator is challenged and the parties have not designated rules which give this power to a different institution.¹⁷⁷

National courts become involved most commonly at one of three stages of the arbitration process: (i) at the outset of the dispute; to enforce the agreement to arbitrate or to appoint or recuse an arbitrator; (ii) during the arbitration proceedings: through request to enforce interim measures (although not yet tested, it is widely assumed that courts will not take such jurisdiction); and (iii) after the close of arbitration to enforce or annul the final award.

Thus, the courts have no jurisdiction to deal with any matters subject to arbitration, other than enforcement or other relief that may be sought after issuance of the final award. An exception might be to enforce interim measures of relief granted by a tribunal, but this has not yet been tested and, as interim relief is generally available only for cases already commenced and under court jurisdiction, any such application in aid of an arbitration is most unlikely to be entertained by the courts.

8.16 Do arbitrators have powers to grant interim or conservatory relief?

Article 32 of the Arbitration Law provides:

- (1) *At the request of one of the parties, the arbitrator or arbitration tribunal may make a provisional award or other interlocutory decision to regulate***

¹⁷⁷ Article 13, Law No.30 of 1999



the manner of running the examination of the dispute, including decreeing a security attachment or ordering the deposit of goods with third parties, or the sale of perishable goods.

However, the Tribunal has no power of execution as only a court would have the power to execute such orders. But courts can only enforce final and binding awards and court judgments. Article 64 of the Arbitration Law also allows enforcement only of judgments and awards that are final and binding, and thus not subject to any further review. Thus compliance depends primarily on the good will of the party affected, and, one would hope, the reticence to defy the tribunal, which surely could not help their case.

Nor does the Arbitration Law provide sanctions for failure of a party to comply with orders of the tribunal. Article 19(6) of the BANI Rules does give the tribunal authority to impose such sanctions, but, again, enforcement of any such sanction would require court intervention, which would not be available unless and until in the final award. Although, to the knowledge of the writers, it has not as yet been tested, it is certainly highly questionable whether the courts would enforce any such interlocutory orders if an affected party fails to comply.

8.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

- **Formal requirements for arbitral awards**

Article 54 of the Arbitration Law sets out the standard for an arbitral award, as follows:

- a) The heading “*DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA*” (In the Name of Justice, Based on Belief in One God);
- b) Full names and addresses of the parties;
- c) A short description of the dispute;
- d) The arguments of the parties;
- e) Full names and addresses of the arbitrators;



- f) The considerations of the arbitrator or arbitration tribunal regarding the whole dispute;
- g) The opinion of each arbitrator, if any differences of opinion arise within the arbitration panel;
- h) The award;
- i) The place and date of the award; and
- j) The signature of the arbitrator or arbitration panel.

- **Deadlines for issuing arbitral awards**

After the close of hearings (which are required to be completed within 6 months of the date of constitution of the full Tribunal,¹⁷⁸ unless such time limit is extended by mutual written consent of the parties¹⁷⁹), the tribunal is allowed only thirty days to render its award,¹⁸⁰ but this time limit also may be extended by mutual written consent of the parties, in which case an alternative limitation should be designated or the extension may be deemed ineffective.

- **Other formal requirements for arbitral awards**

Article 54 Paragraph (2) of the Arbitration Law states that the validity of the award will not be affected even if one of the arbitrators is unable to sign the arbitration award due to sickness or death. The reason of the absence of one arbitrator's signature must, however, be recorded in the award.¹⁸¹

¹⁷⁸ Article 48, Law No.30 of 1999

¹⁷⁹ Article 33, Law No. 30 of 1999

¹⁸⁰ Article 57, Law No.30 of 1999

¹⁸¹ Article 53 (3), Law No.30 of 1999



The Tribunal, or its duly authorized representative, is required to register a signed original, or authentic copy, of the award with the court within 30 days of its rendering.¹⁸² This time limit does not apply to registration of foreign-rendered awards as this stipulation is only regulated under the chapter of the enforcement of national arbitration awards, but in either case the award must be registered in order to be enforceable.¹⁸³ Domestic awards (those rendered in Indonesia) are registered in the District Court having jurisdiction over the respondent.¹⁸⁴ International awards are registered in the District Court of Central Jakarta.¹⁸⁵

In order to register an award the court will require an original or authenticated copy to be submitted in the Indonesian language.¹⁸⁶ Although not specified in the law, for purposes of registration and eventual enforcement in Indonesia, that Indonesian version will be considered as the original. Therefore it would be wise, if possible, for any award that may require enforcement in Indonesia to be rendered in Indonesian, as well as in whatever language the arbitration is held, in most cases in English. At the very least any translation, which must be by government licensed "sworn" translator, should be carefully vetted before submission for registration. Note also that BANI will deem the Indonesian version as the original even if in fact the award has been drafted in another language and the Indonesian version is a translation.¹⁸⁷ It is important to ensure that any translation into Indonesian is accurate, because that is the version which will be operative in case the award must be enforced in Indonesia.

8.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded?

¹⁸² Article 59 (1), Law No.30 of 1999

¹⁸³ Article 59 (4), Law No. 30 of 1999

¹⁸⁴ Articles 59 (1) and 1 (4), Law No. 30 of 1999

¹⁸⁵ Article 65, Law No. 30 of 1999

¹⁸⁶ Article 67, Law No. 30 of 1999

¹⁸⁷ BANI Rule 14 (d)



There is no appeal against the substance of an arbitration award. However, the Arbitration Law does provide for annulment of an arbitral award, either domestic or international, but on very limited grounds which primarily involve withholding of decisive documentation, forgery or fraud.¹⁸⁸

Any such application must be submitted within 30 days of registration of the award,¹⁸⁹ and a decision must be made upon such application within 30 days of submission thereof. An appeal may be made to the Supreme Court against any such decision, and the Law requires the Supreme Court to decide upon such appeal within 30 days of application.¹⁹⁰

8.19 What procedures exist for enforcement of foreign and domestic awards?

8.19.1 Domestic Awards

The enforcement procedure for domestic awards allows the appropriate District Court to issue an order of execution directly if the losing party does not satisfy the award, after being duly summoned and so requested by the court. Although no appeal is available, the losing party does have the opportunity to contest execution by filing a separate contest. Although the District Court may not review the reasoning in the award itself,¹⁹¹ it may only execute the award if both the nature of the dispute and the agreement to arbitrate meet the requirements set out in the Arbitration Law¹⁹² (the dispute must be commercial in nature and within the authority of the parties to settle, and the arbitration clause must be contained in a signed written document) and if the award is not in conflict with public morality and order.¹⁹³ There is no recourse against rejection by the court of execution.¹⁹⁴

¹⁸⁸ Article 70, Law No. 30 of 1999

¹⁸⁹ Article 71, Law No.30 of 1999

¹⁹⁰ Article 72, Law No. 30 of 1999

¹⁹¹ Article 62 (4), Law No. 30 of 1999

¹⁹² Articles 4 and 5, law No. 30 of 1999

¹⁹³ Article 62 (2), Law No. 30 of 1999

¹⁹⁴ Article 62 (3), Law No.30 of 1999



8.19.2 International Awards

As in the case of domestic awards, international awards must also be registered with the court before one can apply to have them enforced. There is no time limit for registration of international awards. However such registration is required to be effected by the arbitrators or their duly authorized representatives. Arbitrators who regularly sit in arbitrations within Indonesia are aware of this requirement and will provide a power of attorney to the parties to effect registration *on behalf of the arbitrators*. However, arbitrators sitting outside of Indonesia generally are not aware of this requirement and, unless so requested by one or both of the parties, are unlikely to grant such authority. This can cause considerable delay, and often difficulty, for a party seeking to register the award later on, as the arbitrators will need to be contacted and requested to provide powers of attorney after the end of the proceedings. Aside from such powers of attorney, applications for registration of International Awards must attach the following:

- “(i) *the original or a certified copy of the award, in accordance with the provisions for authentication of foreign documents, together with an official translation thereof* (into Indonesian, unless the original award is rendered in Indonesian);
- (ii) *the original or a certified copy of the agreement which is the basis of the International Award, in accordance with the provisions for authentication of foreign documents, together with an official Indonesian translation thereof; and*
- (iii) *a certification from the diplomatic representative of the Republic of Indonesia in the country in which the award was rendered, stating that such country and Indonesia are both bound by a bilateral or multilateral treaty on the recognition and implementation of International Arbitration Awards.*”¹⁹⁵

Despite the Arbitration Law having been in effect for almost fifteen years at the time of writing, this last-mentioned requirement still often proves

¹⁹⁵ Since Indonesia is not party to any such bilateral treaty, in effect the certification should state that both countries are parties to the New York Convention. It is implicit that awards rendered in states that are not party to the New York Convention (or other such conventions, such as the ICSID, Washington convention, to which Indonesia is also a party) will not be enforced in Indonesia.



difficult to satisfy. Unfortunately the Foreign Ministry has not advised its diplomatic missions of the requirement and thus many Consulates are at a loss when asked to provide such certification. This can also cause considerable delays, as well as some annoyance for all concerned.

Orders of *exequatur*, granting enforcement of an award, including those ordering injunctive relief, will be issued by the court as long as the parties have agreed to arbitrate their disputes, unless the subject matter of the award was not commercial¹⁹⁶ and therefore not arbitrable, and as long as the award does not violate public order.¹⁹⁷

8.19.3 Execution

Once an order of execution is issued, for either a domestic or an international award, the same may be executed against the assets and property of the losing party in accordance with the provisions of the RV, in the same manner as execution of judgments in civil cases which are final and binding. But note that only those assets which can be specifically identified can be attached or seized and sold. There is no provision for general orders of attachment or seizure in Indonesia.

8.20 Can a successful party in the arbitration recover its costs?

8.20.1 Costs of Arbitration

Under the Arbitration Law, arbitrators shall determine the arbitration fee, which consists of the arbitrators' honoraria, expenses incurred by the arbitrators and costs for (expert) witnesses and administrative matters.¹⁹⁸ The fee shall be borne by the losing party. In the event that a claim is partially granted, the arbitration fee shall be charged to the parties equally.¹⁹⁹

¹⁹⁶ Elucidation of Article 66 b, Arbitration Law. "Commercial" refers to activities in trade, banking, finance, investment, industry, and intellectual property.

¹⁹⁷ Article 66 (c), Law No. 30 of 1999.

¹⁹⁸ Article 76, Law No. 30 of 1999

¹⁹⁹ Article 77, Law No. 30 of 1999



8.20.2 Legal Costs

Generally under Indonesian Law, parties do not have the right to recover their legal costs in litigation or arbitration, unless they have agreed that such costs can be recovered, either in their underlying agreement or in any other valid contract. Despite this general rule, many arbitrations with an international character do see legal costs awarded and as far as the writers can determine, this has never been challenged.

8.21 Are there any statistics available on arbitration proceedings in Indonesia?

Indonesia being a Civil Law jurisdiction, where prior cases do not have precedential value, very few cases are reported. This lack of reported information, coupled with the fact that both registration and enforcement of domestic awards is effected in the District Court in the domicile of the losing party, and since there are 292 judicial districts spread throughout the archipelago, it is almost impossible to obtain reliable data on enforcement of domestic awards, except with respect to cases sufficiently notorious to raise a stir in legal or business circles or warrant comment in the press. It is generally understood, however, that most domestic awards have been enforced without delay or difficulty as a matter of course.

The Clerk of the Central Jakarta District Court does keep records of the registration of international awards, indicating when application is made to enforce any of these, and when the execution order is issued. Between 2010 and 2014 there were 63 international awards registered and, to our knowledge, there have been no significant difficulties in execution. BANI keeps records of the cases it administers, but these records are not publicly accessible.

8.22 Are there any recent noteworthy developments regarding arbitration in Indonesia (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?



In early 2014, the Constitutional Court received a request to test the Arbitration Law specifically the elucidation of Article 70. The Applicants stated that the elucidation of Article 70 of the Arbitration Law caused legal uncertainty.

Article 70 governs that nullification of an arbitration award may be made if the award contains elements of forgery, concealment of material documents or fraud. The elucidation of Article 70 makes it clear that an application for nullification shall be supported by a court decision proving that there has been such a forgery, concealment of material documents, or fraud.

Article 71 provides that an application for annulment shall be submitted within 30 days as of the date when the award was registered.

The Applicants claimed that it is impossible to obtain a court decision proving such ground for annulment within the 30-day time limit and thus claimed Article 70 to be inoperable.

On 11 November 2014, the Supreme Court rendered its judgment stating that the Elucidation of Article 70 is now revoked since it has caused legal uncertainty and injustice, thereby contravening the Indonesian Constitution. A party may now apply for nullification of an award on the ground that the award contains elements of forgery, concealment of material document or fraud, without having to have a court decision to support it.

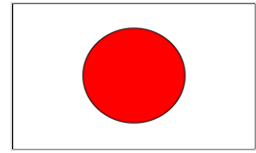
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9. JAPAN



**BY: MR. MICHAEL A. MUELLER
MR. MAXIMILIAN HOCKE**

9.1 Which laws apply to arbitration in Japan?

The Japanese Arbitration Act²⁰⁰ applies to arbitrations in Japan. It was enacted in 2002 and entered into force in March 2003. Before its enactment, the Japanese Civil Procedural Code included some provisions for arbitration, supported by several Japan Supreme Court decisions which might have relevance especially with regard to agreements concluded prior to the enactment. In this regard, it is noteworthy that dispute resolution through arbitration still has a very restricted, nonetheless increasing position in Japan.

9.2 Is the Japanese Arbitration Law based on the UNCITRAL Model Law?

Although generally based on the UNCITRAL Model Law of 1985, the Arbitration Act contains several deviations.²⁰¹ Their background is the Arbitration Act's distinct objective: Whereas the Model Law focuses on commercial arbitration, the Arbitration Act was also designed for arbitration involving parties with the need for special protection, particularly consumers and employees. Accordingly, arbitration agreements in labour disputes can exclusively be concluded after a dispute arose. However, any provisions promoting resolution of individual labour disputes that may arise in the future are null and void.²⁰² Similarly, a consumer may cancel an arbitration agreement if the counter party initiates arbitration against the consumer.²⁰³ Moreover, the Arbitration Act does not contain the Model

200 Act No. 138 of 2003, amended in 2006, hereinafter referred to as "Arbitration Act".

201 Tatsuya Nakamura, "Saltient Features of the New Japanese Arbitration Law Based Upon the UNICTRAL Model", [April 2004] JCAA Newsletter 17.

202 Supplementary Provision Art. 4.

203 Supplementary Provision Art. 3.



Law's amendment as to the detailed regulation of arbitral interim measures and their enforcement.

9.3 Are there different laws applicable for domestic and international arbitrations?

In contrast to other national arbitration laws, the Japanese Arbitration Act does not distinguish between domestic and international arbitration. As long as the arbitral seat is in Japan, all of the Arbitration Act's provisions apply.²⁰⁴ The provisions on recognition and enforcement apply even regardless of the place of arbitration.²⁰⁵

9.4 Has Japan acceded to the New York Convention?

Japan is party to the New York Convention since 1961.

9.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

The Arbitration Act exclusively subjects the choice of the arbitration procedure to the restrictions of public policy.²⁰⁶ Since the Arbitration Act does not distinguish between domestic and international arbitration, the parties' domiciles are irrelevant.

9.6 Does the Japanese Arbitration Law contain substantive requirements for the arbitration procedure to be followed?

The Arbitration Act's stipulation of party autonomy is subject to the principle of due process: All parties to an arbitration have to be treated

204 Art. 3 (1), (2) Arbitration Act.

205 Art. 3 (3) Arbitration Act.

206 Art. 26 (1) Arbitration Act.



equally.²⁰⁷ Subject to further restrictions of public policy, the parties are free to determine the arbitration procedure to be followed. Particularly, they may select the seat of the tribunal,²⁰⁸ the applicable substantive law²⁰⁹, the language of the arbitration²¹⁰, place of the hearings, time restrictions for procedural participation such as defences or statements,²¹¹ the appointments of experts²¹² and the potential attempt of the tribunal to settle a dispute.²¹³ If the parties did not agree on any of these aspects, the arbitral tribunal determines them.

The Arbitration Act comprises a formal requirement for arbitration agreements. An arbitration agreement has to be in writing.²¹⁴ However, electromagnetic records, e.g. e-mails, conform to this requirement.²¹⁵ In relation to the arbitration agreement, the Arbitration Act upholds the Doctrine of Separability. With regard to confidentiality, the rules of the major arbitration institution in Japan, the JCAA²¹⁶, ensure that the parties, the arbitrators and official secretaries keep all information relating to the arbitration, including the files and all documents, confidential.

Suspending any period of limitation,²¹⁷ the arbitral proceedings are deemed to commence on the date the claimant gives notice to the respondent that the dispute will be referred to the arbitral tribunal.²¹⁸ During the proceedings, any provision of evidence requires the party relying on it to ensure the availability of such evidence to the other party. Correspondingly, when the arbitral tribunal relies on expert witnesses, it has to ensure that every witness statement is available to both parties.²¹⁹ If any party fails to conform to its duty to provide evidence or does not attend the arbitral

207 Art. 25 (1) Arbitration Act.

208 Art. 37 Arbitration Act.

209 Art. 36 Arbitration Act.

210 Art. 30 Arbitration Act.

211 Art. 31 Arbitration Act.

212 Art. 34 Arbitration Act.

213 Art. 38 Arbitration Act.

214 Art. 13 (2) Arbitration Act.

215 Art. 13 (6) Arbitration Act.

216 cf. below 8.8.

217 Osamu Inoue and Tatsuya Nakamura, "Litigation and Alternative Dispute Resolution" in Gerald Paul McAlinn (ed.), *Japanese Business Law*, Wolters Kluwer, The Netherlands 2007, p 689.

218 Art. 29 (1) Arbitration Act.

219 Art. 32 (4), (5) Arbitration Act.



hearing, the tribunal has the competence to issue an award based on the evidence available and fairness considerations. Accordingly, the tribunal has to inform the parties adequately about their duty of participation.

Since Japan is not a litigious country, it is not unlikely that arbitrators encourage amicable dispute settlements during the proceedings. In addition, arbitrators are free to issue interim measures upon a party's request. This can be subject to the providing of adequate security.²²⁰

The JCAA Rules contain specifically accelerated procedural rules for disputes of comparatively low economic value, i.e. below twenty million Japanese Yen.²²¹

9.7 Does a valid arbitration clause bar access to state courts?

Yes, if sued before state courts, parties to an arbitration agreement may invoke an objection.²²²

9.8 What are the main arbitration institutions in Japan?

The major Japanese arbitration institution is the Japan Commercial Arbitration Association ("JCAA"). The JCAA was established within the Japan Chamber of Commerce and Industry as an arbitration committee in 1950. In 1953, the JCAA has become independent. Aside from arbitration administration, it provides a vast range of services, *inter alia* mediation administration, seminars and conferences, in addition it maintains a large reference library.

Other arbitration institutions include the Japan Intellectual Property Arbitration Center, an organisation established by the Japan Federation of Bar Associations in corporation with the Japan Patent Attorneys Association. Further institutions are the Japan Shipping Exchange Inc. and the National Committee of the International Chamber of Commerce (ICC).

220 Art. 24 Arbitration Act.

221 Art. 75-82 JCAA Rules.

222 Art. 14 (1) Arbitration Act.



The latter is a national body of the world's most important arbitration association. It comprises leading companies and business associations in their countries or territories. National committees shape ICC policies and alert their governments to international business concerns.

9.9 Addresses of major arbitration institutions in Japan?

Japan Commercial Arbitration Association

Tokyo Office

3rd Floor, Hirose Building,
3-17 Kanda Nishiki-cho, Chiyoda-ku,
Tokyo, 101-0054 Japan

Telephone: +81 3 5280 5171

Telefax: +81 3 5280 5170

Website: <http://www.jcaa.or.jp>

The National Committee of the International Chamber of Commerce (ICC)

Tokyo Chamber of Commerce & Industry Bldg. 7F
3-2-2 Marunouchi, Chiyoda-ku,
Tokyo, 100-0005 Japan

Telephone: +81 3 3213 8585

Telefax: +81 3 3213 8589

Website: <http://www.iccjapan.org>

Japan Shipping Exchange Inc.

TOMAC (Tokyo Maritime Arbitration Commission of Japan Shipping
Exchange Inc)

3rd Floor, Wajun Building,
2-22-2 Koishikawa, Bunkyo-ku,
Tokyo, 112-0002 Japan

Telephone: +81 3 5802 8361

Telefax: +81 3 5802 8371

Website: <http://www.jseinc.org/en/tomac/index.html>

Japan Intellectual Property Arbitration Center

3-4-2 Kasumigaseki, Chiyoda-ku, Tokyo 100-0013, Japan

Telephone: +81(0)3 3500 3793



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9.10 Arbitration Rules of major arbitration institutions?

Japan Commercial Arbitration Association:

http://www.jcaa.or.jp/e/arbitration/docs/e_shouji.pdf

The National Committee of the International Chamber of Commerce (ICC):

http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf

Japan Shipping Exchange Inc.:

http://www.jseinc.org/en/tomac/arbitration/ordinary_rules.html

Japan Intellectual Property Arbitration Center:

<http://www.ip-adr.gr.jp/eng/>

9.11 What is/are the Model Clause/s of the arbitration institutions?

The model clause of the Japan Commercial Arbitration Association (JCAA) is:

“All disputes, controversies or differences which may arise between the parties hereto, out of or in relation to or in connection with this Agreement shall be finally settled by arbitration in (name of city) in accordance with the Commercial Arbitration Rules of the Japan Commercial Arbitration Association.”



9.12 How many arbitrators are usually appointed and which qualifications are required for the arbitrators?

As an expression of party autonomy, the parties are free to determine the number of arbitrators and the appointment procedure.²²³ Absent any agreement on the number of arbitrators, there shall be three arbitrators where only two parties arbitrate.²²⁴ If more than two parties arbitrate, the court competent for matters of the arbitration shall specify the number of arbitrators.²²⁵

Japan's most popular arbitral rules, the JCAA Rules equally uphold party autonomy for the appointment of arbitrators. However, the default number of arbitrators is not three, but one.²²⁶ Hence, the default numbers of the Arbitration Act and the JCAA Rules differ. The latter prevails, because arbitral rules are incorporated into the arbitration agreement and thus constitute an agreement in the sense of the *lex arbitri*.²²⁷

If three arbitrators shall be appointed, under both, the Arbitration Act and the JCAA Rules, both parties appoint one arbitrator each. The two party-appointed arbitrators eventually appoint the presiding arbitrator. It is further noteworthy that the JCAA Rules contain specific proceedings for appointing a panel with three arbitrators in case of multi-party arbitrations.²²⁸

Under their distinct autonomy, the parties are additionally free to determine any particular qualification for the arbitrators to be appointed. However, in any case, every arbitrator is required to be impartial.²²⁹ Further requirements are not imposed, neither by the Arbitration Act nor the JCAA Rules. As a factual influence on the appointment of arbitrators, the JCAA maintains a panel of more than one hundred experts in various fields, including both Japanese and non-Japanese.

223 Art. 16 (1) et. seqq. Arbitration Act.

224 Art. 16 (2) Arbitration Act.

225 Art. 16 (3) Arbitration Act.

226 Art. 25, 26 JCAA Rules.

227 Cf. Partasides/Blackaby, Redfern and Hunter on International Arbitration, 9th Edition, Oxford University Press 2009, para. 1.162.

228 Art. 29 JCAA Rules.

229 Cf. Art. 18 (1) Arbitration Act.



9.13 Is there a right to challenge arbitrators, and if so under which conditions?

In order to preserve efficiency, party autonomy and due process, the Arbitration Act provides an opportunity to challenge arbitrators. The grounds for challenging an arbitrator are (i.) a discrepancy between the arbitrator's qualification and the party-specified requirements and (ii.) a lack of impartiality. If, particularly in case of three arbitrators, a party challenges the arbitrator which the party itself appointed, the party must have become aware of the grounds for challenge after the appointment.²³⁰

The procedure is subject to the parties' agreement. Absent such an agreement, the challenging party shall first submit its request to the tribunal itself. Upon rejection of the tribunal, the party may file a petition before the competent court.²³¹ If the party additionally bases its challenge on the grounds that (i.) the arbitrator is unable to perform his duties or (ii.) delays his performance, the party may directly petition the court.²³²

9.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

There are no restrictions in Japan with regard to party representatives particularly under the Japanese arbitration law. However, the general restrictions of Japanese Law apply: Exclusively attorneys (*Bengoshi*) are allowed to practise law in Japan.²³³ Additionally, “foreign lawyers admitted to practice in Japan” (*Gaikokuhou Jimu Bengoshi*) which are commonly referred to as *Gaiben* may represent parties in arbitration proceedings. In any case, lawyers both practising and appointed as party counsel outside of Japan may represent a party in arbitration proceedings.²³⁴

230 Art. 18 Arbitration Act.

231 Art. 19 Arbitration Act.

232 Art. 20 Arbitration Act.

233 Art. 72 Lawyers Act.

234 Art. 58-2 Foreign Lawyers Act of 1986, amended in 2003.



9.15 When and under what conditions can courts intervene in arbitration?

Comparable to many arbitration laws, the Arbitration Act states that a court must not intervene in arbitration except where explicitly provided in the Arbitration Act. This restriction does not apply to the application for interim measures before state courts.²³⁵ Consequently, if a party to an arbitration agreement files a lawsuit before a court, the court will dismiss the claim on jurisdictional grounds. Beyond that simple principle, there are numerous situations where the complicated relationship between the parties' interests such as party autonomy, efficiency, due process and enforcement raises issues with regard to court interventions.²³⁶

The interventions that the Arbitration Act explicitly provides for are as follows:

- Service of notice (Art. 12(2));
- Appointment of arbitrators (Art. 17(3));
- Challenge of an arbitrator (Art. 19(4));
- Removal of an arbitrator (Art. 20);
- Determination on the jurisdiction of the arbitral tribunal (Art. 23(5));
- Taking of evidence (Art. 35);
- Setting aside of an arbitral award (Art. 44); and
- Enforcement of an arbitral award (Art. 46(1)).

9.16 Do arbitrators have powers to grant interim or conservatory relief?

The Arbitration Act provides that, unless otherwise agreed upon by the parties, a tribunal may take interim measures. If necessary, it may require the party requesting the interim measure to provide sufficient security.²³⁷ However, in contrast to the UNCITRAL Model Law as amended in 2006, the Arbitration Act contains no specific provisions concerning the

²³⁵ Art. 15 Arbitration Act.

²³⁶ cf. Born, *International Commercial Arbitration*, Wolters Kluwer 2014, pp. 2522 et. seqq.

²³⁷ Art. 24 Arbitration Act.



modification of an interim measures, lifting the measures are the possibility to claim damages for wrongful damages. Furthermore, the difficult issue of parallel interim proceedings before state courts and arbitral tribunal is not addressed.²³⁸

9.17 What are the formal requirements for arbitral awards (form; contents; deadlines; other requirements)?

As to the formal requirements, an arbitral award has to be written and signed. It must state the place of the arbitration as well as the date of the award. Moreover, it shall state the reasons of the decision unless otherwise agreed upon by the parties.²³⁹ The JCAA Rules additionally require that the contact data of the representing counsels and that the specific relief sought and granted are stipulated within the award.²⁴⁰ Whereas the Arbitration Act does not contain any time requirements, the JCAA Rules formally did. During the 2014 revision, however, such deadlines have been removed from the arbitral rules.²⁴¹

A tribunal has to notify the parties of the arbitral award and send them a copy thereof. In case the JCAA Rules have been agreed, the original award remains with the JCAA.²⁴² A deposit of the arbitral award at the competent district court, in contrast, is unnecessary.

9.18 On what conditions can arbitral awards be appealed or rescinded?

Generally, an arbitral award is final and binding upon the parties. Under the Arbitration Act, a Japanese court may set aside an award where the arbitral seat was in Japan. The Arbitration Act transfers the UNCITRAL Model

238 Cf. Martin Illmer, *Rebels Journal on Comparative and Private International Law* Vol. 62 (2011), p. 645 et. seqq.

239 Art. 39 Arbitration Act.

240 Art. 61 JCAA Rules.

241 Art. 58 et. seqq. JCAA Rules, Art. 53, 59 JCAA Rules 2008. See further *supra*, 9.22-

242 Art. 62 JCAA Rules.



Law's restricted grounds for setting aside an award, *inter alia* due to a lack of an arbitration agreement and a violation of public policy²⁴³.

The complex issue whether parties can deliberately agree on a more extensive and comprehensive appeal of arbitral awards before courts is not addressed in the Arbitration Act. Hence, the validity of a contractually agreed appeal mechanism and a potential invalidity's effect on the arbitration agreement can be subject to debate. As an illustration: Whereas the German Federal Court of Justice generally upholds a party agreed appeal mechanism,²⁴⁴ the Supreme Court of New Zealand restricted an appeal on the facts.²⁴⁵ Similarly, the US Supreme Court banned independent court intervention beyond the grounds in the Federal Arbitration Act.²⁴⁶ It is uncertain which approach Japanese courts would apply if an arbitration clause containing a comprehensive court appeal mechanism was brought before it.

9.19 What procedures exist for the enforcement of foreign and domestic arbitral awards?

Japanese courts generally enforce both foreign and domestic arbitral awards. Arbitral awards shall have the same effect as court judgements.²⁴⁷ In order to apply for enforcement, a party has to provide a copy of the arbitral award, a document certifying that the content of said copy is identical to the arbitral award and potentially a Japanese translation. Additionally, parties may apply for a civil execution order of an arbitral award before state courts.²⁴⁸

The grounds for refusal of enforcement in the Arbitration Act have been drafted in correspondence with the New York Convention. In any case, if an application for enforcement falls under the Convention's scope, Japanese

243 Art. 44 JCAA Rules.

244 Decision of 1 March 2007, Docket No. III ZB 7/06, para. 19.

245 Carr v. Gallaway (2014) NZSC 75, paras. 76-86.

246 Hall Street Associates v. Mattel Inc. 170 L.Ed. 2D 254, para. 1.

247 Art. 45 Arbitration Act.

248 Art. 46 (1) Arbitration Act.



courts are required to exclusively and autonomously apply the Convention.²⁴⁹

In this regard, it shall be further mentioned that Japan signed numerous bilateral trade treaties, investment treaties and the Washington Convention. Subject to the statutory provisions concerning Civil Jurisdiction of Japan with respect to a Foreign State²⁵⁰, arbitral awards will consequently be enforced against other states. Of specific importance is the Japan-China Trade Agreement. Japanese court decisions applied this trade agreement in preference to the New York Convention.²⁵¹ Because of a lacking reciprocity requirement²⁵² - which is the same concept as for instance in the German Code of Civil Procedure - neither Chinese courts nor Japanese courts are in a position to enforce judgements rendered by courts domiciled outside Japan. Hence, arbitration clauses in contracts not only with China are crucial to ensure later enforcement.²⁵³

9.20 What applies with regard to the costs of arbitration and can a successful party recover its costs?

Fees and costs for lawyers, experts, translations and transportation are typically awarded. The Arbitration Act provides that the parties can agree on any cost allocation in their arbitration. If there is no such agreement between the parties, the law provides that each party shall bear the costs it has disbursed with respect to the arbitral proceedings. The Japanese Arbitration Law does accordingly not provide that the unsuccessful party should always bear the costs of the arbitration. The parties have to make specific provisions with regard to cost allocation in advance if they consider

249 Cf. Gary Born, *International Commercial Arbitration* III, 2nd Edition, The Hague 2014, p. 2914 et. seq.

250 Art. 16 Act on the Civil Jurisdiction of Japan with respect to a Foreign State, Act. No. 24 of April 24 2009.

251 Osaka District Court, March 25, 2011, Hanrei Taimizu, 1355, p. 249.

252 Art. 118 Japan Civil Procedural Act.

253 Osaka High Court, April 9, 2003, Hanrei Jiho, 1841, p. 111.



it appropriate.²⁵⁴ This is in line with the allocation of costs in case of normal court proceedings in Japan.

Most importantly however, the JCAA Rules contain a tribunal's discretion to allocate the costs between the parties. It shall take both the merits of the dispute and other circumstances into account.²⁵⁵ The tribunal's cost decision will be treated as part of the arbitral award. Therefore, state courts can exclusively review this allocation taking into account the general limitations that state courts have to observe with regard to the judicial review of arbitral awards.

The administrative fees of the JCAA, including VAT, range from JPY 216,000 for disputes with a value of less than JPY 5 million to JPY 15 million for a dispute with a value of more than JPY 5 billion. The detailed table of fees is attached to the official version of the JCAA Rules.

9.21 Are there any statistics available on arbitration proceedings in Japan?

Compared to other major arbitration institutions, there number of arbitration matters brought before the JCAA is still comparatively small. Due to the confidential nature of arbitration, however, it remains difficult to obtain more detailed data regarding the JCAA administered cases. The following (somewhat dated) statistic, comparing the annual JCAA cases with those brought before the ICC and the AAA is available.

	2002	2003	2004	2005	2006	2007	2008	2009	2010
JCAA	9	14	21	11	11	15	12	18	27
ICC	593	580	561	521	593	599	663	817	796
AAA	672	646	614	580	N/A	N/A	N/A	N/A	888

Recognizing the fact that Japan is a society that heavily emphasizes harmony and amicable dispute resolution, Japan has amongst the lowest

254 Art. 49 Arbitration Act.

255 Art. 83 JCAA Rules.



ratios of inhabitants and lawsuits. Accordingly, there is only a limited number of arbitrations in Japan taking place, especially with regard to domestic issues. On the other hand, Japan has a long tradition of out-of-court mediation. However, it is very likely for larger Japanese corporations to include an arbitration clause in international contracts which not necessarily leads to Japan as place of arbitration. Therefore, from an international view, arbitration cases with Japanese corporations involved as a party are seen more frequently outside of Japan. Especially if counterparts from China or other Asian countries are involved, Japanese companies increasingly choose arbitration as their preferred dispute resolution mechanism.

9.22 Are there any recent noteworthy developments regarding arbitration in Japan²⁵⁶?

Aside from a translation into the Chinese language, the JCAA Rules have been recently revised. In 2014 the new version of the JCAA was published. Particularly, the revisions contain revised provisions with regard to multiple claims, multi-party situations, emergency proceedings and expedited procedure.²⁵⁷

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²⁵⁶ Goodrich; Greer: The Modernization of Japan's International Arbitration Infrastructure, Mealey's International Arbitration Report, Volume 25, #12 December 2010, p. 31 - 42

²⁵⁷ See "The Key Points of the 2014 Amendment to the Commercial Arbitration Rules", JCAA Newsletter No. 31 (2014).



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10. KOREA



**BY: MR. YOUNG SEOK LEE
MR. MORITZ WINKLER**

10.1 Which laws apply to arbitration in the Republic of Korea?

The Korean Arbitration Act (the “Act”) applies. It is the legislative law governing both institutional and ad-hoc arbitrations in Korea.

The full text of the Act (including the English version) can be found on the KCAB website (<http://www.kcab.or.kr>).

10.2 Is the Republic of Korea’s arbitration law based on the UNCITRAL Model Law?

The Act is based on the 1985 UNCITRAL Model Law (the “Model Law”). The Act was first enacted in 1966, and was wholly amended on 31 December 1999 to generally adopt the Model Law with minor deviations.

In November 2014, the Ministry of Justice of Korea announced the amendment proposal of the Act (the “Proposal”) which adopts the 2006 Model Law with minor deviations. The Proposal is currently under the legislative process.

10.3 Are there different laws applicable for domestic and international arbitration?

No. The Act applies to both domestic and international arbitrations.

10.4 Has the Republic of Korea acceded to the New York Convention?

Yes, the Republic of Korea has been a member of the New York



Convention since February 8, 1973. The Republic of Korea has exercised both the reciprocity and commerciality reservations when acceding to the New York Convention pursuant to Article 1 of the Convention. Under the reciprocity reservation, the Republic of Korea needs to recognize awards made in another New York Convention signatory states only. Under the commerciality reservation, the Republic of Korea needs to apply the Convention only to those transactions deemed commercial under Korean law.

10.5 Can Parties agree on foreign arbitration institutions (i) if both parties are domiciled in the Republic of Korea, (ii) if one party is domiciled in the Republic of Korea and the other party abroad?

Yes, in both instances, the parties are free to agree on foreign arbitration institutions.

10.6 Does the Korean arbitration law contain substantive requirements for the arbitration procedure to be followed?

The Act contains provisions requiring equal treatment of the parties with a full opportunity to present their case (Article 19) and that arbitration shall proceed in accordance with agreement between the parties.

10.7 Does a valid arbitration clause bar access to state courts?

Yes, if the respondent raises a defence based on the existence of a valid arbitration agreement, the court is required to reject the suit, unless the arbitration agreement is null and void, inoperative or incapable of being performed. Generally speaking, South Korean courts adopt a strong non-interventionist stance to arbitrations.

10.8 What are the main arbitration institutions in the Republic of Korea?



The KCAB is the main arbitration institution in the Republic of Korea.

It was established in 1966 and has offices in Seoul and Busan. It has administered a total of 9,789 arbitration cases which consisted of 8,542 domestic and 1,247 international arbitration cases between 1966 and 2013. There are over 1,080 arbitrators in the KCAB's Panel of Arbitrators including 89 arbitrators in the new Panel of International Arbitrators. The Panels include widely recognized professionals from diverse backgrounds including academia and business. There are more than 200 arbitrators who are non-residents of Korea from which the KCAB can appoint arbitrators.

It is not mandatory for parties to resolve their disputes at the KCAB. Parties may agree to resolve their disputes at any other competent arbitration institution.

10.9 Addresses of major arbitration institutions in the Republic of Korea?

The main office of the KCAB is located at 43rd Floor, Trade Tower (Korea World Trade Center) 159 Samsung-dong, Gangnam-gu, Seoul 135-729, Korea.

The Busan office is located at Room 1306, Korea Express Building, #1211-1, Choryang-dong, Dong-gu, Busan 601-714, Korea.

10.10 Arbitration Rules of major arbitration institutions?

The KCAB has two sets of rules, i.e. the Domestic Arbitration Rules (the "Domestic Rules") and the International Arbitration Rules (the "International Rules").

The Domestic Rules are designed to govern procedures for domestic arbitration matters, whereas the International Rules are designed to govern procedures for international arbitration matters. If the arbitration agreements were reached before September 1, 2011, the International Rules



apply only if the arbitration agreements specify that the International Rules apply.

The Rules can be accessed at the KCAB website (<http://www.kcab.or.kr>).

10.11 What is/are the Model Clause/s of the arbitration institutions?

The Domestic Rules recommend the following model clause for future disputes:

“Any disputes arising out of or in connection with this contract shall be finally settled by arbitration in Seoul in accordance with the Domestic Arbitration Rules of the Korean Commercial Arbitration Board.”

The KCAB International Arbitration Rules recommend the following model clause for future disputes:

“Any disputes arising out of or in connection with this contract shall be finally settled by arbitration in Seoul in accordance with the International Arbitration Rules of the Korean Commercial Arbitration Board.

The number of arbitrators shall be [one/three]. The seat, or legal place, of arbitral proceedings shall be [city/country]. The language to be used in the arbitral proceedings shall be [language].”

The KCAB International Arbitration Rules recommend the following model clauses for submission (post-dispute arbitration) agreements:

“We, the undersigned parties, hereby agree that the following dispute shall be referred to and finally determined by arbitration in accordance with the International Arbitration Rules of the Korean Commercial Arbitration Board.

[Brief description of the dispute]

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

The seat, or legal place, or arbitral proceedings shall be [city/country].



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

10.12 How many arbitrators are usually appointed?

Pursuant to the agreement of the parties, either in the arbitration agreement or separately, 1 or 3 arbitrators are usually appointed.

If the parties fail to reach an agreement on the number of arbitrators, the default number is three pursuant to Article 11 of the Act. On the other hand, pursuant to Article 11 of the KCAB International Rules, a dispute under the Rules shall be decided by a sole arbitrator in principle although a case may be decided by 3 arbitrators in the absence of such agreement between the parties and if 3 arbitrators are considered appropriate based on the totality of circumstances. This does not render the Tribunal consisting of 2, 4 or 5 arbitrators unfit.

10.13 Is there a right to challenge arbitrators, and if so under which conditions?

Both Article 13 of the Act and Article 13 of the KCAB International Rules provide that an arbitrator may be challenged if impartiality, independence or qualification of the arbitrator is doubtful. The grounds for challenge shall be limited to those that the challenger becomes aware of after the appointment.

10.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

Article 7 of the KCAB International Rules provides that a party may be represented by *any* person of its choice in the proceeding subject to proof of authority as the tribunal may require.

It is worth mentioning that under the Attorneys Act, only Korean attorneys are allowed to provide legal services for profit. An exception to this principle is that a foreign attorney may represent a party if he or she is



qualified under the governing law of the arbitral proceedings. In practice, however, this restriction under the Attorneys Act is seldom implemented, and foreign lawyers frequently represent either Korean or foreign parties in the arbitrations in Korea.

10.15 When and under what conditions can courts intervene in arbitration?

There is no anti-arbitration injunction in Korea as of now. While an arbitration proceeding is pending, Korean courts may assist but cannot intervene in the proceedings, except on a challenge to arbitrators, termination of the mandate of arbitrators, jurisdiction of arbitrators, or challenge to experts, as provided in the Act.

10.16 Do arbitrators have powers to grant interim or conservatory relief?

Yes, the tribunal has the power to grant interim relief under the Act. However, under the current Act, which has not yet adopted the 2006 Model Law (see 1.2 above), only final awards are enforceable and interim awards are not

Whilst any form of interim measures given by the Tribunal is unenforceable, Korean courts are generally liberal in granting interim measures, particularly those maintaining the *status quo*.

10.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

- **Formal requirements for arbitral awards**

Article 32 of the Act requires the award to be in writing, signed by all arbitrators, stating the reasons upon which it is based, and stating its date and place of arbitration.



- **Deadlines for issuing arbitral awards**

The Act does not provide for the period within which an arbitral award must be issued.

Article 33 of the KCAB International Rules requires the arbitral award to be delivered within 45 days from the date on which final submissions are made or the hearings are closed, whichever is later. However, the above time frame is not always strictly adhered to and the delay in issuance of an arbitral award does not let the tribunal's power to issue an award expire.

10.18 Under what conditions can arbitral awards be (i) appealed or (ii) rescinded?

An arbitral award cannot be appealed.

Article 36(2) of the Act provides that an arbitral award can be set aside by the court only if the arbitration agreement is not valid, proper notice was not given, the tribunal had no jurisdiction, or the composition of the arbitral tribunal was not in accordance with the parties' agreement.

10.19 What procedures exist for enforcement of foreign and domestic awards?

Arbitral awards, both domestic and foreign, are enforced by court judgments. It takes between 4 months and 1 year to obtain an enforcement judgment for an arbitral award in the first instance. An enforcement judgment in the first instance ordering monetary payment is provisionally enforceable pending appeal.

Arbitral awards are seldom denied enforcement in Korea.

10.20 Can a successful party in the arbitration recover its costs?



Article 61(2) of the Domestic Rules provides that costs of arbitration are borne by the parties in accordance with the apportionment fixed in the award. However, these costs do not include legal fees unless otherwise agreed. Hence the parties cannot recover their legal fees from the other parties unless otherwise agreed.

Article 47(1) of the International Rules provides that the arbitration costs are in principle borne by the unsuccessful party unless specifically apportioned by the tribunal.

10.21 Are there any statistics available on arbitration proceedings in the Republic of Korea?

More than 300 arbitration cases are received by KCAB per year, of which around 80 are international arbitration cases.

10.22 Are there any recent noteworthy developments regarding arbitration in the Republic of Korea (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

As discussed above, there are discussions to amend the Act to reflect the 2006 amendment to the Model law.

The KCAB is also preparing to revise the International Rules, which revision is also expected to take effect in 2015. Two major items under consideration are (i) the introduction of emergency arbitrators, and (ii) multi-party arbitrations.

Furthermore, the Seoul International Dispute Resolution Center (“Seoul IDRC”), which is not a new arbitration institution but an institution promoting Korean international arbitration and providing hearing facilities for international arbitration, opened in Seoul in May 2013.

Korean courts have maintained the pro-arbitration position in setting aside actions and enforcement actions.



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11. LAOS



BY: MS. SIRI BOUTDAKHAM

11.1 Which laws apply to arbitration in the Laos People's Democratic Republic?

The *Law on Resolution of Economic Disputes* No. 06/NA (17 December 2010) (*'Law on Resolution of Economic Disputes'*) sets out the principles, regulations and measures for the resolution of economic disputes involving domestic and foreign entities and government organizations.

Arbitration and mediation are the preferred methods of resolving economic disputes in the Lao PDR. The *Law on Resolution of Economic Disputes* is used in conjunction with other laws and regulations to actively encourage arbitration and mediation as a means of avoiding court proceedings.

11.2 Is the Lao PDR arbitration law based on the UNCITRAL Model Law?

Although there are many similarities between the *Law on Resolution of Economic Disputes* and the UNCITRAL Model Law, the Lao PDR law on arbitration is not based on the Model Law.

11.3 Are there different laws applicable for domestic and international arbitration?

No, the *Law on Resolution of Economic Disputes* applies to both domestic and international arbitration. However, enforcement of arbitration awards varies for domestic and international decisions.



11.4 **Has the Lao PDR acceded to the New York Convention?**

The Lao PDR acceded to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards on 17 June 1998. The Prime Minister announced that the Convention came into force in Lao PDR on 15 September 1998.

11.5 **Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?**

The *Law on Resolution of Economic Disputes* does not differentiate between whether both parties are domiciled in the Lao PDR or if only one party is domiciled in the state.

Where a contract exists between the parties, Article 101 of the *Law on Contract and Tort* No 01/NA (8 December 2008) (*Law on Contract and Tort*) stipulates that the parties must endeavor to resolve their dispute through mediation and arbitration, either domestically or internationally, before commencing court proceedings.

Where foreign investors are unable to resolve their dispute amicably through discussions and in accordance with the terms of their contract, the *Law on Investment Promotion* No.02/NA (8 July 2009) (*Law on Investment Promotion*) allows for either parties to file a request for settlement with the relevant industry sector, usually the Ministry of Planning and Investment or the Ministry of Industry and Trade. If an agreement cannot be reached through administrative means, a further request can be sent to the Economic Arbitration Committee. Filing for proceedings to start a court action should be used as a last resort.

Often, due to concerns regarding the efficiency and reliability of the Lao arbitration system, foreign investors are advised to seek arbitration outside the country. In practice, many foreign entities operating in the Lao PDR or conducting business with Lao business partners will incorporate a clause in their contract that includes referral to a foreign arbitration institution and the UNCITRAL Arbitration Rules.



11.6 Does the Lao PDR arbitration law contain substantive requirements for the arbitration procedures to be followed?

For any petition to be considered, it must be an economic and commercial dispute, which is not or has not been heard before the People's Court of Lao PDR ('People's Court'). Further, there must have been an arbitration clause in the contract and parties must have voluntarily consented to having the dispute arbitrated.

Articles 9-14 of the *Law on the Resolution of Economic Disputes* sets out the basic principles of the dispute resolution process and includes the independence and impartiality of the arbitrator, the equality of both parties, and the use of the Lao language (an interpreter may be used if necessary). Apart from these requirements, parties have a wide discretion in terms of the procedures to be followed during arbitration.

11.7 Does a valid arbitration clause bar access to state courts?

Where there is an arbitration clause in the parties' contract, the People's Court has no jurisdiction to hear the matter. At the request of one or both parties, the People's Court can intervene on matters of enforcement of award or hear a challenge to an arbitrator.

11.8 What are the main arbitration institutions in the Lao PDR?

There are two levels of arbitration in Lao PDR.

At the central level in Vientiane, the Centre of Economic Dispute Resolutions ('CEDR') is equivalent to a department within the Ministry and is under the supervision of the Ministry of Justice. The CEDR is responsible for examining and receiving economic dispute resolution petitions and parties' evidence, liaising with the parties involved, and appointing mediators and arbitrators in accordance with the laws and regulations. At the provincial level, the Office of Economic Dispute



Resolution ('OEDR') is under the supervision of the Provincial Department of Justice and the Chief of Office. It has a status equivalent to the Deputy-Director of the Department of the Province.

11.9 Addresses of major arbitration institutions in Lao PDR?

Centre of Economic Dispute Resolutions Ministry of Justice

Lane Xang Avenue, PO Box 08

Vientiane, Lao PDR

T: +856 21 451 920

The individual OEDRs are located in the Justice Office of each province in Lao PDR: Oudomxay Province, Luang Prabang Province, Savahnnakhet Province, and Champassak Province.

11.10 Arbitration Rules of major arbitration institutions?

Currently, the CEDR and OEDR do not have any separate arbitration rules. However, a regulation is expected to be passed relating to the organizational structure and rules of the institutions.

11.11 What is/are the Model Clause/s of the arbitration institutions?

The CEDR and OEDR do not propose a Model Clause for incorporation into contracts. However, a contract clause confirming arbitration as the chosen method for dispute resolution is the most common and wide-spread approach in commercial transactions in Lao PDR and is in line with the *Law on Contract and Tort*.

11.12 How many arbitrators are usually appointed?

There is a minimum of three arbitrators to be appointed to the Arbitration Committee. At the consent of either party, more arbitrators may be appointed, subject to the condition that the committee is comprised of an odd number of arbitrators.



The selection of arbitrators is set out in Article 23 of the *Law on the Resolution of Economic Disputes*. Both parties shall select one arbitrator each from a shortlist provided by the CEDR and the third arbitrator shall be appointed by the two selected arbitrators. Arbitrators can be of Lao nationality from private or state own entities or on a voluntary basis by foreign individuals. Article 44 sets out the requisite criteria to be shortlisted as an arbitrator.

11.13 Is there a right to challenge arbitrators, and if so under which conditions?

Article 31 of the *Law on the Resolution of Economic Disputes* provides that parties may challenge the appointment of an arbitrator where an arbitrator is related or has relations with either parties involved, where there is a conflict of interest involved, or where an arbitrator is unable to perform his duties to the required standard.

11.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

There are no restrictions on either parties' representation whereby in Lao arbitration proceedings, parties have a right to be self-represented or be represented by a person of their choosing. The use of a foreign lawyer to represent a party to the proceedings is not prohibited by Lao laws. Proceedings, however, must be conducted in the Lao language (an interpreter may be used if necessary). One exception to the use of the Lao language is where it was agreed upon beforehand and the contract provides for another language to be used.

11.15 When and under what conditions can courts intervene in arbitrations?

The People's Court can only intervene in arbitrations after a decision regarding the award has been made, but has not yet been enforced. Article 42 of the *Law on Civil Procedures* No. 13/NA (4 July 2012) and Article 51 of



the *Law on Resolutions of Economic Disputes* provide that parties have a right to request a review by the People's Court. The People's Court are only allowed to take into consideration whether the arbitral proceedings and award given were in accordance with Lao PDR laws and regulations, any international treaties that the Lao PDR is a signatory to, and have not affected any national security, social peace or the environment.

11.16 Do arbitrators have powers to grant interim or conservatory relief?

There is no requirement on arbitrators to grant interim or conservatory relief. Article 34 of the *Law on the Resolution of Economic Disputes* provides that the Arbitration Committee can, by application of either party, request the People's Court to issue an order to seize, confiscate, or take any other appropriate measure to protect the interests and rights of the applicable party.

Under Article 35 of the *Law on the Resolution of Economic Disputes*, parties are allowed to reach an agreement before a decision is made by the Arbitration Committee, and it will be considered equally binding. For it to be effective, the agreement must be made in writing and signed by the required parties stated in Article 35.

11.17 What are the formal requirements of an arbitral award (form; contents, deadlines, other requirements)?

- **Formal requirements for arbitral awards**

Article 37 of the *Law on the Resolution of Economic Disputes* sets out the formal requirements. In summary, this includes:

- a) Full names, age, occupation, nationality, present address, and location of activities of parties and their representatives;
- b) Full names of the Arbitration Committee and the recorder;
- c) Time, date, subject, and reference number of the dispute(s) and place the decision was issued;



- d) Main arguments of the dispute(s), the decision(s) and their reasons;
- e) The division of fees and service charges; and
- f) Signatures of the Arbitration Committee, the recorder, and Chief of CEDR or ODER where the arbitration proceedings took place.

- **Deadlines for issuing arbitral awards**

Article 33 of the *Law on the Resolution of Economic Disputes* provides that the resolution of the arbitration shall be completed within three months of the appointment of the Arbitration Committee but does not stipulate a formal deadline for the issue of the arbitration award. In the event that the Arbitration Committee cannot reach a unanimous decision, the award will be given based on a majority vote (Article 36 of the *Law on the Resolution of Economic Disputes*).

- **Other formal requirements for arbitral awards**

Article 36 of the *Law on the Resolution of Economic Disputes* prescribes that the decision(s) of the Arbitration Committee are to be read in the presence of the parties or their representatives, and takes effect from the date it is made. If parties are unable to attend, the date of receipt of the decision(s) will be its effective date.

11.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in the Lao PDR?

Article 38 of the *Law on the Resolution of Economic Disputes* sets out a list of conditions from which parties may appeal their decisions. The parties have 15 days from when the decision was made to appeal to the People's Court. Reasons for which an appeal can be brought are wide-ranging and cover both the procedural as well as the substantive aspect of the arbitral proceedings including where the composition of the Arbitration Committee was not consistent with the laws and regulations or the information and evidence relied upon by the Arbitration Committee was falsified.



Generally, an arbitral award cannot be rescinded. However, where it violates the laws and regulations of the Lao PDR, the People's Court will not issue a notice to enforce the award. In this case, the parties can apply for a review by the CEDR or OEDR, or file a claim with the People's Court to consider making a legally compliant decision.

Article 61 of the *Law on the Resolution of Economic Disputes* provides for action by the Ministry of Justice. It is however, unclear on the scope of the role of the Ministry and how much power the Ministry is able to exercise in the review of arbitration awards.

11.19 What procedures exist for enforcement of foreign and domestic awards in the Lao PDR?

Domestic arbitration awards from the CEDR or OEDR are recognized as binding on the parties involved and parties are obliged under Article 49 of the *Law on the Resolution of Economic Disputes* to implement the outcomes of the award within a period of 15 days from when the decision(s) was made. Where a domestic award is not satisfied, redress can be obtained under Article 50 and 51 of the *Law on the Resolution of Economic Disputes* which allows for the People's Court to review the decision. The Court, however, is limited in their consideration to matters that affect national security and economic stability.

Decisions of foreign arbitrations are recognized but for awards to be enforced, it must be certified in the People's Court and subject to further conditions. Article 52 of the *Law on the Resolution of Economic Disputes* stipulates that parties must be nationals of countries that are party to the New York Convention 1958, the award does not contravene any laws and regulations of Lao PDR relating to national security and stability, and the payer must have assets located in Lao PDR. Once conditions have been met and the decision(s) certified, the foreign award is implemented in accordance with the *Law on Judgment Enforcement* No. 04/NA (25 July 2008).

To date, there has been one example of enforcement of a foreign arbitration award in Lao PDR based on an arbitration that occurred in Vietnam between Vietnamese and Lao entities over a commercial dispute.



However, it is yet to be seen whether this precedent is enforceable given the ongoing non-payment of an arbitration award by the Lao PDR Government to Thai-Lao Lignite (TLL) over a wrongfully terminated agreement. The Lao PDR government was granted an application to set aside the award by the High Court of Kuala Lumpur as well as the Paris Court of Appeal. TLL is appealing this decision in the Malaysian Federal Court. Accordingly, the laws relating to enforcement of foreign awards is still unclear.

11.20 Can a successful party in the arbitration recover its costs in Lao PDR?

Legal fees and expenses are not recoverable under Lao PDR law unless stipulated beforehand by both parties in their contract. As such, the costs involved in the arbitration proceedings themselves are borne by both parties according to the decisions made by the Arbitration Committee (Article 54 of the *Law on the Resolution of Economic Disputes*).

11.21 Are there any statistics available on arbitration proceedings in Lao PDR?

As arbitration proceedings are not required to be published by any laws or regulations, accurate statistics are not available. Based on the research undertaken, there were 258 arbitration cases from 2006-2012.

11.22 Are there any recent noteworthy developments regarding arbitration in Lao PDR (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

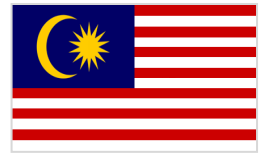
At the time of writing, it is expected that the Ministry of Justice is drafting a Presidential Decree on Recognition and Enforcement of Foreign and International Awards. If this decree is passed, it is likely that it will provide



RESPONDEK & FAN

a better and more wholesome framework on the procedures to be followed for the enforcement of a foreign arbitration award.

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12. MALAYSIA

**BY: TAN SRI DATO' CECIL ABRAHAM
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12.1 Which laws apply to arbitration in Malaysia?

The Arbitration Act 2005 applies to arbitration in Malaysia.

12.2 Is Malaysian arbitration law based on the UNCITRAL Model Law?

The Arbitration Act 2005 is based on the UNCITRAL Model Law.

12.3 Are there different laws applicable for domestic and international arbitration?

Section 3(2) of the Arbitration Act 2005 provides that Parts I, II and IV of the Act apply to domestic arbitration and Part III shall apply unless the parties agree otherwise in writing. Section 3(2) provides that Parts I, II and IV apply to international arbitration and Part III shall not apply unless the parties agree otherwise in writing.

12.4 Has Malaysia acceded to the New York Convention?

Malaysia is a signatory of the New York Convention. Sections 38 and 39 of the Arbitration Act 2005, which provide for the recognition and enforcement of awards, give effect to the New York Convention.

12.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?



Section 19(1) of the Arbitration Act 2005 provides that, subject to the provisions of the Act, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. The parties are accordingly free to agree on foreign arbitration institutions where both parties are domiciled in Malaysia or one party is domiciled in Malaysia and the other party is abroad subject to fundamental provisions of the Act, like section 20, which provides that the parties shall be treated with equality and each party shall be given a fair and reasonable opportunity of presenting that party's case.

12.6 Does Malaysian arbitration law contain substantive requirements for the arbitration procedures to be followed?

Sections 20 to 29 of the Arbitration Act 2005 provide for the conduct of arbitral proceedings. The arbitral proceedings must comply with section 20, which gives statutory effect to the rules of natural justice and section 29, which provides for court assistance in taking evidence in arbitral proceedings. However, the parties are not compelled to comply with section 21 to 28 and this is expressly provided for in the Act by use of words like “*unless otherwise agreed by the parties*” or “*the parties are free to agree*” which precede all these sections.

12.7 Does a valid arbitration clause bar access to state courts?

Section 10(1) of the Arbitration Act 2005 provides that a court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

The Court of Appeal, in *Albilt Resources Sdn Bhd v. Casaria Construction Sdn Bhd* [2010] 7 CLJ 785, *Lembaga Pelabuhan Kelang v. Kuala Dimensi Sdn Bhd & another appeal* [2010] 9 CLJ 532 and *TNB Fuel Services Sdn Bhd v. China National Coal Group Corp* [2013] 4 MLJ 857, has recognized that under



section 10(1) of the Arbitration Act 2005, it is mandatory for court proceedings to be stayed.

The Court of Appeal, in *Comos Industry Solution GmbH v. Jacob and Toralf Consulting Letrikon Sdn Bhd & Ors* [2012] 4 MLJ 573, held that an application to set aside a writ of summons did not amount to a step in the proceedings under section 10(1) of the Arbitration Act 2005.

12.8 What are the main arbitration institutions in Malaysia?

The main arbitration institution in Malaysia is the Kuala Lumpur Regional Centre for Arbitration (KLRCa).

12.9 Addresses of major arbitration institutions in Malaysia?

The address of the KLRCa is Bangunan Sulaiman, Jalan Sultan Hishamuddin, 50000 Kuala Lumpur, Malaysia.

12.10 Arbitration Rules of major arbitration institutions?

The arbitration rules published by the KLRCa are the KLRCa Arbitration Rules, the KLRCa Fast Track Arbitration Rules and the KLRCa i-Arbitration Rules.

12.11 What is/are the Model Clause/s of the arbitration institutions?

The Model Clause for the KLRCa Arbitration Rules is:

*“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the **KLRCa Arbitration Rules**.”*

The Model Clause for the KLRCa Fast Track Arbitration Rules is:



“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the KLRCA Fast Track Arbitration Rules.”

And, the Model Clause for the KLRCA i-Arbitration Rules is:

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the KLRCA i-Arbitration Rules.”

12.12 How many arbitrators are usually appointed?

One or three arbitrators are usually appointed. Section 12(1) of the Arbitration Act 2005 provides that the parties are free to determine the number of arbitrators. If the parties fail to agree, section 12(2) provides that, in the case of international arbitration, the arbitral tribunal shall consist of three arbitrators, and, in the case of domestic arbitration, the arbitral tribunal shall consist of a single arbitrator.

12.13 Is there a right to challenge arbitrators, and if so under which conditions?

There is a right to challenge arbitrators. The grounds for challenge are set out in section 14 of the Arbitration Act 2005 and the challenge procedure is set out in section 15.

12.14 Are there any restrictions as to the parties’ representation in arbitration proceedings?

The High Court of Malaya, in *Zublin Muhibbah Joint Venture v. Government of Malaysia* [1990] 3 CLJ Rep 371, held that a foreign lawyer who was not an advocate & solicitor within the meaning of the Legal Profession Act 1976 was not prohibited from representing parties in arbitral proceedings in West Malaysia, as the Legal Profession Act 1976 did not apply to arbitral proceeding in West Malaysia.



The Legal Profession Act 1976 has now been amended, with effect from 3 June 2014, to expressly provide under section 37A that foreign arbitrators, counsel and solicitors may act in arbitration proceedings with a seat in Malaysia.

The High Court of Sabah and Sarawak, *In Re Mohamed Azabari Matiasin* [2011] 2 CLJ 630, held that a foreign lawyer who was not an advocate within the meaning of the Advocates Ordinance 1953 was prohibited from representing parties in arbitral proceedings in Sabah, East Malaysia. However, the Court of Appeal, in *Mohamed Azabari Matiasin v. GBB Nandy & Ors* [2013] 7 CLJ 277, allowed an appeal against the decision of the High Court of Sabah and Sarawak in *Matiasin* supra. At present, an application for leave to appeal to the Federal Court against the decision of the Court of Appeal is pending.

Based on these authorities, the present position in Malaysia, is that there are no restrictions as to the parties' representation in Malaysia. However, the position in East Malaysia will depend on the decision of the Federal Court, in the event leave to appeal is granted.

12.15 When and under what conditions can courts intervene in arbitrations?

Section 8 of the Arbitration Act 2005 provides that no court shall intervene in matters governed by the Act, except where so provided by the Act. The areas where court intervention is provided for in the Act are:

Part II

- (a) section 10: provision for stay of court proceedings where there is an arbitration agreement;
- (b) section 11: the High Court's power to grant interim measures of protection;
- (c) section 13(7): the High Court's power to appoint an arbitrator in certain situations;
- (d) section 15(3): the High Court's power to deal with challenges to an arbitrator;



- (e) section 18(8): the High Court's power to hear appeals on the jurisdiction of the arbitral tribunal;
- (f) section 29: the High Court's power to assist in the taking of evidence;
- (g) section 37: applications for setting aside arbitral awards to the High Court;

Part III

- (h) section 41: determination of preliminary point of law by the High Court;
- (i) section 42: reference of questions of law to the High Court;
- (j) section 44(1): taxed costs by the High Court in certain circumstances;
- (k) section 44(2): power of the High Court to order the arbitral tribunal to deliver the award in certain circumstances;
- (l) section 45: power of the High Court to extend time for the commencing arbitral proceedings; and
- (m) section 46: power of the High Court to extend time for the making of the award.

12.16 Do arbitrators have powers to grant interim or conservatory relief?

Section 11(1) of the Arbitration Act 2005 provides that a party may, before or during the arbitral proceedings, apply to the High Court for any interim measures and the High Court may make the following orders for:

- (a) security for costs;
- (b) discovery of documents and interrogatories;
- (c) giving of evidence by affidavit;
- (d) appointment of a receiver;
- (e) securing the amount in dispute, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;
- (f) the preservation, interim custody or sale of any property which is the subject-matter of the dispute;



- (g) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the disposition of assets by a party; and
- (h) an interim injunction or any other interim measure.

The High Court, in *Jiwa Harmoni Offshore Sdn Bhd v. Ishi Paower Sdn Bhd* [2009] 1 LNS 849, recognized that certain power granted to the High Court under sections 11(1) of the Arbitration Act 2005 had also been granted to the arbitral tribunal under section 19(1) and, as such, the High Court should not be troubled with such applications in the first instance unless such an order is necessary to bind third parties or to effectively enforce the relief in cases where it cannot be done by an order of the arbitral tribunal.

The High Court has applied the principle in *Jiwa Harmoni* supra in *Cobrain Holdings Sdn Bhd v. GDP Special Projects Sdn Bhd* (2010) Transcript and *Metrod (Singapore) Pte Ltd v. GEP II Beteiligungs GmbH & Anor* [2013] 1 LNS 324.

12.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

Section 33(1) of the Arbitration Act 2005 provides that an award shall be in writing and subject to section 33(2) shall be signed by the arbitrator. Section 33(2) provides that, in arbitral proceedings with more than one arbitrator, the signature of the majority of all members of the arbitral tribunal shall be sufficient provided that the reason for any omitted signature is stated.

Section 33(3) provides that an award shall state the reasons upon which it is made unless: (a) the parties have agreed that no reasons are to be given; or (b) the award is an award on agreed terms under section 32.

Section 33(4) provides that an award shall state its date and the seat of arbitration as determined in accordance with section 22 and shall be deemed to have been made at that seat.



Section 33(5) provides that, after an award is made, a copy of the award signed by the arbitrator in accordance with sections 33(1) and (2) shall be delivered to each party.

Section 33(6) provides that, unless otherwise provided in the arbitration agreement, the arbitral tribunal may: (a) award interest on any sum of money ordered to be paid by the award from the date of the award to the date of realization; and (b) determine the rate of interest.

In summary, the formal requirements of an arbitral award under section 33 of the Arbitration Act 2005 are that:

- (a) it must be in writing;
- (b) it must be signed by a majority of the arbitral tribunal;
- (c) it must be reasoned unless otherwise agreed by the parties or it is an agreed award;
- (d) it must be dated;
- (e) it must state the seat;
- (f) it must be delivered; and
- (g) it may include interest.

There are no deadlines for the delivery of an award under the Arbitration Act 2005.

12.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in Malaysia?

There are no provisions in the Arbitration Act 2005 to appeal against or rescind an arbitral award as such. Instead, section 37 provides that an award may set aside on limited grounds.

Specifically, section 37(1) provides that an award may be set aside by the High Court only if the party making the application provides proof that:

- (a) a party to the arbitration agreement was under an incapacity;



- (b) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;
- (c) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present the party's case;
- (d) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
- (e) subject to section 37(3), the award contains decisions on matters beyond the scope of the submission to arbitration; or
- (f) the composition of the arbitral tribunal or the arbitration procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with the Act.

Section 37(1) also provides that an award may be set aside by the High Court only if, the High Court finds that:

- (a) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or
- (b) the award is in conflict with the public policy of Malaysia.

The High Court, in *Kelana Erat Sdn Bhd v. Niche Properties Sdn Bhd & another application* [2012] 5 MLJ 809, recognized that an award under the Arbitration Act 2005 was by and large immune from any interference by the courts unless the award was infected with the infirmities identified in section 37(1).

Similarly, the High Court, in *The Government of India v. Cairn Energy India Pty Ltd & Ors* [2014] 9 MLJ 195, held that the courts do not sit in an appellate capacity under section 37. Furthermore, the courts will be slow to interfere even when there is a specific discretion to do so under section 37.

12.19 What procedures exist for enforcement of foreign and domestic awards in Malaysia?



Section 38(1) of the Arbitration Act 2005 provides that, on an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to sections 38 and 39, be recognized as binding and be enforced by entry as a judgment in terms of the award or by action.

Section 38(2) provides that, in an application under section 38(1), the applicant shall produce: (a) the duly authenticated original award or a duly certified copy of the award; and (b) the original arbitration agreement or a duly certified copy of the agreement.

Section 38(3) provides that, where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.

Section 38(4) provides that, for the purposes of the Arbitration Act 2005, “foreign State” means a State which is a party to the New York Convention.

12.20 Can a successful party in arbitration recover its costs?

A successful party may recover its costs subject to the agreement between the parties and the discretion of the arbitral tribunal. Section 44(1)(a) of the Arbitration Act 2005 provides that, unless otherwise agreed by the parties, the costs and expenses of an arbitration shall be in the discretion of the arbitral tribunal who may:

- (a) direct to and by whom and in what manner those costs or any part thereof shall be paid;
- (b) tax or settle the amount of such costs and expenses; and
- (c) award such costs and expenses to be paid as between solicitor and client.

The High Court, in *Magnificent Diagraph Sdn Bhd v. JWC Ariatektura Sdn Bhd* (2009) Transcript, recognized that the jurisdiction to determine costs vests with the arbitrator in the absence of agreement between the parties.



12.21 Are there any statistics available on arbitration proceedings in Malaysia?

Statistics on arbitration proceedings in Malaysia are available upon request from the KLRCA.

12.22 Are there any recent noteworthy developments regarding arbitration in Malaysia (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

The Kuala Lumpur Regional Centre for Arbitration (KLRCA) signed a memorandum of understanding on 20 November 2014 with the International Centre for Settlement of Investment Disputes (ICSID), whereby the KLRCA will be the venue for ICSID disputes that arise in the region. This will allow disputes linked to the region to be heard locally should they be referred to ICSID.

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13. MONGOLIA



**BY: MS. ENKHTSETSEG NERGUI
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13.1 Which laws apply to arbitration in Mongolia?

The main source of law for arbitration in Mongolia is the Arbitration Law 2003²⁵⁸.

Aside from this, there are also secondary sources of arbitration law which include:

- a. International treaties to which Mongolia is a party;
- b. The Civil Procedure Code 2002 in relation with procedures on seeking interim injunction in support of arbitration, appeals on the jurisdiction of the tribunal, and enforcing both domestic and foreign arbitral awards;
- c. The Law on Court Enforcement 2002 in relation with enforcement of awards and supplement the Civil Procedure Code 2002 by providing more detail on the process of enforcement of arbitral awards by the Mongolian courts;
- d. The Supreme Court Interpretation of the Arbitration Law which provides guidance and greater detail to the Arbitration Law;
- e. The Civil Code in relation with jurisdiction of the courts and the arbitral tribunal in conjunction with the Civil Procedure Code 2002; and
- f. The 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards in connection with the procedure of recognizing and enforcing foreign arbitral awards in Mongolia, and Mongolian arbitral awards abroad.

²⁵⁸ <http://www.wipo.int/edocs/lexdocs/laws/en/mn/mn025en.pdf>



13.2 Is the Mongolian arbitration law based on the UNCITRAL Model Law?

Yes. The current Arbitration Law 2003 is based on the UNCITRAL Model Law 1985. However, additional provisions which supplement the Model Law provisions also can be found in the law.

Some of the additional provisions that can be found in the Arbitration Law:

- (i) prohibiting members of the constitutional court, judges, prosecutors, court officers and others from acting as arbitrators;
- (ii) provision on the ‘doctrine of separability’ of the arbitration agreement;
- (iii) provision on procedure of appointment of arbitrators where the parties fail to agree;
- (iv) Mongolian as default language;
- (v) the requirements for the contents of an arbitration claim are the same as those set out in article 62 of the Mongolian Civil Procedure Code (which requires the claim to include the full name and address of the claimant and the respondent, the basis of the claim, the value of the claim, supporting evidence for the claim etc.);
- (vi) provision on confidentiality of the arbitral proceedings which obliges the tribunal and the parties to maintain the confidentiality of confidential information which were revealed during the arbitration proceedings.

13.3 Are there different laws applicable for domestic and international arbitration?

Where the seat of arbitration is in Mongolia, the Arbitration Law 2003 is the only law that is applicable for domestic and international arbitration.

13.4 Has Mongolia acceded to the New York Convention?

Yes, Mongolia is one of the contracting states of the New York Convention, which was officially ratified on 24 October 1994. However,



Mongolia has also declared that the Convention shall apply only to recognition and enforcement of awards made in the territory of another contracting State and to differences arising out of legal relationships, contractual or otherwise, that are considered commercial under the national law.²⁵⁹

Furthermore, the Arbitration Law 2003 in Article 3.2 specifically states that the procedure of recognizing and enforcing foreign arbitral awards should be regulated in accordance with the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Award and Chapter Eight (Recognition and Enforcement of Awards) of the Arbitration Law.

13.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

This depends solely on the agreement between the parties. In practice, most arbitrations involving Mongolian parties will be carried out in Mongolia and it is rare for Mongolian parties to agree to foreign arbitration, unless one of the parties is a foreign investor and insists on a foreign arbitration.

If one of the parties is not Mongolian, the place of arbitration usually depends on the financial volume of the contract and the equality of bargaining power between the parties. Larger foreign companies with larger contracts in dispute usually prefer foreign arbitration institutions with the seat of arbitration in a third neutral country. Smaller foreign companies or foreign individuals with smaller contracts in dispute, on the other hand, usually agree for the seat of arbitration to be in Mongolia.

²⁵⁹ Contracting States' (The New York Arbitration Convention, 2009) <<http://www.newyorkconvention.org/contracting-states/list-of-contracting-states>> accessed 4 February 2013



13.6 Does the Mongolian arbitration law contain substantive requirements for the arbitration procedures to be followed?

Under the Mongolian Arbitration Law there is no specific arbitration procedure to be followed by the parties or the Arbitral Tribunal to conduct the proceedings. However, there is a restriction on persons who can be appointed as an arbitrator, obligation to maintain confidentiality regarding matters that were revealed during the proceedings, and the form and content of the arbitration award. Apart from the aforesaid matters, the parties are free to agree on the procedure of the proceedings starting from the appointment and challenge of arbitrators, seat of arbitration, substantive law and hearing.

13.7 Does a valid arbitration clause bar access to state courts?

Yes it does. If a party to a valid arbitration agreement files a law suit in a state court in Mongolia, state courts shall reject to resolve the case as it belongs to the arbitral jurisdiction²⁶⁰.

13.8 What are the main arbitration institutions in Mongolia?

The best known arbitration institution in Mongolia is the Mongolian International and National Arbitration Court (**MINAC**). MINAC is part of the Mongolian National Chamber of Commerce and Industry (**MNCCI**) which was founded on 2 July 1960. MINAC has its 21 branch arbitration centres in Aimag (cities) encouraging the settlement of domestic disputes through arbitration²⁶¹.

13.9 Addresses of major arbitration institution in Mongolia?

Mongolian International and National Arbitration Court (MINAC)
MNCCI Building,

²⁶⁰ Mongolian Arbitration Law 2003 Art.6 and Civil Procedure Code Art.13 (2)

²⁶¹ <http://mongolchamber.mn> accessed 06 December 2014



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13.10 Arbitration Rules of major arbitration institutions?

These are the Mongolian International and National Arbitration Court (MINAC) Arbitration Rules 2014.

13.11 What is the Model Clause of the arbitration institutions?

Model Clause of the MINAC Arbitration Rules²⁶²:

"All disputes arising out of or in connection with this contract or related to its violation, termination or nullity shall be finally settled in the Mongolian International and National Arbitration Court at the MNCCI under its Rules on Arbitration in Mongolia"

13.12 How many arbitrators are usually appointed?

The Arbitral Tribunal under the Arbitration Law 2003 may consist of a sole or more arbitrators. The parties have the freedom to determine the number of arbitrators and if the parties fail to agree on a certain number, the default number of arbitrators will be three. Furthermore, the parties also have the freedom to agree on a procedure for appointing arbitrators, failing such agreement the number of arbitrators shall be three and each party shall appoint one arbitrator, and those two appointed arbitrators shall appoint the third arbitrator who will act as the chairman of the Arbitral Tribunal.

²⁶² Administrator, Mongolian National Arbitration Center (Mongolian National Chamber of Commerce and Industry, 2011) <<http://en.mongolchamber.mn/index.php/business-services/mongolian-national-arbitration-center>> accessed 6 December 2014



As for sole arbitrators, the appointment shall be based on mutual agreement. Failing such agreement, a sole arbitrator shall be appointed by the Court of Appeal upon request of a party. If a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made by the Court of Appeal upon request of a party. Where a party fails to act as required under such procedure, or the parties are unable to reach an agreement expected of them under such procedure, or a competent body stated in a statute of institutional arbitration fails to perform any function entrusted to it under such procedure, any party may request the Court of Appeal to take the necessary measures. Any decisions on matters entrusted to the Court of Appeal shall be subject to no further appeal.

In appointing arbitrators, the Court of Appeal should consider the ability of those arbitrators to act as an arbitrator, their independency and impartiality, and qualifications required by the agreement of the parties.

Meanwhile, the procedure of appointing and also the number of arbitrators under the MNAC Arbitration Rules are very similar with the procedures under the Arbitration Law 2003. The Arbitral Tribunal may consist of one or three arbitrators. The parties have the freedom to determine the number of arbitrators and if the parties fail to agree, the default number of arbitrators will be three. Every arbitrator shall be and remain independent, impartial, and fair.

Furthermore, the parties also have the freedom to agree on a procedure for appointing arbitrators, failing such agreement the number of arbitrators shall be three - each party shall appoint one arbitrator, and those two appointed arbitrators shall appoint the third arbitrator, who will act as the chairman of the Arbitral Tribunal. If a party fails to appoint the arbitrator within twenty one days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within twenty one days of their appointment, the appointment shall be made by the Chairman of the Arbitration Court upon request of a party.



As for sole arbitrators, the appointment shall be based on mutual agreement. Failing such agreement, the sole arbitrator shall also be appointed by the Chairman of Arbitration Court upon request of a party.

In appointing arbitrators, the Chairman of the Arbitration Court should consider the ability of those arbitrators to act as an arbitrator, their independency and impartiality, and qualifications required by the agreement of the parties.

13.13 Is there a right to challenge arbitrators, and if so under which conditions?

Article 16 of the Arbitration Law explains that arbitrators must disclose any circumstances likely to give rise to justifiable doubts as to their impartiality of independence regarding the appointing party, starting from the time of their appointment and throughout the arbitral proceedings. This shows that arbitrators may only be challenged if there are circumstances that give rise to justifiable doubts as to his impartiality or independence.

Furthermore, a party may only challenge an arbitrator appointed by such party, or in whose appointment a party has participated, for reasons such party becomes aware after the appointment has been made.²⁶³

Circumstances that allow a party to challenge arbitrators under the MINAC Arbitration Rules are similar to the circumstances under the Arbitration Law 2003 as explained above. However, the MINAC Arbitration Rules also require an arbitrator to sign a Declaration of Independence and Impartiality before their appointment, and the arbitrators are required to disclose whether there are any doubtful circumstances regarding their independence and impartiality in writing. The arbitration court will send this declaration to the parties and set a time limit to submit any challenges.²⁶⁴

²⁶³ Mongolian International and National Arbitration Court (MINAC) Arbitration Rules Article 14.3

²⁶⁴ MINAC Arbitration Rules Article 11.6



13.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

The Mongolian Arbitration Law 2003 expressly prohibits the following persons to act as an Arbitrator:

- (i) Members of Constitutional Court;
- (ii) Judges;
- (iii) Prosecutors;
- (iv) Case Registrars;
- (v) Detectives;
- (vi) Officers of court decision enforcement;
- (vii) Attorneys or notaries who had rendered legal service to any of the parties and
- (viii) Other officials who are prohibited to conduct other work which are not related to the legal duties.

13.15 When and under what conditions can courts intervene in arbitrations?

In general, the courts cannot intervene in arbitration proceedings. However, if the parties agree, they may refer to the court to rule on: the appointment, challenge and termination of authority of Arbitrators, appeal to the competence of an arbitral tribunal to rule on its jurisdiction (*Kompetenz-Kompetenz*), Interim Measures by the Court, the Court's assistance in taking evidence and setting aside an arbitral award (by application of one of the parties).²⁶⁵

Arbitration institutions are also statutorily allowed to reserve the rights to rule on the appointment, challenge and termination of authority of arbitrators and appeal to the competence of Arbitral Tribunal to rule on its jurisdiction (*Kompetenz-Kompetenz*). Any decisions made by the Arbitration Institutions thereof will be considered as final.

²⁶⁵ Arbitration Law Article 8



Other than any of the above-explained matters, the courts cannot intervene in arbitration proceedings in Mongolia.

13.16 Do arbitrators have powers to grant interim or conservatory relief?

Yes. According to Article 21 Arbitration Law, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute unless otherwise agreed by the parties. The arbitral tribunal may also require any party to provide appropriate security in connection with such measures.

13.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

- **Formal requirements for arbitral awards**

The Arbitration Award has to be made in writing and has to be signed by the arbitrator/s. In a Tribunal with more than one arbitrator, the signature of the majority members of the arbitral tribunal should be sufficient. However, the reason why such signature is omitted has to be stated clearly in the award.

The Award has to include the names of the arbitral tribunal or sole arbitrator, place of arbitration and date the award is signed, legal reasons of the arbitral award unless otherwise agreed by parties or settled the dispute by the parties, and arbitration costs.

The arbitral award will be delivered to each party, and after the arbitral award comes into force it should be binding and final, the parties or their heirs do not hold a right to appeal to any arbitration and court.



The MINAC Arbitration Rules provides similar requirements with some additional provisions. The arbitration award has to be made in writing and has to be signed by the arbitrator/s. In a tribunal with more than one arbitrator, the signature of the majority members of the arbitral tribunal should be sufficient. However, the reason why such signature is omitted has to be stated clearly. An arbitrator who has a dissenting opinion may attach his opinion to the award.

The award has to include the names of the arbitral tribunal or sole arbitrator, place of arbitration and date the award is signed, legal reasons of the arbitral award unless otherwise agreed by parties or settled the dispute by the parties, and arbitration costs. The place where the arbitral award is rendered is the place of arbitration and the date when the arbitral tribunal signed and stamped on the award is the date of the arbitral award.

The arbitral award will be delivered to each party, and after the arbitral award comes into force it is binding and final, the parties or their heirs do not hold a right to appeal to an arbitration award.

- **Deadlines for issuing arbitral awards**

There is no provision on the deadline for arbitration tribunals to issuing arbitral awards under the Arbitration Law 2003.

13.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in Mongolia?

The Court has a right to set aside an arbitration award, by the parties' application, only under the following circumstances:²⁶⁶

- (i) if one party to the arbitration agreement did not have legal capability or, the arbitration agreement was invalid under the laws of a state;

²⁶⁶ Arbitration Law Article 40.2



- (ii) if the tribunal failed to provide the parties with the opportunity to make explanations on appeal, refusal, statement, evidence documents, and appeal to appointment of arbitrators and arbitration proceedings or;
- (iii) if the tribunal breached the procedure agreed upon by the parties on composing the arbitration panel and the arbitration proceedings;
- (iv) if the Tribunal rendered an award on issues that are not relevant to the arbitration agreement;
- (v) if a particular dispute is not subject to the jurisdiction of an arbitration dispute; and
- (vi) if a particular arbitration award infringes the interests and national security of Mongolia.

The application for setting aside an award must be made within three months from the date of the parties' receipt of the award.

13.19 What procedures exist for enforcement of foreign and domestic awards in Mongolia?

Article 3.2 of the Arbitration Law clearly states that the procedure of recognizing and enforcing foreign arbitral awards shall be regulated in accordance with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Award and Article 42 of the Arbitration Law which explained that:

If the relevant party fails to implement the award, the other party may submit its request to the Court to enforce the award by the court enforcement measures within three years after the arbitral award has come into force. The time limit to submit a request to enforce foreign arbitral awards in Mongolia is within three years after the arbitral award became valid.

The party applying for the enforcement of an award shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof. If an arbitration award or agreement is written in a foreign language, it has to be



translated into Mongolian and attached to an act on the enforcement of arbitral award.

If the Court considers an appeal to enforce an arbitration award as reasonable, it shall certify that a particular arbitration award and issue an execution notification pursuant to the Law on Civil Procedure. The arbitral award that came into force in accordance with this law and enforcement notification thereon shall be the grounds to conduct court enforcement measures, and altering the content of the above-mentioned documents shall be deemed as illegal.

13.20 Can a successful party in the arbitration recover its costs?

The basic position in relation to allocation of costs under the Arbitration Law, unless the parties agree otherwise, is that the costs of the arbitration will be borne by the losing party²⁶⁷.

If the claimant's claim is fully satisfied, the respondent pays the arbitration costs and if the claimant's appeal was dismissed, such costs are paid by the claimant and if partially satisfied, payment is allocated proportionally among the parties.

Similar provisions also can be found under the MINAC Arbitration Rules²⁶⁸ Moreover, 60% of the total basic expenses may be refunded in the event of:²⁶⁹

- (i) the parties have reached an amicable agreement before the hearing;
- (ii) the claimant has called back his statement of claim; or
- (iii) the case was dismissed because the respondent has satisfied the claim.

²⁶⁷ Arbitration Law Article 41

²⁶⁸ MINAC Arbitration Rules Article 25

²⁶⁹ MINAC Procedure for the Determination of Arbitration Costs Article 5



13.21 Are there any statistics available on arbitration proceedings in Mongolia?

(a) Caseload

Table on the total number of cases administered by the MINAC* are as follows:

Year	Total Number of cases
2013	51
2012	45
2011	41
2010	35
2009	31
2008	16
2007	25
2006	18
2005	11

*These statistics have been received from MINAC.

Table on the number of cases where one of the parties (claimant) is a foreign business entity/individual:

Year	Total Number of cases
2013	11
2012	6
2011	11
2010	15
2009	12
2008	9
2007	14
2006	19
2005	5

Table on the number of cases where the parties are foreign business entities/individual:

Year	Total Number of cases
2013	3
2012	3
2011	1
2010	1
2009	2
2008	2



2007	5
2006	6
2005	3

Table on the number of cases where the parties are Mongolian business entities/individual:

Year	Total Number of cases
2013	40
2012	23
2011	32
2010	9
2009	15
2008	10
2007	10
2006	6
2005	6

13.22 Are there any recent noteworthy developments regarding arbitration in Mongolia (new laws, new arbitration etc)?

In relation to the economic growth in Mongolia and expansion of economic foreign relations, from January 2013 onwards the name of the Mongolian National Arbitration Centre (MNAC) has been changed to “Mongolian International and National Arbitration Court (MINAC)”. The charter of the MINAC was adopted on 17 December 2012 by the Council of the MNCCI and became effective from 1 January 2013.



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14. MYANMAR



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14.1 Which laws apply to arbitration in Myanmar?

The Myanmar arbitration law is the Arbitration Act of 1944 (“the Arbitration Act”).

There is another set of legal provisions consisting of the “Arbitration (Protocol and Conventions) Act of 1939”²⁷⁰ (“the Protocol and Conventions Act”), which was enacted to give effect to the Geneva Convention.

14.2 Is the Myanmar arbitration law based on the UNCITRAL Model Law?

No. The Myanmar arbitration law is not based on the UNCITRAL Model Law.

14.3 Are there different laws applicable for domestic and international arbitration?

The Arbitration Act applies to domestic arbitration. The Protocol and Conventions Act applies to the enforcement of foreign awards made in Geneva Convention countries having reciprocal arrangements with Myanmar. The countries having reciprocal arrangements with Myanmar are Belgium, Czechoslovakia, Denmark, Estonia, Finland, France, Germany,

²⁷⁰ India Act No. VI of 1937.



Greece, Italy, Luxemburg, the Netherlands, Poland, Portugal, Romania, Thailand, Spain, Sweden, Switzerland and the UK.²⁷¹

14.4 Has Myanmar acceded to the New York Convention?

Myanmar has acceded to the New York Convention. However, it is still necessary to adopt domestic legislation in order to implement the New York Convention in Myanmar. Currently, no implementing legislation has been adopted. Myanmar's government published a draft law to give effect to the New York Convention on May 25, 2014 for public comments.

14.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

If both parties are domiciled in the country, it is unlikely that they can agree on foreign arbitration institutions, there is no existing precedent. Section 47 of the Arbitration Act provides to the effect that unless otherwise provided by any law for the time being in force, the Arbitration Act applies to all arbitrations and to all proceedings thereunder.

If one party is domiciled in the country and the other party abroad and these parties enter into a contract that amounts to a trading business, they cannot agree on foreign arbitration institutions since Myanmar's export Rules and Regulations provide that any disputes arising from trading must be arbitrated in Myanmar under the Arbitration Act. Apart from disputes arising from trading, there is no explicit legal authority as to whether one of the parties is domiciled in Myanmar and the other party abroad can agree on foreign arbitration institutions. Such authority may be implied from two cases where the arbitration was conducted by foreign arbitration institutions. Also, after 1988, when market-oriented reforms were introduced in Myanmar, quite a number of contracts between Myanmar parties and foreign parties, including contracts in which the Myanmar party

²⁷¹ Notification no. 180 dated December 2, 1938 of the then Department of Commerce and Industry.



is a government entity, have included provisions for foreign arbitration institutions.

14.6 Does the Myanmar arbitration law contain substantive requirements for the arbitration procedures to be followed?

The Arbitration Act does not contain substantive requirements for the arbitration procedures to be followed. The arbitral tribunal is not required to strictly follow formal judicial procedure. The arbitrators must, however, observe the fundamental principles of justice.

14.7 Does a valid arbitration clause bar access to state courts?

The mere existence of a valid arbitration clause included in an agreement does not bar access to state courts. If a party to such an agreement, however, commences legal proceedings with respect to the subject matter thereof, the other party has a right to get such proceeding stayed so as to enable the arbitration to proceed in accordance with the terms of the agreement.²⁷²

14.8 What are the main arbitration institutions in Myanmar?

No arbitration institution exists in Myanmar.

14.9 Addresses of major arbitration institutions in Myanmar?

Not applicable.

²⁷² Section 34, the Arbitration Act.



14.10 Arbitration Rules of major arbitration institutions?

Not applicable.

14.11 What is/are the Model Clause/s of the arbitration institutions?

Not applicable.

14.12 How many arbitrators are usually appointed?

Parties are free to agree on the number of arbitrators to be appointed. In the absence of such an agreement, there will be a sole arbitrator.²⁷³ In case of an even number of arbitrators appointed by the parties, the arbitrators must appoint an umpire not later than one month from the latest date of their respective appointments.²⁷⁴ If an arbitration clause provides that a reference must be to three arbitrators, one to be appointed by each party and the third by the two appointed arbitrators, the clause will be given effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.²⁷⁵

14.13 Is there a right to challenge arbitrators, and if so under which conditions?

An arbitrator may be challenged under the following conditions:

- Having a personal interest in the subject matter of dispute;
- Mishandling the arbitration proceedings;
- Incapability of acting as an arbitrator;
- Occurrence of misconduct.

²⁷³ Section 3 and Para 1, the First Schedule, the Arbitration Act.

²⁷⁴ Section 3 and Para 2, the First Schedule, the Arbitration Act.

²⁷⁵ Section 10, the Arbitration Act.



14.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

The Arbitration Act is silent on the parties' representation in arbitration. However, when and if court involvements occur during the arbitration, only counsel eligible to appear before Myanmar courts have the right of representation. Foreign lawyers would not have this right.²⁷⁶

14.15 When and under what conditions can courts intervene in arbitrations?

The court can intervene in arbitration proceedings in exercise of the powers conferred by the Arbitration Act. They are to (a) allow the parties to revoke the authority of an arbitrator; (b) appoint an arbitrator or umpire, or to fill up vacancy in certain circumstances; (c) set aside the appointment of a sole arbitrator by a party; (d) remove an arbitrator who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award, or who has misconducted himself or the proceedings; (e) terminate the effectiveness of the arbitration agreement; (f) give its opinion when a special case is submitted by an arbitrator; (g) direct the award to be filed; (h) modify or correct the award; (i) remit the award for reconsideration; (j) extend the time for the submission of an award; (k) pronounce judgment according to the award and pass a decree; (l) pass interim orders after the award is filed so as to prevent the rights of the person in whose favor a decree might be passed from being defeated or delayed; (m) supersede the reference; (n) summon the parties and witnesses whom the arbitral tribunal wishes to examine; (o) punish the parties or the witnesses, if they fail to give evidence or are guilty of contempt.

14.16 Do arbitrators have powers to grant interim or conservatory relief?

²⁷⁶ Rule 3, the Advocates' Admission Rules of 1954 and Pleader's Admission Rules of 1955.



An arbitral tribunal has the powers to pass interim orders.²⁷⁷ The court has powers to grant conservatory relief, which includes (i) preservation, interim custody or sale of any goods which are the subject-matter of the reference; (ii) securing the amount in difference in the reference; (iii) detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein; (iv) authorizing for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference; (v) authorizing any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; (vi) interim injunctions or the appointment of a receiver; (vii) appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.²⁷⁸

14.17 What are the formal requirements for an arbitral award (form; content; deadlines; other requirements)?

- **Formal requirements for arbitral awards**

The Arbitration Act makes no mention of detailed statutory requirements to constitute an award. An award may be composed of any words expressive of a decision. Detailed reasons are not necessarily required to be given in an award. An award made by the arbitrators must be signed by them, and the subsequent making of the award must be informed, by a written notice, to the parties.²⁷⁹

- **Deadlines for issuing arbitral awards**

Unless otherwise agreed, an arbitral tribunal must render its award within four months after entering on the reference or after having been called

²⁷⁷ Section 27, the Arbitration Act.

²⁷⁸ Para 5, the Second Schedule, the Arbitration Act.

²⁷⁹ Section 14, the Arbitration Act.



upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the court may allow.²⁸⁰

- **Other formal requirements for arbitral awards**

Registration of awards is mandatory if a transaction embodied therein is related to declaration or creation or assignment of any interest in immovable property. Awards are subject to stamp duty depending on the amount or value of the property to which the award relates.

14.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in Myanmar?

After an arbitral award has been converted into a judgment of a court and then a decree, no appeal can be brought against the court's decree, unless the decree is in excess of, or not otherwise in accordance with the award.²⁸¹ An appeal may result from the following orders passed by the court to a higher court having appellate jurisdiction authorized by law to hear appeals from original decrees. The orders are: (i) superseding an arbitration; (ii) on an award stated in the form of a special case; (iii) modifying or correcting an award; (iv) filing or refusing to file an arbitration agreement; (v) staying or refusing to stay legal proceedings where there is an arbitration agreement; (vi) setting aside or refusing to set aside an award.²⁸² No second appeal is possible from an order passed in appeal under this section. No appeal can be lodged from another order, apart from the orders mentioned above, but they are open to revision under section 115 of the Code of Civil Procedure of 1882 ("the Code of Civil Procedure").

An award may be set aside for any one of the following grounds²⁸³:

- (i) arbitrator's or umpire's misconduct;

²⁸⁰ Para 3, the First Schedule, the Arbitration Act.

²⁸¹ Section 17, the Arbitration Act.

²⁸² Section 39, the Arbitration Act.

²⁸³ Section 30, the Arbitration Act.



- (ii) arbitrator or umpire have improperly conducted the proceedings;
- (iii) award made after the arbitration is superseded;²⁸⁴
- (iv) award made after the arbitration proceedings have become invalid under section 35;²⁸⁵
- (v) award improperly procured;
- (vi) award otherwise invalid.

An application for setting aside an award may be submitted by a party to the court²⁸⁶ within 30 days from the date of service of the notice of filing the award.²⁸⁷

The court also has the powers to modify, in certain circumstances, correct or remit an arbitral award.²⁸⁸

14.19 What procedures exist for enforcement of foreign and domestic awards in Myanmar?

A procedure for enforcement of domestic awards exists. When the arbitral tribunal has made its award, a written notice of the making of the award must be given to the parties.²⁸⁹ Any party may request, in the form of an application, to file the award²⁹⁰ within 90 days from the date of such notice.²⁹¹ The arbitral tribunal must file its award together with its letter for request for filing, depositions and documents in a court²⁹² having jurisdiction in the matter to which the reference relates.²⁹³ The award must

²⁸⁴ Under section 19 of the Arbitration Act, when an award has become void or has been set aside, the Court may by order supersede the reference.

²⁸⁵ According to section 35 of the Arbitration Act, when legal proceedings upon the whole of the subject-matter of a reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending reference is, unless a stay of proceedings is granted, be invalid.

²⁸⁶ Section 33, the Arbitration Act

²⁸⁷ Article 158, the Limitation Act of 1908.

²⁸⁸ Sections 15 and 16, the Arbitration Act.

²⁸⁹ Section 14 (1), the Arbitration Act.

²⁹⁰ Section 14 (2), the Arbitration Act.

²⁹¹ Article 178, the First Schedule, the Limitation Act.

²⁹² Section 14, the Arbitration Act.

²⁹³ Section 31 (1), the Arbitration Act.



be accompanied by the evidence on the reference, the minutes of proceedings and a copy of the notice given to the parties.²⁹⁴ The court will proceed to pronounce judgment according to the award unless cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award is found, and a decree will follow.²⁹⁵

Foreign awards made in Geneva Convention countries having reciprocal arrangements with Myanmar are enforceable in Myanmar as if they were a domestic award.²⁹⁶ Such a foreign award may be allowed to be filed, on application, with a court having jurisdiction over the subject-matter of the award.²⁹⁷ The provisions of the Code of Civil Procedure relating to execution of decrees and orders are, *mutatis mutandis*, applicable to the execution of decrees and orders. The original award or an authenticated copy thereof must accompany the application for filing of the award. Also required to be attached are the original arbitration agreement or an authenticated copy thereof; evidence proving that the award has become final; and such evidence as may be necessary to prove that the award is a foreign award and that it meets the conditions required by the Protocol and Conventions Act and an affidavit showing the award is a foreign award that meets the conditions required by the Protocol and Conventions Act. If any document requiring to be produced is not in English, a translation into English, certified by a diplomatic or consular agent of the party's home country is required.²⁹⁸ The court will register the application as a miscellaneous proceeding and a written notice of the same will be sent to the other party to show cause why the award may not be filed.²⁹⁹ The court will pronounce judgment in terms of the award³⁰⁰ unless it is not satisfied that the award is enforceable. Upon the judgment pronounced, a decree

²⁹⁴ Referred to Rule 1 of rules under the Arbitration Act, High Court Notification No. 16 (General), dated the 28th August, 1924.

²⁹⁵ Section 17, the Arbitration Act.

²⁹⁶ Section 4, the Protocol and Conventions Act.

²⁹⁷ Section 5 (1), the Protocol and Conventions Act.

²⁹⁸ Section 8, the Protocol and Conventions Act.

²⁹⁹ Sections 5(2) and (3), the Protocol and Conventions Act.

³⁰⁰ Section 6 (1), the Protocol and Conventions Act.



follows.³⁰¹ The decree would be executable as if it was an ordinary decree of a Myanmar Court.

There is no procedure for the enforcement of foreign awards made outside Myanmar other than Geneva Convention countries having a reciprocal arrangement with Myanmar.

14.20 Can a successful party in the arbitration recover its costs in Myanmar?

In the absence of an agreement to the contrary, the cost of arbitration must be in the discretion of the arbitral tribunal. The arbitral tribunal may direct the parties to, and by whom, and in what manner, such costs or any part thereof must be paid.³⁰² A successful party in the arbitration could, therefore, recover its costs in Myanmar.

14.21 Are there any statistics available on arbitration proceedings in Myanmar?

No statistics are available on arbitration proceedings in Myanmar.

14.22 Are there any recent noteworthy developments regarding arbitration in Myanmar (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

The Drafting Committee of Myanmar's Parliament is in the process of gathering public comments on the draft law to give effect to the New York Convention.

³⁰¹ Section 6 (2), the Protocol and Conventions Act.

³⁰² Section 3 and Para 8 the First Schedule, the Arbitration Act.



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15. PAKISTAN



BY: JUSTICE S AHMED SARWANA

15.1 Which laws apply to arbitration in Pakistan?

Pakistan currently has the following arbitration regulations:

- i) The Arbitration Act, 1940 which governs and regulates domestic arbitration matters.
- ii) The Recognition and Enforcement (Arbitration Agreements & Foreign Arbitral Awards) Act, 2011 (“REA”). This Act incorporates the provisions of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 1958 as a part of the municipal laws of Pakistan and thereby facilitates the enforcement of international arbitration agreements and foreign arbitral awards in Pakistan.
- iii) The Arbitration (International Investment Disputes) Act, 2011 (“IIDA”) was enacted on 30 April 2011 to implement the International Convention on the Settlement of Investment Disputes between States and Nationals of other States (“ICSID Convention”).

15.2 Is Pakistan’s arbitration law based on the UNCITRAL Model Law?

The Arbitration Act, 1940 (“AA”) is based on the principles of English arbitration laws and the Second Schedule of the Pakistan Code of Civil Procedure, 1908. A new arbitration statute is under consideration by the Government.



15.3 Are there different laws applicable for domestic and international arbitration?

Domestic arbitration is governed by the AA while International arbitration falls within the realm of the REA.

15.4 Has Pakistan acceded to the New York Convention?

Pakistan signed the New York Convention on 20 December 1958 and ratified it on 12 October 2005. A foreign arbitral award made in a State which is a party to the New York Convention and such other State as may be notified by the Federal Government in the Official Gazette may be enforced in Pakistan.

15.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

There are no restrictions. Parties can agree on foreign arbitration (i) where both parties are domiciled in Pakistan and (ii) where one party is domiciled in Pakistan and the other in a foreign country.

15.6 Does Pakistan's arbitration law contain substantive requirements for the arbitration procedures to be followed?

The guiding principle is that the parties to an arbitration agreement are free to agree to any terms with respect to arbitration proceedings. An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule of the AA in so far as they are applicable to the reference. The requirements in the First Schedule include, among others, provisions relating to the appointment of arbitrators, umpire, recording of evidence on oath, production of documents and costs of arbitration.



15.7 Does a valid arbitration clause bar access to state courts?

The arbitration agreement can be enforced by filing an application to the courts under Section 34 of the AA for stay of proceedings commenced by any person who is a party to an arbitration agreement in respect of the matter forming the basis of the suit. The application must be made before filing a written statement or taking any other step in the proceedings.

Under the AA the power to grant a stay is not absolute. The Court may refuse to stay proceedings if by looking upon the facts and circumstances of the case the Court is satisfied that there is no sufficient reason for making reference to arbitration and substantial miscarriage of justice would take place or inconvenience would be caused to the parties if a stay is granted.

Under the REA arbitration agreements can be enforced by making an application to the Court for stay of proceedings. The Court has no discretion and it must stay the proceedings and shall refer the parties to arbitration unless it finds that the agreement itself is null and void, inoperative or incapable of being performed.

15.8 What are the main arbitration institutions in Pakistan?

There are no arbitration institutions in Pakistan.

15.9 Addresses of major arbitration institutions in Pakistan?

There are no arbitration institutions in Pakistan.

15.10 Arbitration Rules of major arbitration institutions?

Since there is no arbitration institution, there are no Arbitration Rules.

**15.11 What is / are the Model Clause / s of the arbitration institutions?**

There are no Model Clauses specific to Pakistan.

15.12 How many arbitrators are usually appointed?

Under the AA the parties are free to determine the number of arbitrators in the arbitration agreement. If the arbitration agreement is silent about the number of arbitrators, the reference shall be to a sole arbitrator. If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments. Where an arbitration agreement provides a reference to three arbitrators, the award of the majority, unless provided otherwise in the agreement, shall prevail. If the arbitration agreement provides for the appointment of more arbitrators than three, the award of the majority, or if the arbitrators are equally divided in their opinions the award of the umpire, shall prevail.

The REA does not have any provision relating to the appointment of arbitrators. Arbitration clauses directly or indirectly provide the number of arbitrators.

15.13 Is there a right to challenge arbitrators, and if so under which conditions?

There is no provision in the AA which gives a party the right to challenge arbitrators. However, a party may move the court under Section 11 for removal of an arbitrator if he can by evidence establish reasonable doubts about the arbitrator's independence or impartiality.



15.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

The parties may be represented by the counsel of their choice both in international and domestic arbitration proceedings. There are no nationality restrictions and parties can be represented by any counsel they deem fit. There is no law or regulation which prohibits a foreign counsel to work on arbitrations in Pakistan. The parties may even appoint non-lawyers as their representatives.

15.15 When and under what conditions can courts intervene in arbitrations?

Under the AA the courts in Pakistan may only intervene in the arbitration proceedings if they are required to do so by the parties to an arbitration agreement by making an application to:

- i) appoint an arbitrator where any appointed arbitrator neglects or refuses to act, or is incapable of acting or dies and parties do not supply the vacancy (Section 8);
- ii) remove arbitrators or umpire where the arbitrator or umpire has failed to use all reasonable dispatch to enter on the reference and make the award or misconducted himself or the proceedings (Section 11);
- iii) enlarge time for making an award (Section 28; Para 8, First Schedule);
- iv) set aside an arbitral award (Section 30);
- v) order the tribunal to deliver the award to the applicant on payment of fees into the court [Section 38(i)];
- vi) issue process to parties and witnesses to attend arbitration proceedings and assist in taking evidence (Section 43);
- vii) take interim measures (Second Schedule).



15.16 Do arbitrators have powers to grant interim or conservatory relief?

Under the AA the arbitrators do not have powers to grant interim or conservatory relief. It is the Court which has the power to issue orders for interim injunction, appointment of receiver, preservation of property, interim custody or sale of goods which are the subject matter of reference.

15.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

- **Formal Requirements for Arbitral Awards**

Section 14 of the AA requires that every arbitral award shall be made in writing and shall be signed by the arbitrators or umpire and shall state the reasons upon which the award is based in sufficient detail.

The arbitrators or umpire shall give notice in writing to the parties of the making of the award and signing thereof. Thereafter, an award or a signed copy of it, together with any depositions and documents, must be filed in the Court for pronouncement of Judgment in terms of the award.

- **Deadlines for issuing Arbitral Awards**

Unless a different intention is expressed in the arbitration agreement, an arbitral award shall be made within four months after the arbitrators have entered on the reference or they have been called upon to act by notice in writing by any party to the arbitration agreement or within such extended time as the court may allow. However, the time limit can be extended by the court or by the arbitrators with the consent of all the parties to the agreement as provided under Section 28. The Umpire shall make the award within two months of entering the reference or within such extended time as the Court may allow.



15.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in Pakistan?

Under the AA any party to an arbitration agreement or any person claiming thereunder, desiring to challenge the existence or validity of an award or to have its effect determined, shall apply to the court. The court shall then decide the question on affidavits provided that where the court deems it just and expedient, it may, inter alia, hear other evidence and pass an order for discovery and particulars as in an ordinary suit.

However, the Court shall not entertain such application challenging the existence or validity of an award or to have its effect determined unless the applicant has deposited in the Court the amount required to be paid under the award or has furnished security for the payment of such sum or the fulfillment of any other obligation by him under the award.

The court may, inter alia, set aside an award on the following grounds: (i) that the arbitrator or umpire misconducted himself or the proceedings; (ii) that the award has been made after issue, by the court, of an order superseding the arbitration; or (iii) that an award has been improperly procured or is otherwise invalid.

Under the REA recognition and enforcement of a foreign arbitral award may be refused on the following conditions:

- (i) the parties to the arbitration agreement were under some incapacity or the agreement was not valid under the law to which the parties have subjected it or under the law of the country where the award was made; or
- (ii) the party against whom the award is invoked was not given proper notice of the appointment of arbitrators or the arbitration proceedings or was unable to present his case; or
- (iii) the award deals with a difference not contemplated in the submission to arbitration or it contains decisions on matters beyond the scope of arbitration; or
- (iv) the arbitration procedure or the composition of the arbitral tribunal was not in accordance with the arbitration agreement or was not in



- accordance with the law of the country where the arbitration took place; or
- (v) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority under the law of which that award was made; or
 - (vi) the subject matter of the difference is not capable of settlement by arbitration under the law of the country; or
 - (vii) the award is contrary to the public policy of the country.

15.19 What procedures exist for enforcement of foreign and domestic awards in Pakistan?

- **Domestic Awards**

Where the validity of a domestic award is not challenged, or any challenge has been unsuccessful and the court sees no cause to modify, remit or set aside the arbitral award, the court, after the time for parties to apply to set aside the award has expired, may pronounce judgment according to the award, and issue a decree. Such a decree may be executed under the Code of Civil Procedure, 1908 as a decree issued in a suit.

- **Foreign Awards**

The court shall recognize and enforce a foreign award in the same manner as a judgment or order of a court in Pakistan. Section 5 of the REA stipulates that the party seeking enforcement shall furnish to the court the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof.

An award made under the ICSID Convention may be enforced through the IIDA. The party seeking to enforce such an award may register the award in the court subject to proof of any matters that may be prescribed and to the other provisions of the Act. Once registered, the award, as respects the pecuniary obligations which it imposes, shall be of the same force and effect for the purposes of execution as if it had been a judgment of the High



Court given when the award was rendered pursuant to the ICSID Convention and entered on the date of registration under the Act.

15.20 Can a successful party in an arbitration recover its costs?

There is no express provision in the AA which allows a successful party to recover costs of the dispute. The arbitrator or umpire may include the costs of arbitration in the award if so authorized by the arbitration agreement or by the terms of the reference. Under Paragraph 8 of the First Schedule to the AA the costs of the reference and award is at the discretion of the tribunal. The court may also make such orders as it thinks fit respecting the costs of arbitration where a dispute arises as to such costs and the award contains no sufficient provision concerning them.

The successful party in an international arbitration can recover the costs allowed by the arbitrator in the award.

15.21 Are there any statistics available on arbitration proceedings in Pakistan?

No statistics are available on arbitration proceedings in Pakistan.

15.22 Are there any recent noteworthy developments regarding arbitration in Pakistan (new laws, new arbitration institutions, significant court judgments affecting arbitration etc.)?

The High Court of Sindh at Karachi has consistently held that the discretion available to the Court under Section 34 of the AA is not available in the REA and the Court must stay the proceedings and refer the matter to arbitration unless it finds the arbitral agreement is null and void, inoperative or incapable of being performed. (*Cummins Sales & Service (Pakistan) Ltd. v. Cummins Middle East FZE*, 2013 CLD 292; *Far Eastern Impex (Pvt.) Ltd. v.*



Quest International Nederland BV, 2009 CLD 153; *Travel Automation (Pvt.) Ltd. v. Abacus International (Pvt.) Ltd.*, 2006 CLD 497)

It has been held by the High Court of Sindh that an exchange of emails between the parties is an “arbitration agreement in writing” as provided in Article II (2) of the NY Convention and does not necessarily require signature of both parties to be enforceable in law. *Metropolitan Steel Corporation Ltd. v. McSteel International U.K. Ltd.*, PLD 2006 Karachi 664

In *Lakbra Power Generation Company Ltd. v. Karadeniz Powership Kaya Bey and others*, 2014 CLD 337, the Plaintiff had filed a suit under the Admiralty Jurisdiction of the High Court Ordinance, 1980 and moved an application seeking arrest of the Defendant’s four vessels while the owner Karkey (Defendant No.5) filed an application under Section 4 of the REA asking for stay of the proceedings. The High Court held that in view of the fact that Karkey had itself initiated the proceedings under the ICSID Convention which were subsisting, the arbitration agreement, in the circumstances, was incapable of being performed and dismissed the application.

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16. PHILIPPINES



BY: MS. RENA RICO-PAMFILO

16.1 Which laws apply to arbitration in the Philippines?

The Philippines adopts a dual-system approach to arbitration with one law dealing with domestic arbitration and another law dealing with international arbitration.

First, domestic arbitration is governed by Republic Act 876. Republic Act 876 was enacted on 19 June 1953 and deals with domestic arbitration proceedings in the Philippines, i.e., arbitration between two Philippine entities or individuals with a seat of arbitration in the Philippines. This law provides who may be the parties to an arbitration, what matters may be subject to arbitration, when and how arbitration proceedings may be commenced. The law also provides the procedure for appointment of arbitrators, the qualifications of arbitrators, and the conduct of the arbitration proceedings. Finally, the law also provides the procedure and grounds to set aside, modify or correct an arbitral award. The law has been amended in part by Republic Act 9285 which governs international arbitration proceedings.

Second, international arbitration is governed by the Republic Act 9285 or the “Alternative Dispute Resolution Act of 2004,” enacted on 13 April 2004. The Philippines adopted with this law the UNCITRAL Model Law on International Commercial Arbitration.³⁰³ Republic Act 9285 amends to a certain extent the provision of Republic Act 876 on domestic arbitration, by providing that certain provisions of the UNCITRAL Model Law applies to domestic arbitration. These provisions include the enforcement of the arbitration agreement (Article 8), number and procedure of appointment and challenge of arbitrators (Articles 10-14), the arbitration procedure and making of the award (Articles 18-19, 29-32). Thus, to the extent indicated, the provisions of Republic Act 876 on domestic arbitration are modified

³⁰³ Section 19, R.A. 9285. The Philippines has not adopted the 2006 amendments to the UNCITRAL Model Law.



and adopt the provisions of the UNCITRAL Model Law. Republic Act 9285 further provides that Sections 22 to 31 therein applies to domestic arbitration. These Sections refer to legal representation in arbitration proceedings, confidentiality and designation of appointing authority, grant of interim measures of protection, place and language of the arbitration.

Republic Act 9285 also provides the procedure for ad hoc mediation³⁰⁴ in the Philippines.

Arbitration of disputes arising from construction contracts in the Philippines is governed by Executive Order 1008 or the Construction Industry Arbitration Law. The law created a body known as the “Construction Industry Arbitration Commission (CIAC)” which will have original and exclusive jurisdiction over disputes arising from, or connected with contracts entered into by parties involved in construction in the Philippines, whether the dispute arises before or after the completion of the contract, or after the abandonment or breach thereof. These disputes may involve government or private contracts. For the CIAC to acquire jurisdiction, the parties to a dispute must agree to submit the same to voluntary arbitration.³⁰⁵ Section 35 of Republic Act 9285 provides that construction disputes which fall within the original and exclusive jurisdiction of the CIAC shall include those between or among parties to, or who are otherwise bound by, an arbitration agreement, directly or by reference whether such parties are project owner, contractor, subcontractor, fabricator, project manager, design professional, consultant, quantity surveyor, bondsman or issuer of an insurance policy in a construction project. Further, the CIAC shall continue to exercise original and exclusive jurisdiction over construction disputes although the arbitration is "commercial" pursuant to the provisions of Republic Act 9285.

³⁰⁴ Administrative issuances of the Supreme Court govern court annexed mediation.

³⁰⁵ Section 4, Executive Order 1008 dated 4 February 1985.



16.2 Is the Philippine arbitration law based on the UNCITRAL Model Law?

Yes, Republic Act 9285 adopts the 1985 UNCITRAL Model Law to govern international arbitration proceedings.³⁰⁶

16.3 Are there different laws applicable for domestic and international arbitration?

Yes, Republic Act 876, as amended by Republic Act 9285 governs domestic arbitration and Republic Act 9285 (which includes, as an Annexure, the UNCITRAL Model Law), governs international arbitration.

16.4 Have the Philippines acceded to the New York Convention?

Yes, the Philippines acceded to the New York Convention on 6 July 1967, which entered into force in the Philippines on 4 October 1967.³⁰⁷ The Philippines has exercised both the reciprocity and commerciality reservations. While the Philippines was one of the first countries in Asia to accede to the New York Convention, it was only in 2004 under the provisions of Republic Act 9285 that enabling legislation on the Convention was enacted. Section 42 of Republic Act 9285 states the procedure for enforcing an award under the Convention.

The procedure for enforcement of arbitral awards that are not covered by the Convention shall be governed by the rules of procedure enacted by the Supreme Court of the Philippines. The Court may, on grounds of comity and reciprocity, recognize and enforce a non-Convention award as a Convention award.³⁰⁸

³⁰⁶ Section 19, Republic Act 9285.

³⁰⁷ The Philippines adopted reservations on applying the Convention only to awards rendered in contracting States and that the Philippines will only apply the Convention to differences arising out of legal relationships, whether contractual or not, that are considered commercial under national law.

³⁰⁸ Section 43, Republic Act 9285.



16.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

Yes, Republic Act 876, as amended by Republic Act 9285 governs domestic arbitration and Republic Act 9285 (which includes, as an Annexure, the UNCITRAL Model Law), governs international arbitration.

16.6 Does the Philippines arbitration law contain substantive requirements for the arbitration procedures to be followed?

For international arbitration proceedings, apart from the requirement that the arbitration agreement must be in writing, there are no mandatory substantive requirements for the arbitration procedures, following the provisions of the UNCITRAL Model Law.

For domestic arbitration, Republic Act 876 requires that the arbitration agreement be in writing and subscribed by the party sought to be charged, or by his lawful agent.³⁰⁹ In the institution of arbitration proceedings arising from contracts to arbitrate future controversies, the arbitration shall be instituted by service by either party upon the other of a demand for arbitration in accordance with the contract. Such demand shall set forth the nature of the controversy, the amount involved, if any, and the relief sought, together with a true copy of the contract providing for arbitration. The demand shall be served upon any party either in person or by registered mail.³¹⁰ In case of a submission agreement, the arbitration shall be instituted by the filing with the Clerk of the Regional Trial Court having jurisdiction of the submission agreement, setting forth the nature of the controversy and the amount involved, if any. Such submission may be filed by any party and shall be duly executed by both parties.³¹¹ In domestic arbitration proceedings, arbitrators are required to be sworn, by any officer

³⁰⁹ Section 4, Republic Act 876 as amended.

³¹⁰ Section 5(a), Republic Act 876 as amended.

³¹¹ Section 5(c), Republic Act 876 as amended.



authorized by law to administer an oath, to faithfully and fairly hear and examine the matters in controversy and to make a just award according to the best of their ability and understanding.³¹²

16.7 Does a valid arbitration clause bar access to state courts?

For both domestic and international arbitration proceedings, the existence of a valid arbitration clause bars access to the courts for the resolution *on the merits* of a dispute that is within the scope of the arbitration agreement.³¹³ However, parties to an arbitration may invoke the court's supervisory powers over arbitration proceedings under Republic Act 876 as amended (for domestic proceedings) and Republic Act 9285 (for international proceedings) in other ways. These include the power of the courts to (1) enforce the arbitration agreement, (2) act in the event of the failure of the Appointing Authority designated by law or agreement to act, (3) grant interim measures of protection and (4) set aside, vacate, modify or correct arbitration awards.

16.8 What are the main arbitration institutions in the Philippines?

The main arbitration institution in the Philippines is the Philippine Dispute Resolution Center, Inc. (PDRCI). It is a non-stock, non-profit organization incorporated in 1996 out of the Arbitration Committee of the Philippine Chamber of Commerce and Industry. It has for its purpose the promotion of arbitration as an alternative mode of settling commercial disputes and providing dispute resolution services to the business community. These services include the administration of arbitration proceedings, whether domestic or international, under its own rules of procedure and the

³¹² Section 13, Republic Act 876 as amended.

³¹³ Under Section 24 of Republic Act 9285, if one party disregards the arbitration agreement and commences an action in court, and the other party does not object by the end of the pre-trial conference, the court action shall continue unless both parties thereafter request that the dispute be referred to arbitration.



appointment of arbitrators when designated by the parties as an appointing authority.

16.9 Addresses of major arbitration institutions in the Philippines?

The address of the PDRCI is as follows:

Philippine Dispute Resolution Center, Inc.

3rd Floor Commerce and Industry Plaza (PCCI Building)

1030 Campus Avenue corner Park Avenue

McKinley Town Center, Fort Bonifacio Taguig City

Metro Manila, Philippines

Phone: +63 2 555-0798

Fax: +63 2 822-4102

Email: secretariat@pdrci.org

Website: www.pdrci.org

16.10 Arbitration Rules of major arbitration institutions?

The arbitration rules of the PDRCI are available on their website³¹⁴ and can also be purchased at their office.

16.11 What is/are the Model Clause/s of the arbitration institutions?

The model clause of the PDRCI as published in their website is as follows:

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the Philippine Dispute

³¹⁴ <http://www.pdrci.org/web/wp-content/uploads/2012/07/NEW-ARBITRATION-RULES-PDRCI.pdf>



Resolution Center, Inc. (PDRCI) Arbitration Rules as at present in force."

Note: Parties may wish to consider adding:

- (a) The appointing authority shall be...(name of institution or person)*
- (b) The number of arbitrators shall be...(one or three)*
- (c) The place of arbitration shall be...(city or country)*
- (d) The language(s) to be used in the arbitral proceedings shall be...(language")*

16.12 How many arbitrators are usually appointed?

In view of the modification of certain provisions in Republic Act 876 (for domestic arbitration), in both domestic and international arbitration, the parties are free to agree on the number of arbitrators.³¹⁵ If the parties fail to agree on the number of arbitrators, there shall be three.

For both domestic and international arbitration proceedings, the law provides that the appointing authority for administered arbitration proceedings or arbitration pursuant to institutional rules shall be the appointing authority designated in such rules. For ad hoc arbitration, the default appointing authority shall be the National President of the Integrated Bar of the Philippines or his duly authorized representative.³¹⁶ In the event that the Appointing Authority fails or refuses to act within 30 days from receipt of the request, the parties may apply to the courts.³¹⁷

³¹⁵ Article 11, UNCITRAL Model Law, Appendix A to Republic Act 9285 and is applicable to domestic arbitration proceedings by virtue of Section 33 of Republic Act 9285.

³¹⁶ Section 26, Republic Act 9285 and is applicable to domestic proceedings by virtue of Section 33 of Republic Act 9285.

³¹⁷ Section 27, Republic Act 9285 and is applicable to domestic proceedings by virtue of Section 33 of Republic Act 9285.

**16.13 Is there a right to challenge arbitrators, and if so under which conditions?**

Following the UNCITRAL Model Law, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made. These grounds for challenge apply to both domestic and international arbitration proceedings.

16.14 Are there any restrictions as to parties' representation in arbitration proceedings?

Republic Act 9285 provides that in international arbitrations conducted in the Philippines, a party may be represented by any person of his choice, including foreign lawyers or foreign law firms. However, foreign lawyers, unless admitted to the practice of law in the Philippines, shall not be authorized to appear as counsel in any Philippine court, or any other quasi-judicial body whether or not such appearance is in relation to the arbitration in which he appears.³¹⁸ Thus, local counsel will have to be engaged with respect to proceedings before Philippine courts even if related to international arbitration proceedings. Republic Act 9285 makes this provision applicable to domestic arbitration proceedings.

16.15 When and under what conditions can courts intervene in arbitrations?

For international arbitration proceedings with the seat of arbitration in the Philippines, Philippine courts may intervene or provide judicial support in arbitration proceedings in the following instances:

³¹⁸ Section 22, Republic Act 9285.



16.15.1 Protective orders to preserve confidentiality³¹⁹

The court where an action or appeal is pending in relation to international arbitration proceedings may issue a protective order to prevent or prohibit disclosure of documents or information containing secret processes, developments, research and other information where it is shown that the applicant shall be materially prejudiced by an authorized disclosure thereof.

16.15.2 Failure or refusal to act by the Appointing Authority³²⁰

Where the Appointing Authority fails or refuses to act in any of the instances provided under Articles 11(3), 11(4), 13(3) or 14(1) of the UNCITRAL Model Law within 30 days from receipt of a request, a party may renew its application before the appropriate Philippine court.

16.15.3 Ruling on a Jurisdictional Issue as a Preliminary Question³²¹

Where the arbitral tribunal rules as a preliminary question that it has jurisdiction under the provisions of Article 16(2) of the UNCITRAL Model Law, the aggrieved party may request, within 30 days from the receipt of the ruling, the appropriate Regional Trial Court to decide the matter.

16.15.4 Issuance and Enforcement of Interim Measures of Protection³²²

³¹⁹ Section 24, Republic Act 9285.

³²⁰ Section 27, Republic Act 9285.

³²¹ Article 16(3), UNCITRAL Model Law in relation to Article 6, UNCITRAL Model Law and Section 3(k), Republic Act 9285.

³²² Sections 28 and 29, Republic Act 9285.



Before the constitution of the arbitral tribunal, a party may request from a Court an interim measure of protection. Provisional relief may be granted against the adverse party (i) to prevent irreparable loss or injury; (ii) to provide security for the performance of any obligation; (iii) to produce or preserve any evidence; or (iv) to compel any other appropriate act or omission. The order granting provisional relief may be conditioned upon the provision of security or any act or omission specified in the order. Further, to the extent that the arbitral tribunal, after the constitution of the tribunal and during the course of the proceedings, has no power to act or is unable to act effectively, the request for interim relief may be made with the Court.

Interim or provisional relief is requested by written application transmitted by reasonable means to the Court and the party against whom the relief is sought, describing in appropriate detail the precise relief, the party against whom the relief is requested, the grounds for the relief, and the evidence supporting the request.

A party who does not comply with the order shall be liable for all damages resulting from non-compliance, including all expenses and reasonable attorney's fees incurred in obtaining the order's judicial enforcement.

Further, either party may apply to Court for assistance in implementing or enforcing an interim measure ordered by an arbitral tribunal.

16.15.5 Assistance in Taking Evidence³²³

The arbitral tribunal or a party with the approval of the arbitral tribunal may request the assistance of the courts in taking evidence. The court may execute the request within its competence and in accordance with the applicable Rules of Court on taking evidence.

³²³ Article 27, UNCITRAL Model Law



16.15.6 Setting Aside, Enforcement and Recognition of Arbitral Awards and Recognition and Enforcement of Foreign Arbitral Awards

The appropriate Regional Trial Court shall have the power to set aside arbitral awards issued under international arbitration proceedings with a seat of arbitration in the Philippines.³²⁴ The recognition and enforcement of an award in an international commercial arbitration shall be governed by Article 35 of the UNCITRAL Model Law.³²⁵

The recognition and enforcement of foreign arbitral awards, i.e., awards issued pursuant to arbitration proceedings with a seat in a country other than the Philippines, shall be filed with the Regional Trial Court and governed by the rules of procedure issued by the Supreme Court.³²⁶

It should be noted that proceedings for recognition and enforcement of an arbitration agreement or for vacation, setting aside, correction or modification of an arbitral award, and any application with a court for arbitration assistance and supervision shall be deemed as special proceedings and shall be filed with the Regional Trial Court (i) where arbitration proceedings are conducted; (ii) where the asset to be attached or levied upon or the act to be enjoined is located; (iii) where any of the parties to the dispute resides or has his place of business; or (iv) in the National Judicial Capital Region, at the option of the applicant.³²⁷

The above matters are specifically implemented by the Special Rules of Court on Alternative Dispute Resolution (A.M. No. 07-11-08-SC) (the “Special ADR Rules”) which took effect on 30 October 2009.

16.16 Do arbitrators have powers to grant interim or conservatory relief?

³²⁴ Article 34, UNCITRAL Model Law in relation to Section 3(k), Republic Act 9285.

³²⁵ Section 40, Republic Act 9285.

³²⁶ Section 42, Republic Act 9285.

³²⁷ Section 47, Republic Act 9285.



For both domestic and international arbitration proceedings, arbitrators have the power to issue interim measures of protection under the same circumstances as the courts described above. After constitution of the arbitral tribunal and during arbitral proceedings, a request for an interim measure of protection, or modification thereof, may be made with the arbitral tribunal. Interim relief may be granted (i) to prevent irreparable loss or injury; (ii) to provide security for the performance of any obligation; (iii) to produce or preserve any evidence; or (iv) to compel any other appropriate act or omission. The order granting provisional relief may be conditioned upon the provision of security or any act or omission specified in the order.³²⁸

Interim or provisional relief is requested by written application transmitted by reasonable means to the arbitral tribunal and the party against whom the relief is sought, describing in appropriate detail the precise relief, the party against whom the relief is requested, the grounds for the relief, and the evidence supporting the request.³²⁹

The order issued by the tribunal shall be binding upon the parties. A party who does not comply with the order shall be liable for all damages resulting from non-compliance, including all expenses, and reasonable attorney's fees incurred in obtaining the order's judicial enforcement.³³⁰

Further, unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute following the rules stated above. Such interim measures may include but shall not be limited to preliminary injunction directed against a party, appointment of receivers or detention, preservation, inspection of property that is the subject of the dispute in arbitration.³³¹

³²⁸ Section 28, Republic Act 9285.

³²⁹ Section 28, Republic Act 9285.

³³⁰ Section 28, Republic Act 9285.

³³¹ Section 29, Republic Act 9285.



16.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

- **Formal requirements for arbitral awards**

Both domestic and international arbitration proceedings follow the requirements of the UNCITRAL Model Law with regard to the form and contents of an arbitral award. The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30 of the UNCITRAL Model Law. The award shall state its date and the place of arbitration. After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

- **Deadlines for issuing arbitral awards**

There is no deadline or time limit for the issuance of arbitral awards under international arbitration proceedings. However, in domestic arbitration, Republic Act 876 requires that in the absence of an agreement between the parties, the award shall be rendered within 30 days after close of the hearings or if oral hearings have been waived, within 30 days after the arbitrators shall have declared the proceedings in lieu of hearing closed. This period may be extended by mutual consent of the parties.³³²

- **Other formal requirements for arbitral awards**

There are no other formal requirements to be followed.

³³² Section 19, Republic Act 876.



16.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded?

A decision of the Regional Trial Court confirming, vacating, setting aside, modifying or correcting an arbitral award, in both international and domestic arbitration proceedings, may be appealed to the Philippine Court of Appeals in accordance with the rules of procedure to be promulgated by the Supreme Court.

An arbitral award in international arbitration proceedings may be set aside under the grounds set forth in Article 34 of the UNCITRAL Model Law. Thus, an arbitral award may be set aside where the party making the application furnishes proof that:

- (i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the Philippines;
- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the UNCITRAL Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with the UNCITRAL Model Law; or



- (v) the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under Philippine law or the award is in conflict with Philippine public policy.

In domestic arbitration proceedings, an award may be vacated upon the petition of any party to the controversy when such party proves affirmatively that in the arbitration proceedings:³³³

- (i) The award was procured by corruption, fraud, or other undue means; or
- (ii) That there was evident partiality or corruption in the arbitrators or any of them; or
- (iii) That the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; that one or more of the arbitrators was disqualified to act as such under section nine hereof, and willfully refrained from disclosing such disqualifications or of any other misbehavior by which the rights of any party have been materially prejudiced; or
- (iv) That the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted to them was not made.

Where an award in a domestic arbitration is vacated, the court, in its discretion, may direct a new hearing either before the same arbitrators, a new arbitrator or arbitrators to be chosen in the manner provided in the submission or contract for the selection of the original arbitrator or arbitrators, and any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration and to commence from the date of the court's order.

These are specifically implemented by the Special ADR Rules.

³³³ Section 24, Republic Act 876.



16.19 What procedures exist for enforcement of foreign and domestic awards?

The recognition and enforcement of foreign arbitral awards rendered in a New York Convention country shall be governed by the said Convention.³³⁴ The recognition and enforcement of such arbitral awards shall be filed with the Regional Trial Court in accordance with the rules of procedure to be promulgated by the Supreme Court. Republic Act 9285 states that the said procedural rules shall provide that the party relying on the award or applying for its enforcement shall file with the court the original or authenticated copy of the award and the arbitration agreement. If the award or agreement is not made in any of the official languages, the party shall supply a duly certified translation thereof into any of such languages. The applicant shall also establish that the country in which foreign arbitration award was made is a party to the New York Convention.

If the application for rejection or suspension of enforcement of an award has been made, the Regional Trial Court may, if it considers it proper, vacate its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the party to provide appropriate security.

For arbitral awards issued in countries that are not signatories to the New York Convention, the recognition and enforcement of such awards shall be done in accordance with procedural rules to be promulgated by the Supreme Court. The Court may, on grounds of comity and reciprocity, recognize and enforce a non-convention award as a convention award.³³⁵

Republic Act 9285 states that a foreign arbitral award when confirmed by a court of a foreign country shall be recognized and enforced as a foreign arbitral award and not as a judgment of a foreign court.³³⁶ Further, a foreign arbitral award, when confirmed by the Regional Trial Court, shall be

³³⁴ Section 42, Republic Act 9285.

³³⁵ Section 43, Republic Act 9285.

³³⁶ Section 44, Republic Act 9285.



enforced in the same manner as final and executory decisions of courts of law of the Philippines.³³⁷

A party to the foreign arbitration proceeding may oppose an application for recognition and enforcement of the foreign arbitral award in accordance with the procedural rules to be promulgated by the Supreme Court only on those grounds enumerated under Article V of the New York Convention. Any other ground raised shall be disregarded by the Regional Trial Court.³³⁸

The recognition and enforcement of an award in an international commercial arbitration shall be governed by Article 35 of the UNCITRAL Model Law.³³⁹

For domestic arbitration proceedings, a party may, at any time within one month after the award is made, apply to the court having jurisdiction, for an order confirming the award; and thereupon the court must grant such order unless the award is vacated, modified or corrected, as prescribed herein.³⁴⁰ Notice of such motion must be served upon the adverse party or his attorney as prescribed by law for the service of such notice upon an attorney in action in the same court. A domestic arbitral award when confirmed shall be enforced in the same manner as final and executory decisions of the Regional Trial Court.³⁴¹

The above provisions of law are specifically implemented by the Special ADR Rules.

16.20 Can a successful party in the arbitration recover its costs?

There is no provision in Republic Act 9285 on the recovery of costs in an arbitration proceeding nor has there been a case decided by the Supreme

³³⁷ Section 44, Republic Act 9285.

³³⁸ Section 45, Republic Act 9285.

³³⁹ Section 40, Republic Act 9285.

³⁴⁰ Section 23, Republic Act 876 in relation to Section 40, Republic Act 9285.

³⁴¹ Section 40, Republic Act 9285.



Court dealing with this issue.³⁴² It is still uncertain on how the Philippine courts will react to a recovery of costs in an arbitration proceeding and whether an award of this nature will be enforced by Philippine courts. In *Asset Privatization Trust v. Court of Appeals* (300 SCRA 579), the arbitration panel in a domestic proceeding awarded damages and costs to a party, but on review, the Supreme Court vacated the award.

16.21 Are there any statistics available on arbitration proceedings in the Philippines?

The Secretariat of the Philippine Dispute Resolution Center, Inc. (PDRCI) compiled statistics on arbitration cases filed with the PDRCI. From 2004 to 2008 a total of 15 arbitration cases (domestic and international) were submitted under the auspices of the PDRCI. Out of these 15 cases, only one case was for use of facilities of PDRCI (room hire, transcription, secretarial services) and the remaining 14 cases were administered arbitration proceedings under PDRCI Rules. The majority of the cases are domestic arbitration proceedings. Only two out of the 15 cases are international arbitration proceedings.

From 2009 to 2013, a total of 39 arbitration cases were filed with the PDRCI, more than double the number of cases filed in the previous 5-year period. Only 25% of the cases filed from 2009 to 2013 were international arbitration cases. The cases filed with the PDRCI are primarily cases administered under the PDRCI Rules with 80% of the 39 cases classified as administered arbitration.

16.22 Are there any recent noteworthy developments regarding arbitration in the country (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

³⁴² There has been a Court of Appeals decision on the award of costs in arbitration which was struck down by the court as being “contrary to public policy.” Unfortunately, no definitive ruling on the matter was given by the Supreme Court as the parties to that case settled amicably and jointly withdrew the appeal before the Supreme Court.



RESPONDEK & FAN

Since February 2013 there have been no noteworthy developments regarding arbitration.

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Brief Profile:	Ms. Rico-Pamfilo is admitted to the Philippine Bar (2001) and the New York Bar (2009). She started her career in international arbitration at the SIAC / Singapore. Ever since moving to the Philippines she worked for an international law firm first, focusing on domestic and international commercial arbitration. She was also involved in various corporate transactional and project finance work on energy and infrastructure projects, including oil, gas, and power generation. Ms. Rico-Pamfilo is now Chief Legal Counsel of a private equity firm based in the Philippines and a Professor of Law at the Ateneo de Manila University School of Law on International Commercial Arbitration. She is also an accredited lecturer of the Philippine Judicial Academy on Arbitration. She lectures on Mandatory Continuing Legal Education seminar series both in the Philippines and in the US. She has delivered lectures in various countries in Asia on international arbitration and the UNCITRAL Model Law on International Commercial Arbitration, particularly arbitration in Singapore and in the Philippines.
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17. SINGAPORE



**BY: MR. CHAN LENG SUN, SC
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17.1 Which laws apply to arbitration in Singapore?

There are three primary arbitration statutes in Singapore:

- i. the International Arbitration Act (“**IAA**”)³⁴³, which adopts the 1985 UNCITRAL Model Law on International Commercial Arbitration (“**Model Law**”) and is also the implementing legislation for the recognition and enforcement of arbitral award under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “**New York Convention**”);
- ii. the Arbitration Act (“**AA**”); and
- iii. the Arbitration (International Investment Disputes) Act (“**AIDA**”), giving effect to the UN Convention on the Settlement of Disputes between States and Nationals of other States (the “**ICSID Convention**”).

As the ICSID Convention and AIDA come under a different regime administered by the World Bank, they are not relevant here.

The IAA applies to "international" arbitrations and to all arbitrations to which parties agree that the IAA or the Model Law should apply.

An arbitration is considered "international" under the IAA if:

³⁴³ The Text of the IAA and AA are available online at <http://statutes.agc.gov.sg>.



-
- (a) at least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business in any State other than Singapore; or
 - (b) one of the following places is situated outside the State in which the parties have their places of business;
 - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; or
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
 - (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

The AA applies to all arbitrations outside the scope of the IAA.

The main distinction between the IAA and the AA lies primarily in the extent and degree of possible court intervention in the arbitral process. Generally the AA allows for a greater scope of court intervention as compared to the IAA.

For example, under the IAA, the court's power to grant interim measures is restricted to situations of urgency, where the arbitral tribunal or institution is unable to act effectively, and by the permission of the arbitral tribunal or the agreement of parties. In contrast, under the AA, the court's power to grant interim measures is not restricted to the same degree although it must have regard to any applications or orders made by the tribunal when exercising its power to grant interim measures. Under the IAA, the arbitral tribunal has general power to grant "an interim injunction or any other interim measure"³⁴⁴, whereas under the AA, the arbitral tribunal has no such general power as such power is reserved for the courts.³⁴⁵

³⁴⁴ S. 12(1)(i) of the IAA.

³⁴⁵ S. 28 of the AA read with S. 31 of the AA.



Under the AA, parties may apply to the court to determine any question of law arising in the course of the arbitration proceedings which substantially affects the rights of the parties.³⁴⁶ Such application may be made with the agreement of all parties to the proceedings or the permission of the arbitral tribunal, provided that the court is satisfied that the application is timely and will result in cost-savings. A party may also appeal an award on a question of law arising out of the award by agreement of the parties or by leave of court provided the conditions under section 49 of the AA are satisfied.³⁴⁷

Both the AA and the IAA were amended in 2012 to allow parties to appeal on both positive and negative jurisdictional rulings by the tribunal.³⁴⁸

17.2 Is the Singapore arbitration law based on the UNCITRAL Model Law?

The IAA largely adopts the 1985 UNCITRAL Model Law (excluding Chapter VIII of the UNCITRAL Model Law which deals with recognition and enforcement of awards), with a few modifications. While the IAA requires arbitration agreements to be in writing, it was amended in 2012 to adopt a corresponding amendment to the 2006 UNCITRAL Model Law by expanding the definition of "in writing" to include agreements concluded by any means (orally, by conduct or otherwise), as long as their content is recorded in any form.

The 2006 UNCITRAL Model Law amendments to enforce interim measures have not been adopted in Singapore.

17.3 Are there different laws applicable for domestic and international arbitration?

³⁴⁶ S. 45, AA. All references to "S." are an abbreviation of the word "Section" and "Art." are an abbreviation of the word "Article".

³⁴⁷ S. 45, AA.

³⁴⁸ S. 21A, AA and s. 10, IAA.



Yes. Generally, the IAA governs international arbitration, while the AA governs domestic arbitrations seated in Singapore. Please refer to paragraph 1.1 above for further detail.

17.4 Has Singapore acceded to the New York Convention?

Yes. It is given effect under Part III of the IAA.

17.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

Yes. There are no restrictions.

17.6 Does the IAA contain substantive requirements for the arbitration procedures to be followed?

Yes. However, many of the provisions in Part II of the IAA and in the Model Law adopted pursuant to the IAA allow for parties to agree otherwise. For example, provisions relating to the power of the courts to grant interim measures and public policy grounds to challenge an award do not provide for parties to agree otherwise.

17.7 Does a valid arbitration clause bar access to state courts?

Under the IAA and the AA, arbitration agreements may be enforced by a party making an application to the courts for a stay of the court proceedings.

Under the IAA, a court must grant a stay if the conditions provided under the IAA are fulfilled and the court then has to direct the parties to proceed to arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed. Under the AA, a court has discretion whether or not to grant a stay.



Under the IAA and the AA, the courts also have the power to discontinue court proceedings in respect of which no further step has been taken for at least two years after a stay order was made.

17.8 What are the main arbitration institutions in Singapore?

Main arbitration institutions with presence in Singapore include the following:

- (a) the **Singapore International Arbitration Centre ("SIAC")**, which was established in 1991 (see: www.siac.org.sg);
- (b) the **Singapore Chamber of Maritime Arbitration ("SCMA")** (see: <http://www.scma.org.sg>);
- (c) the **WIPO Arbitration and Mediation Center Singapore Office ("WIPO")** (see <http://www.wipo.int/amc/en/center/singapore/>);
- (d) **International Centre for Dispute Resolution – Singapore ("ICDR")**, which was set up jointly between the International Division of the American Arbitration Association and the SIAC;
- (e) **Permanent Court of Arbitration - Singapore facility ("PCA")**.

In addition, the Law Society of Singapore has also set up the Law Society Arbitration Scheme ("LSAS"). (See: <http://www.lawsociety.org.sg/lsas/Default.aspx>.)

17.9 Addresses of major arbitration institutions in Singapore?

SIAC's address and contact details are as follow:

Singapore International Arbitration Centre

32 Maxwell Road

#02-01, Maxwell Chambers

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17.10 Arbitration Rules of major arbitration institutions?



The **SIAC Rules** (5th Edition, effective 1 April 2013) can be found on the SIAC's website at <http://www.siac.org.sg/our-rules/rules/siac-rules-2013>.

The **SCMA Rules** (2nd Edition 2009, as amended January 2013) can be found on the SCMA's website at http://www.scma.org.sg/pdf/rules_2009v3_eng.pdf.

The **WIPO Arbitration Rules** can be found at WIPO's website at <http://www.wipo.int/amc/en/arbitration/rules/newrules.html>

The **ICDR's Arbitration Rules** can be found at the ICDR's website at www.icdr.org.

The **PCA's Arbitration Rules 2012**, consisting of four sets of Optional Rules can be found at http://pca-cpa.org/shownews.asp?ac=view&pag_id=1261&searchkind=archive&nws_id=347

The **LSAS Arbitration Rules 2011** can be found at the Law Society of Singapore's website at http://www.lawsociety.org.sg/portals/0/ResourceCentre/eshop/pdf/Arbitration_Scheme_Handbook.pdf.

17.11 What is/are the Model Clause/s of the arbitration institutions?

(i) SIAC's standard model clause provides as follow:

"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 in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause.

*The Tribunal shall consist of _____**
arbitrator(s).

The language of the arbitration shall be _____."



SIAC also has model clauses for adoption of its expedited procedure and the Arb-Med-Arb process, which is a tiered dispute resolution mechanism administered by SIAC and SIMC.

The **SCMA** recommends the use of the following model clause:

"Any and all disputes 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 in Singapore in accordance with the Arbitration Rules of the Singapore Chamber of Maritime Arbitration ("SCMA Rules") for the time being in force at the commencement of the arbitration, which rules are deemed to be incorporated by reference in this clause".

The SCMA also has model clauses specifically designed for use with the Documents, Agreements and Forms of The Baltic and International Maritime Council ("**BIMCO**") as well as for use with its Bunker Claims Procedure for bunker-related disputes.

- (ii) **WIPO** recommends the use of the following model arbitration clause by parties to a contract:

"Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules. The arbitral tribunal shall consist of [a sole arbitrator] [three arbitrators]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute, controversy or claim shall be decided in accordance with the law of [specify jurisdiction]."

WIPO also has model clauses for mediation-arbitration clauses, for binding expert determination followed by arbitration, etc.

- (iii) The **ICDR** recommends the use of the following model clause for international commercial contracts:



"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules."

The parties should consider adding:

"The number of arbitrators shall be (one or three)";

"The place of arbitration shall be [city, (province or state), country]";

"The language(s) of the arbitration shall be ____."

- (iv) The **PCA** recommends the use of the following model clause by parties to a contract:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the PCA Arbitration Rules 2012."

- (a) *The number of arbitrators shall be ... (one, three, or five);*
- (b) *The place of arbitration shall be ... (town and country);*
- (c) *The language to be used in the arbitral proceedings shall be ..."*

The PCA also has a slightly different model arbitration clause for treaties and other agreements.

- (v) For the **LSAS**, the following model clause is recommended:

"Any dispute arising out of or in connection with this Contract, including any question regarding its existence, validity or termination, shall be determined by arbitration in Singapore in accordance with the LawSoc Arbitration Rules in force at the commencement of the arbitration."

17.12 How many arbitrators are usually appointed?



Parties are free to determine how many arbitrators they wish to appoint. If the parties have not determined the number of arbitrators, as a general rule, a single arbitrator will be appointed under the IAA (s. 9) and the AA (s. 12).

Certain institutional arbitration rules also provide for a default number of arbitrators if parties have not reached any agreement on the number. As such, if parties have agreed to adopt such rules, the default provisions in such rules will be applicable. For example, pursuant to the Rule 6.1 of the SIAC Rules (5th Ed.), if the parties have not agreed on the number of arbitrators, then generally a sole arbitrator will be appointed, unless it appears to the Registrar of the SIAC, giving due regard to any proposals by the parties, the complexity, the quantum involved or other relevant circumstances of the dispute that the dispute warrants the appointment of three arbitrators. All nominations of arbitrators are subject to the appointment by the President of the Court of the SIAC in his discretion (Rule 6.3).

17.13 Is there a right to challenge arbitrators, and if so under which conditions?

Art. 12 of the Model Law given the force of law through s. 3 of the IAA states as follows:

"...12(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware the appointment has been made."

Similar provision is made in respect of domestic arbitrations in S. 14(3) of the AA. The SIAC Rules also provide for a similar standard for challenge of arbitrators (Rule 11.1 of the SIAC Rules (5th Ed.)).

The IBA Guidelines on Conflicts of Interest is often referred to in practice to determine whether there is a possible conflict of interest.

The standard of bias or partiality that has been applied by the Singapore courts is whether there is an actual bias, imputed bias or apparent bias.



Proof of an actual bias will disqualify a person from sitting in judgment. Imputed bias arises where a judge or arbitrator may be acting in his own cause, for instance, if he has a pecuniary or proprietary interest in the case. If this is proven, disqualification is certain without the need to investigate whether there is a likelihood or a reasonable suspicion of bias.

The test for determining apparent bias is whether:

- (a) there are factual circumstances that have a bearing on the suggestion that the tribunal was or might be seen to be impartial; and
- (b) whether a reasonable and fair-minded person knowing all the facts would have a reasonable suspicion that the circumstances might result in the proceedings being affected by apparent bias if the arbitrator was not removed.

If the court has issued an order to remove the arbitrator but an award has already been issued, a party need only furnish proof of the court order for removal to support its application to set aside the award and the court will most likely set aside the award in the absence of compelling evidence to the contrary.³⁴⁹

17.14 Are there any restrictions as to the parties' representation in arbitration proceedings?

For international arbitration proceedings, there are no formal restrictions and parties are free to choose their representatives. There are no nationality restrictions and parties can choose to be represented by any counsel they deem fit, including non-Singaporean counsel.

In terms of rules governing the conduct of party representatives, parties are free to adopt the new IBA Guidelines on Party Representation. Party representatives who are lawyers may be bound by ethical rules in the jurisdiction(s) in which they practice.

³⁴⁹ *PT Central Investindo v Franciscus Wongso & Ors* [2014] SGHC 190.



17.15 When and under what conditions can courts intervene in arbitrations?

The courts may intervene in arbitration proceedings in Singapore in the following instances:

- (a) the courts may hear appeals on tribunal's rulings on jurisdiction, whether positive or negative (s. 10 of the IAA and s. 21A of the AA);
- (b) the court may hear applications to challenge an arbitrator if there is justifiable doubt regarding an arbitrator's impartiality or independence or if he does not possess the qualifications agreed by the parties (Art. 13 of the Model Law (First Schedule of the IAA) read with s. 3 of the IAA and s. 15(6) of the AA);
- (c) the court has powers to grant interim measures in aid of arbitration (as elaborated upon below);
- (d) the court has the power to compel the attendance of witnesses (s. 13 of the IAA and s. 30 of the AA);
- (e) with respect to domestic arbitrations, the court may in limited circumstances hear appeals:
 - (i) against a decision of the tribunal on a question of law³⁵⁰; and
 - (ii) to determine a preliminary point of law³⁵¹; and
- (f) the court also has power to set aside awards made in Singapore, or to refuse to recognize or enforce foreign awards.

In relation to interim measures the High Court has the same powers as a tribunal to order any interim measure, except security for costs and discovery of documents and interrogatories,³⁵² irrespective of whether the seat of arbitration is in Singapore.³⁵³ Although the court may order interim measures to aid, promote or support foreign arbitration, it may refuse to make such an order if, in its opinion, the fact that the place of arbitration is outside or likely to be outside Singapore makes such an order

³⁵⁰ S. 45 of the IAA.

³⁵¹ S. 49 of the IAA.

³⁵² IAA S. 12A(2). However, where the law governing the arbitration is not the IAA, the power to order security for costs and discovery orders is not excluded: see AA s. 31(1).

³⁵³ IAA S. 12A(1)(b).



inappropriate.³⁵⁴ Importantly, the High Court shall exercise its power to order interim measures "*only if and to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.*"³⁵⁵

17.16 Do arbitrators have powers to grant interim or conservatory relief?

An arbitral tribunal has the power to grant interim and conservatory relief under the IAA (s. 12(1) of the IAA, see for example s. 12(2)(d), (f) and (i); preservation and interim custody of property, interim injunctions and other interim measures) and the AA (s. 28(2), see for example 28(2)(e) and (g); preservation and interim custody of evidence and property). Under the IAA, the tribunal has general power to grant "an interim injunction or any other interim measure"³⁵⁶, whereas the under the AA, the tribunal has no such general power as such power is reserved for the courts.³⁵⁷

Institutional rules such as the SIAC Rules may also provide for powers of the arbitral tribunal to grant interim and conservatory relief, e.g. the SIAC Rules (5th Ed.) (Rule 26 (Interim and Emergency relief)).

17.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

• Formal requirements for arbitral awards

The IAA regulates the form and contents (Model Law, Art. 31). The award shall be made in writing and shall be signed by the arbitrator or arbitrators. For arbitral proceedings with more than one arbitrator, the signature of a

³⁵⁴ IAA S. 12A(3).

³⁵⁵ IAA S. 12A(6). This restriction does not apply where the governing law is not the IAA. Where the IAA does not apply, the High Court only needs to have regard to any application before or order made by the arbitral tribunal in respect of the same interim measure when exercising its powers to make interim orders: see AA s. 31(3).

³⁵⁶ S. 12(1)(i) of the IAA.

³⁵⁷ S. 28 of the AA read with S.31 of the AA.



majority of the tribunal shall suffice, provided that the reason for any omitted signature is stated.

The award shall state the reasons upon which it is based and state its date and the place of arbitration. The award must be delivered to each party.

The AA contains an almost identical regulation in s. 38.

If the tribunal makes an award on an issue, claim or part of a claim, it must specify in its award the issue, claim or part of a claim which is the subject matter of the award (s. 19A of the IAA and s. 33 of the AA).

- **Deadlines for issuing arbitral awards**

The IAA and the AA do not contain a specific deadline as to when the award must be rendered. Parties may apply to court to terminate an arbitrator's mandate if the arbitrator fails to act without undue delay under Art. 14 of the Model Law³⁵⁸ read with s. 3 of the IAA.³⁵⁹

For domestic arbitrations, in cases where the arbitration agreement or arbitration rules provide that an arbitrator has to issue his award within a specified time, the Singapore court has power under s. 36 of the AA to extend such time if the failure to grant an extension causes substantial injustice. Parties may agree to exclude such power of the Court. However, the Singapore court would not grant an extension unless exceptional circumstances can be shown, provided there is no prejudice. It has been held by the High Court of Singapore that the longer the delay in making the application to extend time, the less likely the court would exercise its discretion to extend time.³⁶⁰

- **Other formal requirements for arbitral awards**

³⁵⁸ First Schedule, IAA.

³⁵⁹ See *PT Central Investindo v Franciscus Wongso* [2014] SGHC 190.

³⁶⁰ *Ting Kang Chung John v Teo Hee Lai Building Constructions Pte Ltd* [2010] SGHC 20.



Institutional rules may further provide for rules to be followed with regard to the issue of the award. For example, according to Rule 28.2 of the SIAC Rules (5th Ed.) the Tribunal shall, before issuing the award, submit it in draft form to the Registrar within 45 days from the date on which the Tribunal declares the proceedings closed. Until approval by the Registrar as to its form, the final award shall not be issued by the Tribunal.

17.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded?

There is no right of appeal from an award under the IAA.

There is a limited and conditional right of appeal on questions of law for domestic arbitrations under the AA. Institutional rules such as the SIAC Rules also often provide that the award is final and binding and cannot be appealed (Rule 28.9 of the SIAC Rules (5th Ed.)).

Under the IAA, an award can only be set aside by the High Court:

- (a) if the making of the award was induced or affected by fraud or corruption;
- (b) if a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced; or
- (c) under the grounds provided in Art. 34 of the Model Law³⁶¹, namely if:
 - (i) a party to the arbitration agreement was under some incapacity or the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of Singapore;
 - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

³⁶¹ First Schedule of the IAA Art. 34.



- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to the arbitration may be set aside;
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Model Law from which parties cannot derogate, or failing such agreement, was not in accordance with the Model Law;
- (v) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this Singapore; or
- (vi) the award is in conflict with Singapore public policy.

The grounds to set aside an award are exhaustive and the court hearing an application to set aside an award under the IAA has no power to investigate the merits of the dispute or to review any decision of law or fact made by the tribunal.

The grounds for setting aside an award under section 48 of the AA are similar to that under the IAA. In addition, as mentioned in paragraph 1.1 above, it may be possible to appeal against an award with the agreement of all parties or leave of court under limited circumstances.

17.19 What procedures exist for enforcement of foreign and domestic awards in Singapore?

For international arbitrations seated in Singapore and for domestic arbitrations, an arbitral award may by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award (s. 19 of the IAA and s. 46 of the AA).



For international arbitrations seated outside of Singapore, a foreign arbitral award rendered in any of the countries that have acceded to the New York Convention may be enforced in a Singapore court under the IAA either by action or in the same manner as a judgment or order to the same effect, with the leave of the High Court (s. 29 of the IAA). The detailed procedure is set out in Part III of the IAA. A foreign award from a non-New York Convention country is enforceable like a domestic award under s. 46 of the AA.

No action to enforce an award shall be brought after the expiration of six years from the date of the award (s. 6(1)(c) of the Limitation Act).

Parties seeking the enforcement of a Singapore or foreign award must file an application for leave to enforce the award in the High Court of Singapore, along with a supporting affidavit. The supporting affidavit must:

- (a) exhibit the arbitration agreement (or any record of the content of the arbitration agreement) and the duly authenticated original award (or duly certified copies). Where the award, agreement or record is in a language other than English, a translation of it in the English language (duly certified) must be included;
- (b) state the name and the usual or last known place of abode or business (or in relation to a body corporate, its registered or principal address) of the applicant (the “**creditor**”) and the person against whom it is sought to enforce the award (the “**debtor**”); and
- (c) as the case may require, state either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

In Singapore, the persons appointed to authenticate original awards and certify copies of the award and original arbitration agreement are:

- (i) the Registrar and Deputy Registrar of the Singapore International Arbitration Centre³⁶²;

³⁶² See International Arbitration (Appointed Persons under S. 19C) Order 2009.



- (ii) the Chief Executive and Deputy Chief Executive of Maxwell Chambers Private Limited³⁶³; and
- (iii) the Registrar and Chairman of the Singapore Chamber of Maritime Arbitration.³⁶⁴

An order giving leave must be drawn up by or on behalf of the creditor and submitted to the Court (the "**Order**").

After the Court grants leave, a copy of the Order must be duly served on the debtor by delivering a copy to the usual or last known place of abode or business (or in relation to a body corporate, its registered or principal address) or in such manner as the Court may direct. The copy of the Order served on the debtor must state the right of the debtor to apply to set aside the Order within the relevant time (see paragraph immediately below). Service out of jurisdiction is permissible without leave and the relevant Singapore Rules of Court for service out of jurisdiction will apply in relation to such an order.

The debtor will have 14 days following service (or if the order to be served out of jurisdiction, such other period as the Court may fix) to contest recognition and enforcement by applying to set aside the Order. The award shall not be enforced until after the expiration of the above-mentioned period or, if the debtor applies to set aside the order, until the application is finally disposed of.

Once the Order is obtained, the award can be enforced in the same manner as a judgment of the Singapore High Court. The usual enforcement procedures prescribed in the Singapore Rules of Court will apply thereafter for various methods of enforcement such as application for writ of seizure and sale, garnishee order, etc.

A court hearing the application for enforcement of a foreign award cannot review the case on the merits. It may, however, refuse to grant enforcement of the award and set aside the court order granting leave to enforce the award in Singapore if the grounds set out in the IAA are proven. Such

³⁶³ See International Arbitration (Appointed Persons under S. 19C) Order 2009.

³⁶⁴ See International Arbitration (Appointed Persons under S. 19C) Order 2010.



grounds are substantially similar to the grounds for setting aside of an award for Singapore-seated arbitrations (as described above), with an additional ground that recognition and enforcement may be refused if the award has not yet become binding on parties, or has been set aside or suspended by a competent authority in which, or under the law of which the award was made.³⁶⁵

17.20 Can a successful party in the arbitration recover its costs in Singapore?

The tribunal may award costs in its discretion or parties may request costs to be taxed by the Registrar of the SIAC pursuant to s. 21 of the IAA for international arbitrations or by the Registrar of the Supreme Court pursuant to s. 39 of the AA for domestic arbitrations.

As a general rule, the majority of tribunals will apply the principle that costs will follow the event, i.e. the prevailing party will get (at least) part of their costs paid by the losing party. The degree to which a successful party would recover its costs will depend on various factors, such as the circumstances of the specific matter and the conduct of the parties in the matter.

17.21 Are there any statistics available on arbitration proceedings in the country?

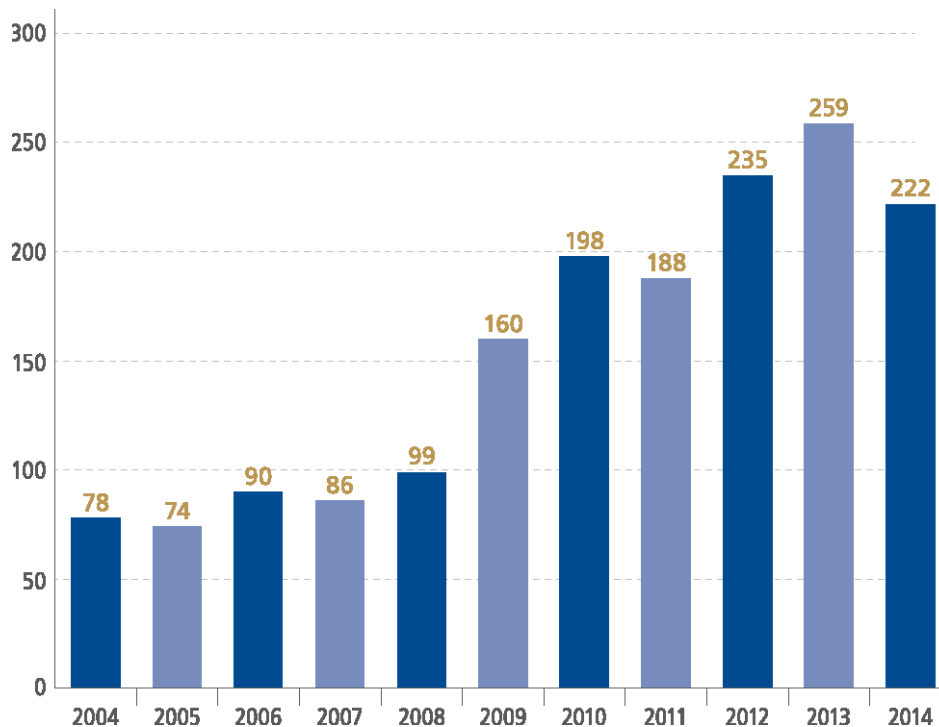
As of 2013, the SIAC received 259 new cases, a 10.2% increase in new filings compared to 2012. The active caseload as of 31 December 2013 was 619 cases. The SIAC published the following statistics on its website³⁶⁶, summarizing the number of new cases handled by the SIAC from 2001 until 2013.

³⁶⁵ See s. 31(2) of the IAA, as well as Art. V of the New York Convention (Second Schedule to the IAA).

³⁶⁶ <http://www.siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics>



Total Number of New Cases Handled by SIAC



17.22 Are there any recent noteworthy developments regarding arbitration in the country (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?

There have been a number of court decisions affecting arbitration in Singapore. Selected noteworthy decisions are described below.

Dual remedies of setting aside and resisting enforcement

In *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372; [2013] SGCA 57 ("**Astro**"), the Singapore Court of Appeal (SGCA) has ruled that a party against whom an award is made has an "active" remedy of seeking to set aside the award and a "passive" remedy of resisting enforcement. Accordingly, even if a party had failed to apply to set



aside an award or to challenge the tribunal's preliminary ruling on jurisdiction under Art. 16(3) of the Model Law, it can apply to resist the enforcement of an award.

Non-arbitrability of certain claims

In *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414, the court ruled that insolvency claims which are based on the operations of the statutory provisions of the insolvency regime, such as provisions to void the transfer of property made with an intention to defraud creditors³⁶⁷, unfair preferences or transactions at an undervalue³⁶⁸ are non-arbitrable.

In *Silica Investors v Tomolugen Holdings Ltd* [2014] 3 SLR 815, the Singapore High Court ruled that a stay of Singapore court proceedings under s. 6(2) of the IAA cannot be granted in the case of a non-arbitrable claim, and that most minority oppression claims are generally not arbitrable, except in exceptional cases where all shareholders are bound by the arbitration agreement and the remedy or relief sought would affect only the parties to the arbitration.

Rejection of the "group of companies" doctrine

In a minority of arbitration cases decided in other jurisdictions, some tribunals had rendered awards binding companies which were part of the same group of companies and closely associated to a party to arbitration agreement, even though such third party companies were not parties to the arbitration agreement. This is known as the "group of companies" doctrine.

In *Manuchar Steel Hong Kong v Star Pacific Line Pte Ltd* [2014] SGHC 181, the Singapore High Court clarified that an arbitral award cannot impose obligations on non-parties to an arbitration agreement, even if those non-parties were part of the same group, rejecting the applicability of "group of companies" doctrine in Singapore. The Singapore High Court held that the corporate veil would only be pierced in exceptional circumstances where there was evidence of abuse of the separate legal entity of companies.

³⁶⁷ S. 73B of the Conveyancing and Law of Property Act.

³⁶⁸ S. 98 and 99 of the Bankruptcy Act, read with s. 329(1) of the Companies Act.

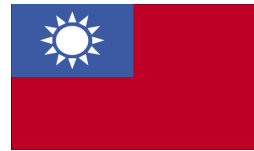


No grant of unworkable injunctions

In *Maldives Airports Co Ltd v GMR Male International Airport Pte Ltd* [2013] SGCA 16, the SGCA discharged an injunction in support of arbitration on the basis that damages were an adequate remedy and the injunction would be too difficult to supervise. The decision in *Maldives Airports* further confirmed that:

- (i) S. 12A of the IAA allows the court to grant an Anton Piller or Mareva or any other order necessary for preservation of evidence and assets, the term “assets” being confined to such contractual rights as lend themselves to being preserved;
- (ii) the standards for the grant of interim measures in an arbitration are no different from the standards applied to civil court cases; and
- (iii) no leave was required to appeal against the grant of an interim injunction by the Singapore High Court.

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18. TAIWAN

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18.1 Which laws apply to arbitration in Taiwan?

Arbitration conducted in Taiwan is governed by the so-called “Arbitration Law”. The Law replaced its predecessor, the “Commercial Arbitration Act” of 1961, and rendered the Republic of China (hereinafter Taiwan) arbitration regime more consistent with international standards. The Arbitration Law became effective in 1998, and was last amended in December, 2009. It applies to both domestic and international arbitrations conducted in Taiwan.

In addition to the Arbitration Law, the Rules on Arbitration Institution, Mediation Procedures and Fees also regulate arbitrations conducted in Taiwan. This set of rules sets forth requirements and procedures for the setting up of an arbitration institution and provides a default method for the calculation of arbitration fees, which applies to both institutional and *ad hoc* arbitration.

18.2 Is the Taiwanese Arbitration Law based on the UNCITRAL Model Law?

The Arbitration Law was drafted with reference to the UNCITRAL Model Law on International Commercial Arbitration, as well as a view to legislation in the U.S., UK, Germany and Japan. Unlike most national arbitration laws, however, Taiwan’s Arbitration Law contains detailed arbitrator qualification requirements and requires training of arbitrators, which appears inconsistent with international norms.



18.3 What constitutes an arbitral agreement?

Article 1 of the Arbitration Act defines an arbitral agreement as an agreement between the parties to submit to arbitration any dispute that has arisen or may arise in connection with a defined legal relationship between them.³⁶⁹³⁷⁰ The definition is worded similarly to Article 7 of the Model Law on International Commercial Arbitration.³⁷¹

In addition Article 1 limits arbitral disputes to those which may be settled in accordance with the law. In other words, parties may not enter into an agreement to arbitrate criminal matters or domestic relations disputes.

Article 1 further provides that an arbitral agreement must be in writing. Written documents, documentary instruments, correspondence, facsimiles, telegrams, or any other similar types of communication between the parties that may evince the parties' mutual intention to arbitrate may all constitute an arbitration agreement.³⁷²

18.4 Separability of Arbitral Clauses

Article 3 of the Arbitration Law provides that the validity of an arbitration clause which forms part of a principal contract between the parties shall be determined separately from the rest of the principal contract. Therefore, even if in the case that the principal contract is nullified, invalid, revoked, rescinded or terminated, the validity of the arbitral clause is determined separately, so as to facilitate arbitration.³⁷³

³⁶⁹ See YANG, CHONG-SEN (楊崇森) ET AL., On Arbitration (仲裁法新論), pp. 56 (3rd ed. 2008).

³⁷⁰ See LIN, JYUN-YI (林俊益), The Practical Benefit of Arbitration Law (仲裁法之實用權益), pp. 61-62 (1st ed. 2001).

³⁷¹ See Arbitration Law of R.O.C. Article 1, Paragraph 3 and 4; the sorts of "writing form" include and not limited to written documents, documentary instruments, correspondence, facsimiles and telegrams. See also UNCITRAL Model Law on International Commercial Arbitration (hereinafter UNCITRAL Model Law) Article 7 (2) and 16 (1).

³⁷² See Arbitration Law of R.O.C. Article 1.

³⁷³ See Arbitration Law of R.O.C. Article 3 and UNCITRAL Model Law Article 16 (1).



18.5 Force of Arbitral Agreement

The main force of an arbitral agreement is to suspend court proceedings when disputes can be referred to arbitration. If one of the parties to an arbitral agreement commences a legal action in conflict with the arbitral agreement, the court shall, upon petition by the adverse party, suspend the legal action and order the suing party to submit to arbitration within a specified time, unless the counter party has already proceeded to respond to the legal action. After the suspension, the legal action shall be deemed to have been withdrawn when an arbitral award is made. If the suing party fails to submit to arbitration within the specified time period ordered by the court, the court shall dismiss the legal action.³⁷⁴

18.6 Principle of Clarity and Definiteness and the Right of Procedural Choice

The clarity of an arbitral agreement may not only affect the validity of the agreement but also essentially influences the ensuing arbitral proceedings. For example, in the civil ruling of Taiwan Supreme Court 87 Tai-Kang-Tzu No. 88, an arbitral agreement stated that certain disputes “may,” instead of “shall,” be submitted to arbitration; the agreement was deemed valid by the Supreme Court. However, the ruling also dismissed the legal action brought by the plaintiff (who argued that the dispute should be arbitrated) because the court interpreted the arbitral agreement to be not binding.³⁷⁵

In addition, the court has ruled that an agreement to either arbitrate or litigate entitles the parties to choose either course of action. If a party pursues legal action, the other party may no longer be able to submit the dispute to arbitration. Likewise, when a party commences arbitration, the other party will not be able to sue in court.

A clear and definite arbitration agreement should also stipulate the following procedural factors:

- (1) **The place of arbitration:** The place of arbitration is important because it determines which country’s *lex arbitri* will govern the

³⁷⁴ See Arbitration Law of R.O.C. Article 4 and UNCITRAL Model Law Article 8 (1).

³⁷⁵ See also the Taiwan High Court 84 Kang-Tzu No. 753.



arbitration process. In addition, whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the country where the arbitration takes place and the country or countries where the award may have to be enforced is important to the arbitration. In the absence of an agreement, the place of arbitration is to be determined by the arbitral tribunal.³⁷⁶

- (2) **The arbitrator(s) and arbitral institution:** In the absence of an appointment of an arbitrator or a method of appointment in an arbitral agreement, each party shall appoint an arbitrator for itself. The appointed arbitrators shall then jointly designate a third arbitrator to be the chairperson. The parties are free to submit their dispute to an arbitral institution of their own choice.³⁷⁷
- (3) **The language of the proceedings:** Parties to a trans-national dispute may designate a language or languages to be used to conduct the arbitral proceedings. Interpreters shall, however, be provided under the direction of the arbitral tribunal in the event that a party or an arbitrator is not familiar with the language of arbitration. In addition, it is also advisable to make an agreement beforehand on how those translation costs are to be split and paid by the parties along with the other arbitration costs. In practice, if the parties fail to designate the language to be used in the arbitration proceedings, the arbitral tribunal would select one for the parties. Most frequently the language chosen by the arbitrators will be Mandarin Chinese.³⁷⁸
- (4) **The arbitration rules:** In the absence of an agreement on the procedural rules governing the arbitration, the arbitral tribunal shall apply the Arbitration Law. Where the Arbitration Law is silent, the arbitral tribunal may apply the Code of Civil Procedure *mutatis mutandis* or such other procedural rules it deems proper.³⁷⁹ In practice, parties may agree on certain arbitral rules or guidelines issued by arbitral institutions or international organizations, such as The Arbitration Rules of the Chinese Arbitration Association

³⁷⁶ See Arbitration Law of R.O.C. Article 20.

³⁷⁷ See Arbitration Law of R.O.C. Article 9, Paragraph 1 and 4.

³⁷⁸ See Arbitration Law of R.O.C. Article 25.

³⁷⁹ See Arbitration Law of R.O.C. Article 19.



(Taipei) or the UNCITRAL Model Rules.

- (5) **The enforcement of an arbitral award:** An award may not be enforceable unless a competent court has granted an enforcement order. The arbitral award may be enforced without having an enforcement order granted by a competent court, however, if the contending parties so agree in writing and the arbitral award concerns any of the following subject-matters:
 - (a) Payment of a specified sum of money or certain amount of tangible things or valuable securities;
 - (b) Delivery of a specified movable property.³⁸⁰
- (6) **The confidentiality of arbitration:** Article 15 of the Arbitration Act requires the arbitrator to “uphold the principle of confidentiality in conducting the arbitration.” Arbitral proceedings cannot be made public unless agreed upon by both parties.³⁸¹ In addition, Article 32 requires the arbitrators to keep the deliberations of the tribunal confidential.³⁸² There is, however, no clear rule regarding the extent to which the parties to the arbitration are under the obligation to keep information relating to the dispute secret. In practice, in Taiwan, parties to the arbitration rarely agree to impose a duty of confidentiality among them.

18.7 What are the main arbitration institutions in Taiwan?

Taiwan neither has a so-called “national arbitration center” nor a default appointing authority. An arbitration institution can only be established if it meets the requirements set forth under the Rules on Arbitration Institutions, Mediation Procedures and Fees. Currently there are four registered arbitral institutions in Taiwan, including:

- (1) **The Arbitration Association of the Republic of China** (also known as the “Chinese Arbitration Association, Taipei” or the

³⁸⁰ See Arbitration Law of R.O.C. Article 37, Paragraph 2.

³⁸¹ See Arbitration Law of R.O.C. Article 15.

³⁸² See Arbitration Law of R.O.C. Article 32.



“CAA”) is the leading arbitral institution in Taiwan. It is based in Taipei, Taiwan, and has 2 branch offices in Taiwan, and 2 liaison offices in China. In addition to arbitration, it provides a wide range of dispute settlement administration services, including mediation, dispute review board and other alternative dispute resolution proceedings. In 2011, the CAA handled 109 cases.³⁸³

- (2) The **Taiwan Construction Arbitration Association**, established in 2001, specializes in construction disputes.
- (3) The **Chinese Construction Industry Arbitration Association** also specializes in construction disputes.
- (4) The **Association of Labor Dispute Construction Arbitration of the Republic of China** specializes in labor disputes.

18.8 How many arbitrators are usually appointed?

Parties are free to agree on the method of appointment of arbitrators and the number of arbitrator(s) as long as a single arbitrator or an odd number of arbitrators is designated and the arbitrators selected meet the qualification requirements listed in Articles 6 to 8 of the Arbitration Law. Article 9 of the Arbitration Law provides that in the absence of an appointment of an arbitrator or an agreed method of appointment in an arbitral agreement, three arbitrators shall be appointed. Each party shall appoint one arbitrator and the appointed arbitrators shall then jointly designate a third arbitrator to be the chair of the arbitral tribunal.

Article 5 of the Arbitration Law requires that only a natural person can be appointed as an arbitrator. The Article further provides that “if the parties agreed to appoint a corporate entity or any other organization other than an arbitration institution as an arbitrator, the selection is null and void and it shall be deemed that no arbitrator was appointed.” In practice, if the parties appoint an arbitral institution as an arbitrator, it is also deemed that no arbitrator was appointed.

³⁸³ See <http://www.arbitration.org.tw/english/index-1.html> (last visited February 11, 2013).



In arbitrations administered by a Taiwanese arbitral institution, unless the parties otherwise agree, a similar method of appointment of arbitrators to that laid out in Article 9 of the Arbitration Law applies, the only difference being that if a party fails to nominate an arbitrator or if the two arbitrators fail to nominate the chair arbitrator, the parties shall then ask the arbitration institution to make the appointment on their behalf. The institution shall notify the parties and the appointed arbitrators of all arbitrator appointments in writing.³⁸⁴ The process of appointing arbitrators and constituting the arbitral tribunal will usually resemble the following:³⁸⁵

- (1) The claimant submitting the dispute to arbitration chooses an arbitrator and notifies in writing the respondent as well as the appointed arbitrator.
- (2) After the respondent has chosen an arbitrator, it in turn notifies in writing the claimant and the appointed arbitrators.
- (3) The appointed arbitrators then jointly designate a third arbitrator to be the chair and the three arbitrators together constitute the arbitral tribunal, which shall notify in writing both parties of the final appointment.

Pursuant to Article 14 of the Arbitration Law, the appointment of arbitrators made by an arbitral institution or the court shall not be challenged by the parties. Nevertheless, Article 16 of the Arbitration Law provides that the parties may challenge an appointment if “the arbitrator does not meet the qualifications agreed by the parties or if the arbitrator has a conflict of interest with one of the parties”. In addition, if the appointment falls into any of the circumstances listed in Article 40 of the Arbitration Law, a party may still petition the court to set aside the arbitral award.³⁸⁶

In arbitrations administered by the Chinese Arbitration Association, Taipei, if a party wishes to remove an arbitrator from a panel of more than 1 arbitrators, the arbitral tribunal shall determine whether to sustain the challenge with the challenged arbitrator refrained from taking part. On the

³⁸⁴ See Arbitration Law of R.O.C. Article 9, Paragraph 4 and Article 10, Paragraph 1.

³⁸⁵ See HU,YUAN-JHEN (胡元禎), *An Introduction to Arbitration*. FT Law Review, Vol. 159, pp. 71.

³⁸⁶ See YANG,CHONG-SEN (楊崇森) ET AL., *supra* note 1, pp. 167.



other hand, if a party wishes to remove a sole arbitrator, the request shall be submitted to the court for determination.

18.9 Qualifications of Arbitrators

Unlike in most other countries, in Taiwan not everyone is eligible to be appointed as an arbitrator. According to the Arbitration Law, in order to act as an arbitrator, a person must possess legal or other professional knowledge or experience, a reputation for integrity and impartiality and any of the following qualifications:

- (1) having served as a judge or a prosecutor;
- (2) having practiced as a lawyer, accountant, architect, or mechanic, or in any other commerce-related profession for more than five years;
- (3) having acted as an arbitrator of a domestic or foreign arbitral institution;
- (4) having taught as an assistant professor or higher position in a domestic or foreign college certified or recognized by the Ministry of Education; and,
- (5) being specialized in a particular field or profession and having practiced for more than five years.³⁸⁷

Again contrary to international practice, Article 8 of the Arbitration Law allows only a few categories of persons to be listed on the roster of arbitrators of an arbitration association. In addition, the Article stipulates that anyone except those:

- (1) having served as a judge or prosecutor;
- (2) having practiced as a lawyer for more than 3 years;
- (3) having taught in a department or graduate school of law as professor for two years, as an associate professor for 3 years; or
- (4) having been registered as an arbitration institution prior to the amendment of the Arbitration Law in 1998 and having arbitrated a dispute shall receive training and obtain a passing certificate before they can be listed on a Taiwanese arbitration institution's roster of

³⁸⁷ See Arbitration Law of R.O.C. Article 6.



arbitrators.³⁸⁸ Because of the training requirement, the Chinese Arbitration Association, Taipei, has only been able to register foreign arbitrators, among foreign judges, prosecutors, lawyers, and law professors, to its roster of arbitrators.³⁸⁹

18.10 Arbitrator's Independence and Impartiality

The independence and impartiality of arbitrators are the foundation of arbitration. The Arbitration Law takes several measures to assure that disputing parties have a just arbitration:

- (1) **Duty of disclosure:** An arbitrator is obliged to disclose any of the following circumstances to the parties:³⁹⁰ (a) the existence of any cause that would require judges to reject themselves from a judicial proceeding in accordance with Article 32 of the Code of Civil Procedure;³⁹¹ (b) an employment or agency relationship now or in the past between the arbitrator and one of the parties; (c) an employment or agency relationship now or in the past between the arbitrator and an agent of one of the parties or between the arbitrator and a key witness; and (d) the existence of any other circumstances which raise any justifiable doubts as to the impartiality

³⁸⁸ However, according to Arbitration Law of R.O.C. Article 8, those who meet both mentioned qualifications and any of the following criterions would be allowed to apply with an arbitration institution for being registered as an arbitrator exempted from training: 1. Having served practically as a judge or prosecutor; 2. Having practiced as a lawyer for more than three years; 3. Having taught with the department of law or graduate school of law of a domestic or foreign university or college accredited by the Ministry of Education as a professor for two years, or as an associate professor for three years, while teaching the major legal courses for more than three years; and 4. Having been registered as an arbitrator in any arbitration institution prior to the effectiveness of amendment of this Law, and acted practically as an arbitrator in a dispute.

³⁸⁹ See YANG, CHONG-SEN (楊崇森) ET AL., supra note 1, pp. 136 note 4. See also UNCITRAL Model Law Article 11 (1).

³⁹⁰ See Arbitration Law of R.O.C. Article 15, Paragraph 2.

³⁹¹ Code of Civil Procedure of R.O.C. Article 32 : "Any judge shall voluntarily disqualify himself/herself in the following circumstances: 1. When the judge, or the judge's spouse, former spouse, or fiancée is a party to the proceeding; 2. When the judge is or was either a blood relative within the eighth degree or a relative by marriage within the fifth degree, to a party to the proceeding; 3. When the judge, or the judge's spouse, former spouse, or fiancée is a co-obligee, co-obligor with, or an indemnitor to, a party to the proceeding; 4. When the judge is or was the statutory agent of a party to the proceeding, or the head or member of the party's household; 5. When the judge is acting or did act as the advocate or assistant of a party to the proceeding; 6. When the judge is likely to be a witness or expert witness in the proceeding; 7. When the judge participated in making either the prior court decision or the arbitration award regarding the same dispute in the proceeding."



or independence of the arbitrator.

- (2) **Withdrawal of an arbitrator:** A party may apply for withdrawal of an arbitrator, if the arbitrator does not meet the qualifications agreed by the parties, or if any of the aforementioned circumstances regarding disclosure obligations exist. A party shall not apply to withdraw an arbitrator whom it had itself appointed, however, unless the cause for withdrawal has arisen or become known after the appointment had been made.³⁹² In the Arbitration Law, violations of disclosure obligations are causes for withdrawal. By contrast, the UNCITRAL Model Law uses “circumstances ‘likely to’ give rise to justifiable doubts as to his independence and impartiality” as a disclosure factor, while it uses “circumstances (exist) that give rise to justifiable doubts as to his independence and impartiality” as a withdrawal factor. It appears that the Arbitration Law has a wider range of causes for withdrawal.
- (3) **Setting aside of an arbitral award:** Unlike the duty of disclosure and the withdrawal of an arbitrator, which protect the independence and impartiality before an arbitral award is made, the revocation of an arbitral award is a remedy for unjust arbitration after an award has been rendered. Article 40 of the Arbitration Law stipulates the grounds on which a party may apply to a court to set aside an arbitral award.

18.11 Does the Taiwanese arbitration law contain substantive requirements for the arbitration procedures to be followed?

The Arbitration Law’s Article 19 indicates that the parties can themselves determine the procedural rules governing the arbitration and in the absence of an agreement on the procedural rules, the arbitral tribunal shall conduct the arbitration pursuant to the Arbitration Law. If the Arbitration Law is silent, the arbitral tribunal can follow the procedural rules stipulated in the Code of Civil Procedure or other rules it deems proper. The respect for disputing parties’ autonomy on procedural arrangements also becomes

³⁹² See Arbitration Law of R.O.C. Article 16.



obvious in many other stipulations in the Arbitral Proceedings Chapter of the Arbitration Law. For instance:

- (1) Article 18, Paragraph 2, on the commencing date of the arbitral proceedings;
- (2) Article 20, on the place of arbitration;
- (3) Article 21, Paragraph 1: on the appointment of arbitrators;
- (4) Article 23, Paragraph 2: on whether the proceeding shall be made public;
- (5) Article 25, Paragraph 1: on the language used in the arbitral proceeding;
- (6) Article 31: on whether the arbitral tribunal shall apply the rules of equity;
- (7) Article 32, Paragraph 4: on the termination of arbitral proceedings;
- (8) Article 33, Paragraph 2: on whether the relevant facts and reasons for the arbitral decision shall be recorded on the arbitral award; and
- (9) Article 36: on whether to apply the Simplified Procedures prescribed in the Code of Civil Procedure to the arbitral proceedings.

Unless otherwise agreed upon by both parties, the arbitral proceedings for a dispute shall comply with the Arbitration Law. In any case, the parties are required to abide by the mandatory provisions of the Arbitration Law. For instance,

- (1) Articles 5-8: on the qualifications of arbitrators;
- (2) Article 9-12: on the right of the parties to request an arbitral institution or a court to appoint an arbitrator after a specified time period;
- (3) Article 21: on the time limit of arbitration;
- (4) Article 27: on the delivery of documents; and
- (5) Article 33: on the time limit for the arbitral tribunal to render an award after the conclusion of the final hearing.

Request for Arbitration: Article 18 of the Arbitration Law stipulates that the claimant shall provide the respondent with a written arbitration notification (specifying when the dispute is to be submitted to arbitration). The arbitral proceedings commence on the date specified on the written



notice of arbitration received by the respondent.³⁹³ In institutional arbitral practice, the applicant submits the written notice of arbitration and arbitrator appointment to an arbitral institution. Following the claimant's payment of the arbitration fees³⁹⁴, the arbitral institution will then deliver the notice of arbitration to the counter party and ask the counter party to appoint its arbitrator. Aside from the arbitral fee, the parties shall also submit the following documents:

- (a) The Request for Arbitration and a sufficient number of copies (usually five) of the Request for each of the arbitrators and the parties against whom a claim is being made. The Request for Arbitration shall contain a statement of claim, including the names and addresses of the parties; the relief or remedy sought; the facts and reasons supporting it; the arbitral institution to administrate the arbitration; the date of the Request for Arbitration; the names and addresses of the legal representatives or the authorized representatives for the arbitration, if any; the subject-matter of the arbitration; and the amount involved.
- (b) The submission agreement or the contract containing an arbitral clause.
- (c) The Power of Attorney for the authorized representative in the arbitration, if any.

³⁹³ See Arbitration Law of R.O.C. Article 18, Paragraph 1 and 2.

³⁹⁴ The Rules on Arbitration Institution, Mediation Procedures and Fees Article 25, Paragraph 1: "For arbitration regarding property disputes, in addition to the TWD600 net cost for the forms and information for application, the arbitral fee shall be progressively escalated according to the amount or price of the subject matter pursuant to the following standard: 1. Where the amount or price of the subject matter is TWD60,000 or less, the arbitral fee shall be TWD3,000. 2. Where the amount or price of the subject matter is greater than TWD60,000 and up to TWD600,000, the arbitral fee for the amount exceeding TWD60,000 shall be 4%. 3. Where the amount or price of the subject matter is greater than TWD600,000 and up to TWD1,200,000, the arbitral fee for the amount exceeding TWD600,000 shall be 3%. 4. Where the amount or price of the subject matter is greater than TWD1,200,000 and up to TWD2,400,000, the arbitral fee for the amount exceeding TWD1,200,000 shall be 2%. 5. Where the amount or price of the subject matter is greater than TWD2,400,000 and up to TWD4,800,000, the arbitral fee for the amount exceeding TWD2,400,000 shall be 1.5%. 6. Where the amount or price of the subject matter is greater than TWD4,800,000 and up to TWD9,600,000, the arbitral fee for the amount exceeding TWD4,800,000 shall be 1%. 7. Where the amount or price of the subject matter is greater than TWD9,600,000, the arbitral fee for the amount exceeding TWD9,600,000 shall be 0.5%." And Article 26, Paragraph 1: "For arbitration regarding non-property disputes, the arbitral fee shall be TWD9,000."



- (d) The Letter of Appointment of Arbitrator, in case the appointment has been made. The Statement should include the names and addresses of the appointed arbitrator and the circumstances said arbitrator should disclose.³⁹⁵

On the other hand, the respondent may make a counterclaim pursuant to the submission of arbitration. The arbitral tribunal may consolidate the arbitral proceedings related to the claim and the counterclaim. Unless otherwise agreed upon by the parties, a counterclaim shall not fall outside of the scope of the agreement to arbitrate. The arbitral tribunal may not allow a counterclaim if it considers the counterclaim to be an attempt by the defendant to delay the arbitral proceedings.³⁹⁶ During the arbitral proceedings, a party may amend or supplement its submissions as to the relevant parties, the subject matter of the arbitration and the relief or remedies sought, if the other party consents, or if such alteration will not unreasonably prejudice the defense of the other party or terminate the arbitration. The aforementioned restrictions shall not apply, however, before the respondent receives a copy of the Request for Arbitration. In addition, unless otherwise agreed upon by the parties, the arbitral tribunal shall not allow such amendment or supplement if it would fall outside the scope of the agreement to arbitrate.³⁹⁷

Place of Arbitration: Drafted with a view to the Model Law on International Commercial Arbitration Article 20 Paragraph 1, unless otherwise agreed upon by both parties, the arbitral tribunal shall determine the place of arbitration as well as the time and date for the hearing and notify both parties thereof within ten days upon receipt of notice of the final arbitral appointment.³⁹⁸

Principle of Confidentiality: Unless otherwise agreed upon by the parties, the arbitral proceedings shall not be made public.³⁹⁹ This is one of the most important characters of arbitration and very different from the litigation process, which opens the proceedings to the general public unless the law

³⁹⁵ See CAA Arbitration Rules, Article 8 and 9.

³⁹⁶ See CAA Arbitration Rules, Article 15.

³⁹⁷ See CAA Arbitration Rules, Article 14.

³⁹⁸ See Arbitration Law of R.O.C. Article 20 and Article 21, Paragraph 1.

³⁹⁹ See Arbitration Law of R.O.C. Article 23, Paragraph 2.



specifies otherwise.⁴⁰⁰

Full Opportunity of Presentation and Comprehension: The arbitral tribunal shall ensure that each party has a full opportunity to present its case and the arbitral tribunal shall conduct the necessary investigations of the claims by the parties. Either party may appoint a representative in writing to appear before the arbitral tribunal to make statements for and on its behalf. If the arbitral tribunal fails to give a party an opportunity to present its case prior to the conclusion of the arbitral proceedings, or if any party is not lawfully represented in the arbitral proceedings, a party may apply to a court to set aside the arbitral award.

The requirement for a full opportunity of presentation and comprehension has been a popular ground for parties to set aside an arbitral award in Taiwan. To curb this problem, most arbitral tribunals now ask the parties whether they have had a full opportunity to present their case in the last hearing in order to stop the parties from raising this ground to set aside an award.

International parties may designate a language or languages to be used to conduct the arbitral proceedings. The arbitral tribunal or a party may, however, request that any documents relating to the arbitration be accompanied by a translation in another language. Interpreters shall be provided under the direction of the arbitral tribunal in the event that a party or an arbitrator is not familiar with Mandarin.⁴⁰¹ In practice, the arbitral tribunal makes inquiries into submissions during the hearing, which shall be recorded on camera unless the parties agree otherwise.

During the hearing, each party has the burden of submitting statements in support of the facts and legal arguments addressing the subject of the dispute, and has the burden of proving the facts by producing relevant evidence. In addition, each party shall submit arguments addressing the facts and evidence presented by the other party. The arbitral tribunal may, at the request of a party or on its own motion, order witnesses or experts to

⁴⁰⁰ See Court Organic Act of R.O.C. Article 86; exceptions include but not limited to Code of Civil Procedure of R.O.C. Article 195-1, Article 344 Paragraph 2, Article 350 Paragraph 2, Article 410 Paragraph 2, Article 574 Paragraph 4 and Article 600.

⁴⁰¹ See Arbitration Law of R.O.C., Article 23, Paragraph 1, Articles 24, 25, and 40, Paragraph 1, Item 3.



testify at the hearing. The arbitral tribunal orders the parties to submit arguments addressing the inquiries requested by a party, and the tribunal arranges for their submissions to be recorded, unless the tribunal considers it unnecessary. The arbitral tribunal also orders the parties to submit arguments addressing the outcome of the aforementioned inquiries and to arrange for their submissions to be recorded. Normally there will be only one hearing. When the arbitral tribunal is satisfied that no future submission or argument shall be made by the parties, an arbitral award shall be made, and the arbitral tribunal shall declare the hearing closed. After the closure of the hearing, however, the arbitral tribunal may notify the parties that the hearing will be reopened before the arbitral award is made, if the tribunal considers this necessary.⁴⁰²

18.12 What are the formalities for arbitral awards?

Time limit for rendering of the Arbitral Award: By law, the arbitral tribunal shall render an arbitral award within six months of commencement of the arbitration. Under the Arbitration Law, the arbitration time period begins on the date of the appointment of the last arbitrator. The arbitral tribunal may extend the decision period up to an additional three months if the circumstances so require.⁴⁰³ In other words, the length of the statutory decision period will not exceed nine months. If the arbitral tribunal fails to produce a decision within nine months, both parties may agree to extend the arbitration period instead of commencing an action or filing a motion to litigate. In order to prevent the parties that agreed to extend the time limit from going to court against the agreement, it is advised that the agreement shall be executed in written form before the arbitral tribunal.⁴⁰⁴ If the arbitral tribunal fails to produce a decision within the deadline, either party may commence an action or file a motion to litigate. Once a disputant has commenced an action or filed a motion to litigate, the arbitral proceedings are deemed terminated thereafter.⁴⁰⁵

⁴⁰² See CAA Arbitration Rules, Article 23, 24, 25, 27, and 34.

⁴⁰³ See Arbitration Law of R.O.C., Article 21, Paragraph 1.

⁴⁰⁴ See YANG, CHONG-SEN (楊崇森) ET AL., *supra* note 1, pp. 212.

⁴⁰⁵ See Arbitration Law of R.O.C., Article 21, Paragraph 3.



18.13 On what conditions can arbitral awards be appealed or rescinded?

According to Arbitration Law, Article 29, Paragraph 1 (modeled after the Model Law on International Commercial Arbitration, Article 4) a party who knows or may know that the arbitral proceedings have derogated from the provisions of the Arbitration Law, or has not complied with the requirements of the arbitral agreement, yet proceeds with the arbitration without objecting to such non-compliance, shall be deemed to have waived the right to object. In addition, any objections raised shall be considered by the arbitral tribunal. The decisions made with respect thereto shall not be subject to appeal and the assertion and consideration of an objection shall not suspend the arbitral proceedings.⁴⁰⁶

Rescission of Arbitral Awards: After an arbitral decision has been handed down, recourse to a court against an arbitral award may be made by an application for setting aside to a competent court. Following international norms, the court may never conduct substantive review and can only set aside an award for one of the following circumstances:

- (i) In case of the existence of any circumstances stated in Arbitration Law Article 38.
- (ii) If the arbitral agreement is nullified, invalid, or has yet to come into effect, or has become invalid prior to the conclusion of the arbitral proceedings; a party to the arbitral agreement was under some incapacity; or the arbitral agreement is not valid under the law to which the parties have subjected it; or failing any indication thereon, under the law of this state.⁴⁰⁷
- (iii) If the arbitral tribunal fails to give any party an opportunity to present its case prior to the conclusion of the arbitral proceedings, or if any party is not lawfully represented in the arbitral proceedings.
- (iv) If the composition of the arbitral tribunal or the arbitral proceedings is contrary to the arbitral agreement or the law.
- (v) If an arbitrator fails to fulfill the duty of disclosure prescribed in Paragraph 2 of Article 15 of the Arbitration Law and appears to be

⁴⁰⁶ See Arbitration Law of R.O.C., Article 29, Paragraph 2 and 3.

⁴⁰⁷ See UNCITRAL Model Law, Article 34 (2) (a) (i).



partial or has been requested to withdraw, but continues to participate, provided that the request for withdrawal has not been dismissed by the court.

- (vi) If an arbitrator violates any duty in the entrusted arbitration and such violation carries criminal liability.
- (vii) If a party or any representative has committed a criminal offense in relation to the arbitration.
- (viii) If any evidence or content of any translation upon which the arbitral award relies, has been forged or fraudulently altered or contains any other misrepresentations.
- (ix) If a judgment of a criminal or civil matter, or an administrative ruling upon which the arbitral award relies, has been reversed or materially altered by a subsequent judgment or administrative ruling.

Items (vi) to (viii) above are limited to instances where a final conviction has been rendered, or the criminal proceedings may not be commenced, or continued for reasons other than insufficient evidence. Item (iv), concerning circumstances contravening the arbitral agreement, and items (v) to (ix), are limited to the extent that the circumstances in question are sufficient to affect the arbitral award.⁴⁰⁸ However, a party filing such a suit may only cite procedural flaws in the arbitral process as grounds for action; a party may not file a lawsuit seeking voidance of the arbitral decision if its dispute has to do with factual matters, such as whether the reasons for the decision were correct, or whether the decision was contradictory.

Rescission Procedures: An application to revoke an arbitral award may be filed at the district court at the place of arbitration. The Arbitration Law adopted the wording “may” instead of “shall,” which leaves room for parties’ autonomy to choose other competent courts regulated by the Code of Civil Procedure of the Republic of China (Taiwan).⁴⁰⁹ An application to revoke an arbitral award shall be submitted to the court within the thirty-day statutory period after the arbitral award has been issued or delivered. If, however, any cause in the above-mentioned items 6 to 9 exists, and if sufficient evidence is offered to show that the failure of a party to apply to

⁴⁰⁸ See Arbitration Law of R.O.C., Article 40.

⁴⁰⁹ See YANG, CHONG-SEN (楊崇森) ET AL., *supra* note 1, pp. 321.



the court to revoke an award before the end of the limitation period does not arise from any fault on the part of such party, then the thirty-day statutory period commences to run from the time when the party becomes aware of the cause for revocation.

The application to revoke an arbitral award shall be barred in any event after five years have elapsed from the date on which the arbitral award was issued.⁴¹⁰ It is noteworthy that the above-mentioned application period is statutory and not subject to parties' autonomy. In addition, the court may grant an application to stay the enforcement of the arbitral award once the applicant has paid an appropriate and specific security to the court. When setting aside an arbitral award, the court shall, under the same authority, simultaneously revoke any enforcement order which has been issued with respect to the arbitral award.⁴¹¹ Once an arbitral award has been revoked by a final judgment of a court, a party may bring the dispute to the court unless otherwise agreed by the parties.⁴¹²

18.14 When and under what conditions can courts intervene in arbitrations?

A court may assist with the following aspects of arbitral proceedings:

- (1) **Investigation:** The arbitral tribunal, if necessary, may request assistance with the conduct of the arbitral proceedings from a court or other agencies. A court so requested may exercise its investigative powers in the same manner and to the same extent as permitted in a legal action.⁴¹³ In addition, the arbitral tribunal may summon witnesses or expert witnesses to appear for questioning. In the event that a witness fails to appear without sufficient reason, however, the arbitral tribunal may apply for a court order compelling the witness to appear.⁴¹⁴

⁴¹⁰ See Arbitration Law of R.O.C., Article 41.

⁴¹¹ See Arbitration Law of R.O.C., Article 42.

⁴¹² See Arbitration Law of R.O.C., Article 43.

⁴¹³ See Arbitration Law of R.O.C., Article 28.

⁴¹⁴ See Arbitration Law of R.O.C., Article 26.



- (2) **Replacement of an arbitrator:** an arbitrator appointed in an arbitral agreement may be replaced if such arbitrator becomes unable to perform as a result of death or any other cause, or refuses to conduct the arbitration, or unreasonably delays the performance of arbitration. In the event that the parties fail to agree upon a replacement, either party may apply to an arbitral institution or the court to appoint the replacement. Should any one of the circumstances mentioned occur with respect to an arbitrator, appointed by an arbitral institution or by the court, such arbitral institution or the court may appoint a replacement, or replacements, upon an application by any party or by its own volition.⁴¹⁵
- (3) **Record keeping:** a certified copy of an arbitral award, along with proof of delivery, shall be filed with a court registry at the place of arbitration for record-keeping.⁴¹⁶

18.15 What are the formal requirements for arbitral awards (form; contents; deadlines; other requirements)?

- (1) **Determination of the Arbitral Award:** The deliberations of an arbitral award shall not be made public. If there is more than one arbitrator, the arbitral award shall be determined by a majority vote. When calculating an amount in dispute and none of the opinions of the arbitrators prevail, the highest figure in an opinion shall be averaged with the second-highest figure in another opinion and so forth, until a majority consensus is obtained.

If an arbitrator refuses to sign the arbitral award, the arbitrators who have signed the award shall state the reason for the missing signature(s).

In the event that a majority consensus of the arbitrators cannot be reached, the arbitral proceedings shall be deemed terminated, unless

⁴¹⁵ See Arbitration Law of R.O.C., Article 13, Paragraphs 1 and 4.

⁴¹⁶ See Arbitration Law of R.O.C., Article 34, Paragraph 2.



otherwise agreed by the parties, and the arbitral tribunal shall notify the parties of the reasons for failing to reach a majority consensus.⁴¹⁷ After notification, both parties may turn to other mechanisms for resolving the dispute.

(2) **Issuance of the Arbitral Award:** To the extent that a decision on the dispute may be satisfactorily obtained, the arbitral tribunal shall declare the conclusion of the hearing and, within ten days thereafter, issue an arbitral award addressing the claims and issues raised by the parties. An arbitral award shall contain the following items:

- Name and residence or domicile of the individual parties. For a party that is a corporate entity or another type of organization or institution, its name(s), administrative office(s), principal office(s) or business office(s) address;
- If any, names and domiciles or residences of the statutory agents or representatives of the parties;
- If any, names, nationalities and residences or domiciles of the interpreters;
- The main text of the decision, which shall include the arbitral decision on disputes submitted by parties, and the allocation of the arbitration fee;⁴¹⁸
- The relevant facts and reasons for the arbitral award, unless the parties have agreed that no reasons shall be stated. Because the reasons for the arbitral award are crucial to the subsequent arbitral award enforcement and revocation, if any, it is advised to address relevant reasons in an arbitral award; and
- The date and place of the arbitral award.

The original copy of the award shall be signed by the arbitrator(s) who deliberated on the award. If an arbitrator refuses to or cannot sign the award for any reason, the arbitrator(s) who did sign the award shall state the reason for the missing signature(s).⁴¹⁹ The arbitral tribunal shall deliver a certified copy of the arbitral award to

⁴¹⁷ See Arbitration Law of R.O.C., Article 32.

⁴¹⁸ See The Rules on Arbitration Institution, Mediation Procedures and Fees, Article 34, Paragraph 1.

⁴¹⁹ See Arbitration Law of R.O.C., Article 33.



each party. The certified copy of the arbitral award, along with proof of delivery, shall be filed with a court registry at the place of arbitration for the record.⁴²⁰ In addition, the arbitral tribunal may correct, on its own initiative or upon request, any clerical, computational, or typographic errors, or any other similar obvious mistakes in the award, and shall provide written notification of this correction to the parties as well as the court. The foregoing is likewise applicable to any discrepancy between a certified copy of the arbitral award and the original version thereof.⁴²¹

- (3) **Binding force of arbitral awards:** The award shall be binding on the parties and have the same force as the final judgment of a court.⁴²² The award binds not only both parties but also the following persons with respect to the arbitration:
- (i) Successors of the parties after the commencement of the arbitration, or those who have taken possession of the contested property of a party or its successors.
 - (ii) Any entity, on whose behalf a party enters into an arbitral proceeding; the successors of said entity after the commencement of arbitration; and, those who have taken possession of the contested property of the said entity or its successors.⁴²³

18.16 What procedures exist for enforcement of foreign and domestic arbitral awards?

As Taiwan is not a signatory to the New York Convention, the requirements for recognition of foreign judgment are somewhat different from most countries. Articles 47 to 51 of the Arbitration Law govern the recognition and enforcement of foreign arbitral awards. Article 47 defines a “foreign” arbitral award as being an arbitral award which is issued outside the territory of Taiwan or issued pursuant to foreign laws within the

⁴²⁰ See Arbitration Law of R.O.C., Article 34.

⁴²¹ See Arbitration Law of R.O.C., Article 35.

⁴²² See Arbitration Law of R.O.C., Article 37, Paragraph 1.

⁴²³ See Arbitration Law of R.O.C., Article 37, Paragraph 3.



territory of Taiwan. The term “foreign laws” in turn is not defined in the Arbitration Law. As a result, a court has even ruled that arbitration conducted in Taiwan under arbitration rules of a foreign arbitral institution is considered a foreign arbitral award.

Unlike a domestic award, a foreign arbitral award may be enforceable only after an application for recognition has been granted by the court.⁴²⁴ A party filing motion with a court for recognition of a foreign arbitral decision must submit the following documents:

- (i) The original arbitral award or an authenticated copy thereof;
- (ii) The original arbitral agreement or an authenticated copy thereof;
- (iii) The full text of the foreign arbitration law and regulation, the rules of the foreign arbitral institution, or the rules of the international arbitral institution which applied to the foreign arbitral award.

If the above-mentioned documents have been issued in a foreign language, Chinese translations of the documents must also be submitted to the court. The word "authenticated" mentioned in items (i) and (ii) means the authentication made by the embassies, consulates, representative offices, liaison offices, or any other organizations authorized by the Taiwan government. Copies of the above-mentioned application shall be made, corresponding to the number of respondents, and submitted to the court which shall deliver those copies to the respondents.⁴²⁵

When an application is submitted by a party seeking recognition of a foreign arbitral decision, the court must issue a dismissal if such award contains one of the following elements:

- (i) Where the content of the arbitral award is contrary to public order or good morals of Taiwan.
- (ii) Under Taiwan law, the matter in dispute cannot be arbitrated or settled through arbitration.

In addition, the court may also issue a dismissal order with respect to an

⁴²⁴ See Arbitration Law of R.O.C., Article 47.

⁴²⁵ See Arbitration Law of R.O.C., Article 48.



application for recognition of a foreign arbitral award if the country where the arbitral award was made, or whose laws govern the arbitral award, does not recognize the arbitral awards of Taiwan.⁴²⁶

Apart from the fact that the court can deny recognition of the foreign award, the respondent may also request the court to dismiss the application within twenty days from the date of receipt of the notice of the application, if the counter party applies to the court for recognition of a foreign arbitral award that concerns any of the following circumstances:

- (i) The arbitral agreement is invalid as a result of a party's incapacity according to the law chosen by the parties to govern the arbitral agreement.
 - (ii) The arbitral agreement is null and void according to the law chosen to govern said agreement or, in the absence of a law of choice, the law of the country where the arbitral award was made.
 - (iii) A party is not given proper notice of the appointment of an arbitrator, or of any other matter required in the arbitral proceedings, or any other situations that give rise to lack of due process.
 - (iv) The arbitral award is not relevant to the subject of the dispute covered by the arbitral agreement, or exceeds the scope of the arbitral agreement, unless the offending portion can be severed from and shall not affect the remainder of the arbitral award.
 - (v) The composition of the arbitral tribunal or the arbitral procedure contravenes the arbitral agreement or, in the absence of an arbitral agreement, the law of the place of the arbitration.
 - (vi) The arbitral award is not yet binding upon the parties or has been suspended or revoked by a competent court.⁴²⁷
- (1) **Enforcement Order Application and Exception:** An award may not be enforced unless a competent court has granted an enforcement order on the application of a concerned party. It is noteworthy that to convert the award into a judgment or court order does not involve a factual investigation.⁴²⁸ However, the arbitral award may be enforced without an enforcement order if both parties

⁴²⁶ See Arbitration Law of R.O.C., Article 49.

⁴²⁷ See Arbitration Law of R.O.C., Article 50.

⁴²⁸ See also Taiwan Supreme Court 87 Tai-Kang-Tzu No. 266.



agreed so in writing and the arbitral award concerns only the following:

- (i) Payment of a specified sum of money or a certain amount of fungibles or valuable securities;
- (ii) Delivery of a specified movable property.⁴²⁹

(2) **Rejection of Enforcement Order Application:** With the exception of the circumstances discussed above, an enforcement order is necessary for the enforcement of the award. The court shall reject an application for enforcement where:

- (i) The arbitral award concerns a dispute not contemplated by the terms of the arbitral agreement, or exceeds the scope of the arbitral agreement, unless the offending portion of the award may be severed and the severance will not affect the remainder of the award;
- (ii) The reasons for the arbitral award were not stated, as required, unless the omission was corrected by the arbitral tribunal. It is noteworthy that the omission of the required reasons for the arbitral award is the only factor governing the rejection of an enforcement order application among other items which are required in the arbitral award; and
- (iii) The arbitral award directs a party to act contrary to the law.⁴³⁰

18.17 Recognition and Enforcement of arbitral awards between China, Hong Kong and Taiwan

The legal frameworks of arbitral systems for the recognition and enforcement of foreign arbitral awards of China, Hong Kong, and Taiwan are either subject to or modeled on the New York Convention,⁴³¹ but with

⁴²⁹ See Arbitration Law of R.O.C., Article 37, Paragraph 2.

⁴³⁰ See Arbitration Law of R.O.C., Article 38.

⁴³¹ See Leyda, José Alejandro Carballo, A Uniform, Internationally Oriented Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards in Mainland China, Hong Kong and



minor variations on implementation.

- (1) **Between Taiwan and China:** Article 74 of the People of Mainland China and Taiwan Areas Relations Act stipulates that an application for a ruling to recognize an arbitral award, civil ruling, or judgment, rendered in China, which is not contrary to the public order or good morals of Taiwan, may be filed with a court. An arbitral award of China may be enforceable after recognition has been granted by the court.⁴³² The word “may” used above does not compel a court in Taiwan to immediately recognize an award of China. Therefore, the Arbitration Law will still be applicable after notification of an application for recognition of an award of China, and the counter party should still be able to request the court to dismiss the application on the grounds listed in Article 50 of the Arbitration Law.⁴³³

However, in accordance with the same law, it shall not apply until any arbitral award rendered in Taiwan may be filed with a court in China and a ruling to recognize it or permit its enforceability in China is effected.⁴³⁴ After the announcement on 16 May 1998 that the PRC Supreme People’s Court had passed the “Regulation of the Supreme People’s Court Regarding the People’s Court Recognition of the Civil Judgments of Taiwan Courts,” Taiwan restored its recognition of China’s arbitral and judgment decisions. In other words, since 1998, both judicial bodies have recognized each other’s judicial judgments and arbitral decisions.

Nevertheless, although Article 19 of the “Regulation of the PRC Supreme People’s Court Regarding the People’s Court Recognition of the Civil Judgments of Taiwan Courts” extends the applicability of the regulation to arbitral awards rendered in Taiwan, any application for the enforcement of a recognized Taiwan arbitral award must still

Taiwan? Chinese Journal of International Law, Vol. 6, Issue 2, pp. 345-361, 2007. Available at SSRN: <http://ssrn.com/abstract=1154962> or DOI: jmm021, at Paragraph 64.

⁴³² See Act Governing Relations Between Peoples of the Taiwan Area and Mainland Area Article 74, Paragraph 1.

⁴³³ See Leyda, José Alejandro Carballo, *supra* note 64, Paragraph 57.

⁴³⁴ See Act Governing Relations Between Peoples of the Taiwan Area and Mainland Area Article 74, Paragraph 3.



be submitted to a competent intermediate court in accordance with the provisions of the Civil Procedure Law of China. At the same time, Article 4 of the “Regulation of the PRC Supreme People’s Court Regarding the People’s Court Recognition of the Civil Judgments of Taiwan Courts” requires that the judgments of Taiwan courts “shall not violate the One-China principle,” and since the grounds for the mutual recognition and enforcement of arbitral awards are based on unilateral legislation, such recognition and enforcement will still depend on cross-strait politics.⁴³⁵

To date, five Chinese awards have been applied for recognition and enforcement in Taiwan. The Taiwanese court recognized four Chinese awards (Taipei District Court 92 Zhong-sheng No. 30, Taichung High Court 93 Zai-Sheng No. 5, and Banchaio District Court 98 Sheng-Zi No. 124, Shihlin District Court 100 Sheng No. 276), but denied one (Taipei District Court 93 Zhong-sheng No. 15) on the ground of failure to give proper notice.

In the latest case, Shihlin District Court 100 Sheng No. 276, the court again analyzed the two criteria to determine if a court should recognize arbitral awards rendered in mainland China. Firstly, the court acknowledged that a 1998 Taiwanese arbitral award was recognized by the People’s Court in PRC China. Secondly, the court believed that recognition of the Chinese award would not offend Taiwan public policy.

In 2004, a Chinese Arbitration Association, Taipei award was applied for recognition and enforcement in the Intermediate People’s Court of Xiamen, China, and was recognized pursuant to China’s Regulation of the Supreme People’s Court Regarding the People’s Court Recognition of the Civil Judgments of Taiwan Courts.

- (2) **Between Taiwan and Hong Kong:** According to the “Act Governing Relations with Hong Kong and Macau,” Article 30 through Article 34 of the Commercial Arbitration Act, instead of Article 47 through Article 51 of the Arbitration Law, shall apply to

⁴³⁵ See Leyda, José Alejandro Carballo, *supra* note 64, Paragraphs 59 and 60.



the validity, petition for court recognition, and suspension of execution proceedings in cases involving civil arbitral awards made in Hong Kong or Macau.⁴³⁶ However, since the earlier Commercial Arbitration Act had been amended into the then re-named Arbitration Law, it is obvious that the Arbitration Law shall be applicable under this regulation.

Before 1997, Taiwan awards were summarily enforceable in Hong Kong. However, China resumed its sovereignty over Hong Kong on 1 July 1997, which resulted in a legal vacuum in the enforcement of arbitral awards from China and Taiwan until further amendments to the Arbitration Ordinance of Hong Kong took effect in 2000. These substantially restored the status quo ante.⁴³⁷ Therefore, although the 1998 “Regulation of the PRC Supreme People’s Court Regarding the People’s Court Recognition of Civil Judgments of Taiwan Courts” is not applicable for Hong Kong, Taiwan awards may still be enforced under the “universal” enforcement provision contained in the modified Section 2GG (2) of the Arbitration Ordinance of Hong Kong.⁴³⁸

To date, twelve Hong Kong awards have applied for recognition and enforcement in Taiwan. Eight were recognized, three were denied, and one was recognized in part. The court denied the three Hong Kong awards on procedural grounds, including failure to give proper notice. The three awards were denied recognition by Kaohsiung District Court 80 Zhong-Sheng-Keng No.1, Taiwan High Court 83 Keng No. 2331, and Kaohsiung District Court 90 Zai No.13 decisions.

18.18 Settlement Agreements

Parties to an arbitration dispute may explore settlement options to their dispute prior to the issuance of an arbitral award. If the parties reach a

⁴³⁶ See Act Governing Relations with Hong Kong and Macau, Article 42, Paragraph 2.

⁴³⁷ See Morgan, Robert, Enforcement of Chinese Arbitral Awards Complete Once More, but with a Difference. Available at SSRN: <http://ssrn.com/abstract=925211>, p. 2.

⁴³⁸ See Leyda, José Alejandro Carballo, *supra* note 64, Paragraph 62.



settlement before the conclusion of the arbitration, the arbitrator shall record the terms of settlement in a settlement agreement. A settlement agreement has the same force and effect as that of an arbitral award. However, the terms of the settlement agreement may be enforced only after the court has granted an application for enforcement and issued an enforcement order. The provisions of Arbitration Law, Article 38 and Articles 40 to 43, shall apply mutatis mutandis to the settlement proceedings hereunder.⁴³⁹

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6. *UNCITRAL Model Law on International Commercial Arbitration*
7. *UNCITRAL Notes on Organizing Arbitral Proceedings*, 1996
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⁴³⁹ See Arbitration Law of R.O.C., Articles 44 and 46.



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19. THAILAND



BY: DR. ANDREAS RESPONDEK

19.1 Which laws apply to arbitration in Thailand?

In Thailand, the arbitration law is the Arbitration Act B.E. 2545 (2002), which came into force on 30 April 2002 (“Arbitration Act”).

19.2 Is the Thai Arbitration Act based on the UNCITRAL Model Law?

The Arbitration Act is substantially based on the UNCITRAL Model Law with a few differences, such as:

- The arbitrators are not allowed to take any interim measures. The Arbitration Act requires a party to file an application for any provisional measures for the protection of the interests of the party before or during the arbitration proceedings with the competent Thai courts.
- The arbitrators are exempted from liability in performing their duties, except where they act intentionally or with gross negligence causing damages to any party. There are also criminal provisions where an arbitrator can be fined for up to one hundred thousand Baht and/or imprisoned for up to ten years for demanding or accepting bribes (Sec. 23 Arbitration Act).

19.3 Are there different laws applicable for national and international arbitration?

The Arbitration Act applies to both national and international arbitrations, as long as the parties agree on the application of the Thai arbitration law in the arbitration clause or in an arbitration agreement in writing.



There is one noteworthy special feature: Even though Sec. 15 of the Arbitration Act permits a contract between a government entity and a private enterprise to include an arbitration clause to resolve any disputes, in January 2004 the Cabinet passed a resolution that any contract between the government and a private entity should not include the provision that any dispute arising from the contract should be referred to an arbitration tribunal for settlement. Where there is any problem (or a requirement by another party to include such provision in the contract), the contract should be referred to the Cabinet for approval on a case-by-case basis. The validity of this resolution was extended by another resolution passed by the Thai Cabinet in July 2009 to include all types of contracts made between the government and a private entity, whether or not they are administrative contracts. In other words, unless exempted by the Cabinet, no contracts made between the government and a private entity should provide for arbitration as the method of dispute resolution. Foreign investors are opposed to this Cabinet resolution (www.amchamthailand.com/asp/view_doc.asp?DocCID=2518). In this respect Thai Supreme Court Case no. 7277/2549⁴⁴⁰ is also of interest.

19.4 Has Thailand acceded to the New York Convention?

Thailand acceded to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards New York on 21 December 1959 without reservation, and the Convention entered into force for Thailand on 20 March, 1960.

19.5 Can Parties agree on foreign arbitration institutions (i) if the parties are domiciled in Thailand, (ii) if one party is domiciled in Thailand and the other party abroad?

⁴⁴⁰ The case dealt with a dispute over an expressway concession agreement between a private consortium and the Rapid Transit Authority (ETA). The arbitral award awarded the consortium THB 6.2 billion. When enforcement of the award was sought, the Thai Attorney-General objected against the enforcement, but was overruled by the Thai Civil Court. Ultimately the Thai Supreme Court overturned the Civil Court's judgment, arguing – inter alia – that the agreement was an administrative contract and that the execution of the contract by the ETA Governor had been undertaken contrary to law.



The Arbitration Act does not require any party domiciled in Thailand to select Thai arbitration institutions for the arbitration.

19.6 Does the Thai arbitration law contain substantive requirements for the arbitration procedures to be followed?

The Arbitration Act generally allows the parties to agree on the specific rules to govern the arbitration, and provides the substitute provisions in case that the parties are unable to agree. However, additionally to those requirements referred to in 14.15, there are some mandatory provisions that must be followed:

- The arbitration agreement must clearly state the parties' intent to submit all or certain of their present or future disputes to arbitration. It must be in writing and signed by the parties (including the electronic signature, such as email).
- The arbitral tribunal must be composed of an uneven number of arbitrators.
- The arbitrators must be impartial and independent, and possess the qualifications prescribed by the arbitration agreement or the institution administering the arbitration.

The Arbitration Act generally allows the parties to agree on the specific rules to govern the arbitration, and provides the substitute provisions in case that the parties are unable to agree. However, there are some mandatory provisions that must be followed:

- The arbitration agreement must be in writing and signed by the parties (including the electronic signature, such as email).
- The arbitral tribunal must be composed of an uneven number of arbitrators.
- The arbitrators must be impartial and independent, and possess the qualifications prescribed by the arbitration agreement or the institution administering the arbitration.



The arbitral award must be in writing and signed by all or a majority members of the arbitral tribunal.

19.7 Does a valid arbitration clause bar access to state courts?

19.7.1 Conflicts of jurisdiction between the courts and the arbitral tribunal: Proceedings started in Thailand

If litigation proceedings are started in court in Thailand in breach of an arbitration agreement, the opposing party may request that the court strike out the case so that the parties can proceed with arbitration. The request must be made no later than the date for filing the statement of defense. If the court considers that there are no grounds for rendering the arbitration agreement void and unenforceable, the court will issue the order to strike out the case.

However it should be noted that if one of the parties to a dispute files an action in the courts, and if the court determines that it has jurisdiction, then the court will not stay the proceedings merely because an arbitral tribunal has determined that it has jurisdiction over the same dispute. If one of the parties to a court case submits a petition objecting to the court's jurisdiction, and if the court agrees that the dispute should be decided by arbitration, then the court will dismiss the case.

Furthermore, concerning the jurisdiction of the arbitral tribunal, it should be noted that according to the Arbitration Act, the arbitral tribunal can rule on its own jurisdiction, including:

- The existence or validity of the arbitration agreement.
- The validity of the appointment of the arbitral tribunal.
- The issues of dispute falling within the scope of its authority.

For this purpose an arbitration clause is considered to be a separate contract, so if the main contract is void, the arbitration clause can nevertheless survive.



The arbitral tribunal can rule on its jurisdiction as a preliminary question or in the award on the merits. However, if the arbitral tribunal rules as a preliminary question that it does have jurisdiction, and one party in the arbitration denies that the arbitral tribunal has jurisdiction to determine the dispute(s), this party may apply to the court to decide the matter within 30 days of receiving the ruling on the preliminary issue.

19.7.2 Proceedings started abroad

If the proceeding started overseas in breach of an arbitration agreement, the Thai court will not grant an injunction to restrain the proceedings started abroad.

The objecting party must apply to the overseas court to strike out the proceedings on the basis that they are in breach of the arbitration agreement. This is due to the fact that Thailand is not a party to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971, and foreign courts are unlikely to recognize and enforce the Thai court's order granting the injunction.

19.7.3 During Arbitration Proceedings

Regarding the arbitration proceedings, the local courts are not likely to actively intervene in arbitration proceedings. However, a majority of the arbitral tribunal (or a party with the consent of a majority) can request a court to issue a subpoena or an order for submission of any document or materials. If the court believes that this subpoena or court order could have been issued if the action was being conducted in the courts, then it will proceed with the application, applying all relevant provisions of the Civil Procedure Code.

In addition, any party to an arbitration agreement can file an application requesting that the court impose provisional measures to protect its interests either before or during the arbitral proceedings (Sec. 16 Arbitration Act). If the court believes that this provisional relief would have been available if the action was being conducted in the courts, then it will proceed as above. If the court orders provisional relief before the arbitral



proceeding have started, then the application must begin the arbitration within 30 days of the date of the order (or such other period that is specified by the court), failing which the court order automatically expires.

19.8 What are the main arbitration institutions in Thailand?

The main arbitration institutions in Thailand are the Thai Arbitration Institute of the Alternative Dispute Resolution Office (TAI) and the Office of the Arbitration Tribunal of the Board of Trade Thailand (OAT).

In addition to these two bodies, other organizations such as the Securities and Exchange Commission and the Department of Intellectual Property also operate industry-specific arbitration schemes. The Insurance Department of the Thai Ministry of Commerce has also its own arbitration rules and established an arbitration body. The ICC maintains an office in Bangkok.

19.9 Addresses of major arbitration institutions in Thailand?

- **Thai Arbitration Institute of the Alternative Dispute Resolution Office**, Office of the Judiciary (TAI)
Criminal Court Building 5th – 6th Floor
Rachadaphisaek Road,
Bangkok 10900
Tel: +66 2 541 2298/9
Fax: +66 2 512 8432
Website: <http://www.adro.coj.go.th>
- **Office of the Arbitration Tribunal Board of Trade Thailand**
150/2 Rajbopit Road
Bangkok 10200
Tel: +66 2 622 1860-76, ext. 465-467, 518
Fax: +66 2 226 4525
Email: bot@thaichamber.com
Website: <http://www.thaichamber.org>



19.10 Arbitration Rules of major arbitration institutions?

Currently the arbitration Rules of neither the TAI nor the OAT are available online.

19.11 What is/are the Model Clause/s of the arbitration institutions?

For the parties who wish to select The Thai Arbitration Institute (TAI) to be their arbitration institution, Rule 5 sets out the TAI's recommended arbitration clause as follows:

“Any dispute controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Arbitration Rules of the Thai Arbitration Institute, Office of the Judiciary applicable at the time of submission of the dispute to arbitration and the conduct of the arbitration thereof shall be under the auspices of the Thai Arbitration Institute.”

19.12 How many arbitrators are usually appointed?

If the arbitration agreement is silent as to the required number of arbitrators, only one arbitrator shall be appointed.

According to Sec. 18 of the Arbitration Act, unless otherwise agreed by the parties, the procedure for appointing the tribunal (and the procedure for appointing a chairman if the parties have agreed to an even number of arbitrators) is as follows:

- Where the tribunal consists of a sole arbitrator, and the parties are unable to agree on that arbitrator, then either party can apply to the court requesting it to appoint the arbitrator.
- Where the tribunal consists of multiple arbitrators, then each party must appoint an equal number of arbitrators, and those arbitrators jointly appoint an additional arbitrator (the chairman). If either party



fails to appoint its arbitrator(s) within 30 days after notification from the other party, or if the party-appointed arbitrators are unable to agree on a chairman within 30 days from the date of their own appointment, then either party can apply to the court requesting it to appoint the arbitrator(s) or the chairman, as the case may be.

19.13 Is there a right to challenge arbitrators, and if so under which conditions?

The arbitrators can be challenged if there are circumstances that give rise to “justifiable doubts” as to the arbitrator’s impartiality and independence, or the lack of qualifications agreed by the parties. (Sec. 19 Arbitration Act)

The challenge of the appointment of an arbitrator shall, within 15 days after becoming aware of the appointment of the arbitrator or after becoming aware of circumstances that rise to justifiable doubts as to arbitrator’s impartiality, independence or lack of agreed-on qualifications. (Sec. 20 Arbitration Act).

19.14 Are there any restrictions as to the parties’ representation in arbitration proceedings” (Royal Decree No. 3 BE 2543)?

Whereas foreign nationals may act as arbitrators (subject to compliance with immigration and work permit laws), foreign lawyers may only represent parties to an arbitration:

- (i) Where the dispute is not governed by Thai law; or
- (ii) Irrespective of the governing law, where there is no need to apply for enforcement of the arbitral award in Thailand.

19.15 When and under what conditions can courts intervene in arbitrations?



The arbitrators, or any party with the approval of the majority of the tribunal, may make an application for the court intervention, when they are of the opinion that a specific procedure can only be carried out by a court (such as summoning a witness or ordering production of a document). So long as the request is within its jurisdiction, the court shall accept the application.

In addition, any party to an arbitration agreement can file an application requesting that the court impose provisional measures to protect its interest either before or during the arbitral proceedings.

19.16 Do arbitrators have powers to grant interim or conservatory relief?

No; however the parties may file with a competent court an application for provisional measures for the protection of the interests of the party before or during arbitration proceedings. The court may grant such relief if the court believes that this provisional relief would have been available if the action was being conducted in the courts.

19.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

- **Formal requirements for arbitral awards**

The award must be in writing and signed by the arbitral tribunal and state the reasons for the decision. The award cannot go beyond the extent of the arbitration agreement or the request of the parties. The date and the place of arbitration shall also be stated in the award. If the arbitral tribunal consists of more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature shall also be stated. And the copies of the award must be sent to each party. (Sec. 37 Arbitration Act).



- **Deadlines for issuing arbitral awards**

However, the Arbitration Act does not stipulate a time limit for delivery of the award.

- **Other formal requirements for arbitral awards**

Apart from the aforementioned there are no other formal requirements for arbitral awards.

19.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded?

An arbitral award is usually not allowed to be appealed. For one of the ultimate purposes for which the arbitration system was designed is to regulate and solve the disputes fast and final. However, the Arbitration Act allows the court to set aside the arbitral awards for certain specific procedural issues.

A party can apply to the court within 90 days of receipt of the award (or after a correction, interpretation or the making of an additional award, as stated in Sec. 39 Arbitration Act) to set aside the award (Sec. 40, Arbitration Act). The grounds for the arbitral awards to be set aside are essentially identical to Art.34 of the Model Law.

The Court will set aside the arbitral award if:

- (i) a party who makes the application is able to prove that:
 - (a) a party to the arbitration agreement lacks legal capacity under the law applicable to the party;
 - (b) the arbitration agreement is not legally binding under the law to which the parties have agreed upon or, in case where there is no such agreement, the law of the Kingdom of Thailand;
 - (c) a party who makes the application was not delivered advance notice of the appointment of the arbitral tribunal or the



- hearing of the arbitral tribunal, or was otherwise unable to present his or her case;
- (d) the award deals with a dispute not falling within the scope of the arbitration agreement or contains decisions on matters beyond the scope of the submission to arbitration. If the decisions on matters submitted to arbitration could be separated from those not so submitted, only the part of the award which contains decisions on matters not submitted to arbitration may be set aside by the Court; or
 - (e) the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or, in the case where there is no such agreement, was in accordance with Arbitration Act;
- (ii) if it appears to the Court that:
- (a) the award deals with the dispute which shall not be settled by arbitration by the law; or
 - (b) the recognition or enforcement of the award is contrary to public order or good morals (Sec. 40 Arbitration Act).

19.19 What procedures exist for enforcement of foreign and domestic awards?

Domestic arbitration awards are expressly recognized as binding on the parties, and enforceable in the domestic courts on application by one of the parties. Regarding foreign arbitral awards, according to Sec. 41 of the Arbitration Act, foreign arbitral awards will be recognized and enforced if they are made in accordance with a treaty or international agreement where Thailand is a member and to the extent Thailand agrees to be bound.

While Thailand is a party to both the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention, no reservations were entered on accession) and the Geneva Protocol on Arbitration Clauses 1923 (Geneva Protocol), foreign arbitration awards given in countries that are signatories to the New York Convention or the Geneva Protocol are recognized and enforceable in Thailand. The



procedure for enforcing a foreign award is the same as the procedure for enforcing a domestic award (Sec. 41 Arbitration Act). The grounds for denying enforcement for both domestic and foreign awards are also the same and are essentially like those set out in Art. V of the New York Convention.

The party seeking enforcement, according to Sec. 42 Arbitration Act, must file a petition within three years from the date the award first became enforceable. The party must submit the following documents:

- An original or certified copy of the arbitral award;
- An original or certified copy of the arbitration agreement;
- A certified Thai translation of the award and the arbitration agreement. (The translations of the arbitral award and the arbitration agreement in Thai language made by a translator who has sworn under oath before the Court or official or the person having power to accept the oath, or who has made an oath to, or represented by, the official authorized to certify the translation or by a diplomatic delegate or the Thai consul in the country in which the award or the arbitration agreement was made (Sec. 42 (3) Arbitration Act).

The court can refuse the enforcement of an arbitral award according to Sec. 43, Arbitration Act, if the party against which the enforcement is sought can prove any of the following:

- Any of the grounds for the award to be set aside (see the grounds for appeal);
- That the arbitral award has not yet become binding;
- That the arbitral has been set aside or suspended by a competent court, or under the law of the country where it was issued.

An order or judgment of a Court under the Arbitration Act concerning the recognition and enforcement shall not be appealed, except where:

- (1) The recognition or judgment of the award is contrary to public order or good morals;



- (2) The order or judgment is contrary to the provisions of law relating to public order or morals;
- (3) The order or judgment is not in accordance with the arbitral award;
- (4) The judge who has tried the case gave a dissenting opinion in the judgment; or
- (5) It is an order on provisional measure under Sec. 16 Arbitration Act.

An appeal against an order or judgment under the Arbitration Act shall be made to the Supreme Court or the Supreme Administrative Court, as the case may be. (Sec. 45 Arbitration Act)

19.20 Can a successful party in the arbitration recover its costs?

The tribunal's award may include directions with respect to costs, including the tribunal's own charges. The fees and expenses of the arbitral proceedings, and the arbitrators' compensation will be paid according to the arbitral award. However, under the Arbitration Act, a party's legal fees and expenses are not recoverable unless otherwise agreed.

19.21 Are there any statistics available on arbitration proceedings in the country?

No.

19.22 Are there any recent noteworthy developments regarding arbitration in Thailand (new laws, new arbitration institutions, significant court judgments affecting arbitration etc.)?

An amendment to the Thai Penal Code is currently under consideration that would extend the reach of the Thai Penal Code also to arbitrators with regard to the accepting of bribes, carrying the death penalty.

Immigration problems for foreign arbitrators do not seem to have been resolved yet and are sometimes used as a "weapon" of last resort against



foreign arbitrators and foreign counsel. Proper care should be taken by all non-Thai parties engaging in any arbitration work in Thailand to secure proper work permits in advance.

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20. VIETNAM



BY: MR. DINH QUANG THUAN

20.1 Which laws apply to arbitration in Vietnam?

Arbitration has been officially recognized and applied in Vietnam since 1960. Arbitration was governed in many official documents of the Government such as Decree No. 116/ND-CP dated 05 September 1994 on the Organization and Management of Economic Arbitration, Decision No. 204/QĐ-TTg dated 28 April 1993 of the Prime Minister on the Organization of the Vietnam International Arbitration Center, Decision No. 114/QĐ-TTg dated 16 February 1996 of the Prime Minister on extending the jurisdiction of dispute resolution of the Vietnam International Arbitration Center; the Law on Foreign Investment in Vietnam 1987, the Vietnam Maritime Code 1990 and the Law on Commerce 1997.

In order to create a sustainable and comprehensive legal regulatory framework for the activities of arbitration for commercial dispute resolution, on 25 March 2003, the Standing Committee of Vietnam's National Assembly passed the Commercial Arbitration Ordinance. However, due to the fast development of Vietnam's economy, especially after Vietnam joined the World Trade Organization since 07 November 2006, the Commercial Arbitration Ordinance has shown its weakness in governing new arising matters. Therefore, on 17 June 2010, the Vietnamese National Assembly passed the Law on Commercial Arbitration ("**Law on Commercial Arbitration**") which has come into effect since 01 January 2011 and replaced the Commercial Arbitration Ordinance respectively.

The Law on Commercial Arbitration contains the current legal framework regarding commercial arbitration competence, arbitration forms, arbitration institutions and arbitrators, orders and procedures for arbitration, rights, obligations and responsibilities of parties to arbitration proceedings, the competence of courts over arbitration activities, organization and operation of foreign arbitration in Vietnam and enforcement of arbitral awards.



In addition, there is other legislation, notably the Civil Procedure Code 2004 as amended in March 2011 (“**Civil Procedure Code**”), the Law on Enforcement of Civil Judgments 2008 (“**Law on Enforcement of Civil Judgments**”), the Law on Protection of Consumers’ Right 2010 and the Law on Investment 2005 etc. which also govern issues relevant to arbitration.

20.2 Is the Vietnamese arbitration law based on the UNCITRAL Model Law?

The Law on Commercial Arbitration was drafted with the reference to the UNCITRAL Model Law on International Commercial Arbitration as well as the legislation of developed countries like the United States of America, United Kingdom, Singapore, Germany, France, Japan, China and Thailand.

20.3 Are there different laws applicable for domestic and international arbitration?

Both domestic and international arbitration are generally covered under the Law on Commercial Arbitration. While the Law on Commercial Arbitration governs certain important aspects with regard to domestic arbitration such as arbitration procedures, the procedures for cancelation of arbitral awards and the procedures for enforcement of arbitral awards, it is silent on the same areas with regard to international arbitration. This is because the recognition and enforcement of foreign arbitral awards in Vietnam is governed by the Civil Procedure Code and the applicable arbitration procedures are implied to be that of the relevant foreign arbitration center.

20.4 Has Vietnam acceded to the New York Convention?

Yes. On 28 July 1995, the President of Vietnam signed a Decision in relation to Vietnam’s accession to the New York Convention 1958 (Convention on Recognition and Enforcement of Foreign Arbitral Awards, “the **Convention**”). Nevertheless, Vietnam reserves its right under the Convention with regard to the following details:



- Vietnam considers the Convention to be applicable to the recognition and enforcement of arbitral awards made only in the territory of another Contracting State. With respect to arbitral awards made in the territories of non-contracting States, it will apply the Convention on the basis of reciprocity.
- The Convention will be applied only to differences arising out of legal relationships which are considered as “commercial” under the laws of Vietnam.
- Interpretation of the Convention before the Vietnamese Courts or competent authorities should be made in accordance with the Constitution and the laws of Vietnam.

20.5 Can parties agree on foreign arbitration institutions (i) if both parties are domiciled in the country, (ii) if one party is domiciled in the country and the other party abroad?

Generally, the parties can agree on foreign arbitration institutions without having to consider if any of the parties is domiciled in the country or a foreign party. However, there are certain exceptions. For instance, the Maritime Code of Vietnam provides that selection of foreign arbitration institutions is allowed only if there is at least one foreign party involved in the maritime transaction.

20.6 Does the Vietnamese arbitration law contain substantive requirements for the arbitration procedures to be followed?

According to the Law on Commercial Arbitration, if a dispute is agreed to be resolved at an arbitration centre, the arbitration procedures issued by such centre will be applied. If a dispute is agreed to be resolved by “ad hoc” arbitration, the arbitration procedures shall be agreed by the parties.



20.7 Does a valid arbitration clause bar access to state courts?

With reference to Article 6 of the Law on Commercial Arbitration, when a party to a valid arbitration agreement brings a lawsuit against the other party before the state court in Vietnam, the court shall refuse to accept jurisdiction, unless the arbitration agreement is void or incapable of being performed.

20.8 What are the main arbitration institutions in Vietnam?

There are seven (7) arbitration institutions in Vietnam. Among them, the three main arbitration institutions are the **Vietnam International Arbitration Center (VIAC)** at the **Vietnam Chamber of Commerce and Industry**, the **Asian International Commercial Arbitration Center (ACIAC)** and the **Pacific International Arbitration Center (PIAC)**.

20.9 Addresses of major arbitration institutions in Vietnam?

Vietnam International Arbitration Center (VIAC)

Headquarter:

9 Dao Duy Anh Street, Dong Da District, Hanoi, Vietnam

Tel: +84 4 3574 4001

Fax: + 84 4 3574 3001

Email: info@viac.org.vn

Website: <http://www.viac.org.vn>

Branch:

171 Vo Thi Sau Street, District 3, Ho Chi Minh City, Vietnam

Tel: +84 8 3932 1632

Fax: +84 3932 0119

Asian International Commercial Arbitration Center (ACIAC)

Headquarter:

3th Floor, 37 Le Hong Phong Street, Ba Dinh District, Hanoi, Vietnam

Tel: +84 4 7344 677

Fax: +84 4 7343 327

Email: ttnmachau@vnn.vn/aciac1994@gmail.com/
tranmylawyer@gmail.com



RESPONDEK & FAN

Website: www.aciac.com

Branches:

Room 56, 3rd Floor, 89 Nguyen Du, District 1, Ho Chi Minh City, Vietnam

Tel: +84 8 8234 114

Fax: +84 8 8235 325

68 Ha Huy Tap, Ha Huy Tap Ward, Vinh City, Nghe An Province, Vietnam

Tel: +84 388.68.88.98

Fax: +84 916.665.668

Pacific International Arbitration Center (PIAC)

Headquarter:

3B Floor, Building No.57 – 59 Ho Tung Mau, Ben Nghe Ward, District 1, Ho Chi Minh City, Vietnam

Tel: +84 8 3914 0597

Fax: +84 8 3914 0587

Website: www.piac.com.vn

20.10 Arbitration Rules of major arbitration institutions?

The **VIAC's** Arbitration Rules which have come into effect since 01 January 2012 are published on its website as follows:

<http://www.viac.org.vn/vi-VN/Home/quytactotungtrongtai-99/153/Quy-tac-to-tung-trong-tai-cua-VIAC-MOI.aspx>

The **ACIAC's** Arbitration Rules are given in details as follows:

<http://aciac.com/?page=quy-tac-to-tung>

20.11 What is/are the Model Clause/s of the arbitration institutions?

VIAC recommends that parties include the following arbitration clause in their contract:

“Any dispute arising out of or in relation with this contract shall be finally resolved by the Vietnam International Arbitration Centre (“VIAC”) in accordance with its Rules of Arbitration”.



ACIAC recommends that parties include the following arbitration clause in their contract:

“All disputes arising out of or in relation shall be finally settled by the Asian International Commercial Arbitration Center (ACIAC)”.

PIAC recommends that parties include the following arbitration clause in their contract:

“Any dispute, controversy or claim arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally determined by arbitration at the Pacific International Arbitration Centre (PIAC) in Vietnam and in accordance with its Arbitration Rules for the time being in force, which rules are deemed to be incorporated by reference in this clause. The panel shall consist of [one/three] arbitrator(s) to be appointed in accordance with the PIAC Arbitration Rules. The language of the arbitration shall be []”

20.12 How many arbitrators are usually appointed?

Pursuant to Article 39 of the Law on Commercial Arbitration, an arbitration tribunal may consist of one or more arbitrators subject to the agreement of the disputing parties. In the absence of which, the arbitration tribunal shall consist of three arbitrators. In practice, the number of arbitrators appointed to form an arbitration tribunal to resolve a dispute is usually three.

20.13 Is there a right to challenge arbitrators, and if so under which conditions?

Yes, there is. According to Article 42.1 of the Law on Commercial Arbitration, an arbitrator must refuse to resolve a dispute, and the parties shall have the right to request a replacement of an arbitrator to resolve the dispute in the following circumstances:

- The arbitrator is a relative or the representative of a party;
- The arbitrator has an interest related to the dispute;



- There are clear grounds demonstrating that the arbitrator is not impartial or objective; or:
- The arbitrator was a mediator, representative or lawyer for either of the parties prior to the dispute being brought to arbitration for resolution, unless the parties provide written consent.

20.14 Are there any restrictions as to parties' representation in arbitration proceedings?

The Law on Commercial Arbitration is silent on any restriction with regard to the parties' representation in arbitration proceedings, but provides that the parties can authorize another person to act as their representative during the arbitration proceedings. However, as a matter of practice, in arbitration proceedings as well as in the courts, disputing parties can only authorize natural persons, not legal persons (i.e. legal entities) to act as their representatives.

20.15 When and under what conditions can courts intervene in arbitrations?

It is the general understanding that the courts will have no jurisdiction over a dispute if the parties to such dispute have agreed to choose arbitration for resolving any disputes between them.

However, there are certain circumstances where the courts may intervene in arbitration proceedings pursuant to Articles 41, 42, 43, 44, 46, 48, 62 and 69 of the Law on Commercial Arbitration as follows:

a. Appointing "ad hoc" arbitrators for the respondent

If the respondent fails to appoint its arbitrator within 30 days as of its receipt of the claimant's petition and if the parties do not agree otherwise to appoint the arbitrator, the claimant shall file to request the competent court to appoint an arbitrator for the respondent.



In case of more than one respondent, if the respondents fail to reach an agreement on the appointment of their arbitrator within 30 days as of its receipt of the claimant's petition and if the parties do not agree otherwise to appoint the arbitrator, either party or the parties can file to request the competent court to appoint the arbitrator for the respondents.

b. Appointing an “ad hoc” presiding arbitrator

If the arbitrators nominated by the parties fail to appoint the “ad hoc” presiding arbitrator within 15 days as of their appointment and if the parties do not agree otherwise to appoint the presiding arbitrator, then the parties shall file a request to the competent court to appoint the presiding arbitrator.

c. Appointing an “ad hoc” unique arbitrator

If the parties fail to appoint the ad hoc unique arbitrator within 30 days as of the respondent's receipt of the petition, and if the parties do not agree to request an arbitration centre to appoint the ad hoc unique arbitrator, either party shall file to request the competent court to appoint the ad hoc unique arbitrator.

d. Substituting an “ad hoc” arbitrator

If the substitution of an arbitrator is not agreed upon by the remaining arbitrators, or if an arbitrator or the unique arbitrator refuses to handle the settlement of the dispute, the Chief Judge of the competent court shall, within 15 days as of its receipt of the request filed by one of the arbitrators, by one or the disputing parties, assign a judge to decide the substitution of such arbitrator.

In case where an arbitrator cannot continue participating in the arbitration proceedings due to a force majeure event or objective



obstacles or is substituted, the selection and appointment of the substituted arbitrator shall be conducted along similar procedures.

e. Review of arbitration tribunal's decision on arbitration agreement

Before considering the substance of a dispute, the arbitration tribunal must consider the validity and effect of the relevant arbitration agreement. Any party taking issue with the arbitration tribunal's decision on the validity and effect of the relevant arbitration agreement shall have the right, within 5 working days as of its receipt of the arbitration tribunal's decision, to file a complaint with the competent court to request the court's review of such decision of the arbitration tribunal.

f. Collection of evidence

If the arbitration tribunal or the parties cannot collect evidence by themselves after exhausting all means, they can file an application with the competent court to request the court's assistance in collecting the evidence for them.

g. Subpoenaing witness

If a witness who has been properly subpoenaed by the arbitration tribunal fails to show up at the arbitration hearing without good reason, the arbitration tribunal has the right to request the competent court to issue a decision to subpoena the witness to the hearing. The court shall summon witnesses in case where the witnesses have been legitimately summoned by the arbitral tribunal but then fail to attend the meeting without justifiable reasons, and their absence obstructs the dispute settlement. The subpoenaed witness has the duty to comply with such court decision.

h. Granting interim or conservatory relief



Disputing parties have the right to request the court to grant interim or conservatory relief during the arbitration proceedings as summarized in more detail under item 20.16 below, irrespective of whether or not the arbitral tribunal has been established or the dispute has been settled by the tribunal. Disputing parties also have the right to request the court to change or discharge the interim or conservatory relief.

i. Registration of ad hoc arbitral award

Either party has the right to apply to the competent court for the registration of an ad hoc arbitral award within one year from the issuance of such arbitral award. It should be noted however that an ad hoc arbitral award can only be enforced after it has been properly registered with the competent court.

j. Cancellation of arbitral award

Last but not least, the competent court can set aside the arbitral award upon either party's application under one of the circumstances as indicated at item 20.18 below.

20.16 Do arbitrators have powers to grant interim or conservatory relief?

According to Article 49 of the Law on Commercial Arbitration, the arbitration tribunal has the powers to grant the following interim or conservatory relief measures:

- Prohibition of any change in the status quo of the assets in dispute;
- Prohibition of acts by, or ordering specific acts to be taken by a disputing party, aimed at preventing conduct adverse to the process of the arbitration proceedings;



- Attachment of the assets in dispute;
- Requirement of preservation, storage, sale or disposal of any of the assets of one or all disputing parties;
- Requirement of interim payment of money as between the parties; and
- Prohibition of transfer of the rights to the assets in dispute.

If during the course of the dispute, one of the parties has already petitioned a court to order one or more of the forms of interim relief summarized above and then applies to the arbitration tribunal to order interim relief, the arbitration tribunal must refuse such application.

If the arbitration tribunal orders a different form of interim relief, or one that exceeds the scope of that applied for by the applicant, and causes loss to either of the parties or to a third party, the party who has suffered loss has the right to institute court proceedings for adequate compensation.

20.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

• Formal requirements for arbitral awards

Pursuant to Article 61 of the Law on Commercial Arbitration, an arbitral award must be made in writing and contain the following main particulars:

- Date and location of issuance of the award;
- Names and addresses of the claimant and of the respondent;
- Full names and addresses of the arbitrator(s);
- Summary of the statement of claim and matters in dispute;
- Reasons for issuance of the award, unless the parties agree it is unnecessary to specify reasons for the award;



- Result of the dispute resolution;
- Time-limit for enforcement of the award;
- Allocation of arbitration fees and other relevant fees; and
- Signatures of the arbitrator(s).

If an arbitrator does not sign an arbitral award, the chairman of the arbitration tribunal must record such fact in the arbitral award and specify the reasons for it. Under such case, the arbitral award shall still be effective.

- **Deadlines for issuing arbitral awards**

The arbitral award shall immediately be issued in the session or no later than 30 days from the end of the final session. An arbitral award shall be final and in full force and effect as from the date of its issuance.

- **Other formal requirements for arbitral awards**

In addition, the Law on Commercial Arbitration provides stipulations relating to the right of requesting the arbitration tribunal to correct the form of arbitral awards. In detail, pursuant to Article 63 of the Law on Commercial Arbitration, a party may, within 30 days from the date of receipt of an arbitral award - unless the parties have some other agreement about this time-limit -, request the arbitral tribunal to rectify obvious errors in spelling or figures caused by a mistake or incorrect computation in the arbitral award, and must immediately notify the other party of such request. If the arbitral tribunal considers the request legitimate, it shall make the rectification within 30 days from the date of receipt of the request.

Otherwise, within 30 days from the date of issuance of the arbitral award, the arbitration tribunal may, on its own initiative, rectify any of the errors in spelling or figures caused by a mistake or incorrect computation in the arbitral award and immediately notify the parties.



20.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded?

As mentioned above, a domestic arbitral award shall be final and in full force and effect as from the date of its issuance as stipulated in the Law on Commercial Arbitration. A domestic arbitral award cannot be appealed. However, pursuant to Article 68 and Article 69 of the Law on Commercial Arbitration, a domestic arbitral award can be rescinded by the court if so requested by either party within 30 days of the receipt of such arbitral award and only in one of the following cases:

- There was no arbitration agreement or the arbitration agreement is void.
- The composition of the arbitration tribunal was or the arbitration proceedings were, inconsistent with the agreement of the parties or contrary to the provisions of the Law on Commercial Arbitration.
- The dispute was not within the jurisdiction of the arbitration tribunal; where an award contains an item which falls outside the jurisdiction of the arbitration tribunal, such item shall be set aside.
- The evidence supplied by the parties on which the arbitration tribunal relied to issue the award was forged; or an arbitrator received money, assets or material benefits from one of the parties in dispute which affected the objectivity and impartiality or the arbitral award.
- The arbitral award is contrary to the fundamental principles of the laws of Vietnam.

20.19 What procedures exist for enforcement of foreign and domestic awards?

20.19.1 Recognition and Enforcement of foreign arbitral awards in Vietnam



The recognition and enforcement of foreign arbitral awards in Vietnam is governed by the New York Convention, the Civil Procedure Code, and the Law on Enforcement of Civil Judgments and Mutual Legal Assistance Treaties between Vietnam and other countries.

The procedural steps for the recognition and enforcement of foreign arbitral awards in Vietnam are as follow:

- (i) The arbitral award creditors file petitions for recognition and enforcement of foreign arbitral awards in Vietnam with the Ministry of Justice of Vietnam;
- (ii) Within 7 days of the receipt of the petition dossiers, the Ministry of Justice of Vietnam forwards the petition dossiers to the competent court;
- (iii) Within 3 working days of the receipt of the petition dossiers from the Ministry of Justice of Vietnam, the court accepts the case and issues notice of acceptance to the relevant Procuracy and the award debtor;
- (iv) Within a period from 2 to 4 months, the court makes one of the following decisions:
 - a. Temporarily suspending the consideration of the petition if the award is being reviewed by a foreign competent body;
 - b. Suspending the consideration of the petition;
 - c. Organizing a court meeting for consideration of the petition.
- (v) Within 20 days of the decision to organize a court meeting for consideration of the petition, the court summons the involved parties for the meeting where a panel of 3 judges will decide if the award is recognized for enforcement in Vietnam;



- (vi) Parties have 15 days as of the judgment date (if they are present at the hearing) or as of their receipt of the court judgment (if they are absent from the hearing) to appeal to the higher court;
- (vii) Within 1 month as of its receipt of the appeal the higher court will summon the involved parties for a meeting where a panel of 3 judges will decide if the appealed judgment is upheld, partially amended or wholly amended;
- (viii) If an award which has been recognized for enforcement in Vietnam is being considered for cancellation by a foreign competent body, the relevant enforcement agency in Vietnam shall issue a decision to temporarily suspend the enforcement of the award. If an award which has been recognized for enforcement in Vietnam is cancelled by a foreign competent body, the court who granted the recognition for enforcement in Vietnam for the award shall issue a decision to cancel such recognition and send its decision to the relevant enforcement agency.

20.19.2 Enforcement of domestic awards

The enforcement of domestic arbitral awards is governed by the Law on Commercial Arbitration, the Civil Procedure Code and the Law on Enforcement of Civil Judgments. The procedural steps for the enforcement of domestic arbitral awards in Vietnam are as follow:

If the award debtor does not voluntarily implement the award and does not file with the court to request cancellation of the award within 30 days as of receipt of the award, the award creditor shall have the right to file with the competent enforcement agency to request the enforcement of the award in accordance with the Law on Civil Enforcement;

The award creditor of a domestic ad hoc arbitral award is required to register the award with the competent court before it can file with the competent enforcement agency to request the enforcement of the award.



20.20 Can a successful party in the arbitration recover its costs?

As stipulated in Article 34 of the Law on Commercial Arbitration, the party which loses the case must pay the arbitration fees, unless otherwise agreed by the disputing parties or stipulated by the procedural rules of the arbitration centre, or allocated by the arbitration tribunal.

“Arbitration fees” is defined by the same Article to be fees collected “for the provision of services for dispute resolution by arbitration”. This includes:

- (i) Remuneration and travelling and other expenses of arbitrators,
- (ii) Fees for expert consultancy and other assistance requested by the arbitration tribunal,
- (iii) Administrative fees,
- (iv) Fees for the arbitration centre’s appointment of an arbitrator for an ad hoc arbitrator at the request of the parties in dispute and
- (v) Fees for use of other necessary services provided by the arbitration centre.

20.21 Are there any statistics available on arbitration proceedings in the Vietnam?

The Ministry of Justice receives annual reports on the operation of arbitration centers from the Department of Justice of the provinces where the arbitration centers register their operation. Therefore, it is assumed that the Ministry of Justice has statistics on arbitration proceedings in Vietnam. However, the Ministry of Justice does not make the statistics on arbitration available for public access.

VIAC provides statistics on its arbitration proceedings in Vietnam on its website as follows:

<http://www.viac.org.vn/en-US/Home/statistics-111.aspx>



20.22 Are there any recent noteworthy developments regarding arbitration in Vietnam (new laws, new arbitration institutions, significant court judgments affecting arbitration etc.)?

On 20 March 2014, the Judge Council of the Supreme People's Court issued Resolution No. 01/2014 /NQ-HDTP guiding the implementation of several provisions of the Law on Arbitration. This Resolution provides guidelines for the implementation of the Law on Commercial Arbitration in connection with inter alia, the following issues:

- Determination of an invalid arbitration agreement;
- Determination of an unworkable arbitration agreement;
- The court's competence to settle a dispute in case there is an arbitration agreement;
- Revocation of arbitral award;
- Filing complaint and settlement of complaint regarding the existence, the invalidity and the unworkableness of an arbitration agreement;
- Court procedures in connection with the application, alteration and termination of interim or conservatory relief

The Resolution became effective on 2 July 2014.

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Brief Profile:	Mr. Thuan has more than 13 years of experience working for the People's Court of Ho Chi Minh City, of which he spent more than 8 years working as the assistant to the Chief Judge of the Civil Division. In March 2003, Mr. Thuan decided to leave the Court and started his career as a lawyer. He joined the then leading firm Vilaf – Hong Duc and played the role as a key litigator of the firm for more than 5 years before joining P&P in October 2008



	and being promoted the fifth partner of P&P in April 2009. Mr. Thuan is highly regarded for his versatility as a civil, commercial, maritime, insurance and construction trial and appellate lawyer. In his commercial litigation practice, Mr. Thuan has handled a variety of well-known cases including legal actions against a tax agency to decline a tax obligation equal to 7 million USD, defending a world famous soft drink manufacturer in labour class actions by employees, handling dispute among members of a 5-star hotel joint venture, handling various maritime cases which include the work of applying for arrest and release of sea-going vessels, representing the top US non-life insurer in subrogation cases, representing international top cotton and feeds traders in enforcing foreign arbitral awards in Vietnam to recover several of millions of USD and defending a local aqua-products manufacturer in an arbitration case worth of several of millions of USD. Mr. Thuan is consistently recommended by reputable legal journals such as Legal 500 as one of the leading lawyers for dispute resolution and litigation. Mr. Thuan has annually given lectures at several seminars on labour both in Vietnam and Singapore from 2009 and on debt collection in Vietnam in 2012. He also has had several contributions to Saigon Economic Times Magazine and other local newspapers on various commercial issues.
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