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ASIA ARBITRATION GUIDE

7th (Extended and Revised) Edition

DR. ANDREAS RESPONDEK
EDITOR



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ASIA ARBITRATION GUIDE

**DR. ANDREAS RESPONDEK
(EDITOR)**

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RESPONDEK & FAN PTE LTD

1 North Bridge Road #16-03

High Street Centre Singapore 179094

Tel.: +65 6324 0060 Fax: +65 6324 0223

Email: andreas.respondek@rf-arbitration.com Website: www.rf-arbitration.com

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.



TABLE OF CONTENTS

INTRODUCTION.....	7
MR. NEIL KAPLAN CBE QC SBS	7
STRUCTURE OF EACH COUNTRY REPORT	11
1. BANGLADESH.....	12
2. BRUNEI	41
3. CAMBODIA.....	54
4. CHINA.....	64
5. THE CHINESE EUROPEAN ARBITRATION CENTRE – HAMBURG	87
6. HONG KONG	99
7. INDIA	125
8. INDONESIA	147
9. JAPAN.....	165
10. KOREA	183
11. LAOS.....	198
12. MACAU.....	209
13. MALAYSIA	218
14. MONGOLIA.....	233
15. MYANMAR	245
16. NEPAL.....	255
17. PAKISTAN.....	265
18. PHILIPPINES.....	275
19. SINGAPORE	297
20. SRI LANKA	322
21. TAIWAN	339
22. THAILAND.....	363
23. VIETNAM	381



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AUTHORS

Introduction	MR. NEIL KAPLAN, CBE QC SBS
Bangladesh	DR. SHARIF BHUIYAN Dr. Kamal Hossain and Associates
Brunei	MR. AHMAD JEFRI ABD. RAHMAN Associate Professor, Universiti Brunei Darussalam (UBD)
Cambodia	DR. NARYTH H. HEM / MR. KOY NEAM BNG Legal
China	MR. RAINER BURKARDT MR. ONDREJ ZAPLETAL MS. QING GUO Burkardt & Partner Rechtsanwälte
China/Europe	PROF. DR. ECKART BRÖDERMANN, LL.M. (Harvard), Maître en Droit (Paris), FCI Arb (London) Brödermann Jahn DR. CHRISTINE HEEG-WEIMANN, LL.M. (Sydney), KPMG Law
Hong Kong	MR. STEFAN C. SCHMIERER Ravenscroft & Schmierer
India	MRS. ZIA MODY MR. ADITYA VIKRAM BHAT MS. PRIYANKA SHETTY AZB & Partners
Indonesia	MS. KAREN MILLS / MR. RIZKI KARIM KarimSyah Law Firm
Japan	MR. MICHAEL A. MUELLER Mueller Foreign Law Office



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Korea	MR. HYUNG SOO LEE MR. JOACHIM NOWAK MR. ROBERT W. WACHTER MS. YEBIN JEONG Lee & Ko
Laos	MR. SOULIGNASACK LIEMPHRACHANH MS. ROSIE COLE McDonald Patafta & Associates Lawyers Sole Co., Ltd
Macau	MR. PEDRO CORTÉS MS. MARTA MOURÃO, FCI Arb Rato Ling Lei & Cortés - Advogados e Notários (Lektou)
Malaysia	MR. THAYANANTHAN BASKARAN Baskaran
Mongolia	MS. ENKHTSETSEG NERGUI MS. MARALGOO DASHDOOROV Anand Advocates LLP
Myanmar	MR. JAMES FINCH MRS. THIDA AYE DFDL Myanmar Limited
Nepal	MR. ANUP RAJ UPRETI Pioneer Law Associates
Pakistan	JUSTICE. S. AHMED SARWANA Abraham & Sarwana
Philippines	MS. RENA RICO-PAMFILO Ateneo de Manila University School of Law
Singapore	PROF. LAWRENCE BOO MR. EUGENE THONG The Arbitration Chambers



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Sri Lanka	MR. CHANAKA DE SILVA PC MS. SEWWANDI KARALLIADDE Nithya Partners
Taiwan	MS. WENDY CHU MS. JAMIE CHEN Eiger
Thailand	DR. ANDREAS RESPONDEK MS. TASHA LIM MS. SUTTHIDA NORASARN MS. CHONLITA SAIKANDOK Respondek & Fan
Vietnam	MR. CHRISTIAN BRENDEL MR. TIM HOLTORF Brendel & Associates

Amendments for the 7th edition

Each country report has been completely revised and updated and was finalized in February 2021.



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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 2021 edition contains a review of 23 jurisdictions. By including Sri Lanka it has increased by one the number of jurisdictions covered in the last 2019 edition.

The importance of this work is underscored by the very large increase in the numbers of arbitrations being conducted at Asian and Australasian Centres. These Centres have truly come of age and have collectively overtaken the traditional European Centres.

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. It is important to note that each chapter has been updated where necessary, so it is important to refer to the most recent edition of this Guide.

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. Hong Kong and Singapore have taken the lead by introducing legislation which makes clear that third party funding for arbitration does not contravene rules of public policy that prevent the funding of litigation.



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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 yet again on my shelf.

Neil Kaplan CBE QC SBS



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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 jurisdictions. 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.

Singapore, February 2021

Dr. Andreas Respondek
Chartered Arbitrator (FCIArb)



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ABOUT DR. ANDREAS RESPONDEK

(www.rf-arbitration.com)

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 25 years in Asia, Andreas focusses on complex international arbitrations. He brings to international arbitrations multi-jurisdictional experience, backed up by fluency in five languages, combined with proven case management skills and experience. He is a member of the panel of many leading arbitration institutions in Asia and beyond and has acted as arbitrator, emergency arbitrator or counsel in many major international proceedings in institutional (including expedited proceedings) and ad hoc arbitrations, under the ICC, SIAC, HKIAC, Swiss Rules, TAI and UNCITRAL Arbitration Rules.

Andreas’ contact details are as follows:

Email: Respondenk@rf-arbitration.com
Office Tel: +65 6324 0060
Cellphone: +65 9751 0757
Office: 1 North Bridge Road
#16-03 High Street Centre
Singapore 179094

¹ In re application of Andreas Respondenk 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)?



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1. BANGLADESH



BY: **DR. SHARIF BHUIYAN**

1.1 Which laws apply to arbitration in Bangladesh?

The Arbitration Act, 2001 (Act No. I of 2001) (the “Act” or the “2001 Act”), which came into effect on 24 January 2001, governs arbitration in Bangladesh. It replaced the earlier Arbitration Act, 1940. The Act has been enacted in the Bangla language, and hence, its official name is also in Bangla, which is “Salish Ain, 2001.” There is no official English translation of the Act, and the translation of various provisions of the Act referred to in this report is an unofficial translation. The Act relates to both domestic and international arbitration.

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

The Act is substantially based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 (the “Model Law”). However, the Act does not incorporate the 2006 amendments to the Model Law as the Act was passed in 2001 and amendments were made to the Act in 2004. There are certain departures from the Model Law. The major deviations are summarized below:

- i. In defining “international commercial arbitration”, the Act determines the internationality of arbitration in terms of nationality of the parties, whereas the Model Law determines internationality in terms of location of business of the parties or of the subject matter of the dispute. In effect, this means that a commercial dispute between two Bangladeshi nationals may not, unlike under the Model Law, fall within the scope of “international commercial arbitration”, even if their places of business are outside Bangladesh.
- ii. Unlike the Model Law, the Act allows the parties to an arbitration agreement to exclude or modify jurisdiction of an arbitration tribunal to determine the validity of an arbitration agreement and



competence/jurisdiction of the tribunal in relation to a dispute referred to it.

- iii. In the context of challenge of an arbitrator, the Act deviates from the Model Law in that the Act provides that the concerned arbitral tribunal, in case of such a challenge, has to wait until the challenged matter is finally disposed of. It is only when such a challenge or the appeal against the decision of the arbitral tribunal is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an award. The Model Law allows the concerned arbitral tribunal, including the challenged arbitrator, to continue the arbitral proceedings and to make an award despite the fact that a request on challenge may be pending before a court.
- iv. Under the Model Law, the grounds for setting aside an arbitral award and the grounds for non-recognition of a foreign arbitral award include a ground that the arbitration agreement concerned was not valid under the law to which the parties subjected it. The relevant provisions of the Act on these matters are based on the Model Law (and also the New York Convention). However, in drafting the provisions of the Act, the English language text of the Model Law has been mistranslated into Bangla. As a result, instead of invalidity of the arbitration agreement, invalidity of the governing law of the arbitration agreement (“the law under which the parties entered into arbitration agreement was not a valid law”) has become a ground for setting aside and non-recognition. This anomaly needs to be corrected by way of an amendment of the Act.

According to the decision in *STX Corporation Ltd. V. Meghna Group of Industries Ltd.* 64 DLR (2012) 550 and 32 BLD (2012) 400, only those provisions of the UNCITRAL Model Law, which have been enacted in the Act, are binding on Bangladesh courts. Where the Act has departed from the Model Law, the courts are bound to give effect to such deviation.

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



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“Arbitration” is defined in Section 2(m) of the 2001 Act as “any arbitration whether or not administered by a permanent arbitration institution”. The Act deals with both domestic and international arbitration. The term “domestic arbitration” is not defined in the Act. “International commercial arbitration” is defined in Section 2(c) of the Act as follows:

“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:

- *an individual who is a national of, or habitually resident in, any country other than Bangladesh; or*
- *a body corporate which is incorporated in any country other than Bangladesh; or*
- *a company or an association or a body of individuals whose central management and control is exercised in any country other than Bangladesh; or*
- *the government of a foreign country.”*

Section 3 of the Act states that the provisions of the Act, except Sections 45 to 47, are not applicable to an arbitration if the place of that arbitration is outside Bangladesh. Sections 45 to 47 of the Act provide for recognition and enforcement of “foreign arbitral awards”. A “foreign arbitral award” is defined in section 2(k) as *“an award, in pursuance of an arbitration agreement, made in the territory of any state other than Bangladesh, but does not include an award made in the territory of a Specified State”*. However, the Act does not define the expression “foreign arbitration”.

The High Court Division (“HCD”) of the Supreme Court of Bangladesh in *Southern Solar Power v. Bangladesh Power Development Board* 2019 (2) 16 ALR (HCD) has held that an international commercial arbitration, the seat of which is outside Bangladesh, is to be regarded as foreign arbitration.

While construing the scope of application of Section 3 of the Act, the HCD in the *Southern Solar* case held that all the provisions of the Act, except Sections 45 to 47, are mandatorily applicable by the courts of Bangladesh to domestic arbitrations and international commercial arbitrations which take



place in Bangladesh. Sections 45 to 47 of the Act are mandatorily applicable to the execution of an award passed in a foreign arbitration. Sections 7A and 10 of the Act may be applied by the HCD to foreign arbitrations at its discretion in order to assist the foreign arbitration proceedings. Thus, the HCD has a discretion to apply Sections 7A and 10 of the Act to foreign arbitrations for ensuring effectiveness of foreign arbitrations.

1.4 Has Bangladesh acceded to the New York Convention?

Bangladesh is a party to the “1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”)”. Bangladesh acceded to the New York Convention on 6 May 1992. The Act has incorporated the principle of recognition and enforcement of foreign arbitral awards, as embodied in the New York Convention. The Act does not make a distinction in relation to the recognition and enforcement of a foreign arbitral award between a New York Convention state and a non-New York Convention state.

Sections 45 to 47 of the Act provide for recognition and enforcement of foreign arbitration awards. These provisions are discussed in 1.19 below.

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?

Parties can 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 Bangladesh arbitration law contain substantive requirements for the arbitration procedures to be followed?

1.6.1 Procedural law

I. Relating to procedural matters

**a. General**

Chapter VI of the Act contains provisions on the conduct of arbitral proceedings. The Act does not impose specific guidelines that must be followed in determining procedural matters when the law is silent on a particular issue. However, section 23 of the Act contains certain mandatory general responsibilities, which the arbitral tribunal must follow.

Section 23(1) of the Act provides that the arbitral tribunal must deal with any dispute submitted to it fairly and impartially and for this purpose: (a) each party must be given reasonable opportunity to present his case orally or in writing or both, and (b) each party must be given reasonable opportunity to examine all the documents and other relevant materials filed by the other party or any other person concerned before the tribunal.

The arbitral tribunal is also required to deal with a dispute submitted to it as quickly as possible (section 23(2)). In conducting the proceedings, the tribunal is required to act fairly and impartially in taking decisions in the matters of procedure and evidence and in exercising other powers conferred on it (section 23(3)).

b. Determining procedure

The Act allows flexibility to the arbitration tribunal in applying laws relating to procedural or evidential matters. Section 24 of the Act states that the arbitration tribunal is not bound to follow the rules of civil procedure (the Code of Civil Procedure, 1908) and evidence (the Evidence Act, 1872) in disposing of a dispute under the Act.

The arbitral tribunal must, in conducting its proceedings, follow the procedure agreed by the parties (section 25(1)). In the absence of any agreement on the procedure, the arbitral tribunal must decide the procedural and evidential matters in accordance with the Act (section 25(2)).



Section 25(3) provides that, without prejudice to the powers of the parties to agree generally on procedural or evidential matters, the following are to be included in the procedural and evidential matters: (a) time and place of holding the proceedings either in whole or in part; (b) language of the proceedings and supply of translation of any document; (c) form of written statement of claim and defence, the time of submission and extent of amendment thereof; (d) publication of documents and presentation thereof; (e) the questions to be asked to the parties and replies thereof; (f) admissibility, relevance and weight of any evidence and materials; (g) powers of the arbitral tribunal in examining the issues of fact and law; and (h) submission or presentation of oral or written evidence.

The arbitral tribunal may fix the time to enforce its orders and extend the time fixed by it (section 25(4)).

c. Determination of place of arbitration

Section 26(1) of the Act provides that the parties are free to agree on the place of arbitration. Failing an agreement, the place of arbitration is to be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties (section 26(2)). However, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, goods or other property (section 26(3)).

d. Exchange of written pleadings

According to section 29 of the Act, unless the parties agree otherwise, the arbitration tribunal is to set the timeframe within which the statement of claim has to be filed by the claimant and defence has to be filed by the respondent. The parties can provide the supporting documents along with their respective pleading and may list the documents, which would be provided at a later stage.

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Subject to any agreement between the parties, the pleadings may be amended during the course of the arbitration proceedings unless the tribunal, in the interest of fairness or to avoid delay, considers such amendment improper (Section 29(3) of the Act).

e. Oral hearing

According to section 30(1) of the Act, the parties are free to agree whether to hold oral hearings or to conduct the proceedings on the basis of written pleadings. Unless the parties have a contrary agreement, the tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents supported by affidavit and other materials.

The tribunal can hold oral hearings at an appropriate stage of the proceedings, either on a request by a party, or of its own motion, unless the parties have agreed that no oral hearing shall be held.

The parties must be given sufficient prior notice of any hearing and of any meeting of the tribunal for the purposes of inspection of documents, goods or other property (section 30(2)). All statements, documents or other information supplied to, or applications made to the tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the tribunal may rely in making its decision shall be communicated to the parties (section 30(3)).

Section 35(4) of the Act provides that if, after receiving notice in this regard, a party without sufficient cause fails to (a) attend or be represented at an oral hearing; or (b) submit written evidence or make written submissions, the arbitral tribunal may continue the proceedings in the absence of that party or without any written evidence or submissions from that party and may make an award on the basis of the evidence before it.

f. Legal or other representation

Under section 31 of the Act, unless otherwise agreed by the parties, a party to an arbitral proceeding may be represented in the proceedings by a lawyer



or other person chosen by him. There are no requirements under the law for the representative to be a lawyer, as it can be any person chosen by the party. In case of a lawyer representing a party in the arbitration, there is also no requirement for the lawyer to be admitted to the local bar. A power of attorney is not specifically required under the Act for a representative to act on behalf of a party, but the tribunal may so require or the parties may agree to that effect.

g. Powers of the arbitration tribunal in case of parties' default

The parties are free to agree on the powers of the arbitral tribunal in case one party fails to do anything necessary for the proper and expeditious conduct of the arbitration. If a claimant fails to communicate his statement of claim, the tribunal shall terminate the proceedings and if the respondent fails to communicate his statement of defence, the tribunal shall continue the proceedings without treating that failure in itself as an admission of the allegations by the claimant (section 35(1) and 35(2) of the Act).

If the arbitral tribunal is satisfied that there has been inordinate and inexcusable delay on the part of the claimant in pursuing his claim and that the delay gives rise to or is likely to give rise to a real risk of there being no fair resolution of the dispute, or has caused, or is likely to cause, serious prejudice to the respondent, the tribunal may make an award dismissing the claim (section 35(3)).

If, after receiving notice in this regard a party without sufficient cause fails to attend or be represented at an oral hearing, or fails to submit written evidence or make written submissions, the tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence before it (section 35(4)).

The following powers are also provided to the arbitral tribunal under section 35 in case of default of the parties:

- (a) If without showing sufficient cause a party fails to comply with any order or direction issued by the arbitral tribunal, the arbitral tribunal



ADWA

may make an order requiring compliance with such order or direction within such time as it may deem fit (section 35(5)).

- (b) If a claimant fails to comply with an order of the arbitral tribunal requiring a deposit or security for costs, the arbitral tribunal may make an award dismissing his claim (section 35(6)).
- (c) If a party fails to comply with any other kind of order, then the arbitral tribunal may –
 - (i) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject-matter of the order;
 - (ii) draw such adverse inferences against the defaulting party from the act of non-compliance as the circumstances justify;
 - (iii) proceed to passing an award on the basis of such materials as have been properly provided to it; or
 - (iv) make such order, as it thinks fit, as to the payment of costs incurred in consequence of the non-compliance (section 35(7)).

h. Interim remedies by tribunal

The tribunal's powers to grant interim orders is discussed in 1.16 below.

II. Relating to evidential matters

a. General

As noted above, according to section 24 of the Act, the arbitral tribunal is not bound by the Evidence Act, 1872. Section 34 of the Act provides that unless otherwise agreed by the parties:

- (a) evidence may be given before the arbitral tribunal orally or in writing or by affidavit.
- (b) the arbitral tribunal may administer oath or affirmation to a witness, subject to his consent.

***b. Evidence of fact witnesses***

Section 33 of the Act permits either the tribunal or a party, if permitted by the tribunal, to apply to the court for issuing summons upon any necessary person for examination, or for the production of goods or for appearing before the tribunal for both purposes. Such person however cannot be compelled to answer any question or produce any document, which cannot be compelled in trial before the court. Wilful default to comply with such summons or refusal to perform constitutes contempt of the tribunal and punishable by the court upon complaint of the tribunal as if the offence is committed in relation to proceedings before a court.

As noted above, under section 34 of the Act, the tribunal may administer oath or affirmation to a witness subject to his consent and therefore, a witness may be sworn in before the arbitrators. There are no provisions as to the method of hearing the witnesses and therefore the parties are free to agree upon a procedure, and cross-examination would also be permissible.

c. Documentary evidence

Apart from section 34 of the Act, which permits evidence to be submitted in writing, there are no further statutory provisions for the production of written evidence.

d. Experts

Under section 32(1) of the Act, the arbitral tribunal has the power to appoint experts or legal advisers to report to it on specific issues. The tribunal may also appoint assessors to assist it on technical matters and require a party to give the expert, legal adviser or the assessor, as the case may be, any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his/her inspection.

Experts may be also appointed by parties to an arbitration. If a party appoints an expert, the expert is required to participate in the oral hearing after delivery of his expert report or after providing information or advice, so that the parties may put questions to him (Section 32(2)(a)). The expert is



ADWA

also required to make available, at the request of a party, all documents, goods and other property which the expert was provided with in order to prepare the report (Section 32(2)(b)). The Act provides that the parties to the arbitration shall be given reasonable opportunity to comment on the report, information, opinion or advice submitted to the tribunal by the expert, legal adviser or the assessor (Section 32(2)(c)).

Section 32(2)(a) of the Act provides that the expert's report may be oral or in writing.

1.6.2 Substantive law

The arbitration tribunal is required to decide the dispute in accordance with the law designated by the parties (Section 36(1)). In the absence of such designation, the arbitration tribunal is required to decide law applicable to the dispute considering all the circumstances surrounding the dispute (Section 36(2)). The arbitration tribunal is required to decide the applicable law in accordance with the terms of the contract taking into account the usages of the matter concerned, if any, for ends of justice (Section 36(3)).

Section 36(1) of the Act states that any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country.

Section 36(1) of the Act appears to be based on Article 28(1) of the Model Law. Article 28(1) of the Model Law provides that any designation of the law or legal system of a given State must be construed as directly referring to the substantive law of that State and not to its “conflict of laws rules.” However, in drafting section 36(1) of the Act, the expression “conflict of laws rules” has been mistranslated into Bangla as “variance of the law” making this provision rather nonsensical. This needs to be corrected by an amendment of the Act.

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

Section 7 of the Act provides that “notwithstanding anything contained in any other law for the time being in force, where a party to an arbitration agreement files any legal proceedings in a court against the other party in



respect of any matter agreed to be submitted to arbitration, the court shall not have jurisdiction in respect of such legal proceedings except in so far as provided by this Act.”

Section 7 of the Act effectively acts as a bar for a judicial authority to entertain any legal proceedings commenced by a party to an arbitration agreement against the other party. The court or judicial authority is obliged to stay further proceedings and refer the parties to arbitration (*Brexco Bremer Export Contor Brand, West Germany v. M/s. Popular Biscuit Ltd.* 6 MLR (2001) (HCD) 281; *Maico Jute and Bag Corporation v. Bangladesh Jute Mills Corporation* 8 MLR (2003) (AD) 4).

Section 10 of the Act allows a party to an arbitration agreement to make an application to the court at any time before filing a written statement (i.e. statement of defence) to stay the proceedings and refer the parties to arbitration. The application under this section may not be made once the party seeking to invoke this section has filed a statement of defence.

Upon receiving an application, the court, if satisfied that an arbitration agreement exists, refers the parties to arbitration and stay the proceedings, unless the court finds that the arbitral agreement is void, inoperative or concerns a matter incapable of determination by arbitration (Section 10(2)).

In *Maico Jute and Bag Corporation v. Bangladesh Jute Mills Corporation* 8 MLR (2003) (AD) 4, it was observed that if an arbitration clause is contained in a contract, the court under Section 10 of the Act makes no wrong if it stays, either on its own motion or on an application by a party, further proceedings of the suit and refers the matter to the arbitrator for settlement.

Sections 7 and 10 of the Act should be read together to construe the duty conferred upon the courts to refer matters to arbitration.

Section 7Ka of the Act empowers the court to pass appropriate interim orders before and after arbitration proceedings or until enforcement of the award. Section 7(Ka) provides that, unless the parties agree otherwise, upon application of a party to an arbitration agreement, before or during the continuance of arbitration proceedings, or until enforcement of an award, the High Court in the case of international commercial arbitration and the



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District Court in case of other arbitrations may pass order in the following matters:

- (a) appointment of guardian for a minor or a person of unsound mind to conduct arbitral proceedings on his/her behalf;
- (b) interim custody of or sale of or other protective measures in respect of goods or property included as the subject matter of an arbitration agreement;
- (c) injunction against transfer or relocation of property with a view to obstructing enforcement of an arbitral award;
- (d) empowering any person to seize, preserve, inspect, take video of, take photograph of, take custody of, collect information and specimen of, observe, examine, take evidence of, any goods or property included as the subject-matter of an arbitration agreement, and for that purpose, to enter into the land or building of which a party is in possession;
- (e) ad interim injunction;
- (f) appointment of receiver; and
- (g) any other interim protective measures, which appear reasonable or appropriate to the court.

The court can also cancel, alter or amend an order passed under section 7Ka.

The High Court Division has observed in *Drilltec-Maxwell Joint Venture v. Gas Transmission Company Limited* 21 BLC (2016) 122 that when a party applies under section 7Ka of the Act for interim measures, the court will first have to be satisfied that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. Once it is so satisfied, the court will have the jurisdiction to pass orders under section 7Ka in order to protect and preserve the subject matter of arbitral proceedings with a view to ensuring that any future award may remain effectively executable. In the *Southern Solar* case 2019 (2) 16 ALR (HCD) the



High Court Division has held that it has a discretion to apply Section 7Ka in case of foreign arbitrations.

1.8 What are the main arbitration institutions in Bangladesh?

The main arbitral institution in Bangladesh is the Bangladesh International Arbitration Centre (BIAC). BIAC was established through private sector initiative with a view to developing and promoting institutional arbitration in Bangladesh. BIAC started its operation in April 2011 and in the same year adopted its arbitration rules, called BIAC Arbitration Rules 2011 which has been repealed by the BIAC Arbitration Rules 2019 (the “BIAC Rules”). BIAC offers arbitration and mediation services, as well as a range of ancillary administrative and technical services in relation to conducting arbitration and mediation. BIAC Rules are applicable to both domestic and international commercial arbitrations. If the parties to an arbitration proceeding adopt the BIAC Rules, the BIAC Arbitration Committee (as defined in the BIAC Rules) can exercise its authority regarding appointment of arbitrators under Rule 7 of the Rules.

The Federation of Bangladesh Chambers of Commerce and Industry (FBCCI) established the “Bangladesh Council of Arbitration (BCA)” in 2004 for the resolution of both national and international commercial disputes as an arbitral body. BCA has its own Rules of Arbitration.

1.9 Addresses of major arbitration institutions?

Bangladesh International Arbitration Centre (BIAC):

Unique Heights, 13th Floor
Kazi Nazrul Islam Avenue
Dhaka-1217, Bangladesh
Tel.: 01314-447490
E-mail: info@biac.org.bd
Website: www.biac.org.bd



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

Federation Bhaban (2nd Floor)
60, Motijheel C/A, Dhaka
Bangladesh
Tel: (880) 956 05 89
Fax: (880) 2 71 760 30 / 956 05 88
Website: <http://www.fbcci-bd.org/>
E-mail: fbcci@bol-online.com

1.10 Arbitration Rules of major arbitration institutions?

The **BIAC Arbitration Rules 2019** are available at:
(<https://www.biac.org.bd/biac-arbitration-rules-2011/>).

Rules of Arbitration of the Bangladesh Council of Arbitration are available at:

<http://www.intracen.org/Rules-of-Arbitration-of-the-Bangladesh-Council-of-Arbitration/>

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

BIAC Model Arbitration Clause:

“All disputes arising out of or in connection with the present contract shall be finally settled under the 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.”

BCA Model Arbitration Clause:

BCA recommends that parties use one of the following arbitration clauses in their contracts:

- 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.”*

1.12 How many arbitrators are usually appointed?

The parties are free to determine the number of arbitrators (section 11(1)). Section 11(3) of the Act provides that unless otherwise agreed by the parties, where the parties appoint an even number of arbitrators, the appointed arbitrators shall appoint an additional arbitrator who shall act as the Chairman of the tribunal. If the parties fail to determine the number of arbitrators, section 11(2) provides that the tribunal shall consist of three arbitrators.

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

a. Grounds

Pursuant to section 13(3) of the Act, an arbitrator may be challenged only if there are circumstances giving rise to justifiable doubts as to his impartiality or independence, or if he does not possess the qualifications agreed to by the parties.

According to section 13(4) of the Act a party may challenge an arbitrator appointed by him, or in whose appointment he has consented, only for reasons of which the party becomes aware after the appointment has been made.

b. Procedure

The parties are free to agree on a procedure for challenging an arbitrator (section 14(1)). Where there is no agreement as to the procedure for



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challenging an arbitrator, a party who intends to challenge an arbitrator shall, within thirty days after becoming aware of the circumstances referred to in section 13(3), send a written statement stating the reasons for the challenge to the arbitral tribunal (section 14(2)). Section 14(3) provides that unless the arbitrator challenged under section 14(2) withdraws from his office or the other party agrees or, in case of multiple parties, the other parties agree, to the challenge, the arbitral tribunal shall decide on the challenge within thirty days from the date of filing the written statement referred to in section 14(2).

Any party aggrieved by the decision of the tribunal under the procedure above, may file an appeal to the High Court Division within thirty days from the date of the decision (section 14(4)). The High Court Division shall decide the appeal within ninety days from the date on which appeal is filed (section 14(5)). If a challenge under any procedure agreed upon by the parties or the procedure set out in section 14(3) or the appeal preferred under section 16(4) of the Act against the decision is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an award (section 16(6)).

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

This is discussed in paragraph (f) under 1.6.1.I above.

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

Under the 2001 Act, the involvement of courts has been kept to a minimum level essential for effective operation of the tribunal's functions.

Circumstances in which the court or the High Court Division, as appropriate, can intervene in arbitrations are outlined below. The court or the High Court Division, as appropriate, can:

- pass interim orders for, among others, preservation of subject matter of the dispute in arbitration (section 7Ka);



- refer the dispute to the arbitration tribunal and thereby stay the proceedings in the court (section 10);
- appoint arbitrator (section 12):
 - in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree;
 - in an arbitration with three arbitrators, if (a) a party fails to appoint an arbitrator within thirty days of the receipt of a request to do so from the other party; or (b) the appointed arbitrators fail to agree on the third arbitrator within thirty days of their appointment;
- decide an appeal submitted by a party aggrieved by the decision of the arbitral tribunal on the challenge of an arbitrator (section 14(4),(5));
- decide on termination of mandate of an arbitrator where the arbitrator becomes unable to perform his functions or fails to act without undue delay (section 15(2));
- decide jurisdiction of the arbitral tribunal on the application of any of the parties to an arbitration agreement (Section 20);
- enforce interim order of an arbitration tribunal requiring a party to take any interim protective measures in respect of the subject matter of the dispute (section 21(4));
- issue summons upon any necessary person on application of the arbitral tribunal or a party to the arbitration proceedings with the approval of the arbitration tribunal (section 33);
- set aside an arbitration award made in an arbitration held in Bangladesh (Section 42);



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-
- enforce an arbitration award made in an arbitration held in Bangladesh (Section 45);
 - enforce an arbitration award made in a foreign arbitration (section 45);
 - hear and decide appeals (by the High Court Division) against an order of a District Judge and Additional District Judge (Section 48):
 - o setting aside or refusing to set aside an arbitration award under section 42;
 - o refusing to enforce an arbitration award under section 44;
 - o refusing to recognize or enforce any foreign arbitral award under Section 45;
 - decide the arbitrators' remuneration or costs (Section 50); and
 - in certain circumstances refer a dispute (by the Bankruptcy Court) to an arbitration tribunal (section 52).

All of the above provisions, except section 45, are applicable to arbitrations the seat of which is in Bangladesh. In case of arbitrations the seat of which is outside Bangladesh, section 45 is generally applicable and sections 7A and 10 may be applicable at the discretion of the court.

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

Section 21 of the Act states that, 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, and no appeal would lie against such order.

The arbitral tribunal also has the power to require a party to provide appropriate security in connection with a measure ordered under section 21 (section 21(2)).

An interim order passed by an arbitral tribunal may be enforced by the court on an application by the party requesting the taking of such interim



measures (section 21(4)). An application filed under section 21(4) cannot be deemed to be incompatible with the arbitration agreement nor a waiver of the agreement (section 21(5)).

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

- **Formal requirements for arbitral awards**

With regard to the form and contents of the arbitral award, section 38 of the Act provides as follows: an arbitral award is required to be made in writing and must be signed by the arbitrator or arbitrators (section 38(1)); in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient and the reason for any omitted signature shall have to be stated in the award (section 38(2)); no reasons would have to be provided by the arbitral tribunal where the parties have agreed to that effect, or the award is an arbitral award on agreed terms under section 22 (section 38(3)); the arbitral award must state the date and place of arbitration and the award would be deemed to have been made at that place (section 38(4));

Section 38 further provides that unless otherwise agreed by the parties, where and insofar as an arbitral award is for the payment of money, the arbitral tribunal may include interest in respect of the sum for which the award is made. The interest may be awarded at such rate as the tribunal deems reasonable, either on the whole or on any part of the sum, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made (section 38(6)(a)).

- **Deadlines for issuing arbitral awards**

There are no time-limits specified in the Act for making an arbitral award.

- **Other formal requirements for arbitral awards**



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After the arbitral award is made, a copy signed by the arbitrator or arbitrators has to be delivered to each party (section 38(5)).

Section 40 of the Act allows any clerical, computational, typographical or similar errors to be corrected on application of either party or on the tribunal's own initiative.

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

a. Appeal

In Bangladesh there is no second arbitral instance where arbitral awards can be appealed on merits.

Pursuant to Section 39 of the Act, an arbitral award is final and binding. Therefore, there is no right of appeal against an arbitral award. A party wishing to challenge an arbitral award may submit an application for setting aside the award under section 42 of the Act.

Section 48 of the Act deals with right of appeal to the High Court from orders passed by the District Court. It states that an appeal would lie from the following orders:

- (a) setting aside or refusing to set aside an arbitral award;
- (b) refusing to enforce an arbitral award; and
- (c) refusing to recognize or enforce any foreign arbitral award.

Pursuant to Article 103 of the Constitution of Bangladesh, appeal against the decision of the High Court in any of the aforesaid appeals would lie to the Appellate Division of the Supreme Court, subject to obtaining a leave for appeal either from the High Court or from the Appellate Division.

b. Setting aside of the arbitral award



Under the Act, arbitral awards cannot be reviewed on the merits. Section 43(1) of the Act lays down the following grounds for setting aside an arbitral award:

- (i) a party to the arbitration agreement was under some incapacity;
- (ii) the law under which the parties entered into arbitration agreement is not a valid law;
- (iii) 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 due to some reasonable cause to present his case;
- (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decision on matters beyond the scope of the submission to arbitrators, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside;
- (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, in the absence of such agreement, was not in accordance with the provisions of this Act;
- (vi) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force in Bangladesh;
- (vii) the arbitral award is prima facie opposed to the law for the time being in force in Bangladesh;
- (viii) the arbitral award is opposed to the public policy of Bangladesh; or
- (ix) the arbitral award is induced or influenced by fraud or corruption.

Section 43(1)(a)(ii) of the Act appears to suffer from the same anomaly as section 46(1)(a)(ii). Article 34(2)(a)(i) of the Model Law, on which section 43(1)(a)(ii) appears to be based, states that one of the grounds for setting aside an arbitral award is that the arbitration agreement concerned is not valid under the law to which the parties subjected it. However, in drafting section 43(1)(a)(ii) of the Act, the relevant English language text of the



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Model Law has been mistranslated into Bangla. As a result, instead of invalidity of the arbitration agreement, invalidity of the governing law of the arbitration agreement has become a ground for setting aside an arbitral award. This anomaly needs to be corrected by way of an amendment of the Act

In *Chittagong Steel Mills Ltd. v. M/s. MEC, Dhaka* 9 MLR (2004) (HCD) 137 it was observed that the applicant while making an application for setting aside an award is required to deposit the amount of money payable under the award in the court or furnish security as may be directed by the court.

In *K.M. Shafi Ltd. v. Government of Bangladesh* 2 BLD (1982) 111 it was held that the court cannot set aside an award on the ground that the point interpreted by the arbitrator could be interpreted in a different way.

In *Bangladesh Power Development Board v. M/s Arab Contractors (BD) Limited* 15 MLR (2010) (HCD) 185 it was observed that the court ordinarily does not interfere with the amount awarded by an arbitration unless the same is against any law in force, unreasonable, mala fide or passed without considering any material evidence substantially affecting the award amount. The award can only be set aside on the grounds set out in section 43 of the Act.

In *M/s. Saudi-Bangladesh Services Company Ltd v. Saudi Arabian Airlines Corporation* 14 MLR (2009) (HCD) 441, the court set aside a majority award on the ground of violation of the principle of fairness and impartiality in arbitral proceedings due to the exclusion of one of the three arbitrators from deliberations before issuing the award.

In *Stratus Construction Co v. R & H Department* 17 BLC (2012) 663 it was held that where an arbitral tribunal entertains and decides issues which had not been referred to it by the contending sides, the arbitral tribunal exceeds its jurisdiction, and therefore, any award made by it is liable to be set aside.

According to section 42 of the Act, an application for setting aside an arbitral award must be made within sixty (60) days from the receipt of the award.



c. Procedure for setting aside of the arbitral award

Under section 42(1) of the Act, an application may be made to the court by a party within sixty days from the receipt of the award. The District Court may set aside the arbitral award in an arbitration other than an international commercial arbitration. Section 42(2) provides that the High Court may set aside an 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.

Section 43(2) of the Act provides that where an application is made to set aside an award, the District Court or the High Court, as the case may be, may order that any money payable by the award must be deposited in the District Court or the High Court (as appropriate) or otherwise be secured pending the disposal of the setting aside application.

d. Effect of an award that has been set aside

There is no provision in the Act regarding effects of setting aside of an arbitral award. Judicial decisions indicate that after an award has been set aside, the parties may refer the dispute to arbitration afresh.

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

a. Enforcement of arbitration award made in arbitration held in Bangladesh

An arbitration award made in arbitration held in Bangladesh is enforceable under Section 44 of the Act in the same manner as if it were a decree of the court. Section 44 reads as follows:

“Where the time for making an application to set aside an arbitration award under section 42 of the Act has expired, or such application having been made has been refused, the award shall be enforced by the court under the Code of Civil Procedure in the same manner as if it were a decree of that court.”



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Explanation: The expression “court” in this section means the court within the local limits of whose jurisdiction the arbitration award has been finally made and signed.”

“Court” in the above provision means the District Court, i.e. the highest judicial tier below the Supreme Court.

b. Enforcement of foreign arbitral award

Regarding recognition and enforcement of foreign arbitral awards, Section 45(1) of the Act states that notwithstanding anything contained in any law for the time being in force, subject to the provisions of section 46, any foreign award which would be enforceable must be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Bangladesh.

A foreign arbitral award must, on an application being made by any party to it, be enforced by execution by the District Court, Dhaka under the Code of Civil Procedure, in the same manner as if it were a decree of a court in Bangladesh. In *Canda Shipping and Trading SA v. TT Katikaayu* 54 DLR (HCD) 93 it was observed that a foreign arbitral award is enforceable in Bangladesh under the Code of Civil Procedure in the same manner as if it were a decree of a Bangladesh court.

Section 45(2) of the Act provides that application for the execution has to be accompanied by original arbitration award or an authenticated copy of the award, original or authenticated copy of the agreement for arbitration and any other evidence proving that the award is a foreign award.

According to section 45(3) of the Act if the foreign arbitral award to be enforced or the arbitration agreement to be produced is in a language other than English or Bangla, the applicant is required to produce a translation in 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 Bangladesh.

Section 46(1) of the Act lays down the grounds for refusing recognition or execution of foreign arbitral awards. Section 46 of the Act provides that:

- “(1) Recognition or execution of foreign arbitration award may be refused only on the following grounds, namely:



- (a) if the party against whom it is sought to be enforced furnishes proof to the court by which the award is sought to be enforced that:
 - (i) a party to the arbitration agreement was under some incapacity;
 - (ii) the law under which the parties entered into arbitration agreement is not a valid law;
 - (iii) the party was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable due to some reasonable cause to present his case; or
 - (iv) the foreign arbitral award 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, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;

 - (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, in the absence of such agreement, was not in accordance with the law of the country where the arbitration took place;
 - (vi) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made; or
- (b) the court in which enforcement of the foreign arbitration award is sought, finds that:
 - (i) the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force in Bangladesh; or



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- (ii) the enforcement of the foreign arbitration award is opposed to the public policy of Bangladesh.

Section 46(1)(a)(ii) appears to be based on Article V(1)(a) of the New York Convention and Article 36(1)(a)(i) of the UNCITRAL Model Law on International Commercial Arbitration 1985 (“Model Law”). According to the relevant provisions of the New York Convention and the Model Law, one of the grounds for non-recognition of a foreign arbitral award is that the arbitration agreement concerned is not valid under the law to which the parties subjected it. However, in drafting section 46(1)(a)(ii) of the Act, the relevant English language text of the New York Convention and the Model Law has been mistranslated into Bangla. As a result, instead of invalidity of the arbitration agreement, invalidity of the governing law of the arbitration agreement has become a ground for non-recognition. This anomaly needs to be corrected by way of an amendment of the Act.

Section 46(1)(b)(ii) of the Act expressly states that recognition or enforcement of an arbitral award may be refused on the ground that recognition and execution of the award would be in conflict with the public policy of Bangladesh. The Act does not define the expression or specify what would constitute “public policy”.

Section 46(2) of the Act provides that if an application for the setting aside or suspension of the enforcement of the foreign arbitral award has been made to a competent authority referred to in sub-clause (vi) of clause (a) of sub-section (1), the court may, if it considers it proper, adjourn the decision on the enforcement of the foreign arbitral award and may also, on the application of the party claiming enforcement of the foreign award, order the other party to give suitable security.

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

Under section 38(7) of the Act, unless the parties agree otherwise, the arbitration tribunal is required to fix the costs of arbitration. With regard to costs, the arbitral tribunal is required to specify the following in an arbitration 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 costs will be paid.

Under the above provision, “arbitration costs” includes reasonable costs relating to the fees and expenses of the arbitrators and witnesses, legal fees and expenses, any administration fees of the institution supervising the arbitration and any other expenses incurred in connection with the arbitral proceedings and the arbitral award.

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

There are no readily available statistics on arbitration proceedings in Bangladesh.

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

The High Court Division in the *Southern Solar* case (2019 (2) 16 ALR (HCD)), which was decided on 23 May 2019, has held that sections 7Ka and 10 of the 2001 Act may be applied by the HCD to foreign arbitrations at its discretion in order to assist the foreign arbitration proceedings. Consequently, a party to an international commercial arbitration the seat of which is outside Bangladesh may file an application to the High Court Division under section 7Ka for obtaining necessary interim orders before or during the continuance of the arbitration proceedings or until enforcement of the arbitral award. Where a party to a foreign arbitration initiates any legal proceedings in any court in Bangladesh, the other party may make an application to the court under section 10 for referring the dispute to the arbitration tribunal and staying the legal proceedings in the court.



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Name of Authors:	DR. SHARIF BHUIYAN PARTNER AND DEPUTY HEAD OF FIRM
Name of Law Firm:	Dr. Kamal Hossain and Associates
Address:	Metropolitan Chamber Building 2nd Floor 122-124 Motijheel CA Dhaka 1000, Bangladesh
Telephone No.:	+ 880-2-955 2946 / 956 4954
Fax No.:	+ 880-2-956 4953
Email:	sbhuiyan@khossain.com
Website:	www.khossain.com



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.



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- iii. 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?

The Courts in Brunei Darussalam are extremely supportive of the arbitration process. Under the International Arbitration Order, a stay of proceedings is mandatory, unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.

2.8 What are the main arbitration institutions in Brunei Darussalam?

The Brunei Darussalam Arbitration Centre (“BDAC”) was established on 24 December 2014 with the role of promoting the adoption of arbitration and mediation services in resolving commercial issues and disputes as a speedier alternative to court proceedings.

BDAC provides services and administration of arbitration and mediation to meet the needs of domestic and international consumers. BDAC has its own board of directors and is located at the 8th Floor of the Brunei Economic Development Board headquarters on Jalan Kumbang Pasang.



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The Chairman of the Brunei Arbitration Centre² is the statutory appointing authority under the AO (Section 13(8)) and the IAO (Section 8(2)).

In addition to the establishment of BDAC, the Arbitration Association of Brunei Darussalam (“AABD”) is the sole arbitration association in Brunei Darussalam.

Formed in 2004, a part of the AABD’s objectives is also to assist Brunei Darussalam in developing and providing advisory and assistance support in the field of arbitration. The AABD assists parties who wish to resolve their disputes by way of arbitration and also arranges places for arbitration hearings, and to ensure that the panel of international arbitrators are kept to a very high standard where there is a wide choice of diversity of leading international arbitrators who are currently mainly non-Brunei nationals. The AABD strongly encourages all of its arbitrators to adopt the latest international arbitration practices and cost controlling techniques.

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 See International Arbitration (Amendment) Order, 2016 and Arbitration (Amendment) Order, 2016



2.10 Arbitration Rules of major arbitration institutions?

The Brunei Darussalam Arbitration Centre Rules can be found at BDAC's website at

http://bdac.gov.bn/SiteCollectionDocuments/BDAC_Rules.pdf

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?

BDAC's Model Arbitration Clause provides 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 BDAC Arbitration Rules”.

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 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?

There are no restrictions for persons representing any party in arbitration proceedings. The amendment to the Legal Profession Act in 2016³ therefore removes the previous requirement to hold a valid Practising Certificate under the Legal Professions Act of Brunei Darussalam for the purposes of representing a party in an arbitration.

³ See Legal Profession Act (Amendment) Order, 2016



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;



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- 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:
 - i) the decision of the arbitral tribunal on the question was obviously wrong;
 - ii) the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and
 - iii) 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.

The courts had the opportunity to provide guidance on what amounts to “... no sufficient reason...” in an application for a stay of proceedings under s.6 of the Arbitration Order, 2009⁴. In Seawise Sdn. Bhd. v. Mashhor General Contactor Sdn Bhd and Anor⁵, the judge in chambers allowed an appeal in favour of the plaintiff for a claim which was subject to an arbitration clause to continue in the courts on the ground that there was a “lack of evidence of serious dispute and the weakness of the Defendant’s case”. The judge found sufficient reason for the matter not to be referred in accordance with the arbitration agreement. This decision was upheld by the Court of Appeal⁶.

This decision appears to be in line with similar jurisdictions in allowing a claimant who is subject to arbitration proceedings under a domestic arbitration regime such as the Arbitration Order, 2009 to demonstrate that its claim is indisputable, or that there is no genuine dispute, or that the defence is so weak that the claim is undisputable thereby allowing the

⁴ S. 6(2) The court to which an application has been made in accordance with subsection (1) may, if it is satisfied that

(a) there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement; and
(b) the applicant was, at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration,
make an order, upon such terms as it thinks fit, staying the proceedings so far as they relate to that matter.

⁵ Available at <http://judiciary.gov.bn/High%20Court%20Document%20Library/HCCS-%2046%20of%202019.pdf>

⁶ Available at http://judiciary.gov.bn/Judiciary_Judgments/COACV-4of2019.pdf



courts the leeway to permit a claim to continue in the courts rather than by arbitration.

Name of Author:	MR. AHMAD JEFRI ABD RAHMAN
Name of Organization:	Ministry of Finance and Economy
Brief Profile:	Ahmad Jefri is Principal Counsel at the Ministry of Finance and Economy. He served as Adjunct Associate Professor at the UBD School of Business and Economics until 2018 where he taught Business Law, Corporate Law and Alternative Dispute Resolution. With 21 years of legal practice in the private and public sectors, he has held positions at the Attorney General Chambers, Brunei Darussalam including Head of Litigation and Dispute Resolution Unit in the Civil Division where he was actively involved in arbitration and litigation as government counsel. Ahmad Jefri also contributed to the drafting of Brunei Darussalam's legislation for domestic and international arbitration.
Telephone No.:	+673 238 3573
Fax No.:	+673 238 3531
Email:	jefri.rahman@mofe.gov.bn
Website:	http://www.ubd.edu.bn/



ADWA

3. CAMBODIA



BY: DR. NARYTH H. HEM
MR. KOY NEAM

3.1 Which laws apply to arbitration in Cambodia?

There are two arbitral forums in Cambodia such as labor and commercial arbitrations. Collective labor disputes are governed principally by the Labor Law of 1997. Under this law, the Arbitration Council was created to resolve labor disputes. The awards of the labor arbitration are not binding unless the parties choose them to be binding or do not object to the awards after eight days of the date of issuance of the awards. Recently, the Royal Government of Cambodia announced that the Labor Law will be amended to enable the Arbitration Council to hear individual disputes. The National Assembly is yet to pass the amendment.

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*”⁷. 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)⁸ and provides for mechanisms as to how the Centre will regulate private arbitration and the procedure for the admission of arbitrators. The NCAC, which is an independent institution, was officially opened in 2013. The key roles of the NAC are to recruit and train arbitrators and arbitrate commercial disputes. Since its official launching, the Center has accepted 25 cases.

The NCAC adopted the “*Arbitration Rules of the National Arbitration Center of Kingdom of Cambodia*” in July 2014⁹. This was an important step for the NCAC to become a fully functioning arbitral institution. In principle, the

⁷ http://www.wipo.int/wipolex/en/text.jsp?file_id=180958

⁸ <http://www.ncac.org.kh/>

⁹ <http://www.ncac.org.kh/?page=detail&menu1=216&menu2=389&ctype=article&id=389&lg=en>



Cambodian Code of Civil Procedure does not apply to arbitration. However, when an arbitral award comes into effect, a party can apply with the relevant court of first instance for the execution of the awards in accordance with the provisions of the Code of Civil Procedure. As for foreign arbitral awards, a party can apply to the Court of Appeals for the recognition of the award before submitting it to the court of first instance for execution.

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 the Cambodian context 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 the adoption of 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?



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The provisions of the Law on Commercial Arbitration 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 4, 5, 6, 7, and 8 of the Law on Commercial Arbitration (2006) and Chapters 2, 3 and 4 of the NCAC Rules (2014).

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

Yes. When an action is brought to the court in a matter that is subject to an arbitration agreement and when a party requests it to refer the case to the arbitration before its first statement on the substance of the dispute, then the court must refer the case to the arbitral tribunal. When an action is brought before the court while the arbitral proceedings begin or continue, then the court must refer that case to the arbitral tribunal pending the outcome of the arbitration. See Article 8 of the Law on Commercial Arbitration (2006).

3.8 What are the main arbitration institutions in Cambodia?

In Cambodia, there are two arbitration institutions: “The Arbitration Council” for labor disputes and the “National Commercial Arbitration Center” for commercial disputes.



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: info@arbitrationcouncil.org
Website: <http://www.arbitrationcouncil.org>

NCAC General Secretariat:

Unit S2607, 26th Floor, Diamond Twin Tower. Corner St Sopheak
Mongkul & St Koh Pich, Tonle Bassac, Chamkarmon, Phnom Penh,
Kingdom of Cambodia, 120101.
Tel: +855 96 888 5333
Email: info@ncac.org.kh
Website: <http://www.ncac.org.kh>

3.10 Arbitration Rules of major arbitration institutions?

The **National Commercial 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?

The model clause of the National Commercial Arbitration Center is:

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity, performance or termination, shall be referred to and finally resolved by arbitration in the Kingdom of Cambodia in accordance with the Arbitration Rules of the National Commercial Arbitration Center (NCAC) being



ADWA

in force at the time of commencement of arbitration and by reference in this clause the NCAC Rules are deemed to be incorporated as part of this contract.

*The Tribunal shall consist of _____ * arbitrator(s).
State an odd number.

The language of the arbitration shall be _____.

*Applicable Law
This contract is governed by the laws of _____.
* State the country or jurisdiction.”¹⁰*

As for labor disputes, there is no arbitration clause. Parties in disputes must go through a conciliation process, conducted by the officials of the Ministry of Labor and Vocational Training. If the conciliation fails, the case will be referred automatically to the Arbitration Council, where parties appoint the arbitrators of their own and the appointed arbitrators choose a third one.

3.12 How many arbitrators are usually appointed?

In labor arbitrations, there are three arbitrators chosen from the lists of employees’ organization-appointed, employers’ organization-appointed and government-appointed arbitrators. In commercial arbitration, 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 Law on Commercial Arbitration (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 Law on Commercial Arbitration (2006). According to this article,

¹⁰ <http://www.ncac.org.kh/www.ncac.org.kh/index7327.html?page=detail&menu1=295&ctype=article&id=295&lg=en&menu1=217&menu2=228&lg=en>



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 Law on Commercial Arbitration (2006) and the Sub-Decree No.124 restrict the parties' representation in arbitration proceedings. In addition, Art. 26 of the Law on Commercial Arbitration (2006) 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?

In labor arbitration, a party in a collective dispute can submit the case to the court only after the issuance of the award and if it objects to that award. A party can file an application to the court to avoid the recognition and enforcement of a final and binding award by providing the grounds that (a) the party was not properly involved in the selection of the arbitrators or was not given proper notice of the arbitral proceedings or was unfairly prevented from making a full presentation of its case, (b) there was non-compliance with the procedures indicated in the Labor Law or the Prakas (ministerial act) establishing the Arbitration Council in connection with the making of the award, or (c) the Arbitration Council rendered an award which went beyond the power given to it by the Labor Law and the Prakas establishing the Arbitration Council.¹¹

In commercial arbitration, once the case is submitted to the arbitral tribunal, the court may not intervene in it except for some matters when the parties'

¹¹ Article 47 of the Prakas on the Arbitration Council, available at <http://www.arbitrationcouncil.org/en/resources/labour-law-and-regulations/prakas>



dispute centers on the procedure of the appointments of arbitrators and jurisdiction of the arbitral tribunal. See Articles 5 and 6 of the Law on Commercial Arbitration. A party can request the court to set aside the arbitral award on the grounds of incapacity of a party to the arbitration agreement, notice of appointment of an arbitrator or of the arbitral proceedings was not properly given, opportunity to present the case was not properly given to a party, awards are not dealt within the terms of the arbitration agreement, the composition of tribunal is not in accordance with the agreement of the parties. See Articles 42 and 44 of the Law on Commercial Arbitration (2006).

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); Article 34 of the Prakas on the Arbitration Council.

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, reasoned, allocating costs of the arbitration among the parties. See Article 39 (1) of the Law on Commercial Arbitration (2006) and Rule 34.3 NCAC (2014).

For a labor award, it must contain (a) the names of the three arbitrators, (b) the name, domicile and seat or actual residence of the parties, (c) a summary of the procedure, (d) a description of the claim and a description of the counterclaim (if any), (e) the reasons for the decisions given in the award with, where applicable, reference to relevant provisions in the Labor Law, its implementing regulations or collective bargaining agreements or individual labor contracts, (f) the decisions of the arbitration panel, and (g) date on which the award is made and signatures of all arbitrators.



- **Deadlines for issuing arbitral awards**

In labor arbitrations, the award must be issued within 15 days of the date of receiving the case except that in practice, the parties agree to delay the issuance of the award.

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

In the case of a commercial dispute being 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; may state the recovery by the prevailing party of reasonable counsel fees upon agreement of the parties or by the judgment of the arbitrators; 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?

In labor arbitration, a party can object to the award without giving any reason.

In commercial arbitrations, an arbitral award can be set aside by the Appeals Court and is again appealable to the Supreme Court. See 3.15 above for the grounds for setting aside. The Cambodian Appeals Court may not recognize the foreign award if it is against public policy or the subject matter of the dispute is not capable of settlement by arbitration under the



ADWA

law of Cambodia. If the foreign award is not recognized by the Appeals Court, a party can appeal against that decision to the Supreme Court, which has the final jurisdiction over this matter.

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.¹²

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).

¹² In March 2014, for the first time, the Supreme Court of Cambodia confirmed a decision of the Cambodian Court of Appeal, which had ruled in favour of the recognition and enforcement of an arbitral award issued by the Korean Commercial Arbitration Board (KCAB) of Seoul, South Korea.



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

So far, statistics are available only for labor related disputes. Since the inception of the Arbitration Council to the present (December 31, 2018), 2,948 cases of collective disputes have been submitted to the Council, with 66 cases in 2018.

The NCAC has accepted twenty-five cases since its official launching in 2013.

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

There are no significant developments of laws, arbitration institutions or court judgments affecting arbitration except the increased interest of the business and industry on referring their commercial disputes to the NCAC. There are 60 arbitrators listed in the NCAC, including six foreign arbitrators.

Name of Author:	DR. NARYTH H. HEM MR. KOY NEAM
Name of Law Firm:	BNG Legal , Phnom Penh, Cambodia
Brief Profile:	BNG Legal is a leading Cambodian law firm providing comprehensive legal services to foreign and local clients. BNG Legal combines international standards with local expertise.
Telephone No.:	+ 855 23 217 510 / 212 414
Fax No.:	+ 855 23 212 840
Email:	hnh@bnglegal.com
Website:	www.bnglegal.com



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4. CHINA



**BY: MR. RAINER BURKARDT
MR. ONDREJ ZAPLETAL
MS. QING GUO**

4.1 Which laws apply to arbitration in China?

The basic law applying to arbitration is the Arbitration Law of the People's Republic of China ("Arbitration Law") which came into force in 1995 and has been revised several times including the latest revision which became effective on January 1, 2018. In addition to the Arbitration Law there are several supporting regulations for the implementation of the Arbitration Law as well as decisions and judicial interpretations by the Supreme People's Court, which are treated like legislation in practice.

The Arbitration Law does not apply to the Hong Kong Special Administrative Region ("Hong Kong"), Macau Special Administrative Region ("Macau") and Taiwan. However, arbitral awards of Hong Kong and Macau arbitration institutions are enforceable in China (In this section China refers to the People's Republic of China, excluding Hong Kong, Macau and Taiwan) and vice versa based on an agreement, which is considered as a judicial interpretation issued by the Supreme Court of the People's Republic of China.

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

No. There are some similarities between the UNCITRAL Model Law and the Arbitration Law, but the two laws differ in many aspects.

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



Generally, the Arbitration Law applies to domestic as well as foreign-related arbitrations but distinguishes between domestic arbitration and foreign-related arbitration. In the past, only CIETAC was permitted to handle foreign-related arbitrations. For maritime disputes the China Maritime Arbitration Commission is competent. Arbitration commissions (please note that in China arbitration institutions generally are referred to as “commission”) established or re-established in accordance with the Arbitration Law may handle foreign-related arbitration.

In addition to the Arbitration Law there are special regulations regarding the challenging and refusal of enforcement of foreign-related arbitral awards (Nos 4.18 and 4.19 below).

The definition of the term “foreign-related” is under dispute though. The Supreme Court released an interpretation¹³ that a civil case is “foreign-related” in case:

- Either party of a civil relationship is a foreign citizen, foreign legal person, or other organization or stateless person.
- Where the subject matter of the relation is located outside the territory of China.
- Where the legal facts that trigger, change or terminate the civil relation take place outside the territory of China.
- Where the "regular residence" of either party is located outside the territory of China.
- Other circumstances that may be determined as foreign-related civil relations.

Please find the recent developments summarized under No. 4.22.

4.4 Has China acceded to the New York Convention?

¹³ Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of the “Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations” (I), Fa Shi [2012] No. 24.



ADWA

China adopted the New York Convention in 1987, with the reservation of reciprocity and limits the application of the New York Convention to commercial cases, subject to the definition of Chinese laws, which is applicable to the acknowledgement and enforcement of foreign arbitration awards.

Generally speaking, Chinese law does not allow ad hoc arbitration and ad hoc arbitration has been regarded as invalid under Chinese Law. Nevertheless, there have been exceptions created (please refer to 4.22 below). Anyway, foreign ad hoc arbitration awards still can be recognized and enforced in China as a result of the New York Convention.

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?

Parties are only permitted to agree on foreign arbitration institutions and / or an arbitration seat outside China if the case is foreign-related. For the definition of “foreign-related”, please refer to No 4.3 above and for recent developments, please refer to No 4.22 below.

Please note that foreign-invested enterprises located in China generally are considered as “domestic” for the purpose of establishing whether a case is foreign-related. In contrast thereto companies located in Hong Kong, Macau and Taiwan are considered as “foreign”.

As exception thereto was made by the Supreme Court opinion¹⁴ that in case both parties are wholly foreign owned and located in a free trade zone (“FTZ”) the parties have the right to agree on foreign arbitration.

In case one party to the arbitration agreement is foreign invested and located in an FTZ, an agreement for arbitration outside China may be considered valid. The court will, however, still determine, whether the

¹⁴ Opinions of the Supreme People's Court on Providing Judicial Guarantee for the Development of FTZs, Fa Fa [2016] No. 34.



dispute is foreign related and may hold an agreement between two domestic parties for foreign arbitration as invalid.¹⁵

Whether the elements defining a foreign-related civil relationship as outlined by the Supreme Court, are given, is subject to the discretion of the Chinese court. Especially, in case the “foreign-relation” depends on the location of the subject matter or the legal facts that trigger, change or terminate the civil relation, there is often a risk that a Chinese court may consider such facts as non-defining or minor and deny a foreign relation.

In any case, to exclude any risks, two domestic parties should refrain from agreeing on a foreign arbitration institution, a foreign seat of arbitration and refrain from applying foreign substantive law.

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

Yes. In general, the Arbitration Law requires an arbitration agreement in writing containing:

- a declaration of intention to apply for arbitration;
- matters for arbitration; and
- a designated arbitration commission registered with the judicial administrative departments.

For further details, please refer to No 4.19 below.

According to the Arbitration Law to initiate arbitration, the claiming party shall submit a written application for arbitration, which shall specify the name, gender, age, occupation, employer and residence of each party or the name and registered address of legal persons or other organizations as well as the names and positions of their legal representatives or chief responsible

¹⁵ Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the “Law of the People's Republic of China on Foreign-related Civil Relations” (I), Fa Shi [2012] No. 24.

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persons, the claim and the case facts and reasons which it is based upon and the evidence, the source of the evidence as well as the names and address of witnesses.

In practice the respective rules of the arbitration commission specify the requirements for the arbitration procedure to be followed.

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

Yes. According to the Arbitration Law a valid arbitration clause limits the access to state courts. However, if a party files a lawsuit in a state court and if the state court accepts such lawsuit and the other party does not object to such a legal proceeding at a state court based on the arbitration clause at the first hearing, the parties are deemed to have terminated their arbitration agreement.

Further, the arbitration agreement must be in writing and may either be contained in the principal contract or in the form of a separate contract. A state court may declare the arbitration clause void, in case the clause does not clearly state the following:

- Intent to apply for arbitration;
- Subject matters;
- A specific arbitration commission registered with the Chinese judicial administrative departments.

4.8 What are the main arbitration institutions in China?

The most important arbitration commission is the “China International Economic and Trade Arbitration Commission” (“CIETAC”). Other important commissions are the “Shanghai International Economic and Trade Arbitration Commission / Shanghai International Arbitration Center” (“SHIAC”) and the Shenzhen Court of International Arbitration (“SCIA”), which developed from sub-commissions of the CIETAC, due to internal disputes. Also, the “Beijing Arbitration Commission / Beijing International Arbitration Center” (“BIAC”) is well known.



By now the SCIA and the SHIAC are well established. However, to avoid ambiguities regarding the appointment of arbitration commissions (refer No 4.18 and 4.19 below), the arbitration clause shall clearly state, whether the CIETAC in Shanghai respectively in Shenzhen shall be the designated commission or the SHIAC or the SCIA shall be the competent arbitration commission.

4.9 Addresses of major arbitration institutions in China?

China International Economic and Trade Arbitration Commission (CIETAC)

6/F, CCOIC Building, 2 Huapichang Hutong, Xicheng District, Beijing
P.C. 100035

Tel : +86 -10-82217788, 64646688

Fax : +86-10-82217766, 64643500

Email: info@cietac.org

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

South China International Economic and Trade Arbitration Commission (Shenzhen Court of International Arbitration)

41/F, West Square of Shenzhen Stock Exchange, 2012 of Shennan Blvd.,
Futian District, Shenzhen 518026, P.R. China

Tel: +86-755-83501700

Fax: +86-755-82468573

E-mail: info@scia.com.cn

Website: www.scia.com.cn

Shanghai International Economic and Trade Arbitration Commission / Shanghai international Arbitration Center

Address: 7-8F, Jin Ling Mansion, 28 Jin Ling Road (W), Shanghai 200021,
P.R.CHINA

Tel: +86 21 6387 5588

Fax: +86 21 6387 7070

E-mail: info@shiac.org

Website: www.shiac.org



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Beijing Arbitration Commission & Beijing International Arbitration Center

Address:

16/F, China Merchants Tower, No.118 Jian Guo Road,
Chaoyang District, Beijing 100022, China

Post Code:100022

Tel: +86-10 6566-9856

Fax: +86-10 6566-8078

Email: bjac@bjac.org.cn

Website: <https://www.bjac.org.cn/english/index.jsp>

4.10 Arbitration Rules of major arbitration institutions?

CIETAC arbitration rules:

<http://www.cietac.org/index.php?m=Page&a=index&id=42&l=en>

SHIAC Rules 2015

http://www.shiac.org/SHIAC/arbitrate_rules_detail_E.aspx?id=12

SHIAC FTZ Rules 2015

http://www.shiac.org/SHIAC/arbitrate_rules_detail_E.aspx?id=14

BIAC Arbitration Rules:

<http://www.bjac.org.cn/english/page/zc/guifan.html> (CH/EN)

http://www.bjac.org.cn/english/page/data_dl/zcgz_en.pdf (EN, .pdf)

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

CIETAC:

Model Arbitration Clause (1)

“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.”

Model Arbitration Clause (2)

“Any dispute arising from or in connection with this Contract shall be submitted to China International Economic and Trade Arbitration Commission (CIETAC)_____Sub-Commission (Arbitration Center) 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.”

SHIAC:

Model Arbitration Clause

“Any dispute arising from or in connection with this Contract shall be submitted to Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Center for arbitration.”

Model Arbitration Clause for FTZ

“Any dispute arising from or in connection with this Contract shall be submitted to Shanghai International Economic and Trade Arbitration Commission/Shanghai International Arbitration Center for arbitration. The arbitration shall be held in The China (Shanghai) Pilot Free Trade Zone Court of Arbitration.”

4.12 How many arbitrators are usually appointed?

According to the Arbitration Law the number of arbitrators shall either be one or three.

Usually, the tribunal shall be composed of three arbitrators (applies e.g. for SHIAC and CIETAC), unless otherwise agreed upon by the parties.

However, most arbitration rules contain exceptions, in which only one arbitrator shall be appointed, unless the parties agreed otherwise. E.g. for summary procedures, which at CIETAC applies in case the amount in

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dispute is less than RMB 5,000,000.- (approx. USD 720,000.-) and at SHIAC in case the amount in dispute is less than RMB 1,000,000.- (approx. USD 145,000.-).

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

According to the Arbitration Law,¹⁶ an arbitrator shall withdraw voluntarily or otherwise the parties have the right to challenge the arbitrator under one of the following conditions:

- The arbitrator is a party, a close relative of a party or a representative in the case;
- The arbitrator has a personal interest in the case;
- The arbitrator has another relationship with a party or the parties' representative, which may affect the impartiality;
- The arbitrator has privately met with a party or representative or accepted an invitation to an entertaining event or a gift from a party or representative.

Parties shall challenge arbitrators with an explanation for the challenge prior to the first hearing. If the fact the challenge is based upon only became known after the first hearing, the arbitrator may be challenged within fifteen days from the date the fact is known, but not later than the end of the last hearing according to the rules of SHIAC and CIETAC.

The chairman of the commission decides whether to replace the arbitrator. In case the chairman of the commission is the arbitrator that is challenged, the commission shall decide. The substitute arbitrator shall be appointed by the commission.

¹⁶ Art. 34 Arbitration Law.



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

Generally, any person with a power of attorney may represent a party in arbitration proceedings. However, according to Chinese law, only lawyers registered in China are permitted to consult in Chinese law. Therefore, in case the substantive law is Chinese law, the counter party often disputes the competence of non-Chinese lawyers to represent the party, which may cause delays in the proceeding.

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

Generally Chinese courts only intervene, if for any reason the arbitration clause is void (See No. 4.18 and No. 4.19 below). Chinese courts may decide on the jurisdiction of the arbitration commission based on the jurisdictional challenge raised by one party. Such challenge shall be raised prior to the first arbitration hearing¹⁷. As a result, Chinese courts may rule the arbitration agreement is invalid¹⁸. Besides, Chinese courts may also intervene in arbitration in the following forms:

- Set aside the arbitral award;
- Disallow its enforcement.¹⁹

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

Arbitrators have the power to grant interim or conservatory relief, if allowed by the rules of the respective arbitration commission. (See also No 4.22 – new developments). The tribunal or emergency arbitrator will release

¹⁷ Art. 20 Arbitration Law.

¹⁸ Art. 20 Arbitration Law.

¹⁹ Art. 9 Arbitration Law.

ADWA

the interim relief, which will subsequently be enforced by a Chinese court according to the Chinese procedural law.

Also, upon application by a party before the arbitration proceedings or the arbitration institution, the competent state court may grant interim or conservatory measures.

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

According to the Arbitration Law, an award shall specify the claim, the facts of the dispute, the reasons for the decisions, the results of the award, the allocation of arbitration fees and the date of the award.

The award shall be made with the opinion of the majority of the arbitrators, signed by the arbitrators and chopped by the commission, whereas arbitrators with dissenting opinions may decide not to sign the award.

There are additional formal requirements or modifications to requirements, depending on the arbitration commission.

According to the CIETAC Arbitration Rules, the facts of the dispute and the reasons on which the award is based may not be stated in the award if the parties have so agreed, or if the award is made in accordance with the terms of a settlement agreement between the parties.

Further the seal of the CIETAC shall be chopped on the award. The SHIAC has similar rules.

The Arbitration Law does not state a deadline to issue an award, however CIETAC and SHIAC rules both state that the award shall be rendered within six months from the constitution the arbitration tribunal. Upon request of the tribunal the time limit may be extended by the commission.

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



According to the Arbitration Law, an arbitral award shall be final and binding. Therefore, arbitral awards cannot be appealed.

However, in case of domestic arbitral awards a party may challenge the award in a court for the same reasons for denying enforcement (see No 4.19 below).

Reasons which have not been successful during a state court trial to set aside the award shall not be brought forward again during enforcement.

If the court considers an arbitration clause or the arbitration agreement invalid, void or non-executable, before issuing a verdict to set aside the award, the court shall confirm with the responsible Higher People's Court and in case the Higher People's Court agrees to set aside the award, the Supreme People's Court shall examine the opinions of the lower courts.

In case of domestic awards, the Higher People's Court shall only confirm with the Supreme People's Court for setting aside the award in case the parties to the arbitration agreement have their habitual residence in different provincial administrative regions or the award shall be revoked or not enforced based on public interest²⁰ (see also No 4.22).

The party applying for setting aside the award shall apply within six months upon receiving the award.

Also, third parties are eligible to apply for denial of enforcement, in case the parties to the arbitration case have maliciously applied for arbitration or engaged in a "fictional" arbitration and the interests of such third party are concerned (see also No 4.22).

Furthermore, the third party's interests shall be lawful and truthful, there must have been a relationship to the facts of the case and the interests of the third party would be damaged by enforcing the award.

²⁰ Relevant Provisions of the Supreme People's Court on Issues Concerning Report and Verification of Cases Involving Judicial Review of Arbitration, Fa Shi [2017] No. 21.



ADWA

The third party shall apply against enforcement within 30 days from the date the third party knew or should have known about the People's Court having taken measures to enforce the award²¹.

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

For the enforcement the Chinese law distinguishes between domestic awards – awards issued in the territory of China -, foreign-related awards, meaning awards issued in the territory of China, which are foreign-related and foreign awards, meaning awards, which are issued outside the territory of China.

A domestic arbitral award shall be enforced according to the Arbitration Law and the Civil Procedure Law. The competent state court for enforcement is the court at the location of the counter party.

The time limit to apply for enforcement is two years from the last day of a performance period according to the arbitral award or an effective date of the arbitral award in case the period for performance was not specified.²²

The court shall deny the enforcement of a domestic arbitral award, in case a party can prove that:

- the parties did not conclude an arbitration agreement;
- the matters dealt with by the award fall outside the scope of the arbitration agreement or are matters which the arbitral organ has no power to arbitrate;
- the composition of the arbitration tribunal or the procedure for arbitration contradicts the procedure prescribed by the law;
- the main evidence is falsified;
- the other party concealed evidence from the arbitral tribunal, which was sufficient to affect the impartiality of the arbitral award; or

²¹ Provisions of the Supreme People's Court on Several Issues concerning the Handling of Cases of Arbitration Awards Enforcement by People's Courts ,Fa Shi [2018] No, 5;

²² Art. 239 Civil Procedure Law.



- the arbitrators have committed embezzlement, accepted bribes or engaged in malpractice for personal benefits or corrupted the law in the arbitration of the case.

In case the domestic arbitral award is foreign-related, the court shall deny the enforcement of such foreign-related arbitral award in case a party provides evidence that:

- the parties did not conclude an arbitration clause / agreement;
- the party against whom the application for enforcement is made was not given notice for the appointment of an arbitrator or for the inception of the arbitration proceedings or was unable to present its case due to causes for which the party is not responsible;
- the composition of the arbitration tribunal or the procedure for arbitration was not in conformity with the rules of arbitration; or
- the matters dealt with by the award fall outside the scope of the arbitration agreement or the arbitral tribunal was not empowered to arbitrate;
- the enforcement of the award is against the social and public interest.

For the enforcement of a foreign arbitral award under the New York Convention, the Intermediate People's Court at the location of the assets which are subject to enforcement or the domicile of the counterparty shall be competent.

The requirements for the enforcement of a foreign arbitral award under the New York Convention are:

- a written application;
- the original arbitral award or a certified copy thereof;
- the original arbitration agreement or a certified copy thereof;
- a translation of the agreement or the award, if made in a foreign language.

Foreign awards, which are not subject to the New York Convention, may only be recognized and enforced based on the basis of a bilateral agreement or reciprocity principle.

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In case a state court considers refusing the enforcement of an arbitral award by a “domestic” foreign-related arbitration tribunal or a foreign award based on the reasons as stated above or based on the reasons as stated in the New York Convention, the state court shall consult the Higher People's Court for examination before refusing the enforcement. If the Higher People's Court agrees to refuse enforcement of the arbitral award, the Supreme People's Court shall examine the opinion. Only after the Supreme People's Court gives its reply, the ruling of non-enforcement or refusal of recognition and enforcement of a foreign award shall be made.

Due to the interpretation of the New York Convention by Chinese courts there have been problems regarding the enforcement of awards by tribunals formed under non-Chinese arbitration Institutions, which have been rendered within the territory of China.

State courts considered the New York Convention applicable, only in case of awards rendered outside the territory of China.

As according to this interpretation, the New York Convention does not apply to arbitral awards issued by tribunals under non-Chinese arbitration institutions within the territory of China, such non-Chinese arbitration institutions under which the tribunal which rendered the award was formed, shall be subject to the Arbitration Law.

Due to this interpretation in the past several arbitral awards issued by tribunals under non-Chinese arbitration institutions within the territory of China were set aside or enforcement was denied (see latest development below No 4.22).

Recently a change in jurisprudence seems to materialize, as arbitration awards by commissions subject to the ICC were occasionally enforced. Nonetheless the dispute is not resolved and in practice there is a risk in case a non-Chinese arbitration institution with the place of arbitration proceedings located in the territory of China is chosen that an award of such tribunal will not be enforced by Chinese state courts.

Moreover, in practice enforcing foreign arbitral awards or awards applying foreign law is considerably more complicated than enforcing an award



rendered by a tribunal subject to the rules of a Chinese arbitration commission seated in China with Chinese law as substantive law, despite the fact that state courts have a smaller leeway in denying enforcement of foreign or foreign-related arbitral awards. In addition, in practice enforcing awards of less known arbitration commissions has appeared to be rather complex.

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

Several arbitration rules allow the arbitrator respectively the tribunal to decide on the allocation of expenses and costs of the parties, like for instance attorneys' fees.

The CIETAC Rules for example permit the tribunal to decide that the losing party shall compensate the prevailing party for the expenses reasonably incurred for pursuing its case. However, the arbitration tribunal shall take into consideration various factors, e.g. the outcome and complexity of the case, the workload of the prevailing party and/or its representative(s), the amount in dispute etc.

Therefore, in practice a tribunal generally will award reasonable costs.

However, in practice it is common to add into the arbitration clause or agreement that the losing party shall bear the arbitration costs, unless otherwise decided by the tribunal.

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

Yes. Most of the arbitration commissions track and publish their statistics:

CIETAC:

<http://www.cietac.org/index.php?m=Page&a=index&id=40&l=en>

SHIAC:

http://www.shiac.org/SHIAC/aboutus_E.aspx?page=5



ADWA

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

- **Choice of arbitration seat outside China between “domestic” companies**

As discussed above in No 4.5 according to Chinese laws it is only legally feasible to agree on a location of arbitration outside China as well as a non-Chinese arbitration institution in case of existing foreign relations.

In case of two foreign invested enterprises, the foreign relation in the past often has been denied due to the argument that the parties, even though they are foreign invested, are still domestic parties as they are registered in China.

In the case of Ningbo Xinhui vs. Meikang²³ International as well as Shanghai Golden Landmark vs. Siemens International Trade²⁴ the Beijing No. 4 Intermediate People’s Court as well as the Shanghai No. 1 Intermediate People’s Court held the arbitration agreement with a foreign commission and a seat outside China as valid.

Both courts rendered their decisions in relation to the Shanghai FTZ. According to the verdict’s goods which were pending clearance at an FTZ are similar to foreign goods and goods, which are processed within the Shanghai FTZ have the characteristics of an international sale of goods. However, it was remarkable that the Shanghai No. 1 Intermediate Court, instead of considering the parties as domestic parties, considered the investors and the beneficiaries of the parties as foreign and therefore argued in favor of an existing foreign relation. The Supreme People’s Court confirmed these considerations.

²³ Beijing No 4 Intermediate People’s Court 2015, (2015) si zhong min (shang) te zi No. 00152 Ningbo Xinhui ./ Meikang international.

²⁴ Shanghai No 1 Intermediate Court, (2013) Hu yi zhong min ren (wai zhong) zi No. 2, Shanghai Golden Landmark Co., Ltd. v. Siemens International Trade Co., Ltd.



It is not clear yet however, whether other courts will follow such argumentation and if the same considerations would be made outside of an FTZ.

Nonetheless, especially the decision of the Shanghai No. 1 Intermediate Court indicates a significant change in the approach of Chinese courts regarding the analyses of foreign relations, as the court did not restrict its argument to the legal nature of the parties, but considered other factors as well.

Besides, the Supreme Court issued an opinion²⁵ supporting that at least wholly foreign owned enterprises located in an FTZ shall be permitted to choose a foreign arbitration commission, provided that the following conditions are met:

- The dispute is between wholly foreign owned enterprises registered within an FTZ, regardless of whether a foreign element exists or not;
- One of the parties is a wholly foreign owned enterprise registered within an FTZ and the parties agree to submit the dispute to foreign arbitration or raise no objection.

In case the companies are foreign invested and located in an FTZ, the decision whether an agreement for foreign arbitration is valid is in the discretion of the competent court.

- **New development in foreign-related arbitrations administered by foreign arbitration institutions in China**

As mentioned above in No 4.5, there has been a long-standing dispute regarding a validity of clauses referring disputes to foreign arbitration institutions. In recent years, there has been, however, a new approach adopted by some courts and authorities.

²⁵ Opinions of the Supreme People's Court on Providing Judicial Guarantee for the Development of FTZs”, Fa Fa [2016] No. 34,



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In the case *Daesung Industrial Gases Co., Ltd. vs Praxair (China) Investment Co., Ltd.*, the Shanghai No. 1 Intermediate Court held that an arbitration agreement providing for SIAC arbitration in Shanghai shall be valid, even though SIAC is a foreign arbitration institution.

This case confirms that foreign arbitral institutions are not prohibited from administering foreign-related disputes in China.

In recent years, foreign arbitral institutions, such as the Hong Kong International Arbitration Centre (“HKIAC”), the Singapore International Arbitration Centre (“SIAC”) and the International Chamber of Commerce (“ICC”), on the legal basis of State Counsel’s Circulars²⁶, have established their representative offices in Shanghai.

As of January 1, 2020, reputable foreign arbitration and dispute resolution institutions may set up operations in the Shanghai Pilot FTZ and are entitled to administer only foreign-related civil and commercial disputes.²⁷

Effective January 1, 2021, foreign arbitration institutions may, after registration, establish a Business Office in China (Beijing) Pilot FTZ to carry out foreign-related arbitration activities.²⁸

• **Enforcement of arbitral awards under ICC rules**

As already mentioned in No 4.19 the enforcement of awards by tribunals subject to non-Chinese arbitration institutions made in the territory of China has been under dispute in the past and mostly the ICC has been standing at the center of such disputes.

Next to the question whether a tribunal constituted under foreign arbitration institutions may issue awards on Chinese territory and whether such awards are enforceable based on the New York Convention, the

²⁶ http://english.www.gov.cn/archive/state_council_gazette/2015/06/05/content_281475121256660.htm

²⁷ Measures for the Administration of Overseas Arbitration Institutions Establishment of Business Departments in the China (Shanghai) Pilot FTZ Lin-Gang Special Area

²⁸ Administrative Measures for Registration of Business Offices Established by Overseas Arbitration Institutions in China (Beijing) Pilot FTZ.



former ICC standard arbitration clause was referring to *“shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce”*.

Chinese courts held such arbitration clause to be invalid due to the argument that no arbitration commission was chosen (please refer to No 4.18 and 4.19).

To avoid such decisions, the ICC modified the wording of its clause now reading:

“... be submitted to the International Court of Arbitration of the International Chamber of Commerce and shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce”. The Supreme People’s Court already indicated that the new clause might be accepted, whereas it was still left open, whether awards of tribunals subject to a non-Chinese arbitration institution within the territory of China may be enforced.

Firstly, in the case Longlide Packaging Printing Co., Ltd. vs. BP Agnati S.r.l., the Supreme People’s Court had upheld the validity of an arbitration agreement providing for ICC arbitration in Shanghai.²⁹

Subsequently in one decision Brentwood vs. Guangdong Fa’anlong delivered on August 6, 2020³⁰, the Guangzhou Intermediate People’s Court has ruled that an ICC arbitration award shall be considered as a Chinese arbitral award and enforced under the Civil Procedural Law and not under the New York Convention. However, as this ruling is until the date of publication of this 7th edition the first and only ruling deciding as outlined above, it remains to be seen whether this is the first ruling of a series of similar rulings indicating a change or will remain an exceptional single ruling.

²⁹ Reply of the Supreme People’s Court 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), 25 March 2013, published on Guide on Adjudication of Cases involving Commercial and Maritime Affairs, Volume 26, pp.125-129.

³⁰ Guangzhou Intermediate People’s Court 2015, Brentwood Industries./. Guangdong Fa-anlong Mechanical Equipment Manufacture Co. Ltd.



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However, one can conclude that in general the acceptance of ICC awards increased, and several awards issued by tribunals subject to ICC rules outside of the territory of China were enforced³¹.

- **The first interim arbitration order by an emergency arbitrator located in China subject to a Chinese arbitration commission was enforced in Hong Kong**

In the respective case³² the claimant needed to prevent the respondent from moving assets, which were located in Hong Kong. The parties had agreed to arbitration subject to the BIAC rules, which rules allow the appointment of an emergency arbitrator.

The claimant filed for asset and evidence preservation.

Subsequently to a hearing the arbitrator granted an emergency order to freeze the assets. The order was handed to the Hong Kong High Court, which subsequently - subject to Hong Kong rules and regulations - enforced the order.

This was - to our knowledge - the first emergency arbitrator proceeding in China as well as the first enforcement of such interim award in Hong Kong by an emergency arbitrator in China subject to a Chinese arbitration commission.

On 2. April 2019 Hong Kong's Secretary for Justice and the Vice-president of the Supreme People's Court signed an "Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region" ("Arrangement"). As of 1 October 2019, parties to arbitral proceedings of certain arbitration institutions in Hong Kong can make an application for interim measures to the China Mainland courts, including property preservation, evidence preservation and conduct preservation, in support of the arbitral proceedings.

³¹ Jiaxing Intermediate People's Court 2017, (2017) Zhe 04 she wai ren No. 1, Valmet. Inc../. Zhejiang Purico Speciality Paper Co., Ltd.

³² <http://www.bjac.org.cn/news/view?id=3273>



The Arrangement is considered a judicial interpretation by the Supreme Court and providing Chinese courts with a base for accepting applications for interim measures. The Arrangement has not been implemented yet. A commencement date will be announced at a later point in time.

- **Online arbitration as a new challenge**

Due to the outbreak of the COVID-19 pandemic, the demand for virtual arbitration rapidly increased in 2020. Although the current Arbitration Law does not have provisions regarding online arbitration, some arbitration commissions in China have already started to conduct arbitration proceedings online.

In 2014, the China Guangzhou Arbitration Commission (“GZAC”) transformed into an online arbitration institution. Besides, also other arbitration institutions in China adapted their online services. CIETAC adopted online arbitration in respect to submitting arbitration applications, documents and evidence and conducting oral hearings through CIETAC’s online platform.

In February 2020, the Supreme People’s Court issued a Notice³³, in which the Court emphasizes the voluntary principle and due process principle. On March 3, 2020, the Ministry of Justice published a guideline³⁴ calling for the new internet arbitration system. Based on these documents, it can be expected that China may adopt respective legal provisions governing online arbitration shortly.

The online arbitration may be the future form of arbitration proceedings, but there are many technical and legal issues to be resolved, such as confidentiality and information security assurance. As judicial practice shows, it might be difficult for online arbitrations to fulfil all procedural standards in accordance with the Arbitration Law and the Civil Procedure

³³ Notice by the Supreme People's Court of Strengthening and Regulating the Online Litigation Work during the Period of Prevention and Control of the COVID-19 Outbreak.

³⁴ http://www.moj.gov.cn/government_public/content/2020-03/03/tzwj_3243112.html



ADWA

Law, which may have implications on the enforceability of the arbitration award.

Name of Authors:	MR. RAINER BURKARDT MR ONDREJ ZAPLETAL MS. QING GUO
Name of Law Firm:	Burkardt & Partner Rechtsanwälte
Brief Profile:	We are a PRC law firm with German management advising medium-sized enterprises as well as business groups and international industrial companies predominantly from Germany, Switzerland and Austria on their investments in the People's Republic of China.
Telephone No.:	+86 21 6321 0088
Fax No.:	+86 21 6321 1100
Email:	info@bktlegal.com
Website:	www.bktlegal.com



5. THE CHINESE EUROPEAN ARBITRATION CENTRE – HAMBURG



BY: Prof. Dr. Eckart Brödermann, LL.M. (Harvard),
 Maître en Droit (Paris), FCI Arb (London), Brödermann
 Jahn
Dr. Christine Heeg-Weimann, LL.M. (Sydney),
 KPMG Law

5.1 Introduction to the Chinese European Arbitration Centre

The Chinese European Arbitration Centre (“CEAC”) provides tailor made arbitration solutions for contracts with an Asian, and in particular China focus, in particular for cases with at least one party from Europe, Africa, North or South America. Accordingly, cases in the past ten years since its foundation in 2008 have involved parties from Bangladesh, Canada, China (Mainland and Hong Kong), Germany, India, Israel, Italy, Slovenia, Spain, Switzerland and Turkey. The key advantage of CEAC is of a legal-cultural nature. From a comparative legal perspective, agreeing on CEAC and a seat of arbitration in Hamburg (even if the place of the hearings can take place anywhere else outside mainland China, to ensure safe enforcement under the New York Convention), agreeing on a CEAC arbitration clause has considerable advantages in the following scenario: If the parties (or their ultimate owners) are domiciled in civil law jurisdictions like China, Korea or Thailand on one side and any of the continental European jurisdictions, or many African or South American jurisdictions on the other side, it is consistent, from a comparative law perspective, to ensure that the arbitration takes place in such civil law environment. This permits to use the one uniting point between the otherwise opposing contracting parties as a starting point for the dispute resolution. China and Germany, the home seat of CEAC, are civil law countries. The contract laws, the civil procedure laws and the arbitration laws as well as the private international law in both jurisdictions have a lot in common. The CISG provides identical



international contract law. The UNIDROIT Principles of International Commercial Contracts (“UNIDROIT Principles” 2016), explicitly offered by the CEAC choice of law clause to consider, provide a bridge with internationally accepted contract rules – officially translated in 15 languages –, which each party can read in its native language. Possibly even more important is the mindset which civil law arbitration brings along. Inherently, a civil law arbitration requires from the arbitrators to encourage dispute resolution by settlement, even during the course of the arbitration proceedings. Furthermore, contract parties from China and continental European jurisdictions are accustomed to rules of evidence which exclude, for example, in principle discovery in any common law style. The concept of truth is procedural (where each party has to prove its own case) and thereby very much distinct from e.g. a US-style of dispute resolution where each party would expect that both parties put all cards on the table. These differences do not imply any kind of judgement which system functions better. The long history of both traditions in dispute resolution demonstrates that both systems do function. Yet, in terms of cost control and risk minimization, it saves time and efforts if the dispute resolution regime by arbitration is kept within the same spirit under which a civil law contract was signed by civil law parties. CEAC was designed, after substantial discussions with Chinese colleagues (e.g. at the China Council for the Promotion of International Trade – CCPIT – or the China International Economic and Trade Arbitration Commission (CIETAC)) – to offer such a civil law forum for dispute resolution complemented by specifics of Chinese arbitration law and integrating Chinese and European cultural issues. That is the reason why opting for CEAC may often be more suitable than agreeing on dispute resolution in a common law jurisdiction under those circumstances.

It is therefore highly recommended to always consider the circumstances of the individual case. In case of a dispute between a US party and a Hong Kong party, arbitration under the ICDR rules or the HKIAC rules may be the better option or the seat of a CEAC arbitration could be transferred to Hong Kong in such circumstances. If civil law is involved on both sides, CEAC with the seat of arbitration in Hamburg, Germany may be the better option. In case of a dispute with parties from both civil and common law jurisdictions, it may be wise to supplement the CEAC Rules with international instruments that strike an additional procedural balance



between civil and common law, i.e the 2010 IBA Rules on the Taking of Evidence and the 2019 IPBA Guidelines on Privilege and Attorney-Secrecy.

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 Model clauses. The **Model Arbitration Clause** in which the parties can decide on the formalities of the arbitral process states 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 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 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).***



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-
- 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 inserted], 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 (offered at lit. b) is part of Chinese law and of more than 70 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). With the explicit reference to the CISG, the CEAC Rules invite to consider an international compromise which was developed by the United Nations Commission on International Trade Law (UNCITRAL) in negotiations between 1968 and 1980. Lit. b) provides for supplementation of the CISG by the UNIDROIT Principles which englobes general contract law beyond sales, based on international compromises developed between 1980 and 2016.

The UNIDROIT Principles (offered at lit. c) 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. The 4th edition 2016 offers robust default rules on all major issues of contract law from formation of contract (e.g. agency, conditions, multi-party scenarios) and rules on assignment and prescription. It is even possible to agree on the UNIDROIT Principles alone and to delete the reference to any national law in lit. c). This was actually done by the parties in a 2017 CEAC arbitration. A Chinese party had filed a CEAC arbitration claim against a German party on the basis of the CISG and Chinese law. To avoid the efforts of arguing Chinese law, the Respondent proposed to switch to the UNIDROIT Principles as the applicable neutral regime. The Chinese Claimant did accept that proposal whereby it must be noted that, since 1999, there is a substantial similarity between Chinese contractual law and the UNIDROIT Principles. In that case, in the end, after full preparation of the case in the briefs, the parties settled their case during the first hearing on the basis of terms which were also submitted to the UNIDROIT Principles.



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

Further issues, to be considered due to the coronavirus pandemic and its consequences for international travel and meetings in person are regulations on oral hearings by use of videoconference, party agreements on procedural aspects for such cases with respect to evidence, discretion of arbitrators and eventually particular additional attempts for amicable settlement within the arbitration due to such circumstances for the sake of efficiency of the proceedings. Such aspects are, however, to be reviewed with respect to issues of enforceability under the applicable laws and regulations for enforcement in order to not endanger enforcement of arbitral awards.

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 other parts of 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 arbitrators who serve on the Advisory Board of CEAC. In practice, the Appointing Authority usually acts via telephone conferences which are being prepared by CEAC management and internal debate between the members of the Appointing Authority which is in charge.

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 any reason to doubt his/her impartiality or independence can be challenged, Art. 11 - 13 CEAC Arbitration Rules. For any reason that occurs after the appointment or of which the party which has appointed the arbitrator becomes aware after the appointment has been made, the arbitrator 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



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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 CEAC 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).



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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. 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 decide 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 proceedings 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

D-20457 Hamburg / Germany

Phone: +49-40-6686 4085

Fax: +49-40-36138-533

Email: contact@ceac-arbitration.com

Website: www.ceac-arbitration.com

The Managing Directors are Dr. Dominik Ziegenhahn and Dr. Ma Lin.



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Further information on the supporting associations of CEAC, the Chinese European Arbitration Association (CEAA) and the Chinese European Legal Association (CELA), can be found under www.ceac-arbitration.com.

Name of Authors:	PROF. DR. ECKART BRÖDERMANN LL.M. (Harvard), Maître en Droit (Paris V), FCI Arb (London) Brödermann Jahn DR. CHRISTINE HEEG-WEIMANN, LL.M. (Sydney) KPMG LAW
Name of Law Firms:	BRÖDERMANN JAHN RA GmbH KPMG Law
Brief Profile:	The Chinese European Arbitration Centre (CEAC) is a global arbitration institution founded in 2008 specialized in disputes dealing with Asia and especially China-related matters. Prof. Dr. Eckart Brödermann is one of the initiators and the former Managing Director of the Chinese European Arbitration Centre. Dr. Christine Heeg-Weimann is the former CEAC Secretary General and has been involved in CEAC activities since its foundation.
Telephone No.:	+49 (0)40 66 86 40-85
Fax No.:	+49 (0)40 66 86 40-699
Email:	eckart.broedermann@german-law.com ; cheegweimann@kpmg-law.com
Websites:	www.german-law.com , www.kpmg-law.com , www.ceac-arbitration.com



6. HONG KONG

BY: MR. STEFAN C. SCHMIERER

6.1 Which laws apply to arbitration in Hong Kong?

The Arbitration Ordinance (Cap. 609) (hereinafter “AO”) came into effect on 1 June 2011 to replace the old Arbitration Ordinance (Cap. 341) in governing arbitration in Hong Kong. Hong Kong takes a pro arbitration approach and the enactment of Cap. 609 caused an essential consequence on the law and procedure in Hong Kong arbitration practice. In addition, the Arbitration (Amendment) Bill 2016 which was passed on 14 June 2017 made amendments to the Arbitration Ordinance (Cap. 609) recognising that disputes regarding intellectual property rights can be resolved through arbitration, expanding Hong Kong’s jurisdiction in arbitration to intellectual property rights. The current AO unified the domestic and international arbitration regimes into one that is mainly governed by the UNCITRAL Model Law. Given that it was the current AO that gave effect to the unification of both regimes, any arbitrations that began prior to the enactment of the current AO, i.e. 1 June 2011, still follow the old AO which makes a distinction between domestic and international arbitrations.

The combination of codified arbitration legislation and the common law embedded in the Hong Kong legal system means that cases which are arbitration related and decided by the Hong Kong courts should also be considered besides the AO.

The High Court Ordinance (Cap. 4) and the Rules of High Court (Cap. 4A) also contain rules that are relevant for arbitration proceedings in Hong Kong.

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

Yes. With respect to international arbitration, the UNCITRAL Model Law (hereinafter “Model Law”) has been in effect in Hong Kong since 1990, and

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with the introduction of the new AO in 2011, the Model Law applies also to domestic arbitrations. Hong Kong's Arbitration Law is largely governed by the UNCITRAL Model Law except for older arbitrations commenced before 1 June 2011.

The Model Law has been regulating international arbitrations in Hong Kong for almost three decades since 1990. The exclusivity of the Model Law regulating international arbitrations has been abolished, so since the new AO came into force in 2011, the same law applies now to domestic and international arbitration.

From the AO's text it is apparent that articles from the Model Law were directly transferred into the AO. This is also reflected in Section 4 AO which states that the incorporated articles of the Model Law shall have the same effect as domestic Hong Kong laws.

To clarify this further and to give easy access to the Model Law, the entire Model Law was added to the AO as Schedule 1. Provisions that are not applicable under the AO are underlined. Certain Sections of the AO refer to the Model Law, but then declare that the Model Law shall be modified in certain parts or certain parts of an Article of the Model Law should not be applicable. The most important differences between the Model Law and the AO are:

- The Ordinance does not state a default number of arbitrators but leaves this to the HKIAC (Section 23 (3) AO);
- According to Article 18 Model Law, the parties shall have the full opportunity to present their cases, whereas this is limited to "reasonable opportunity" in the AO;
- Confidentiality provisions can be found in Section 18 AO, but not in the Model Law;
- The sections about an emergency arbitrator in Hong Kong are not reflected in the Model Law, and are addressed under the HKIAC rules, which deal with emergency arbitrators;
- Under Section 33 AO, an arbitrator may also act as a mediator, if all parties agree;



- The recoverable costs can be limited in Hong Kong under Section 57 AO.

Further, the AO took over various specifications from the Model Law, for instance Article 6 Model Law. The allocation of duties under this Article can be found in Section 13 AO, which allocates the duties and responsibilities between the Hong Kong courts and the HKIAC.

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

The enactment of the AO in June 2011 consolidated both the domestic and international arbitration regulations.

Schedule 2 AO contains provisions that were previously only applicable to domestic arbitration. The stipulations in the Schedule are only applicable if the parties agreed to opt into these provisions or the arbitration is a domestic arbitration and if the arbitration agreement became effective before or after 6 years after the entry of the new AO. Since the new AO became effective on 01 June 2011, Schedule 2 will become less and less important and applicable, as long as the parties do not opt in.

6.4 Has Hong Kong acceded to the New York Convention?

Yes. Hong Kong is a member state of the New York Convention (hereinafter “Convention”), which make arbitral awards from over 150 countries enforceable in Hong Kong. Hong Kong became a member of the Convention in 1977 already, when the UK joined the Convention. After the hand-over of Hong Kong to the PRC, the PRC declared the Convention to be extended to Hong Kong, however, within the scope of the PRC’s reservations towards the Convention.

Since the PRC is not another country towards Hong Kong (even though the jurisdictions are separated), an arbitral award from mainland China would not be enforceable in Hong Kong under the Convention, and vice versa. To counter this problem, Hong Kong and mainland China entered into a separate agreement (*Arrangement Concerning Mutual Enforcement of Arbitral Awards between*



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the Mainland and the Hong Kong Special Administrative Region) signed on June 21st, 1999, under which arbitral awards between the two jurisdictions are enforceable in the other's territory. Further, on 27 November 2020, the Chinese Supreme People's Court and the Hong Kong Department of Justice signed the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards.³⁵

When the formal requirements are met, an international award is presumed to be enforceable, unless one of the grounds for refusing to enforce the arbitral award applies.

Even though an arbitral award is not from one of the Convention's member states, a party could still apply to the Hong Kong courts and seek leave to enforce this award in Hong Kong. Since Hong Kong is known for its arbitration friendly regime, it can be assumed that the chances to get leave granted are rather high.

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?

There are no limitations whatsoever on which arbitration institutions the parties can agree on, regardless of whether both parties are domiciled in Hong Kong or only one party is domiciled in Hong Kong or both parties are domiciled outside Hong Kong, but have business operations in Hong Kong.

The parties can freely choose the venue for the arbitration, the arbitration institution itself and the rules of arbitration.

Therefore, parties can agree on foreign arbitration institutions if both parties are domiciled in the country and also if one party is domiciled in the country and if the other party is domiciled abroad.

³⁵ For more details, please see Section 6.22 below



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

The AO gives only general guidance as how to proceed during arbitration proceedings, therefore there are no fixed procedures for arbitration to be followed. Essentially, the parties are free to decide which procedural rules to follow. Even though it is likely that the parties that agree to an arbitration before the HKIAC and adopt the HKIAC rules as their procedural rules, the parties may still decide on other rules, such as ICC Rules or other rules.

In Hong Kong ad hoc arbitration still seem to be popular, but it becomes more and more common to agree on a certain arbitration institution which should administer the arbitration. If an arbitration institution has been agreed upon, but the parties failed to agree on the procedural rules, then it is up to the arbitral tribunal to decide which rules to follow. However, the arbitral tribunal usually adopts the rules of the institution under which it has been appointed and follows these rules.

The AO itself provides certain guidelines, for instance in Section 3 (1), which states that the proceedings shall be fair and speedy, and that the proceedings shall not violate any public interest Section 3 (2) (a).

Further guidance can be found in Section 46 AO, which stipulates that:

- The parties shall be treated equally (Section 46 (2) AO),
- The arbitral tribunal shall be independent, act fairly and impartially (Section 46 (3) (a), (b) AO), and
- The arbitral tribunal shall avoid unnecessary delay or expenses (Section 46 (3) (c) AO).

However, Section 46 (3) (c) AO also states that the decision how to conduct the arbitration proceedings ultimately rests with the arbitral tribunal as long as the safeguards of the AO are observed.



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

A valid arbitration clause does generally bar the access to the ordinary courts, in accordance with Section 20 (1) AO, which incorporates Article 8 of the Model Law. In case one party is starting legal action at the ordinary courts in Hong Kong despite an arbitration agreement, then the other party must apply to the court to stay the court proceedings in view of the arbitration clause. It is then the courts' obligation to review the arbitration clause and decide whether this clause constitutes a valid arbitration clause. If the court finds the arbitration clause invalid, the court will continue the action before the court. However, if the court finds the arbitration clause to be valid, it is required to stay the court action and refer the parties to arbitration, Section 20 (5) AO.

6.8 What are the main arbitration institutions in Hong Kong?

The main arbitration institution is the Hong Kong International Arbitration Centre ("HKIAC"). The HKIAC is an independent, non-profit company limited by guarantee, which is well respected by the Hong Kong Government. The AO allocates certain duties and responsibilities to the HKIAC, which shows the importance that the HKIAC plays in Hong Kong arbitration proceedings and the importance that the Hong Kong government puts on arbitration in Hong Kong.

The HKIAC Secretariat, manages HKIAC's day to day dispute resolution activities, including administering proceedings, keeping a list of arbitrators, providing and organising the facilities, and other support required by arbitration proceedings in Hong Kong.

The Executive Committee is the principal body responsible for the overall activities of the HKIAC. Under the Executive Committee are further sub-committees, to whom certain tasks are delegated. Furthermore, the HKIAC has several specialised subdivisions, such as the Asian Domain Name Dispute Resolution Centre, the Mediation Council, and the Maritime Arbitration Group.

Hong Kong International Arbitration Centre

38th Floor Two Exchange Square
8 Connaught Place, Central



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Hong Kong S.A.R.

Telephone: +852 2525 2381

Fax: +852 2524 2171

Email: adr@hkiac.org

Website : www.hkiac.org

Besides the HKIAC, since 2008, Hong Kong is also home to the ICC Secretariat of the International Court of Arbitration of the ICC. In November 2008, the Paris-based ICC-ICA has opened the first overseas branch of its Secretariat in Hong Kong to serve ICC arbitration in the Asia-Pacific Region, namely ICC-ICA- Asia Office.

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 S.A.R.

Telephone: +852 3607 5600

Fax: +852 2523 1619

Email: ica8@iccwbo.org

Website: www.iccwbo.org

Since September 2012, CIETAC is operating an office in Hong Kong, which is the first CIETAC representation outside of Mainland China. CIETAC was established in 1956 and is China's oldest and most experienced arbitration institution, accepting the majority of foreign-related arbitration cases in China.

China International Economic and Trade Arbitration Commission

Hong Kong Arbitration Centre

4705 Far East Finance Centre

16 Harcourt Road, Admiralty

Hong Kong S.A.R.

Tel: +852 2529 8066

Fax: +852 2529 8266

Email: hk@cietac.org

Website: www.cietachk.org



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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 S.A.R.

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 S.A.R.

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 only Hong Kong specific arbitration rules are the HKIAC Rules. The arbitration rules of the other two institutions named above (ICC and CIETAC) follow the general ICC and CIETAG arbitration rules so that the focus here should be on the HKIAC rules.

The newest version of the HKIAC Rules came into effect on 01 November 2018 and are applicable to all arbitral proceedings that were commenced after this date and which refer to these rules. The rules are based on the UNCITRAL Arbitration Rules.

The major emphasis of the 2018 revisions focussed on the introduction of the use of IT technology, third party funding possibility in Hong Kong, and making the arbitral process overall more efficient.

To provide an easy-to-handle online system which can be used by the parties for communication and exchange of documents, several new provisions in



Article 3 HKIAC Rules contain the possibility to upload documents to a secure repository. Such repository can either be provided by the HKIAC, or the parties can agree to use their own system. Once a document is uploaded, it is deemed to be received by the other party once it is uploaded.

Another provision that was introduced to increase the efficiency of the arbitration proceedings can be found in Article 13.1 HKIAC Rules which gives the arbitral tribunal the freedom to adopt measures, including “effective use of technology” to speed up the process, as long as such measures are fair for both parties and both parties have a reasonable opportunity to present their case.

With the introduction of third-party funding for arbitration proceedings arose the need to adopt the HKIAC Rules to these new developments. Articles 34.4, 44 and 45 (3) (e) HKIAC Rules were introduced, whereas Article 44 HKIAC Rules is completely new and only deals with third party funding. The other two sub-articles needed to be introduced to amend the confidentiality and costs provisions to the new regime.

Articles 29 and 30 HKIAC Rules were introduced for the sake of efficiency. Both articles provide that claims arising out of several contracts can be consolidated and that two already running arbitration proceedings can also be consolidated subject to several preconditions.

After the introduction of emergency arbitrators by the AO, the HKIAC Rules needed to be adopted (Article 23.1 and Schedule 4 HKIAC Rules). Along with other Practice Notes, the HKIAC Rules can be found on the following website: www.hkiac.org.

The COVID 19 pandemic has also had its impact on arbitration in Hong Kong. In April 2020, HKIAC, SIAC and ICC joined with other arbitration institutions around the world to issue a joint statement encouraging parties and arbitrators to discuss the impact of the pandemic and potential ways to address the same in an open and constructive manner.

The HKIAC Guidelines released on 14 May 2020 provide guidance and recommendation to ensure that virtual hearings proceed as smoothly as possible and with minimal disruption. These recommendations include:

1. Arrange to have an IT specialist (hearing manager) in attendance at all times;



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2. Ensure the confidentiality and security of virtual hearings including using password protection for all cloud-based video conferencing, agreeing on list of participants and allowing only the approved list of participants;
3. Participants of video conferences should ensure the camera is positioned at eye-level, avoid back-lighting, avoid speaking at the same time, use a headset with integrated microphone to protect privacy etc;
4. Where a witness or expert is participating in a video conference remotely:
 - a. A hearing invigilator should attend the same premise as the witness or expert;
 - b. A 360-degree viewing of the room by video at the beginning of each session should be arranged to ensure integrity of the room; and
 - c. The tribunal should recall the witness' or expert's obligation of truthfulness including presenting their evidence in the manner agreed and without proper influence (by administering an oath, declaration, affirmation or otherwise); and
5. Any audio recording is subject to parties' agreement under the tribunal's direction.

6.11 What is the Model Clause 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.

In addition, can be added:

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



This should be included especially in cases where the law of the arbitration venue is different from the substantive law governing the dispute.

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

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

6.12 How many arbitrators are usually appointed?

There is no legal requirement as to the number of arbitrators to be appointed. It is up to the parties to the dispute to determine the number of arbitrators.

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

Section 26 AO cites Article 13 of the Model Law regarding the procedure for challenging an arbitrator. In practice, parties to an arbitration proceeding are unrestricted in setting their own challenge procedure.

According to Section 26 (2) AO, if parties failed to agree on the challenge procedure, any party who wishes to challenge an arbitrator should deliver a written statement to the arbitral tribunal within 15 days after having obtained knowledge of the composition of the arbitral tribunal or if there are circumstances that give rise to justifiable doubts as to the impartiality or independence of the arbitrator, or if the arbitrator does not have the requisite qualification agreed by the parties.

Article 13 (3) of the Model Law states that, regardless of whether the parties have agreed on a challenge procedure, if a challenge to the arbitral tribunal was not successful, the challenging party could appeal the arbitral tribunal's decision to the court or other authority within 30 days from receiving the arbitral tribunal's rejection of the challenge. However, any decision made on the challenge by the court or other authority is final and not open to appeal.

Section 26 (2) 4 AO provides that the High Court may refuse to grant leave to enforce any award made by the arbitral tribunal during the period when a request to challenge the arbitrator is pending before the High Court.



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With regard to the challenged arbitrator, he/she is entitled under Article 13 (2) of the Model Law to withdraw from office as an arbitrator if he/she thinks fit. The withdrawal of the arbitrator will lead to a termination of the challenged arbitrator's mandate. In addition to the withdrawal of an arbitrator, Section 26 (4) 4 AO further stipulates scenarios in which the mandate of a challenged arbitrator will be terminated, these include:

- i. The parties agreeing to the challenge;
- ii. The arbitral tribunal upholds the challenge, and no request is made for the Court to decide on the challenge; or
- iii. The Court upholding the challenge upon receiving request.

It is to be noted that if the Court upholds the challenge, the award made by the arbitral tribunal may be set aside as per Section 26 (5) AO.

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

There are no limitations to the parties' representation in arbitration proceedings in Hong Kong. Article 13.6 4 HKIAC Rules explicitly states that the parties can choose whichever person shall represent them. This is supported by Section 63 AO, which declares certain limitations in the Hong Kong Legal Practitioners Ordinance not to be applicable in arbitration proceedings.

As a result, not only Hong Kong solicitors and barristers can provide legal advice in Hong Kong for arbitration proceedings, but lawyers from any other jurisdiction can do so as well in Hong Kong. This shows Hong Kong's international and pro arbitration attitude and is further supported by the Hong Kong immigration rules, which state that under certain circumstances arbitrators that act in Hong Kong do not have to apply for an employment visa but can work under a general visitor's visa.

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



One of the core principles for Hong Kong arbitrations is that courts should intervene in the arbitration as little as possible. Due to Hong Kong's pro arbitration stance, the courts generally do not interfere with arbitration proceedings except in certain circumstances with the purpose to assist the arbitral process. This is reflected by Section 12 AO, which refers to Article 5 of the Model Law, and which states that the courts should only intervene where proper authority is conveyed to them by applicable law. Even though litigation is pending at a Hong Kong court, either party may, as stated in Section 20 AO, request the court to submit the dispute to arbitration, if the court finds that a valid and binding arbitration agreement exists. In such cases, the court action will be stayed.

In a recent case (*A v D* [2020] HKCFI 2887)³⁶, the Hong Kong Court of First Instance did not grant the applicants a time extension to apply to set aside an arbitral award. This case involved an HKIAC case, where the key question was whether Courts will allow a time extension for an application to set aside an award made by the HKIAC. The court held that the set-aside application submitted on 28th August 2020 was out of time. Article 34 (3) of the Model Law (adopted by section 81 of the AO), states that an application to set aside an arbitral award should be made within three months from the receipt of the award by the party making the application. The award was made and sent via email on 21st May 2020. Hence, the deadline for making this application expired on 21st August 2020. Therefore, on the basis that the Applicants did not give any satisfactory explanation for their delay, the Court did not interfere to grant any time extensions and refused to exercise its discretion. This decision underlines the Hong Kong courts approach not to interfere with the arbitration process.

Another recent case, *T v W*, HCA 366/2020³⁷, the High Court dismissed an application to stay the proceedings in arbitration. This case involved the Plaintiff that had commenced court proceedings against the Defendant for HKD5 million plus interest payable under a cheque drawn by the Defendant. The Defendant applied to the Court to stay the proceedings relying on the Loan Agreement that stated that "it was governed by Hong Kong law and that any dispute should be arbitrated in Hong Kong." The Court held that the cause

³⁶ <https://arbitration.site/wp-content/uploads/2020/12/ABC-v-D.pdf>

³⁷ <https://vlex.hk/>

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of action on a cheque is separate to the cause of action on the underlying contract. Therefore, the cause of action on the cheque is separate and can be determined in the Court versus arbitration. This case shows that the Court can rule that even if there is an arbitration clause involved, if the Court can hold that the Defendant cannot establish a *prima facie* case that the parties are bound by the arbitration clause, it is not necessary to refer the case to the arbitral tribunal.

This has been done in Hong Kong by virtue of Section 13 AO, which provides that certain functions under the Ordinance are to be performed by the courts, and others are to be performed by the HKIAC. This section is quite remarkable, because the law confers functions to a non-judicial authority body which is not directly controlled by the government.

Functions that are allocated to the HKIAC under the Ordinance are, amongst others, the duty to decide on the numbers of arbitrators, Sections 23 (3), 24 AO, if not yet done by the parties, or the power to appoint mediators, Section 32 (1) AO.

On the other side, functions that are allocated to Hong Kong courts can be found in Sections 26 and 26 AO and deal with challenging arbitrators in cases where such challenge was unsuccessful at the level of the arbitral tribunal and to remove an arbitrator if the arbitrator is not able to perform his/her functions properly. Furthermore, the courts have the power to set aside arbitration awards, Section 81 AO, even though Hong Kong courts are reluctant to intervene by setting aside awards, and the court may order interim measures as stated in Section 21 AO. If necessary, the arbitral tribunal may request the courts to support and assist in taking evidence, Section 55 (1) AO, including summoning a person to provide evidence or a witness statement Section 55 (2) AO.

Section 20 AO, in line with Article 8 of the Model Law clearly sets forth that no court action will be taken, or a pending court action will be stayed, if a valid arbitration agreement between the parties exists (Section 20 (5)).

There is a specialist list in the High Court, Court of First Instance called the Construction and Arbitration List which deals with applications under the AO.



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

Section 35 AO incorporates Article 17 Model Law, which clearly states that the arbitral tribunal has the power to grant interim measures, unless the parties opted out of this possibility. Section 35 defines an interim measure as any temporary measure, which can be in the form of an award, an injunction or any other form as deemed fit by the arbitral award to:

- a) Maintain or restore the status quo pending determination of the dispute;
- (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Whereas Section 35 AO deals more generally with interim measures and what they are, Section 36 AO provides further guidance under which circumstances the arbitral tribunal can order interim measures. According to this Section, an interim measure can only be granted, if the arbitral tribunal is satisfied by the applying party that harm is likely to result for that party if the interim measure is not granted and this harm outweighs the harm that is likely to result by the interim measure to the other party. Furthermore, the applying party must have the reasonable possibility to succeed on the merits of the main claim. Whereas the first precondition is relatively hard to achieve, especially if the applying party is seeking for an order to do or omit something rather than just preserving the status quo, the later precondition is easier to satisfy, since a 51% chance to succeed on the merits of the main claim is mostly sufficient.

An interim order has, as stated in Section 61 AO, the same effect as an order or direction from a Hong Kong court, once leave is granted. This means that if a party wants to enforce an interim measure by an arbitral tribunal, either made in Hong Kong or outside Hong Kong, it needs to apply for leave from the court. Leave will be granted (Section 61 (2)) if the party that wishes to enforce



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the measure can demonstrate that the order or direction is a type of order that is similar to an order or direction that can be made in arbitration proceedings in Hong Kong. Therefore, interim measures ordered by local Hong Kong arbitral tribunals will most likely always be granted leave, and orders from outside of Hong Kong need to satisfy the requirements of Section 61 (2) AO.

If an interim measure is not an order or direction but an award, then the enforcement is covered by Section 84 AO. To enforce an award in Hong Kong, regardless whether the award is made in Hong Kong or outside Hong Kong, leave is required from a Hong Kong court.

Lastly, and added to the new AO, Sections 22A and 22B AO deal with the enforcement of interim relief granted by an emergency arbitrator. However, given the nature of emergency arbitrators, Section 22B (2) AO provides a narrower approach under which circumstances an interim relief enforcement may be granted leave.

Furthermore, under Section 70 of the AO, unless otherwise agreed by the parties, the tribunal may award any remedy or relief that could have been ordered by the Court if the dispute had been the subject of civil proceedings in court, including the ability to order specific performance of any contract.

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

- **Formal requirements for arbitral awards**

Section 67 AO gives effect to Article 31 of the Model Law in stating the formalities and content of arbitral awards. The award must be in written form and signed by the arbitrator(s). If more than one arbitrator is present in the arbitral proceedings, obtaining signatures from the majority will suffice in giving effect to the award, provided that the reasons for eliminating other signatures are stated.

Unless the parties agreed otherwise or the award was made on agreed terms as per Article 30 of the Model Law, the award must also state the reasons on which it is based.



- **Deadlines for issuing arbitral awards**

According to Section 72 AO, the award may be made at any time decided by the arbitral tribunal unless the parties agreed to a time for making an award. If parties have set a time limit for the award to be made, any party could apply to the Court to extend the time limit.

In principle, the AO and the HKIAC Rules do not stipulate a time limit for making an award. The arbitrator is at liberty to make an award anytime. However, the arbitrator may be removed by the court if the award was not made in a timely manner. On the other side, the new HKIAC Rules contain in Article 31.2 a deadline of three months after the closure of the proceedings, but this can be extended by parties' agreement or by the HKIAC. The arbitral tribunal is nevertheless required to inform the parties about the anticipated date of delivering the award.

- **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.

Nothing in the applicable laws or rules in Hong Kong require the arbitral tribunal to provide dissenting opinions from arbitrators, unless provided otherwise in the arbitration agreement.

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

Section 73 (1) AO clearly states that unless otherwise agreed between the parties, an arbitration award is final and binding upon the parties. As an exception to this general rule, Section 73 (2) AO provides the right to challenge an award under limited circumstances.

Section 73 (2) AO refers to Section 81 AO, giving effect to Article 34 of the Model Law, which stipulates that an award may be challenged under the following exhaustive grounds:



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- One of the parties was under some incapacity;
 - The arbitration agreement is invalid under the laws to which it is subject to;
 - The applying party was not able to represent itself in the proceedings or was not given proper notice of the appointment of an arbitrator or the arbitral proceedings;
 - The award contains and deals with disputes or decisions that were not subject to the submission to arbitration, if the decisions and matters submitted to the arbitration cannot be severed from the matters that were not subject to such submission;
 - The composition of the arbitral tribunal or the arbitration procedure was not in composition to which the parties agreed;
 - The award cannot be settled by arbitration under Hong Kong laws, or
 - The award violates public policy in Hong Kong.

Any challenge of an award must be made within 3 months after the award was received by the applying party.

Section 81 (2) AO provides three exemptions to Section 81 (1) AO, and widens the court's right to set aside an arbitral award:

- This section refers to Section 26 (5) AO, which states that the court has the right to set aside an arbitration award, if an arbitrator was challenged and such challenge was upheld by the court;
- Furthermore, a court may set aside an award if serious irregularities did affect the proceedings, Section 4, Schedule 2 AO. This section lists several grounds that may establish serious irregularity.
- Section 5 Schedule 2 AO gives the right to appeal an award under limited circumstances, i.e. either if all parties agree to appeal or if leave for appeal is granted by the court.

Please note that the latter two points in Schedule 2 are only applicable, if the parties expressly opted in and agreed to include Schedule 2 into the arbitration agreement, or if the arbitration is a domestic Hong Kong arbitration only.



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

As stated in Section 84 (1) AO, an arbitration award is generally enforceable in Hong Kong. However, both, foreign and Hong Kong awards require leave from the court, and, if leave is granted, the court may then enter judgment in terms of the award (Section 84 (2) AO). This means that arbitration awards are enforceable in Hong Kong even though outside the scope of the Convention. This means, even arbitration awards that were rendered in countries that are not member states to the Convention can be enforceable in Hong Kong, however, the court has more grounds to refuse the enforcement of an award outside the Convention.

Hong Kong became a member of the Convention on 21 January 1977, when the UK extended the application to its then territory. After the hand-over of Hong Kong to China in 1997, it was necessary that China extended the application of the Convention to its new Special Administrative Region, which it did in 1997, so that Hong Kong was and remains a member state of the Convention. However, the return of Hong Kong to Mainland China created a problem between Hong Kong and China because once Hong Kong became part of China, the Convention was not applicable anymore to arbitration awards between Hong Kong and China.

This made it necessary that Hong Kong and China entered into a separate bilateral agreement for the enforcement of arbitration awards between them (the *Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and Hong Kong*) in June 1999. The agreement is basically mirroring the Convention, but with the exemption that if enforcement of the award is pending in China, then it cannot be enforced at the same time in Hong Kong, Section 93 AO. This limitation shall ensure that an award is not enforced in Hong Kong and China, because it is common for many natural and judicial persons to have assets in both jurisdictions. On 27 November 2020, the Chinese Supreme People's Court and the Hong Kong Department of Justice signed the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards.³⁸

³⁸

For more details, please see below Section 6.22



As stated above, awards can be enforced by the AO by virtue of Section 84 AO, including all local and foreign awards. In addition, awards rendered in a member state of the Convention can be enforced by virtue of Section 87 AO, and Mainland awards can be enforced in the same way under Section 92 AO. For both, Convention awards and Mainland China awards, two different ways of enforcement exist: either the award can be enforced by applying for leave at the Hong Kong court so that the court enters judgment in terms of the award, or, more complicated, the award can be used to start a Common Law action. This would start a whole new court proceeding in Hong Kong and the burden of proof would rest with the plaintiff, so that it is recommendable to apply for leave to enforce the award, instead.

The reasons, based on which the court can refuse the enforcement of an award are basically the same for all the types of awards (New York Convention Awards, Mainland China awards, and awards under the AO, and are stated above in para 6.18.)

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

Yes, recovery of costs does follow the general rules. According to Section 74 (1) AO, the arbitral tribunal has the power to issue an order in respect to costs in its award. This includes the costs for arbitrators, for the arbitral tribunal, and any costs of the arbitration institution. However, in order to avoid excessive fees, the arbitral tribunal has the duty to only grant costs that are reasonable, Section 74 (7)(a) AO, but on the other side, the decision what the arbitral tribunal considers as reasonable rests with the arbitral tribunal itself. Section 74 (7) (b) continues in stating that the recoverable costs do not only include the costs during the proceedings but also costs that were incurred before the proceedings.

Section 74 (6) AO expressly states that when deciding about the costs, the arbitral tribunal does not need to follow the scales and practices adopted by the Hong Kong courts. This leads usually to higher recoverable costs in arbitration than in litigation, because even though the recoverable costs in litigation were raised in 2018, they are still far behind the usual fees that local Hong Kong solicitors charge, not to mention the fees of experienced international arbitrators.



To have a better cost control for the arbitration, the arbitral tribunal may limit, in accordance with Section 57 (1) AO the total amount of costs that shall be recoverable. This is a useful guide to the parties to not excessively spend on legal costs during the arbitration, since even in case of obtaining a favourable award, a certain part of the costs may not be recoverable.

When deciding on costs, the arbitral tribunal may issue interim awards (usually during lengthy proceedings or for injunctions) or decide about a split of the costs between the parties, usually following the main award.

It is also noteworthy that the arbitral tribunal can require the claimant to post security for costs, Section 56 AO.

The above is also reflected in the HKIAC Rules in Article 34. As in the AO, Article 34 HKIAC Rules clearly states that the recoverable fees must be reasonable and may limit the total amount of recoverable costs (Article 34.2 HKIAC Rules).

New in the HKIAC Rules is Article 34.4 that now explicitly stating that when making a cost order, the arbitral tribunal may take into consideration any third-party funding arrangement. This new Article is based on the fact that it is now possible in Hong Kong to rely on third party funding for arbitrations.

When challenging an arbitration award before Hong Kong courts, it is important that Hong Kong courts usually grant costs on an indemnity basis to the non-successful party that is trying to challenge the award. The reasoning is to foster arbitration and show the general stand of Hong Kong courts that arbitration awards shall be considered as final.

Typically, the losing party will have to bear the costs reasonably incurred by the winning party and the arbitrators' fees. As a rule of thumb, the taxed costs will be about two-thirds of the actual costs spent by the winning party in arbitration.

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



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The HKIAC reported³⁹ handling a total of 483 cases in 2020, among them 318 were arbitrations, 16 were mediations and 149 were domain name disputes.

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

6.22.1 Increased assistance between Hong Kong and China

On 1 October 2019, the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and the Hong Kong Special Administrative Region (the “Arrangement”) came into force. In effect, this means parties to arbitral proceedings in Hong Kong can now during arbitration apply for interim measures from the Mainland courts to protect the enforcement of arbitral awards. Under the Arrangement, a party to arbitral proceedings in Hong Kong can apply for interim measures from the Mainland courts any time before the arbitral award is made. This includes the time before the arbitration institution has accepted the arbitration case. Prior to the establishment of this Arrangement, a Mainland court would not provide any direct assistance or grant any interim measures to parties to an arbitral proceeding in Hong Kong.

Under the Arrangement, parties to arbitral proceedings administered by arbitral institutions set up or established in Hong Kong will be eligible for applying to the Mainland courts (i.e. Intermediary People’s Court) for interim measures of various types. Such interim measures include preservation of assets, evidence and conduct. Reciprocally, any party to arbitral proceedings in Mainland China may also apply to the Hong Kong courts for interim measures. The interim measures that the Hong Kong courts can grant are more diversified – apart from measures to preserve assets, evidence and conduct, parties may also apply for injunctions and other measures to (a) maintain or restore the status quo pending determination of the disputes and; (b) take actions that would prevent,

³⁹ <https://www.hkiac.org/about-us/statistics#:~:text=2020%20Statistics,submitted%20to%20HKIAC%20in%202020.&text=31.8%25%20of%20all%20arbitrations%20submitted,6.6%25%20involved%20no%20Asian%20parties.>



or refrain the other parties from taking actions that are likely to cause, current or imminent harm or prejudice to the arbitral process.

The Interim Measures Arrangement is seen as an important milestone between Hong Kong and China. Hong Kong has become the first and only jurisdiction outside the Mainland where in terms of arbitration, parties to the arbitral proceedings administered by certain institutions would be eligible to apply to the Mainland courts for interim measures. As of 27 August 2020, the HKIAC processed 25 applications made to different Mainland Courts under the Interim Measures Arrangement. The applications concerned a preservation of assets for a total of RMB 9.4 billion in Mainland China. HKIAC reports that there were 17 decisions made by the Mainland Courts, all of which granted the applications for preservation of assets.

Under the Interim Measures Arrangement, Mainland Courts can also issue orders. In a recent case on 8 October 2019, the Shanghai Maritime Court issued the first order granted under such Arrangement. This case involved a Hong Kong Company that commenced arbitration against a Shanghai-based company involving a breach of a settlement agreement. Through the HKIAC, the Hong Kong Company applied to preserve, seize and freeze the Shanghai Company's bank accounts within the Mainland Court on 1st October 2019. The Shanghai Maritime Court granted the requested measures on the same day.

Furthermore, on 27 November 2020, the Chinese Supreme People's Court and the Hong Kong Department of Justice signed the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region ("Supplemental Arrangement"). The Supplemental Arrangement modifies and supplements the existing Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR which was signed on 21 June 1999 and came into effect on 1 February 2000 (1999 Arrangement).

The main content of the Supplemental Arrangement is as follows:

- Article 1 clarifies that the enforcement of arbitral awards specified under the 1999 Arrangement shall be interpreted to cover both procedures for the "recognition" and "enforcement" of the arbitration awards. The 1999 Arrangement does not expressly include the recognition procedure



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in its text. As a result, there have been debates in the Mainland courts about whether recognition is required prior to enforcing arbitral awards made in Hong Kong against the relevant award debtors' assets. The Supplemental Arrangement clarifies this point.

- Article 2 clarifies the types of arbitral awards under the 1999 Arrangement. It specifies that all arbitral awards made pursuant to the Arbitration Ordinance of Hong Kong can be enforced in the Mainland pursuant to the Supplemental Arrangement. That includes all awards rendered in Hong Kong-seated arbitrations, whether institutional or ad hoc. This aligns with the usual international approach to the seat of arbitration under the New York Convention.
- Article 3 allows parties to apply for enforcement of arbitral awards in the Mainland and in Hong Kong at the same time. The Original Arrangement prohibited “parallel enforcement”, namely applying for enforcement of an award in Hong Kong and the Mainland simultaneously. This modification is particularly helpful for enforcement against parties who have assets in multiple jurisdictions, as it facilitates timely enforcement and helps to prevent asset dissipation.
- Article 4 recognises that before or after enforcement of an award, the courts may order preservation measures in accordance with the applicable law. This is a welcomed development with respect to interim measures in addition to the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong.

Articles 1 and 4 of the Supplemental Arrangement have come into force on 27 November 2020 in Hong Kong. Articles 2 and 3 will only take effect after the necessary amendments to the Arbitration Ordinance are enacted. The Supplemental Agreement is already in effect in the Mainland. The benefit of the Supplement Agreement can be seen that it provides more legal clarity and protection for the effective enforcement of arbitral awards in both jurisdictions.

6.22.2 Third Party Funding (“TPF”)

On 1 February 2019, Hong Kong’s arbitration law was amended to allow the use of third-party funding (“TPF”) for arbitration and related court



proceedings. This means that there are more opportunities for funding, since TPF transfers the risk of a dispute from a claimant to the funder. In a broad sense, the funder bears the legal costs, and will receive a portion if the claim is successful. A Code of Practice for Third Party Funding in Arbitration was issued by the Hong Kong Department of Justice (“DOJ”) in December 2018 to provide guidance on the ethical and financial standards and practices that third party funders are expected to meet.

6.22.3 CAS Opportunity

In addition, in another area of development, the Department of Justice (“DOJ”) has constantly been making efforts in attracting internationally renowned arbitral institutions to set up regional offices or branch institutions in Hong Kong, including offices already established in Hong Kong, namely, the ICCICA – Asia Office, the Hong Kong Arbitration Center of the China International Economic and Trade Arbitration Commission and the Hong Kong Arbitration Center of the China Maritime Arbitration Commission. One interesting institution that the DOJ is exploring to set up in Hong Kong is the Court of Arbitration for Sports (“CAS”). CAS is an institution independent of any sports organizations which provides services to facilitate the settlement of sport-related disputes, through arbitration or mediation, by means of procedural rules adapted to the specific needs of the sport world. The disputes may be related to contractual breaches, disciplinary matters, doping, athlete eligibility and commercial disputes relating to sponsorship and advertising. The DOJ has said of its plans to explore how Hong Kong can contribute to this specialized area of dispute resolution.



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Name of author:	MR. STEFAN C. SCHMIERER Solicitor, Hong Kong Attorney-at-Law, Germany
Name of law firm:	Ravenscroft & Schmierer
Brief profile:	<p>Ravenscroft & Schmierer is a full service law firm with strong focus on international clients. With a clear international focus, our lawyers originate from and are qualified in multi jurisdictions and welcome instructions from anywhere in the world. Whether you reside in Hong Kong or do business there, it's great to have a knowledgeable legal team on your side. Our partners' long decades of experience in advising local as well as international clients we provide a problem-solving approach to our clients' activities in Hong Kong.</p> <p>Our partners collectively have decades of experience in Hong Kong. We understand that each client is different and requires tailor made solutions and prompt, clear and hard-headed advice. Through our Asian and international networks, we can quickly and seamlessly offer you support in more than 50 countries worldwide.</p>
Telephone No:	+852 2388 3899
Fax No:	+852 2385 2696
E-mail	sschmierer@rs-lawyers.com.hk
Website	https://www.rs-lawyers.com.hk/



7. INDIA

**BY: MRS. ZIA MODY
MR. ADITYA VIKRAM BHAT
MS. PRIYANKA SHETTY**

7.1 Which laws apply to arbitration in India?

The Arbitration and Conciliation Act, 1966 (“Arbitration Act”) is the primary legislation which governs arbitration in India. Subsequently, the Arbitration Act has been amended by the Arbitration and Conciliation (Amendment) Act, 2015, which came into effect on October 23, 2015 (“Amendment Act, 2015”) and the Arbitration and Conciliation (Amendment) Act, 2019 (“Amendment Act, 2019”). On November 4, 2020, the President of India has promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2020 (“Ordinance”) further amending the Arbitration Act.

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 like Bombay High Court (Fee Payable to Arbitrators) Rules, 2018. The rules of arbitration institutions will apply to arbitration proceedings, where institutional arbitration is adopted like the Mumbai Centre for International Arbitration (“MCIA”) Rules, 2016 or Delhi International Arbitration Centre (Arbitration Proceedings) Rules, 2018.

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



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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 arbitrations seated in India, and Part II relates to the enforcement of certain foreign awards, such as awards under 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”). Pursuant to the Amendment Act, 2015, certain provisions of Part I of the Arbitration Act such as seeking interim relief from courts, assistance of courts in taking evidence, also apply to arbitrations seated outside of India, unless the arbitration agreement specifically excludes such an application.

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. The Gujarat High Court⁴⁰ held that the Arbitration Act does not *per se* prohibit two Indian parties from choosing a foreign seat as the seat of an arbitral proceeding. Further, the Delhi High Court⁴¹ in *Dholi Spintex Pvt. Ltd v. Louis Dreyfus Company India Pvt. Ltd.* has held that two Indian parties can choose a foreign law as the law governing an arbitration under the contract i.e. a different governing law for the arbitration clause, from the substantive law of the underlying contract.

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

There are no substantive requirements for the procedure to be followed under the Arbitration Act. The Arbitration Act permits the parties to agree on the procedure to be followed by the arbitral tribunal. In the event that parties are unable to agree on the procedure to be followed, then the arbitral tribunal may decide the procedure. 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 on the courts of India. 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 not later than the date of submitting the first statement on the substance of the dispute to the court. The precondition is therefore an application before the court seeking reference to arbitration.

⁴⁰ *GE Power Conversion India Pvt. Ltd. v. PASL Wind Solutions Pvt. Ltd.*, Arb. Pet. 131 & 134 of 2019.

⁴¹ *Dholi Spintex Pvt. Ltd v. Louis Dreyfus Company India Pvt. Ltd.*, 2020 SCC Online Del 1476.



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In addition, parties may be able to approach the courts (i) for appointment (Section 11) and removal (Section 13 & 14) of arbitrators, (ii) seeking interim relief pending arbitration (Section 9), (iii) seeking extension of time for completion of arbitration proceedings (Section 29-A), (iv) seeking assistance of the court in taking evidence (Section 27), (v) seeking to set aside awards (Section 34), (vi) appeal against order of the inferior court/arbitral tribunal (Section 37) and (vii) enforcement of awards (Section 36 & 49).

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?

Arbitration institutions such as the Mumbai Centre for International Arbitration (“MCIA”), and institutions attached to various High Courts such as Delhi International Arbitration Centre (“DIAC”) in Delhi, Karnataka, 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?

Mumbai Centre for International Arbitration (MCIA)

20th Floor, Express Towers,
Nariman Point,
Mumbai - 400021 (India)
Tel: +91-022-61058888
Website: www.mcia.org.in

Delhi International Arbitration Centre (DIAC)

Delhi High Court Campus
Shershah Road



New Delhi – 110503

Tel: +91-11-23386492, 23386493

E-mail: delhiarbitrationcentre@gmail.com

Website: www.dacdelhi.org

7.10 Arbitration Rules of major arbitration institutions?

The above-mentioned arbitration institutions have a specific set of rules which is available on their 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 MCIA, the following clause has been suggested as a model clause⁴²:

"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 accordance with the Arbitration Rules of the Mumbai Centre for International Arbitration ("MCIA Rules"), which rules are deemed to be incorporated by reference in this clause.

The seat of the arbitration shall be _____.

The Tribunal shall consist of [one/three] arbitrators).

The language of the arbitration shall be _____.

The law governing this arbitration agreement shall be _____.

The law governing the contract shall be _____."

The Delhi International Arbitration Centre recommends the following arbitration clause in the contracts⁴³:

"All dispute and differences arising out of or in connection with or relating to the present agreement shall be settled under the Rules of

⁴² <http://mcia.org.in/mcia-rules/model-clauses/>

⁴³ <http://www.dacdelhi.org/topics.aspx?mid=60>



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Delhi International Arbitration Centre by one or more arbitrators appointed in accordance with its Rules.

Note: Parties may consider adding the following:

- (a) The number of arbitrator(s) shall be _____.
- (b) The language of the arbitration proceedings shall be _____.
- (c) Specific qualifications of the arbitrator(s) including language, technical qualifications and experience, if any.
- (d) The place of arbitration shall be the Delhi International Arbitration Centre at Delhi.

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?

An arbitrator may be challenged on the following grounds:

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

The grounds which give rise to the above circumstances have been mentioned in the Fifth Schedule of the Arbitration Act. A separate procedure for challenging the arbitrator(s) is provided for in Section 13 of the Arbitration Act. The existence of grounds mentioned in the Seventh Schedule of the Arbitration Act render an individual ineligible to be appointed as an arbitrator.



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 respective arbitration institution may prescribe certain restrictions.

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

For arbitrations 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 for domestic arbitrations and Section 45 for international arbitrations;
- (ii) application for interim measures under Section 9, for international arbitrations as well, subject to any agreement to the contrary;
- (iii) application for court to appoint arbitrator under Section 11;
- (iv) application challenging the appointment of an arbitrator under Section 13;
- (v) application to determine the termination of mandate of an arbitrator and appointment of a substitute arbitrator under Section 14;
- (vi) application for assistance in taking evidence under Section 27;
- (vii) application for seeking extension of time to complete the arbitral proceedings (Section 29-A);
- (viii) application to set aside an arbitral award under Section 34;
- (ix) enforcement of the award under Section 36;



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- (x) appeals from certain orders of the court/arbitral tribunal under Section 37;
- (xi) application to order the tribunal to deliver the award to the applicant on payment to the court under Section 39;
- (xii) application for jurisdiction under Section 42;
- (xiii) extension of time period under Section 43;

In relation to arbitrations seated outside India, apart from points (i) (ii) and (vi) above, a court in India may intervene in relation to the enforcement of such foreign award delivered outside India under Sections 48 and 57.

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

Under Section 17 of the Arbitration Act, the arbitral tribunal may, during the arbitral proceedings, at the request of a party, grant interim relief of the nature specified in the provision. The Amendment Act, 2015 has extended the scope of reliefs which may be granted by an arbitral tribunal to bring at par with the reliefs which may be granted by a Court under Section 9 of the Arbitration Act. Further, the interim orders of the arbitral tribunal are deemed to be the orders of the Court for the purpose of enforcement.

Furthermore, the rules of certain arbitration institutions also allow an arbitral tribunal to grant interim relief. For instance, under the MCIA Rules, 2016 Article 15.1 allows an arbitral tribunal to "*at the request of a party, issue an order granting and injunction or any other interim relief it deems appropriate. The Tribunal may order the party requesting interim relief or provide appropriate security in connection with the relief sought.*"

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 may include in the sum for which the award is made interest, at such rate of interest as considered reasonable by the tribunal and the period for which the interest is to be paid.
- Section 31 A inserted by the Amendment Act, 2015 has introduced a regime for costs. The arbitral tribunal will determine which party is entitled to costs and the amount of costs and the manner in which the costs are to be paid. The general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party.

- **Deadlines for issuing arbitral awards**

The Amendment Act, 2019 stipulates that the arbitral tribunal is to render its award within twelve months from the date of completion of pleadings. The Arbitration Act provides that the statement of claim and defence shall be completed within a period of six months from the date the arbitrator(s), received a written notice of their appointment. There can be a further extension of a maximum period of six months with the consent of both parties. If the tribunal is in requirement of more time for issuing an award, then either party may apply for such an extension to the Court having



ADWA

jurisdiction. The mandate of the arbitrator shall continue during the pendency of the application for seeking extension of the arbitral tribunal until the disposal of the said application. However, the Court is likely to grant such extension only when sufficient cause has been shown and the arbitrators may be penalized for the delay, with a proportionate reduction of their fees, if the same can be attributable to them. The above deadline for issuing arbitral award is not applicable in the case of international commercial arbitrations.

- **Other formal requirements for arbitral awards**

An arbitral award may be required 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 of the arbitral award is required as per the requirements of the Indian Stamp Act 1899 or the relevant state stamp duty statutes, as may be applicable. Documents which are required to be stamped will not be admissible in evidence "for any purpose" if it is not duly stamped. In addition, penalties may also be levied. The rates at which stamp duty is levied may vary across states. The Supreme Court of India in *Shriram EPC Ltd v Rioglass Solar SA*⁴⁴ held that an award under Item 12 of Schedule I of Stamp Act, 1899 will not include a 'foreign award' and therefore a foreign award is not liable to incur stamp duty for its enforcement in India.

- (b) **Registration requirements**

While the Arbitration Act is silent on registration requirements, pursuant to the Registration Act 1908, awards that purport to impact immovable property, must be registered. Failure to register a document that is mandatorily registered under the statute renders it unenforceable. The registration fee varies depending on the state in which the award is sought to be enforced.

⁴⁴ *Shriram EPC Ltd v Rioglass Solar SA*, (2018) 18 SCC 313.



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 terms of the submission to arbitration; or
- (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.

Domestic awards may also be set aside if found to be vitiated by patent illegality appearing on the face of the award, provided that the award cannot be set aside on the grounds that there was an erroneous application of the law or there is a requirement for re-appreciation of evidence.

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;



ADWA

- (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 by arbitration under the laws of India;
- (vii) if the enforcement of the award would be contrary to the public policy of India.

In order to harmonise various decisions of the courts, the Amendment Act, 2015 has clarified that an award is in conflict of public policy if the making of the award was induced or affected by fraud or corruption, is in contravention of the fundamental policy of Indian Law or in conflict with the basic notions of morality or justice. However, the court shall not review the merits of the dispute in order to examine whether the award is contrary to the fundamental policy of Indian Law.

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

7.19.1 Enforcement of Domestic Awards

Under Section 36 of the Arbitration Act, once an award is final or an application to set aside the arbitration award has been rejected, then such 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.

Recently, the Arbitration and Conciliation (Amendment) Ordinance, 2020 was promulgated wherein it is provided that if the Court is satisfied that a prima facie is made out (a) that the arbitration agreement or contract which



is the basis of the award; or (b) the making of the award, was induced by fraud or corruption, the Court shall stay the award unconditionally pending disposal of the challenge to the award.

7.19.2 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. The party applying for the enforcement of the foreign award must produce the following: (a) the original award or authentic copy; (b) original arbitration 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.

The Supreme Court in *M/s. Fuerst Day Lawson Ltd v. Jindal Exports Ltd*, held that under the Arbitration Act a foreign award is already stamped as the decree. It observed that, *“In one proceeding there may be different stages. In the first stage the Court may have to decide about the enforceability of the award having regard to the requirement of the said provisions. Once the court decides that foreign award is enforceable, it can proceed to take further effective steps for execution of the same. There arises no question of making foreign award as a rule of court/decree again.”*

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

The Amendment Act, 2015 has introduced Section 31 A which is a regime of costs. While the arbitrators will determine whether costs are payable by one party to another, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. The tribunal may make a contrary award by recording its reasons in writing.

Any agreement which has the effect that one of the parties has to pay the whole or part of the costs of the arbitration in any event shall only be valid if such agreement is made after the dispute in question has arisen.

Each arbitration institution will also have separate rules governing costs. For instance, under the MCIA Rules, Rule 32.6 of the MCIA Rules defines “costs of the arbitration” to include: *“(a) The Tribunal’s fees and expenses and the*



ADWA

Emergency Arbitrator's fees and expenses, where applicable; (b) the MCLA's administrative fees and expenses; and (c) the costs of expert advice and of other assistance reasonably required by the Tribunal." Rules 32 and 33, *inter alia*, provide for detailed rules on fixing the aforementioned "*costs of the arbitration*", including directing parties to make advance payments of such costs. The Registrar of the MCIA has the ultimate power to determine the costs and their payment, including directing payment of advance on the costs. Rule 29, *inter alia*, however, allows for the arbitral tribunal to make orders on apportionment of costs between the parties.

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

A 2013 PWC study found that 47% of Indian companies that had chosen arbitration as their preferred method of dispute resolution chose *ad hoc* proceedings.⁴⁵ Despite the presence of arbitral institutions in India, many arbitrations involving Indian parties are administered by international arbitral institutions such as the Court of Arbitration of the International Chamber of Commerce, the Singapore International Arbitration Centre and the London Court of International Arbitration.⁴⁶ Despite the existence of numerous arbitral institutions in India, parties in India prefer *ad hoc* arbitration and regularly approach courts to appoint arbitral tribunals under the relevant provisions of the Arbitration Act.

India has an estimated 42 million cases pending in various courts. As of 01.01.2021 there were 65,086 cases pending in the Supreme Court of India⁴⁷, around 5.6 million cases are pending in the High Courts⁴⁸ and around 37 million pending before the subordinate judiciary⁴⁹.

⁴⁵ pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf

Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India, <https://legallaffairs.gov.in/sites/default/files/Report-HLC.pdf>.

⁴⁷ <https://main.sci.gov.in/statistics>

⁴⁸ <https://njdg.ecourts.gov.in/hcnjdgnew/>

⁴⁹ <https://njdg.ecourts.gov.in/njdgnew/?p=main/index>



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

7.22.1 Proposed Legislative Changes to The Arbitration Act

The government introduced new amendments via the Amendment Act, 2019. The highlights of the Amendment Act, 2019 are as follows:

a) Appointment of Arbitrators

Any request for appointment of arbitrator (s) is required to be disposed within thirty days from the date of service of notice on the opposite party. Parties can approach designated arbitration institutions for the appointment of arbitrators. For international commercial arbitrations, the appointments will be made by institutions designated by the Supreme Court of India. For domestic arbitrations, appointments will be made by the institution designated by a High Court. In the event there are no designated arbitral institutions available, the Chief Justice of the concerned High Court will maintain a panel of arbitrators to perform the functions of the arbitral institutions.

b) Arbitration Council of India

The Amendment Act, 2019 provides for the establishment of a statutory authority called the '*Arbitration Council of India*' ("the ACI"). The ACI will, *inter alia*, identify and grade qualifying arbitration institutions to be considered for designation, by High Courts or the Supreme Court for appointment of arbitrators.

c) Relaxation of time-lines

The Amendment Act, 2019 mandates the filing of statement of claim and statement of defence within six months of the constitution of the arbitral tribunal. The arbitration award must be passed by the arbitral tribunal within twelve months from the date of completion of pleadings.

d) Confidentiality of proceedings



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The Amendment Act, 2019, provides for an express confidentiality provision requiring the arbitrator, arbitral institution and the parties to the arbitration agreement to maintain confidentiality of all arbitral proceedings except the award where its disclosures are necessary for the purpose of implementation and enforcement of the award. The Amendment Act, 2019 also provides for an express provision on immunity of arbitrators.

On November 4, 2020, the President of India promulgated the Ordinance. Key features of the Ordinance include:

a. Automatic Stay on arbitral awards:

The Ordinance provides that an unconditional stay can be granted on the enforcement of an arbitral award (even during the pendency of the setting aside application) if the Court is satisfied on a prima facie basis that: (i) the underlying arbitration agreement or contract, or; (ii) the making of the arbitral award, was induced or effected by fraud or corruption.

b. Qualification of Arbitrator:

The Arbitration Act specified certain qualifications, experience and accreditation norms for arbitrators in the Eighth schedule. The Ordinance omits the Schedule for arbitrators and states that the qualifications, experience, and norms for accreditation of arbitrations will be specified by regulations.

7.22.2 Recent Supreme Court Decisions in relation to Arbitration

In *Government of India v. Vedanta Ltd. & Ors.*⁵⁰, the Supreme Court enforced a Malaysian seated foreign award under Section 47 of the Arbitration Act passed in favour of Vedanta Ltd. and against the Government of India. The Supreme Court *inter alia* held that the period of limitation for filing a petition for enforcement of a foreign award under Sections 47 and 49 of the Act, would be governed by Article 137

⁵⁰ *Government of India v. Vedanta Limited & Ors.*, 2020 SCC OnLine SC 749.



of the Limitation Act, 1963, which prescribed a period of three years from ‘when the right to apply accrues’. In case of delay, a party may file an application under Section 5 of the Limitation Act, 1963, for condonation.

The Supreme Court of India in the case of *Avitel Post Studioz Limited & Ors. v. HSBC PI Holdings (Mauritius) Ltd.*⁵¹ ruled on the issue of arbitrability of disputes involving questions of fraud. The Court held that arbitration can be refused only where ‘serious allegations of fraud’ are involved and further set out two tests to identify such ‘serious allegations of fraud’.

Test 1: When the arbitration clause or agreement itself cannot be said to exist. For e.g., where the party against whom breach is alleged cannot be said to have entered into the agreement relating to arbitration at all.

Test 2: In cases where allegations are made, against the State or its instrumentalities, of arbitrary, fraudulent, or *malafide* conduct, thus necessitating the hearing of the case by a writ court in which questions are raised which are not predominantly questions arising from the contract itself or breach thereof, but questions arising in the public law domain.

The Court further held that the judgment in *N. Radhakrishnan v. Maestro Engineers*⁵², which had held that allegations of fraud are not arbitrable, lacks precedential value and cannot be applied as a precedent for application of the fraud mantra to negate arbitral proceedings.

In *Vijay Karia & Ors. v. Prysmian Cavi e Sistemi S.r.l & Ors.*⁵³ the Supreme Court held that a foreign award may be enforced even if inconsistent with the provisions of the Foreign Exchange Management Act, 1999 (“FEMA”). The court held that a violation of the fundamental policy of Indian law must amount to a breach of some legal principles or legislation which is so basic to Indian law that is not susceptible of being

⁵¹ *Avitel Post Studioz Limited & Ors. v. HSBC PI Holdings (Mauritius) Ltd.*, 2020 SCC Online SC 656.

⁵² *N. Radhakrishnan v. Maestro Engineers*, (2010) 1 SCC 72.

⁵³ *Vijay Karia & Ors. v. Prysmian Cavi e Sistemi S.r.l & Ors.*, 2020 SCC OnLine SC 177.



ADWA

compromised. These would be the core values of India's public policy as a nation, reflected not only in statutes but also time-honoured, hallowed principles which are followed by the Courts. The Supreme Court held that a breach under FEMA can never be held to be a violation of the fundamental policy of Indian law since an approval or permission could subsequently be obtained from the Reserve Bank of India for the transaction.

In *BGS SGS Soma JV v. NHPC Ltd.*,⁵⁴ the Supreme Court held that when parties have selected a seat of arbitration, or if the arbitral tribunal has determined a seat, such a determination automatically confers jurisdiction on the courts at such seat of arbitration for the purposes of interim orders and challenges to an award. The Supreme Court further held that when a seat has not been designated by the arbitration agreement, and only a convenient venue has been designated, an application under Section 9 may then be preferred in any court where a part of the cause of action has arisen. The earlier court before which an application has been made would be deemed the court having exclusive jurisdiction and all further applications must lie before this court by virtue of Section 42 of the Arbitration Act. The Court held that in the absence of any contrary indications, the designation of a 'venue' in an arbitration clause can indicate the 'seat' of the arbitration, while holding that the decision in *Hardy Exploration*⁵⁵ is not good law as it did not follow the 'Shashoua Principle' which was confirmed by the Constitution Bench of the Supreme Court in *Bharat Aluminium Company v. Kaiser Aluminium Technical Service Inc. & Ors.*⁵⁶

In *Hindustan Construction Company Limited v. NHPC Limited*,⁵⁷ the Supreme Court relied upon its decision in *BGS SGS Soma* to state that as New Delhi was the chosen seat of arbitration between the parties, all applications under Part I of the Arbitration Act were to be made only before the courts at New Delhi.

⁵⁴ *BGS SGS Soma JV v. NHPC Ltd.*, (2020) 4 SCC 234.

⁵⁵ *Union of India v. Hardy Exploration and Production (India) Inc.*, 2019 (13) SCC 472.

⁵⁶ *Bharat Aluminium Company v. Kaiser Aluminium Technical Service Inc. & Ors.*, 2012 (9) SCC 552.

⁵⁷ *Hindustan Construction Company Limited v. NHPC Limited*, 2020 SCC OnLine SC 305.



In *Patel Engineering Ltd. v. North Eastern Electric Power Corporation Ltd.*,⁵⁸ the Supreme Court held that patent illegality, as a ground for setting aside an award, has been given a statutory force in Section 34(2A) of the Arbitration Act. However, this ground cannot be invoked in international commercial arbitrations seated in India or for resisting enforcement of a foreign award under Section 48 of the Arbitration Act. In case the decision of an arbitrator is found to be perverse or so irrational that no reasonable person would have arrived at the same, or the construction of the contract is such that no fair or reasonable person would take or that the view of the arbitrator is not even a possible view, the arbitral award can be challenged on the grounds of patent illegality.

In *Vidya Drolia and Ors. v. Durga Trading Corporation*⁵⁹, the Supreme Court held that landlord-tenant disputes under the Transfer of Property Act, 1882 are arbitrable as they pertain to rights *in personam*. However, the Supreme Court clarified that landlord-tenant disputes which are covered and governed by rent control legislation would not be arbitrable, as a specific court or forum has been given exclusive jurisdiction to apply and decide special rights and obligations in those situations. The Court also held that disputes relating to mortgage under the TP Act were incapable of being settled by Arbitration since they involved rights *in rem* as opposed to rights *in personam*. Placing reliance on this judgement the Supreme Court in *Suresh Shah v. Hipad Technology India Private Limited*⁶⁰ further held that disputes relating to lease/tenancy agreements governed by the TP Act are also arbitrable.

The *N.N. Global Mercantile Pvt. Ltd. v Indo Unique Flame Ltd. & Ors.*,⁶¹ the Supreme Court disagreed with its earlier decisions wherein it had held that the statutory bar contained in Section 35 of the Indian Stamp Act, 1899 would also render the arbitration agreement contained in such an instrument as being non-existent, unenforceable, or invalid, pending payment of stamp duty on the substantive contract / instrument. This

⁵⁸ *Patel Engineering Ltd. v. North Eastern Electric Power Corporation Ltd.*, AIR 2020 SC 2488.

⁵⁹ *Vidya Drolia and Ors. v. Durga Trading Corporation*, 2020 SCC OnLine SC 1018.

⁶⁰ *Suresh Shah v. Hipad Technology India Private Limited*, 2020 SCC OnLine SC 1038.

⁶¹ *N.N. Global Mercantile Pvt. Ltd. v Indo Unique Flame Ltd. & Ors.*, Civil Appeal Nos.3802 - 3803/2020.



ADWA

issue has now been referred to a larger bench as the court was of the view that non-payment of stamp duty on the substantive contract will not invalidate the arbitration agreement contained in the said contract. The Supreme Court relied on the doctrine of severability to hold that the arbitration clause would survive independently of the substantive contract. As a consequence, the Supreme Court's earlier decision in *SMS Tea Estates* was over-ruled as it does not lay down the correct position in law on the following two issues: (i) that an arbitration agreement in an unstamped commercial contract cannot be acted upon, or is rendered un-enforceable in law; and (ii) that an arbitration agreement would be invalid where the contract or instrument is voidable at the option of a party, such as under Section 19 of the Indian Contract Act, 1872.

In *Dr. Bina Modi v. Lalit Kumar Modi*⁶², the Delhi High Court held that issues under the Trusts Act cannot be the subject matter of arbitration. Relying upon *Vimal Kishor Shah v. Jayesh Dinesh Shah*⁶³, the court held that disputes relating to trust, trustees and beneficiaries arising out of the trust deed and the Trusts Act, 1882 are not capable of being decided by the arbitrator despite existence of arbitration agreement to that effect between the parties. It was further held that the court would have jurisdiction to grant an anti-arbitration injunction where the party seeking the injunction can demonstrate that the agreement is null and void, inoperative or incapable of being performed.

In *GE Power Conversion India Private Limited v. PASL Wind Solutions Private Ltd.*⁶⁴, the Gujarat High Court held that the Arbitration Act does not *per se* prohibit two Indian parties from choosing a foreign seat as the seat of an arbitral proceeding. Such an agreement would not violate the Act, the public policy of India or the Indian Contract Act, 1872. It further held that the nationality of the parties has no relevance for considering the applicability of Part II of the Act, which is solely based on whether the foreign seat of arbitration is signatory to the New York Convention on Recognition and Enforcement of Foreign

⁶² *Dr. Bina Modi v. Lalit Kumar Modi*, 2020 SCC Online Del 1678.

⁶³ *Vimal Kishor Shah v. Jayesh Dinesh Shah*, (2016) 8 SCC 788.

⁶⁴ *GE Power Conversion India Private Limited v. PASL Wind Solutions Private Ltd.*, Arb. Pet. 131 & 134 of 2019.



Arbitral Awards, 1958. If this requirement is fulfilled, Part II of the Act will be applicable.

In *Dholi Spintex Pvt. Ltd v. Louis Dreyfus Company India Pvt. Ltd.*⁶⁵, the Delhi High Court held that an arbitration agreement/clause is independent of the underlying contract. Accordingly, the parties may choose a different governing law for the arbitration clause, from the substantive law of the underlying contract. The High Court also clarified that two Indian parties can choose a foreign law as the law governing an arbitration under the contract.

⁶⁵ *Dholi Spintex Pvt. Ltd v. Louis Dreyfus Company India Pvt. Ltd.*, 2020 SCC Online Del 1476.



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Name of Authors:	MRS. ZIA MODY MR. ADITYA VIKRAM BHAT MS. PRYANKA SHETTY
Name of Law Firm:	AZB & Partners
Brief Profile:	<p>Zia Mody is the Founder and Managing Partner of AZB & Partners and one of India's foremost corporate attorneys. Apart from being Vice President and a Member of the London Court of International Arbitration, Zia has been nominated to the International Who's Who of Commercial Arbitration.</p> <p>Aditya Vikram Bhat is a Senior Partner at AZB & Partners, Bangalore. He has advised on international investment and commercial disputes and has also been nominated to the International Who's Who of Commercial Arbitration.</p> <p>Priyanka Shetty is a Counsel at AZB & Partners, Mumbai. She has advised clients on arbitrations and has been recognised by Legal 500 for her expertise in investment treaty arbitrations and enforcement proceedings.</p>
Telephone Nos.:	AZB & Partners (Mumbai): +91 22 6639 6880 AZB & Partners (Bangalore): +91 80 4240 0500
Fax Nos.:	AZB & Partners (Mumbai): +91 22 6639 6888 AZB & Partners (Bangalore): +91 80 2221 3947
Email:	zia.mody@azbpartners.com aditya.bhat@azbpartners.com priyanka.shetty@azbpartners.com



8. INDONESIA



**BY: MS. KAREN MILLS
MR. RIZKI KARIM**

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)* ⁶⁶, *Het Herziene Indonesisch Reglement (HIR)* ⁶⁷ and *Rechtsreglement Buitengewesten (RBg)* ⁶⁸ and for more than 150 years all arbitrations in Indonesia were governed under these laws. There was no specific law which governed arbitration in Indonesia, until 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 by 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 prior legislation under the RV, as referred to above, the Arbitration Law

⁶⁶ Article 615 – 651, *Reglement op de Rechtsreglement (RV)*

⁶⁷ Article 377, *Herzien Inlandsch Reglement (H.I.R)*

⁶⁸ Article 705, *Rechtsreglement Buitengewesten (RBg)*



ADWA

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 1981.⁶⁹ 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:

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

⁶⁹ 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.



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 Arbitration Law upholds the provision under



ADWA

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)⁷⁰, 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 arbitration parties, so some due diligence is recommended.

Other established institutions include the Capital Market Arbitration Board (*Badan Arbitrase Pasar Modal Indonesia*, or BAPMI)⁷¹, 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)⁷² 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

⁷⁰ See <http://www.baniarbitration.org>

⁷¹ See <http://www.bapmi.org>

⁷² See <http://www.bakti-arb.org>



ADWA

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.baniarbitration.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: sekretariat@bapmi.org

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



ADWA

Website: www.bakti-arb.org
 E-mail: sekretariat@bakti-arb.org

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.⁷³

The Rules of BAPMI can be found on www.bapmi.org/en/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 to counteract some of BANI's policies, such as a provision to the effect

⁷³ See <http://www.baniarbitration.org/ina/procedures.php> (Indonesian version) and <http://www.baniarbitration.org/procedures.php> (English version)



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.⁷⁴

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

⁷⁴

BANI Rule No.10



ADWA

ties with either party. Furthermore, judges, prosecutors, court clerks or other officials of justice may not be appointed or designated as arbitrators.⁷⁵

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.⁷⁶ Although this is not a legal requirement for non-BANI arbitrations, it would certainly be foolhardy of any party not to engage counsel conversant with the governing law wherever their arbitration is held.

⁷⁵ Article 12 Law No.30 of 1999

⁷⁶ BANI Rule No.5



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.⁷⁷

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 the manner of running the examination of the dispute, including decreeing a security attachment or*

⁷⁷ Article 13, Law No.30 of 1999



ADWA

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.

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,⁷⁸ unless such time limit is extended by mutual written consent of the parties⁷⁹), the tribunal is allowed only thirty days to render its award,⁸⁰ 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.⁸¹ 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.⁸² 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

⁷⁸ Article 48, Law No.30 of 1999
⁷⁹ Article 33, Law No. 30 of 1999
⁸⁰ Article 57, Law No.30 of 1999
⁸¹ Article 53 (3), Law No.30 of 1999
⁸² Article 59 (1), Law No.30 of 1999



ADWA

either case the award must be registered in order to be enforceable.⁸³ Domestic awards (those rendered in Indonesia) are registered in the District Court having jurisdiction over the respondent.⁸⁴ International awards are registered in the District Court of Central Jakarta.⁸⁵

In order to register an award, the court will require an original or authenticated copy to be submitted in the Indonesian language.⁸⁶ 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.⁸⁷ 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?

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.⁸⁸

⁸³ Article 59 (4), Law No. 30 of 1999

⁸⁴ Articles 59 (1) and 1 (4), Law No. 30 of 1999

⁸⁵ Article 65, Law No. 30 of 1999

⁸⁶ Article 67, Law No. 30 of 1999

⁸⁷ BANI Rule 15 (4)

⁸⁸ Article 70, Law No. 30 of 1999



Any such application must be submitted within 30 days of registration of the award,⁸⁹ 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.⁹⁰

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,⁹¹ 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 Law⁹² (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.⁹³ There is no recourse against rejection by the court of execution.⁹⁴

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

⁸⁹ Article 71, Law No.30 of 1999
⁹⁰ Article 72, Law No. 30 of 1999
⁹¹ Article 62 (4), Law No. 30 of 1999
⁹² Articles 4 and 5, law No. 30 of 1999
⁹³ Article 62 (2), Law No. 30 of 1999
⁹⁴ Article 62 (3), Law No.30 of 1999



ADWA

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 International Award, in accordance with the provisions for authentication of foreign documents, together with an official translation thereof into Indonesian⁹⁵);***
- (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 applicant country and Indonesia are both bound by a bilateral or multilateral treaty on the recognition and implementation of International Arbitration Awards.”⁹⁶***

Despite the Arbitration Law having been in effect for about 20 years at the time of writing, this last-mentioned requirement still often proves 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.

⁹⁵ Unless the original award is rendered in Indonesian

⁹⁶ 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.



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 commercial⁹⁷ and therefore not arbitrable, and as long as the award does not violate public order.⁹⁸

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 it should be noted 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 fees, which consists of the arbitrators' honoraria, expenses incurred by the arbitrators and costs for (expert) witnesses and administrative matters.⁹⁹ 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.¹⁰⁰

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

⁹⁷ Elucidation of Article 66 b, Arbitration Law. "Commercial" refers to activities in trade, banking, finance, investment, industry, and intellectual property.

⁹⁸ Article 66 (c), Law No. 30 of 1999.

⁹⁹ Article 76, Law No. 30 of 1999

¹⁰⁰ Article 77, Law No. 30 of 1999



ADWA

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. Based on its most recent publication, BANI cases have shown a steady increase, from only 83 cases between 1977 and 1996, to 215 cases between 1997 and 2006, and 728 cases from 2007 to 2016.¹⁰¹ Overall, to date, BANI has resolved more than 1,000 cases submitted to the institution.

¹⁰¹

http://www.baniarbitration.org/assets/pdf/BANI2017_brochure.pdf



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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Name of Authors:	MS. KAREN MILLS MR. RIZKI KARIM
Name of Firm:	KarimSyah Law Firm
Brief Profile:	KarimSyah is Indonesia's market leader in Dispute Resolution, Financing and Natural Resources. The firm has successfully represented the Indonesian Government in a number of Investor-State cases over the past 10 years. Areas of specialization on the transactional side include Oil, Gas, Mining and Energy and Infrastructure matters, Insurance, all manner of Financing and Restructuring, Information Technology, Land Transactions, Bankruptcy, Joint Ventures and other cross-border transactions and business structures. On the contentious side the firm handles commercial litigation and both local and international arbitration and mediation, with recent new specializations in medical malpractice defense and aviation disaster settlements.
Telephone No.:	+62 21 2966 0001
Fax No.:	+62 21 2966 0007
Email:	kmills@cbn.net.id ; rizki.karim@karimsyah.com
Website:	www.karimsyah.com



9. JAPAN

BY: MR. MICHAEL A. MUELLER

9.1 Which laws apply to arbitration in Japan?

The Japanese Arbitration Act¹⁰² is the relevant law. 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 should be noted that dispute resolution by arbitration still has a very restricted, nonetheless increasing role 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 deviations¹⁰³. 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 of special protection, particularly consumers and employees. Accordingly, arbitration agreements in labor disputes can exclusively be concluded after a dispute arose. However, any provisions promoting resolution of individual labor disputes that may arise in the future are null and void¹⁰⁴. Similarly, a consumer may cancel an arbitration agreement if the counterparty initiates arbitration against the consumer¹⁰⁵. Moreover, the Arbitration Act does not contain the Model Law's amendment as to the detailed regulation of arbitral interim measures, above all their enforcement.

¹⁰² Act No. 138 of 2003, amended in 2006, hereinafter referred to as “Arbitration Act”.

¹⁰³ Tatsuya Nakamura, “Saltient Features of the New Japanese Arbitration Law Based Upon the UNCITRAL Model”, [April 2004] JCAA Newsletter 17.

¹⁰⁴ Supplementary Provision Art. 4.

¹⁰⁵ Supplementary Provision Art. 3.



ADWA

9.3 Are there different laws applicable for domestic and international arbitrations?

In contrast to other national arbitration laws, the 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.¹⁰⁶ The provisions on recognition and enforcement apply even regardless of the place of arbitration.¹⁰⁷

9.4 Has Japan acceded to the New York Convention?

Since 1961 Japan is party to the New York Convention.

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?

Since the arbitration proceedings are subject to party autonomy, the parties are free to determine the proceedings. Accordingly, the Arbitration Act exclusively subjects the choice of the arbitration proceedings to the restriction of public policy.¹⁰⁸ 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 equally.¹⁰⁹ Subject to further restrictions of public policy, the parties are free to determine the arbitration procedure to be followed. Particularly, they may

¹⁰⁶ Art. 3 (1), (2) Arbitration Act.

¹⁰⁷ Art. 3 (3) Arbitration Act.

¹⁰⁸ Art. 26 (1) Arbitration Act.

¹⁰⁹ Art. 25 (1) Arbitration Act.



select the seat of the tribunal,¹¹⁰ the applicable substantive law¹¹¹, the language of the arbitration¹¹², place of the hearings, time restrictions for procedural participation such as defences or statements,¹¹³ the appointment of experts¹¹⁴ and the potential attempt of the tribunal to settle a dispute.¹¹⁵ If the parties have not agreed on any of these aspects, the arbitral tribunal determines them.

The Arbitration Act stipulates certain formal requirements for arbitration agreements. An arbitration agreement has to be in writing.¹¹⁶ However, electronic records, e.g. e-mails, conform to this requirement.¹¹⁷ In relation to the arbitration agreement, the Arbitration Act upholds the Doctrine of Separability. As confidentiality is concerned, the rules of the major arbitration institution in Japan, the JCAA¹¹⁸, ensure that the parties, arbitrators and official secretaries keep all information to the arbitration, including the file and all documents, confidential.¹¹⁹

Suspending any period of limitation,¹²⁰ 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.¹²¹ 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 report is available to both parties.¹²² If any party fails to conform to its duty to provide evidence or does not appear in the arbitral hearing, the tribunal has the competence to issue an award based on the evidence

¹¹⁰ Art. 28 Arbitration Act.

¹¹¹ Art. 36 Arbitration Act.

¹¹² Art. 30 Arbitration Act.

¹¹³ Art. 31 Arbitration Act.

¹¹⁴ Art. 34 Arbitration Act.

¹¹⁵ Art. 38 Arbitration Act.

¹¹⁶ Art. 13 (2) Arbitration Act.

¹¹⁷ Art. 13 (4) Arbitration Act.

¹¹⁸ cf. Below 9.8.

¹¹⁹ Art. 42 JCAA Rules.

¹²⁰ 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.

¹²¹ Art. 29 (1) Arbitration Act.

¹²² Art. 32 (5) Arbitration Act.



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available and fairness considerations.¹²³ Accordingly, the tribunal has to adequately inform the parties about any 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 providing sufficient financial security.¹²⁴

Upon choosing the JCAA Arbitration Rules, parties have two options to choose from. The JCAA Commercial Arbitration Rules (JCAA Rules) contain accelerated procedural rules (so-called expedited procedure rules) for disputes of lower economic value, i.e. below fifty million Japanese Yen, or in case the parties agree to submit the dispute to expedited procedure rules.¹²⁵ These rules have been amended in 2019. Due to this amendment, they now contain detailed provisions on the impartiality of arbitrators, the role of tribunal secretaries, the disclosure of dissenting opinions by arbitrators as well as changes on arbitrator and administrative fees. Arbitrators now have an ongoing obligation to investigate any circumstances that might affect their impartiality¹²⁶. Furthermore, arbitrators cannot delegate tasks that substantially influence the arbitral tribunal's decision.¹²⁷

The second option are the newly issued "Interactive Arbitration Rules (2019)". By introducing these rules, the JCAA aimed at making disputes more time-efficient and predictable at a lower cost for the parties.¹²⁸ Hence, the Interactive Arbitration Rules differ from the JCAA Commercial Arbitration Rules in two main aspects: (1) preliminary communication between the arbitral tribunal and the parties and (2) remuneration for arbitrators. At a stage as early as possible in the arbitral proceedings, the arbitral tribunal shall draft a summary containing each party's factual and legal positions as well as the factual and legal issues that the arbitral tribunal

¹²³ Art. 33 (3) Arbitration Act.

¹²⁴ Art. 24 Arbitration Act.

¹²⁵ Art. 83-90 JCAA Rules.

¹²⁶ Art. 24 (4) JCAA Rules.

¹²⁷ Art. 33 (1) JCAA Rules.

¹²⁸ See "Reform of the JCAA Arbitrations Rules: Three Sets of Rules in Response to All Business Needs", JCAA, December 7, 2018, p. 10.



tentatively ascertains arising from this dispute.¹²⁹ With regard to assessment of evidence, the tribunal shall express its preliminary factual and legal views on the main issues of the dispute before making a decision whether a witness examination is to be held.¹³⁰ At the same time, the remuneration for arbitrators is fixed at a significantly lower level than under the JCAA Commercial Arbitration Rules.¹³¹

The parties can freely agree on a set of rules out of the described options, however, if they simply refer to “JCAA Arbitration” without specifying the applicable rules, the JCAA Commercial Arbitration Rules will apply.¹³² Upon public consultation of the Interactive Arbitration Rules, several foreign lawyers as well as professional arbitrators have expressed doubts whether the abovementioned procedural differences in combination with a reduced remuneration for arbitrators will provide a considerable alternative to the JCAA Commercial Arbitration Rules.¹³³ It was mainly criticized that the concept of in-depth preliminary communication between the tribunal and the parties, although not unknown in civil law jurisdictions,¹³⁴ is alien to the principle of a fair hearing according to common law. Since the concept of preliminary communication has been formulated broadly without substantial restrictions, parties from common law countries might be reluctant to choose the Interactive Arbitration Rules. The JCAA has recognized this, but explicitly chose to design the Interactive Arbitration Rules for parties from civil law jurisdictions or for domestic disputes within Japan.¹³⁵

¹²⁹ Art. 48 JCAA Interactive Arbitration Rules

¹³⁰ Art. 56 JCAA Interactive Arbitration Rules.

¹³¹ Art. 92-102 JCAA Interactive Arbitration Rules.

¹³² See “Reform of the JCAA Arbitrations Rules: Three Sets of Rules in Response to All Business Needs”, JCAA, December 7, 2018, p. 15.

¹³³ See “Public Comments on the Proposed Three Sets of Arbitration Rules and the JCAA’s Response and View”, JCAA, December 26, 2018, p. 28 et. seqq.

¹³⁴ Art. 265 German Civil Procedure Act; Art. 164 et seqq. Japan Civil Procedural Act.

¹³⁵ See “Reform of the JCAA Arbitrations Rules: Three Sets of Rules in Response to All Business Needs”, JCAA, December 7, 2018, p. 10; “Public Comments on the Proposed Three Sets of Arbitration Rules and the JCAA’s Response and View”, JCAA, December 26, 2018, p. 28 et. seqq.



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Since the concept of a proactive arbitral tribunal seems to gain popularity in international arbitration,¹³⁶ the Interactive Arbitration Rules could foster the JCAA's international recognition. However, it remains to be seen in the future to what extent the Interactive Arbitration Rules will be applied in practice.

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

Yes, if sued before state courts, parties to an arbitration agreement may raise an objection.¹³⁷

9.8 What are the main arbitration institutions in Japan?

The main 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 plus it maintains a large reference library.

Other arbitration institutions include the Japan Intellectual Property Arbitration Center, an organization 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). 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.

¹³⁶ Cf. Peter Rees, German Arbitration Journal (SchiedsVZ) Vol. 2 (2016), p. 57 et. seqq; Art. 2 Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules).

¹³⁷ Art. 14 (1) Arbitration Act.



9.9 Addresses of major arbitration institutions in Japan?

Japan Commercial Arbitration Association

Tokyo Office
Hirose Building 3F
3-17 Kanda Nishiki-cho, Chiyoda-ku,
Tokyo, 101-0054 Japan
Telephone: +81 3 5280 5200
Telefax: +81 3 5280 5170
Website: <http://www.jcaa.or.jp>

The National Committee of the International Chamber of Commerce (ICC)

Marunouchi Nijubashi Building 6F,
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)
Wajun Building 3F
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
Telefax: +81(0)3 3500 3839
Website: <https://www.ip-adr.gr.jp/eng/>



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9.10 Arbitration Rules of major arbitration institutions?

Upon choosing the JCAA Arbitration Rules, parties have two options to choose from:

Japan Commercial Arbitration Association (traditional Commercial Arbitration Rules):

http://www.jcaa.or.jp/e/arbitration/docs/Commercial_Arbitration_Rules.pdf

Japan Commercial Arbitration Association (newly established Interactive Arbitration Rules):

http://www.jcaa.or.jp/e/arbitration/docs/Interactive_Arbitration_Rules.pdf

The National Committee of the International Chamber of Commerce (ICC):

<https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>

Japan Shipping Exchange Inc.:

http://www.jseinc.org/en/tomac/arbitration/ordinary_rules.html

Japan Intellectual Property Arbitration Center:

https://www.ip-adr.gr.jp/data/e_1_2.pdf

9.11 What is the Model Clause 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.¹³⁸ Absent any agreement on the number of arbitrators, there shall be three arbitrators where only two parties arbitrate.¹³⁹ If more than two parties arbitrate, the court competent for matters of the arbitration shall specify the number of arbitrators.¹⁴⁰

The JCAA Rules equally uphold party autonomy for the appointment of arbitrators. The principal number of arbitrators is either one or three. However, if the parties fail to notify the JCAA of their agreement on the number of arbitrators, such number shall be one.¹⁴¹ 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*.¹⁴²

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 a specific procedure for appointing a three arbitrator-tribunal in case of multi-party arbitrations.¹⁴³

Under their distinct autonomy, the parties are additionally free to determine any particular qualification for arbitrators. However, in any case, every arbitrator is required to be impartial.¹⁴⁴ Under the JCAA Rules, arbitrators are furthermore obliged to continuously revise their impartiality during the course of the arbitral proceedings, taking into account recent Japanese judgments.¹⁴⁵ As a factual influence on the appointment of arbitrators, the

¹³⁸ Art. 16 (1) et. seqq. Arbitration Act.

¹³⁹ Art. 16 (2) Arbitration Act.

¹⁴⁰ Art. 16 (3) Arbitration Act.

¹⁴¹ Art. 26 JCAA Rules.

¹⁴² Cf. Partasides/Blackaby, Redfern and Hunter on International Arbitration, 6th Edition, Oxford University Press 2015, para. 1.162.

¹⁴³ Art. 29 JCAA Rules.

¹⁴⁴ Cf. Art. 17 (6), 18 (1) Arbitration Act.

¹⁴⁵ Art. 24 (4) JCAA Rules; Supreme Court of Japan, December 12, 2017, Sanyo Electric.



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JCAA maintains a panel of more than one hundred experts in various fields, including both Japanese and non-Japanese arbitrators.

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 comprises an opportunity to challenge arbitrators. The grounds for challenge 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.¹⁴⁶

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 petition the competent court.¹⁴⁷ If the party additionally bases its challenge on the grounds that (i.) the arbitrator is unable to perform its duties or (ii.) delays his performance, the party may directly petition the court.¹⁴⁸

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

In Japan, there are no restrictions on party representatives particularly in international arbitration matters. However, the general restrictions of Japanese Law apply: Exclusively attorneys (*Bengoshi*) are allowed to practice law in Japan.¹⁴⁹ Additionally, "foreign lawyers admitted to practice in Japan" (*Gaikokuhon Jimu Bengoshi*) which are commonly referred to as *Gaiben* may represent parties in arbitration. In any case, lawyers, both practicing and

¹⁴⁶ Art. 18 Arbitration Act.

¹⁴⁷ Art. 19 Arbitration Act.

¹⁴⁸ Art. 20 Arbitration Act.

¹⁴⁹ Art. 72 Lawyers Act.



appointed as party counsel outside of Japan, may represent a party in an arbitration proceeding.¹⁵⁰

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 an arbitration except where explicitly provided in the Arbitration Act. This restriction does not apply to the application for interim measures before state courts.¹⁵¹ 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 multi-faceted relationship between the parties' interests such as party autonomy, efficiency, due process and enforcement raises issues with regard to court interventions.¹⁵²

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?

¹⁵⁰ Art. 58-2 Foreign Lawyers Act of 1986, amended in 2003.

¹⁵¹ Art. 15 Arbitration Act.

¹⁵² cf. Born, International Commercial Arbitration, Wolters Kluwer 2014, pp. 2522 et. seqq.



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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.¹⁵³ However, in contrast to the UNCITRAL Model Law as amended in 2006, the Arbitration Act contains no specific provisions concerning the modification of interim measures, lifting the measures is a possibility to claim damages for wrongful damages. Furthermore, the difficult issue of parallel interim proceedings before state courts and arbitral tribunals is not addressed.¹⁵⁴

In sum, the Japan Commercial Arbitration Rules are mostly in accordance with the UNCITRAL Model Law. They adopted most of the interim measures, but don't contain a clause regarding the allocation of costs.¹⁵⁵

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 must be 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.¹⁵⁶ The JCAA Rules additionally require that the contact data of the representing counsel, the specific relief sought and granted and the procedural history are stipulated within the award.¹⁵⁷ Furthermore, the JCAA Rules prohibit the disclosure of a dissenting opinion in case the arbitral tribunal consists of three arbitrators, thereby aiming at preventing the parties from challenging the arbitral award.¹⁵⁸

It should be noted that the Arbitration Act does not contain specific time requirements for the arbitral award. However, under the JCAA Rules, the

¹⁵³ Art. 24 Arbitration Act.

¹⁵⁴ Cf. Martin Illmer, *Rabels Journal on Comparative and Private International Law* Vol. 62 (2011), p. 645 et. seqq.

¹⁵⁵ Art. 71-74 JCAA Rules.

¹⁵⁶ Art. 39 Arbitration Act.

¹⁵⁷ Art. 66 JCAA Rules.

¹⁵⁸ Art. 63 JCAA Rules.



arbitral award shall be rendered within nine months after constitution of the arbitral tribunal.¹⁵⁹

A tribunal has to notify the parties of the arbitral award and forward them a copy.¹⁶⁰ In case the JCAA Rules have been agreed, the original award remains with the JCAA.¹⁶¹ 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 has incorporated the UNCITRAL Model Law's restricted grounds for setting aside an award, *inter alia*, a lack of an arbitration agreement and a violation of public policy.¹⁶²

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 *lex arbitri*. Hence, the validity of a contractually agreed appeal mechanism and a potential invalidity's effect on the arbitration agreement can be heavily discussed. As an illustration: Whereas for instance the German Federal Court of Justice generally upholds a party's agreed appeal mechanism,¹⁶³ the Supreme Court of New Zealand restricted an appeal on the facts.¹⁶⁴ Similarly, the US Supreme Court banned independent court intervention beyond the grounds in the Federal Arbitration Act.¹⁶⁵ It is uncertain which approach Japanese courts would take if an arbitration clause containing a comprehensive court appeal mechanism was brought before it.

¹⁵⁹ Art. 43 (1) JCAA Rules.

¹⁶⁰ Art. 39 (5) Arbitration Act.

¹⁶¹ Art. 67 JCAA Rules.

¹⁶² Art. 44 Arbitration Act.

¹⁶³ Decision of 1 March 2007, Docket No. III ZB 7/06, para. 19.

¹⁶⁴ Carr v. Gallaway (2014) NZSC 75, paras. 76-86.

¹⁶⁵ Hall Street Associates v. Mattel Inc. 170 L.Ed. 2D 254, para. 1.



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 judgements.¹⁶⁶ 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.¹⁶⁷

The grounds for refusal of enforcement in the Arbitration Act correspond to those under the New York Convention. In any case, if an application for enforcement falls under the Convention's scope, Japanese courts are required to exclusively and autonomously apply the Convention.¹⁶⁸

In this regard, it is noteworthy that Japan signed numerous bilateral trade treaties, investment treaties and the Washington Convention. Subject to the statutory provisions concerning the Civil Jurisdiction of Japan with respect to a Foreign State¹⁶⁹, arbitral awards will consequently be enforced against states. Of specific importance is the Japan-China Trade Agreement. Japanese court decisions applied this trade agreement in preference to the New York Convention.¹⁷⁰ Because of a lacking reciprocity requirement¹⁷¹ neither Chinese courts nor Japanese courts are able to enforce judgements provided by the courts of the other country. Hence, arbitration clauses in contracts with China are crucial to ensure later enforcement.¹⁷²

9.20 What applies with regard to the costs of arbitration and can a successful party recover its costs?

¹⁶⁶ Art. 45 (1) Arbitration Act.

¹⁶⁷ Art. 46 (1) Arbitration Act.

¹⁶⁸ Cf. Gary Born, *International Commercial Arbitration III*, 2nd Edition, The Hague 2014, p. 2914 et. seq.

¹⁶⁹ Art. 16 Act on the Civil Jurisdiction of Japan with respect to a Foreign State, Act. No. 24 of April 24, 2009.

¹⁷⁰ Osaka District Court, March 25, 2011, Hanrei Taimizu, 1355, p. 249.

¹⁷¹ Art. 118 Japan Civil Procedural Act.

¹⁷² Osaka High Court, April 9, 2003, Hanrei Jiho, 1841, p. 111.



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 of arbitration.¹⁷³ 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 Act does accordingly not provide that the unsuccessful party should always bear the costs of the arbitration. The parties have to agree on an allocation of costs if they consider it appropriate.¹⁷⁴ This is in line with the allocation of costs in case of ordinary 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.¹⁷⁵ The tribunal's cost decision will be treated as part of the arbitral award. Therefore, state courts can exclusively review it under the identical restricted grounds that state courts can apply to arbitral awards.

The administrative fees of the JCAA, including VAT, range from JPY 500,000 for disputes with a value of less than JPY 20 million to JPY 19 million plus 0.05 % of any amount in excess of JPY 10 billion for a dispute with a value of more than JPY 10 billion.¹⁷⁶

9.21 Are there any statistics available on arbitration proceedings in Japan?

Compared to other major arbitration institutions, there still is a small number of arbitration cases brought before the JCAA. Due to the confidential nature of arbitration, however, it remains difficult to obtain precise arbitration data. The following statistics, comparing the annual JCAA cases with those brought before the ICC, are available:

¹⁷³ Art. 47 (1) Arbitration Act.

¹⁷⁴ Art. 49 Arbitration Act.

¹⁷⁵ Art. 80 JCAA Rules.

¹⁷⁶ Art. 103 JCAA Rules.



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	2012	2013	2014	2015	2016	2017	2018	2019	2020 ¹⁷⁷
JCAA	19	26	14	20	18	14	13	9	17
ICC	759	767	791	801	966	810	842	869	946

In a community that heavily upholds harmony and amicable dispute resolution, Japan has amongst the lowest ratios of inhabitants in relation to lawsuits. Accordingly, there is only a limited number of arbitrations in Japan, especially in 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 does not necessarily lead to Japan as place of arbitration. Therefore, from an international viewpoint, arbitration cases involving Japanese corporations as a party are seen frequently. Especially if counterparts from China or other Asian countries are involved, Japanese companies increasingly prefer arbitration clauses.

9.22 Are there any recent noteworthy developments regarding arbitration in Japan¹⁷⁸?

On May 22, 2020 a Bill to amend part of the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers was enacted. Part of this amendment expanded the scope of representation in international arbitration. According to the Foreign Lawyers Act, a foreign lawyer can provide legal representation in *international arbitration cases*.¹⁷⁹ Per definition prior to the amendment, an *international arbitration case* was a civil arbitration matter which was conducted in Japan or a case where all or some of the parties have a head office in a foreign jurisdiction, even if the majority of the issued shares of such companies were being held by a foreign company.

In accordance with the new Bill a foreign shareholder of a Japanese company is now treated equal as having a head office in a foreign country, as

¹⁷⁷ As of November 30, 2020.

¹⁷⁸ Goodrich; Greer: The Modernization of Japan's International Arbitration Infrastructure, Mealey's International Arbitration Report, Volume 25, #12 December 2010, p. 31 – 42

¹⁷⁹ Art. 58-2 Foreign Lawyers Act of 1986, amended in 2020



long as the company holds the majority of the issued shares (limited to voting shares). If the parent company is located in Japan, but its shareholder is located in a foreign country, the shareholder has to own 100% of the issued shares of the parent company.¹⁸⁰ Furthermore, a foreign lawyer can now provide legal representation if the parties decided that the governing law shall not be Japanese law¹⁸¹ or the place of arbitration is in a country other than Japan.¹⁸²

On March 30, 2020 the Japan International Dispute Resolution Center Tokyo facility opened. It is available for a variety of institutional and ad hoc arbitration proceedings and can be used for seminars and symposia for arbitration and alternative dispute resolutions. The center was funded by the Ministry of Economy (METI) to set an example for Japan as an arbitration venue.

¹⁸⁰ Art. 2 (xi) (a) Foreign Lawyers Act of 1986, amended in 2020.

¹⁸¹ Art. 2 (xi) (b) Foreign Lawyers Act of 1986, amended in 2020.

¹⁸² Art. 2 (xi) (c) Foreign Lawyers Act of 1986, amended in 2020.



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Name of Authors:	MR. MICHAEL A. MUELLER
Name of Law Firm:	Mueller Foreign Law Office
Brief Profile:	Michael A. Mueller is a German Attorney at Law (“Rechtsanwalt”). He came to Japan more than 30 years ago for the first time. His legal experience and career with relation to Japan goes back to 1999. In 2007, he established his own independent law firm in Tokyo's governmental district. Attorney Michael A. Mueller is registered in Tokyo as a Foreign Lawyer (“Gaikokuho Jimu Bengoshi”) as well as a member of the Tokyo Bar Association (“Toben”) and is the Chairman of its International Committee. He is also registered in Germany (Berlin District Court) and a member of the Berlin Bar Association. In addition, he is a member of the Japan Commercial Arbitration Association (JCAA) as well as The Japan Association of Arbitrators (JAA) and The German Institution of Arbitration (DIS) and a Member of the Chartered Institute of Arbitrators (CI Arb).
Telephone No.:	+81-3-6805-5161
Fax No.:	+81-3-6805-5162
Email:	info@mueller-law.jp
Website:	http://www.mueller-law.jp



10. KOREA



**BY: MR. HYUNG SOO LEE
MR. JOACHIM NOWAK
MR. ROBERT W. WACHTER
MS. YEBIN JEONG**

10.1 Which laws apply to arbitration in the Republic of Korea?

The Korean Arbitration Act (the “Act”) applies, and the Act governs both institutional and ad-hoc arbitrations in Korea. The complete text of the Act can be found in English on the internet ¹⁸³.

10.2 Is the Republic of Korea’s arbitration law based on the UNCITRAL Model Law?

Yes, the current Act is based on the 1985 UNCITRAL Model Law. The Act was first enacted in 1966, and was fully amended with effect as of 31 December 1999, in order to generally adopt the Model Law with minor deviations. The Act was amended further on 7 April 2001, on 26 January 2002, on 31 March 2010 and on 23 March 2013. In October 2015, the Korean government submitted a proposal requesting to amend the Act which, among others, adopts the 2006 Model Law with minor deviations. The National Assembly approved the proposal, and the amendment came into effect as of 30 November 2016. The Act was also amended further on 4 February 2020 regarding a matter irrelevant to the Model Law.

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

No. The Act applies to both domestic and international arbitrations.

¹⁸³ https://elaw.klri.re.kr/kor_service/lawView.do?hseq=38889&lang=ENG



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10.4 Has the Republic of Korea acceded to the New York Convention?

Yes, the Republic of Korea has acceded to the New York Convention since 8 February 1973. The Republic of Korea has exercised the reciprocity and commerciality reservations when acceding to the New York Convention pursuant to Article 1. The reservations are as follows:

"By virtue of paragraph 3 of article I of the present Convention, the Government of the Republic of Korea declares that it will apply the Convention to the recognition and enforcement of arbitral awards made only in the territory of another Contracting State. It further declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national 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?

In general, the parties are free to agree on the procedures for arbitration, as the Act recognizes the principle of party autonomy, subject to the mandatory provisions of the Act (Article 20(1) of the Act). Although the Act does not clearly specify which of its provisions are mandatory, the following are widely considered to be provisions that are required under the Act: (i) an arbitrator's duty to disclose information on whether there exists any circumstances that might give rise to justifiable doubts on the arbitrator's impartiality or independence (Korean Supreme Court Decision No. 2004Da47901 dated 29 April 2005) (Article 13(1) of the Act) and (ii) equal treatment of the parties in the arbitral process with a full



opportunity to present one's case (Article 19 of the Act). In addition, the following procedural provisions require attention as well: (iii) Article 24(1) of the Act, which requires the claimant to submit a Statement of Claim which includes the request and grounds for relief and the respondent to submit a Statement of Defense, by the dates agreed between the parties or designated by the arbitral tribunal; (iv) Article 25(1) of the Act, which requires the arbitral tribunal to decide whether to hold oral hearings or to conduct the arbitration solely based on written documents, unless agreed between the parties, and (v) Articles 26(1) and 26(2) of the Act, which require the arbitral tribunal to terminate the arbitral proceedings, if the claimant fails to submit a Statement of Claim in accordance with Article 24(1); or proceed with the arbitral proceedings, if the respondent fails to file a Statement of Defense in accordance with Article 24(2) without deeming that the respondent has admitted any of the claimant's allegations.

If the parties fail to reach an agreement on the procedures for arbitration, the arbitral tribunal may, subject to the provisions of the Act, conduct arbitration in such manner as it considers appropriate (Article 20(2) of the Act).

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

Yes, if a party to an arbitration raises a defense based on the existence of a valid arbitration agreement, the court is required to dismiss the suit, unless the arbitration agreement is null and void, inoperative or incapable of being performed (Article 9 of the Act).

10.8 What are the main arbitration institutions in the Republic of Korea?

The KCAB is the main and only officially recognized arbitration institution in the Republic of Korea. The KCAB was established in 1966 and has offices in Seoul, Busan, Los Angeles, and Shanghai. The KCAB administered more than 443 arbitration cases in 2019. There are over 1,500 arbitrators in the KCAB's Panel of Arbitrators. The panels include well recognized professionals from diverse backgrounds, including academia, law



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and business. As of 2020, there are more than 500 arbitrators focusing solely on international arbitration from which the KCAB appoints the arbitrators. It is, however, not mandatory for parties to resolve their disputes at the KCAB.

As of April 2018, the KCAB established KCAB INTERNATIONAL, which is a new independent division within the KCAB which specializes in the administration and promotion of international arbitration services. KCAB INTERNATIONAL consults with the International Arbitration Committee, a group of 19 leading arbitration practitioners worldwide to ensure that the KCAB practices are consistent with best practices in the international arbitration community.

The Seoul International Dispute Center (“Seoul IDRC”) was established in May 2013 with the support of the Korean Bar Association, the KCAB, the Seoul Metropolitan Government, the Ministry of Justice of the Republic of Korea and some arbitral institutions including, but not limited to, the ICC, the HKIAC, and the SIAC. It provides hearing rooms and facilities for international arbitrations including those held in Korea under the KCAB or other institutional rules. As of 2020, the Seoul IDRC is located in the same building where the main office of KCAB is located.

10.9 Addresses of major arbitration institutions in the Republic of Korea?

KCAB’s main office

Samseong-dong, Trade Tower, 43rd Floor, 511 Yeongdong-daero, Gangnam-gu, Seoul 06164, Republic of Korea

Website: <http://www.kcab.or.kr>

Tel: +82-(0)2-551-2000

Fax: +82-(0)2-551-2020.

KCAB’s Busan office

Munhyeon-dong, BIFC Bldg., 52nd Floor, 40, Munhyeongeumyung-ro, Nam-gu, Busan 48400, Republic of Korea

**IDRC Seoul**

18 Fl. Trade Tower, 511 Yeongdong-daero (Samseong-dong), Gangnam-gu,
Seoul 06164 Korea

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

Tel. +82-(0)2-551-2025.

10.10 Arbitration Rules of major arbitration institutions?

The KCAB has two sets of rules: the Domestic Arbitration Rules (the “KCAB Domestic Rules”), and the International Arbitration Rules (the “KCAB International Rules”). The KCAB Domestic Rules are designed to govern procedures for domestic arbitration matters and have been revised and fully approved by the Korean Supreme Court to come into effect on 30 November 2016, whereas the KCAB International Rules revised in 2016 apply to arbitration proceedings commenced after 1 June 2016, where one of the parties has its place of business in any state other than Korea or the venue of the arbitration is designated outside of the Republic of Korea, unless the parties explicitly agree otherwise.

Both arbitration rules can be accessed at the KCAB website in English at:
http://www.kcabinternational.or.kr/common/index.do?jpath=/contents/sub020101&CURRENT_MENU_CODE=MENU0008&TOP_MENU_CODE=MENU0007.

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

KCAB International recommends 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 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 [Seoul / Republic of Korea]



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

KCAB International recommends the following model clauses for existing disputes:

“We, the undersigned parties, hereby agree that the following dispute shall be referred to and finally determined by arbitration in accordance with the KCAB International Arbitration Rules: [brief description of the dispute]

The number of arbitrators shall be [one / three]

The seat, or legal place, of arbitral proceedings shall be [Seoul / Republic of Korea]

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

10.12 How many arbitrators are usually appointed?

The parties shall be free to determine the number of arbitrators by agreement according to Article 11(1) of the Act. Almost all cases are decided by (1) or three (3) arbitrators. If the parties fail to reach an agreement on the number of arbitrators, the default number is three (3) pursuant to Article 11(2) of the Act.

As a general rule, pursuant to the first sentence of Article 11 of the KCAB International Rules, a dispute shall be heard by a sole arbitrator. However, the rules also stipulate that a case may be heard by three arbitrators if the parties have agreed to do so or, in the absence of such an agreement, the Secretariat of the KCAB determines, in its discretion, that it would be appropriate, taking into consideration the parties' intentions, the amount in dispute, the complexity of the dispute, and other relevant circumstances (second sentence of Article 11 of the KCAB International Rules).

The KCAB Domestic Rules require the Secretariat to appoint either one or three arbitrators, unless the parties agree otherwise (Article 19(1) of the KCAB Domestic Rules).



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

Yes. Article 13 of the Act stipulates that an arbitrator may be challenged if circumstances exist that are likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications agreed by the parties. The grounds for challenge by a party who nominated or who participated in the appointment of an arbitrator shall be limited to those that the challenging party becomes aware of after the appointment (Article 13(2) of the Act). The parties are free to agree on a procedure for challenging an arbitrator (Article 14(1) of the Act). Failing such an agreement, a party challenging an arbitrator must submit a written application to the arbitral tribunal within 15 days of either (i) the constitution of the arbitral tribunal, or (ii) becoming aware of the grounds for challenge. Unless the challenged arbitrator withdraws, or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge (Article 14(2) of the Act). If the arbitral tribunal rejects the application, the challenging party may, within 30 days of being notified of the decision, request that the court decide on the challenge (Article 14(3) of the Act). In such case, the arbitral tribunal may proceed with the arbitration or render an award, even when the process for challenge at the court is pending. The court's decision is final and not subject to appeal (Article 14(4) of the Act).

The KCAB International Rules and the KCAB Domestic Rules also set forth similar grounds for the challenge of arbitrators (Article 14 of the KCAB International Rules and Article 23 of the KCAB Domestic Rules).

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 proceedings, subject to such proof of authority as the arbitral tribunal may require. Although not specifically required under the Rules, the KCAB's normal practice is to



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request proof of authority even before the constitution of the arbitral tribunal.

Article 6 of the KCAB Domestic Rules provides that a party may be represented by counsel or such other persons as shall be recognized to be proper; however, the tribunal reserves the right to prohibit representation by such persons as deemed improper for arbitral proceedings. The arbitral tribunal may require a written proof of the authority of any party representative under the KCAB Domestic Rules also.

10.15 When and under what conditions can courts intervene in arbitration?

In principle, the Korean courts can only intervene or support arbitration proceedings only when expressly permitted under the Act (Article 6 of the Act). Court interventions or assistance which are allowed under the Act include: (i) court-issued interim measures before the commencement of arbitration and during the arbitration (Article 10 of the Act), (ii) appointment of arbitrators (Articles 12(3) and 12(4) of the Act), (iii) challenge of arbitrators (Article 14(3) of the Act), (iv) termination of the mandate of arbitrators (Article 15(2) of the Act), (v) jurisdiction and the scope of the arbitral tribunal (Article 17(6) of the Act), (vi) approval and enforcement of interim measures issued by the arbitral tribunal (Article 18-7(1) of the Act), (vii) challenge of tribunal-appointed experts (Article 27(3) of the Act), (viii) assistance in taking of evidence (Article 28 of the Act), and (ix) recognition/enforcement and annulment of arbitral awards (Articles 36 through 39 of the Act). Notably, the new amendments made to the Act in 2016 make it possible for the arbitral tribunal to cooperate together with the court and essentially supervise the court's taking of evidence, rather than having the court gather evidence alone and later providing a report to the arbitral tribunal (Article 28(3) of the Act). The amendments further provide that the competent court may order witnesses or document holders to appear before the arbitral tribunal or produce documents (Article 28(5) of the Act).

As of this date, we are unaware of any anti-arbitration injunctions issued by Korean courts. Notably, the Korean Supreme Court recently rejected a



party's application seeking an order to suspend a pending arbitration proceeding (Supreme Court Decision Case No. 2017Ma6087 dated 2 February 2018).

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

Yes, Article 18 of the Act states that unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. In the 2016 amendments to the Act, the National Assembly adopted most of the provisions of the 2006 Model Law amendments for interim measures. In such cases, the arbitral tribunal may determine the amount of security to be provided by the respective party in lieu of such interim measure, and order the party requesting the interim measure to provide appropriate security (Article 18-4 of the Act). In order for a party to enforce the interim relief granted by the arbitral tribunal, it may file for a court order confirming that the interim relief is enforceable (Article 18-7 of the Act). However, it is understood that the provisions of the Act relating to interim measures are only applicable to those made in Korea.¹⁸⁴ The recognition and enforcement of interim measures made in other countries shall adhere to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹⁸⁵ It is also understood that the order that is made by the arbitral tribunal is compatible with Korean law, although the court is empowered to alter the interim measure to the necessary extent without altering the substance of the interim measure if the order is incompatible with Korean law (Article 18-8(1), subparagraph 2(a) of the Act). In this regard, although arbitral tribunals have more discretion when considering what type of interim measures, they consider necessary, one should approach with caution if it intends to enforce such interim orders through the courts of Korea.

¹⁸⁴ Kwang Hyun, Suk. "Interim Measures of Arbitral Tribunal under the Arbitration Act of 2016", *Korea Journal of International Trade and Business Law*, vol. 26 no. 1 (2017): 110.

¹⁸⁵ Ibid.



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Article 37 of the KCAB International Rules and Article 35 of the KCAB Domestic Rules also allow for arbitral tribunals to issue interim measures.

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 stipulates that the award shall be made in writing, signed by all arbitrators as a general rule, stating the reasons upon which it is based (unless the parties have agreed that no reasons are to be given or the award is on agreed terms meaning that the parties settle the dispute), its date and place of the arbitration itself. The award shall be delivered to each party, and the original award shall be sent to and deposited with the competent court (accompanied by a document verifying such delivery).

Article 36 of the KCAB International Rules also stipulate that the award shall be made in writing, state the reasons upon which it is based and its date, and be signed by all members of the arbitral tribunal as a general rule.

• Deadlines for issuing arbitral awards

The Act does not provide for the period within which an arbitral award must be issued. Article 38 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; the KCAB Secretariat may, however, extend the time limit for the final award pursuant to a reasoned request from the arbitral tribunal or on its own initiative as it deems necessary. Article 40(2) of the KCAB Domestic Rules requires the arbitral tribunal to render an award within 30 days from the date of close of the hearings.

• Other formal requirements for arbitral awards

We are not aware of any other formal requirements for arbitral awards required by the Act or the KCAB International/Domestic Rules.



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 may be set aside by a court only if a party seeking to set aside the award demonstrates that: (i) a party to the arbitration agreement was legally incapable at the time of the agreement or the agreement is invalid under the governing law (or under Korean law, if there is no governing law); or (ii) the party seeking to set aside was not given a proper notice concerning appointment of arbitrators or arbitral proceedings, or was unable to present his/her case; or (iii) the tribunal had no jurisdiction; or (iv) the composition of the arbitral tribunal or the arbitral proceedings were not in accordance with the parties' agreement (or under the Act, absent the parties' agreement). The court may also set aside an arbitral award if it finds on its own initiative that the subject matter of the dispute is not capable to be settled by arbitration under Korean law or the recognition and enforcement is in conflict with the good morals or other public policy of the Republic of Korea.

An application for the setting aside of an award may not be made after three months have elapsed from the date on which the party making the application received the award (Article 36(3) of the Act).

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

Arbitral awards, both domestic and foreign, are enforced by Korean courts. Notably, the amendments made to the Act in 2016 enable the courts to enforce arbitral awards by issuing a court order (rather than issuing a formal judgment, as was previously the case. *See* Article 37(1) of the Act), which is an effort to expedite enforcement proceedings. In practice, courts rarely deny enforcement of arbitral awards in Korea.

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



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Yes. The 2016 amendments to the Act specify that the arbitral tribunal has the authority to apportion arbitration costs between the parties, having regard to all of the circumstances of the case, unless the parties agreed otherwise (Article 34-2 of the Act).

Article 56 of the KCAB Domestic Rules provides that the attorney fees or the costs incurred in connection with the proceedings including inspection, expert examination, witness interrogation and translation shall be borne by the parties in accordance with the apportionment fixed in the award by the tribunal by taking into account the circumstances of the case, unless otherwise agreed between the parties.

In contrast to the KCAB Domestic Rules, Article 52(1) of the KCAB International Rules provides that the arbitration costs including administrative fees are in principle borne by the losing party, unless specifically apportioned by the tribunal as it deems appropriate. Pursuant to Article 53, the arbitral tribunal shall have the power to allocate legal costs and other necessary expenses incurred in connection with the proceedings by taking into account the circumstances of the case, unless otherwise agreed between the parties.

10.21 Are there any statistics available on arbitration proceedings in the Republic of Korea?

The KCAB reportedly handled 443 new arbitration cases in 2019, which is significantly higher than the number from the previous year (393 arbitration cases in 2018). The total number of international arbitration cases was 70 cases, accounting for 15.8% of the total. International cases involved parties from such jurisdictions as the United States, China, Turkey, Vietnam, Japan, Hong Kong, Germany, France, Saudi Arabia, and other countries. The total claim amount for arbitration cases in 2019 amounted to over USD 875 million, with a 200% increase in the number of high value cases with the claim amount over KRW 100 billion. Statistics in more detail are available at the KCAB website as follows:

http://www.kcabinternational.or.kr/user/Board/comm_notice.do?BD_NO=174&CURRENT_MENU_CODE=MENU0017&TOP_MENU_CODE=MENU0014



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 indicated in Nos. 1.2 and 1.10 above, the Act, along with the KCAB Domestic Rules and KCAB International Rules, underwent certain revisions in 2016 as below:

The Act has now codified interim or provisional measures in detail including requirements, suspension, revocation and enforcement thereof set forth in the 2006 UNCITRAL Model Law (Articles 18 through 18-8 of the Act). Proceedings concerning the recognition and enforcement of arbitral awards have been streamlined as the court may now issue a decision recognizing and enforcing the award without holding a mandatory hearing while some of the previously required documents no longer need to be filed with the court (Article 37 of the Act). The Act has also eased requirements for written arbitration clauses (Article 8 of the Act), reinforced the court's cooperation with taking evidence (Article 28 of the Act) and clarified that the arbitral tribunal has power to allocate arbitration costs among the parties (Article 34-2 of the Act).

As for the KCAB International Rules, “emergency measures by emergency arbitrator” are now included in the rules, authorizing an emergency arbitrator to grant parties urgent conservatory and interim relief before the composition of the arbitral tribunal (Appendix 3 of the KCAB International Rules). The Rules have also enabled joinder of third parties to the existing proceedings for the sake of judicial economy and to prevent inconsistent outcomes between arbitral awards (Article 21 of the KCAB International Rules). In addition, the KCAB Secretariat may now refuse to confirm the nomination of any party-appointed arbitrators that it deems would compromise the impartiality and independence of arbitral tribunals (Article 13 of the KCAB International Rules).

The KCAB Domestic Rules went through rather minor revisions including allocation of arbitration costs as discussed in 1.20.



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Following the new amendments made to the Act in 2016, a new law came into force aiming to improve and promote arbitration in Korea – the Arbitration Industry Promotion Act, which became effective on 28 June 2017. This law reflects the Korean government’s recognition that arbitration is an important industry, and signals the legislature’s commitment to investing in arbitration. This commitment is apparent in the text of the Promotion Act, which states its purpose as encouraging the use of arbitration, and attracting more international arbitration to Korea (Article 1 of the Promotion Act).

Following the enforcement of the Arbitration Industry Promotion Act, the Act went through a minor revision adding the Minister of Justice as a party capable of designating an incorporated association conducting commercial arbitration for subsidy (Article 40 of the Act).

Name of Authors:	MR. HYUNG SOO LEE MR. JOACHIM NOWAK MR. ROBERT W. WACHTER MS. YEBIN JEONG
Name of Law Firm:	Lee & Ko
Brief Profile:	<p>Following its establishment in 1977, Lee & Ko has become one of Korea’s premier full-service law firms, widely recognized for its leadership and outstanding success in every area of legal practice. As has been confirmed in numerous reviews conducted by Korea’s major media outlets, as well as ratings produced by international law firm rating services, Lee & Ko enjoys one of the highest levels of client satisfaction and a particularly excellent reputation for the quality of the firm’s legal services. Currently, Lee & Ko has 670 plus lawyers working in several practice groups for a range of industries and businesses.</p> <p>Hyung Soo Lee (Partner), a Korean lawyer, known for his participation and success in cases which had written law history in Korea, and his outstanding know-how on Korean law and business issues as well as his strong commitment to his clients.</p>



	<p>Joachim Nowak is the first German lawyer ever, who came to Korea to work in a Korean law firm. Since 1999, he is an arbitrator of the Korean Commercial Arbitration Board, and since 2009 he is the "<i>Vertrauensanwalt der Österreichischen Botschaft in der Republik Korea</i>". He is also a German <i>Bankkaufmann</i> and Entrepreneur.</p> <p>Robert Wachter is co-head of the International Arbitration & Cross-Border Litigation Group at Lee & Ko. He has acted as counsel, arbitrator or arbitral secretary in more than 75 international arbitration cases brought under all of the major arbitration rules, including the ICC, KCAB, VIAC, Swiss Chambers, SIAC, LCIA, SCC, JCAA and UNCITRAL arbitration rules.</p> <p>Jin-uk Joseph Kim is a member of Lee & Ko's International Arbitration & Cross-Border Litigation Group. He is experienced with leading international arbitral institutions such as the ICC, SIAC, HKIAC, AAA and KCAB.</p>
Telephone No.:	+82 2 772 4000
Fax No.:	+82 2 772 4001
Email:	hyungsoo.lee@leeko.com / nowak@leeko.com / robert.wachter@leeko.com / yebin.jeong@leeko.com
Website:	www.leeko.com



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11. LAOS



**BY: MR. SOULIGNASACK LIEMPHRACHANH
MS. ROSIE COLE**

11.1 Which laws apply to arbitration in the Laos People's Democratic Republic?

The two main laws which apply to arbitration in Lao PDR are:

1. The Law on Resolution of Economic Disputes No. 51/NA (22 June 2018) ("**Law on Resolution of Economic Disputes**")¹⁸⁶ which sets out the principles, regulations and measures for the resolution of economic disputes through mediation or arbitration involving individuals, legal entities or organisations undertaking business in international trade or foreign investment in the Lao PDR; and
2. The Law on Civil Procedures No.13/NA (4 July 2012) ("**Law on Civil Procedures**")¹⁸⁷ which governs dispute resolution procedures for civil matters within the jurisdiction of the Lao PDR including the recognition of domestic and foreign arbitration awards.

11.2 Is the Lao PDR arbitration law based on the UNCITRAL Model Law?

No, the Lao PDR arbitration law is not based on the UNCITRAL Model Law.

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

¹⁸⁶ https://www.wto.org/english/thewto_e/acc_e/lao_e/WTACCLAO22_LEG_2.pdf

¹⁸⁷ https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=95115&p_country=LAO&p_classification=01



The Law on Resolution of Economic Disputes is applicable to domestic and international arbitration on economic disputes and the Law on Civil Procedures is applicable to domestic and international arbitration for civil matters in general.

The Law on Civil Procedures governs the enforceability of arbitration awards for domestic and international arbitration.

11.4 Has the Lao PDR acceded to the New York Convention?

The Lao PDR acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (“**The New York Convention**”) on 17 June 1998 and it came into force in the Lao PDR on 15 September 1998.

It is worth noting that the Lao PDR is not a member to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of 1971 (“**The Hague Convention of 1971**”).

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?

Yes, Article 5 of the Law on Resolution of Economic Disputes permits parties undertaking business in international trade or foreign investment in the Lao PDR to nominate foreign or international arbitration institutions as their dispute resolution mechanism in an agreement regardless of whether both parties are domiciled in the Lao PDR or if only one party is domiciled in the Lao PDR.

11.6 Does the Lao PDR arbitration law contain substantive requirements for the arbitration procedures to be followed?



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Article 5 of the Law on the Resolution of Economic Disputes permits parties to choose the arbitration rules and procedures governing the foreign arbitration institution or international organisation they have nominated to submit their economic dispute. Arbitration rules and procedures governing domestic commercial arbitration in the Lao PDR are provided in Articles 34 to 47 of the Law on the Resolution of Economic Disputes.

For an arbitral award to be enforceable in the Lao PDR, arbitration proceedings, both domestic and foreign, must comply with the basic guarantees provided for under Articles 8 to 14 of the Law on the Resolution of Economic Disputes which requires the independence and impartiality of the arbitrator, the guarantee of equity in the award, willingness of the parties to submit the dispute to arbitration, equal treatment of the parties without discrimination, mutual understanding of proceedings (by using a common language or an interpreter) and strict confidentiality of arbitration proceedings unless authorised by the parties.

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

Yes, the parties are free to choose arbitration as their dispute resolution mechanism in which case the Peoples' Court of Lao PDR will have no jurisdiction to hear the matter.

However, a party can apply to the court to:

1. Enforce an arbitral award under Article 42 of the Law on Civil Procedures and Article 53 of the Law on Resolution of Economic Disputes;
2. Set aside an arbitral award according to Article 47 of the Law on Resolution of Economic Disputes.

11.8 What are the main arbitration institutions in the Lao PDR?



The main arbitration institutions in the Lao PDR for economic disputes are:

- The “Centre of Economic Dispute Resolutions” (“**CEDR**”) operating at the central level under the supervision of the Ministry of Justice with status equivalent to a department within the Ministry. The CEDR is responsible for liaising with the concerned parties, examining and receiving economic dispute applications, petitions and evidence from concerned parties, and appointing arbitrators in accordance with the laws and regulations.
- The Offices of Economic Dispute Resolution (“**OEDR**”) operating at the provincial level under the supervision of the Provincial Departments of Justice. The OEDR have the same rights and functions as the CEDR.
- Industry-specific arbitration committees within some government line ministries in the Lao PDR such as the Labour Arbitration Committee within the Ministry of Labour and Social Welfare.

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

Tel: +856 21 451 920

Individual OEDRs are located in the Justice Office of each province in Lao PDR: Phongsaly Province, Luang Namtha Province, Oudomxay Province, Luang Prabang Province, Hua Phan Province, Xieng Khuang Province, Khammuan Province, Savannakhet Province and Champasak Province.

11.10 Arbitration Rules of major arbitration institutions?

The arbitration rules are expected to be passed.

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

There are no laws, regulations or guidelines in the Lao PDR proposing a Model Clause for contracting parties to use arbitration for dispute resolution. The Law on the Resolution of Economic Disputes simply requires that it is clearly the mutual agreement of the parties to voluntarily submit their dispute to foreign or domestic arbitration for dispute resolution.

11.12 How many arbitrators are usually appointed?

As mentioned previously, Article 5 of the Law on the Resolution of Economic Disputes permits parties to choose the arbitration rules and procedures governing the foreign arbitration institution or international organization they have nominated to submit their dispute including any procedures on the appointment of an arbitrator or an arbitration tribunal.

Pursuant to Article 26 of the Law on the Resolution of Economic Disputes, the parties may agree on the number of arbitrators to be appointed to the panel.

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

Yes, pursuant to Article 27 of the Law on the Resolution of Economic Disputes parties have the right challenge the appointment of an arbitrator on the basis of a conflict of interest or direct relations with the parties. In the event that an arbitrator is withdrawn, the respective CEDR or OEDRs must appoint a replacement arbitrator within seven days.

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

There are no restrictions to the parties' representation in arbitration proceedings and parties have the right to be self-represented or represented



by a person of their choosing. However, domestic arbitration at the CEDR or OEDR in the Lao PDR must be conducted in Lao language unless otherwise agreed by the parties.

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

As mentioned previously, the jurisdiction of the court is barred from hearing a matter if the parties have chosen to submit the dispute to arbitration. However, pursuant to Articles 47, 52 and 53 of the Law on the Resolution of Economic Disputes and Article 41 of the Law on Civil Procedures, if a party subsequently submits the arbitration award within fifteen days of receiving the arbitration award to the court for an enforcement order of an arbitration award or to challenge the enforceability of the arbitral award, the court will have jurisdiction to determine the enforceability of the arbitral award.

The enforceability of an arbitral award in the Lao PDR will be subject to the determination of the court whether there has been any violation of laws and regulations on the conduct of proceedings, if the enforcement of the arbitral award is in breach of any international treaties which Lao PDR is a party to or if the enforcement of the award will affect the national security, social peace and environment of the Lao PDR. If the court finds any of the above issues in the positive, it will not issue an order certifying the enforcement of the arbitral award and such an order is not subject to appeal. Parties which had previously submitted their dispute to CEDR or OEDRs will have the right to re-submit their matter to the respective arbitration body to reconsider the arbitration award.

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

Article 41 of the Law on the Resolution of Economic Disputes provides that the arbitration tribunal can, by application of either party, request the court to issue an order to seize, confiscate, or take any other appropriate



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measure to protect the interests and rights of the applicable party within five working days from the day of receipt of the request.

11.17 What are the formal requirements of an arbitral award (form; contents, deadlines, other requirements)?

- **Formal requirements for arbitral awards**

Article 45 of the Law on the Resolution of Economic Disputes sets out the contents which are required to be contained in the arbitral award.

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 arbitrators and the minute taker;
- c) Time, date, subject, and reference number of the dispute(s) and place the decision was issued;
- d) Main content of the dispute(s), the decision(s) and reasons for the arbitral award;
- e) division of fees and service charges and responsible party for payment; and
- f) parties' right to challenge the decision of the arbitration tribunal

- **Deadlines for issuing arbitral awards**

Article 37 of the Law on the Resolution of Economic Disputes provides that the arbitration tribunal should resolve disputes within three months from the day the arbitration tribunal was appointed, except under exceptional circumstances relating to the presentation



of evidence, but does not provide a formal deadline for the issuing of an arbitral award.

- **Other formal requirements for arbitral awards**

Article 43 of the Law on the Resolution of Economic Disputes provides that the decision of the arbitration tribunal must be read in the presence of the parties or their representatives and must be effective from the date the decision is made.

11.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in the Lao PDR?

Generally, an arbitral award cannot be rescinded. However, a party may appeal the enforceability of the arbitral award in the court within thirty days of receiving the arbitral award for reasons outlined in Articles 47, 52 and 53 of the Law on the Resolution of Economic Disputes and Article 41 of the Law on Civil Procedures including any violation of laws and regulations on the conduct of proceedings, breach of any international treaties which the Lao PDR is a party to or if the enforcement of the award will affect the national security, social peace and environment of the Lao PDR.

As mentioned previously, if the court finds any of the above issues in the positive, it will not issue an order certifying the enforcement of the arbitral award and such an order is not subject to appeal. Parties which had previously submitted their dispute to CEDR or OEDR will have the right to re-submit their matter to the respective arbitration body to reconsider the arbitral award.

11.19 What procedures exist for enforcement of foreign and domestic awards in the Lao PDR?

Domestic arbitral awards from the CEDR or OEDRs are recognised as binding on the parties involved and parties are obliged under Article 50 of the Law on the Resolution of Economic Disputes to implement the outcome of the award within a period of 30 days from when the decision was made. In the event that the parties do not self-enforce the obligations



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of the arbitral award, either party may submit the arbitral award to the court and seek an enforcement order to be issued pursuant to Article 51 of the Law on the Resolution of Economic Disputes.

Foreign arbitral awards and decisions are recognised by the Lao PDR, subject to certification by the court. Pursuant to Article 53 of the Law on the Resolution of Economic Disputes and Article 41 of the Law on Civil Procedures, the court will only certify the arbitration awards and decisions of foreign or international arbitration if the following conditions are satisfied: (1) both parties hold the nationality of member countries to the New York Convention of 1958; (2) the arbitration award does not violate the Lao PDR Constitution, laws and regulations relating to national security, social peace and environment; (3) the party obliged to repay any debt under the arbitral award has property, activities, shares, money or other assets in the Lao PDR; and (4) the arbitration proceedings did not violate any procedural laws and regulations. Once these conditions have been met and the arbitral award or decision is certified by the court, the award or decision may then be implemented and enforced in accordance with the Law on Judgment Enforcement No. 04/NA (25 July 2008)¹⁸⁸. If the court dismisses the application for certification of the arbitral award or decision, it may order the parties to re-submit the matter to arbitration.

11.20 Can a successful party in the arbitration recover its costs in Lao PDR?

There are no laws or regulations in Lao PDR stipulating the recovery of any costs, legal fees and expenses incurred by the successful party in arbitration. Parties may, however, agree on the responsible party to pay any such costs, legal fees and expenses borne by either or both parties and any other costs and fees required to be paid pursuant to the arbitral award or decision under Article 55 of the Law on the Resolution of Economic Disputes.

188

[https://www.vientianetimes.org.la/Laws%20in%20English/50.%20Law%20on%20Judgment%20Enforcement%20\(2004\)%20Eng.pdf](https://www.vientianetimes.org.la/Laws%20in%20English/50.%20Law%20on%20Judgment%20Enforcement%20(2004)%20Eng.pdf)



11.21 Are there any statistics available on arbitration proceedings in Lao PDR?

Domestic arbitration proceedings are not required to be published in the Lao PDR. Based on the research undertaken, there were 258 arbitration cases from 2006-2012.

At the time of writing, we are not aware of any foreign arbitral award which has successfully obtained certification and enforcement from the court.

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, we are aware of a draft Decree on the Instruction for the Implementation of the Law on Economic Dispute Resolution which seeks to clarify selected articles on the Law on Economic Dispute Resolution. We are not aware of any progress on this draft Decree at this stage.



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Name of Author:	MR SOULIGNASACK LIEMPHRACHANH, Deputy Director & MS ROSIE COLE, Senior Legal Advisor
Name of Law Firm:	McDonald Patafta & Associates Lawyers Sole Co.,Ltd
Brief Profile:	<p>McDonald Patafta & Associates Lawyers (“MPAL”) has been operating in Vientiane, Lao PDR since 2008 and is the only Australian law firm with a registered office in Lao PDR. MPAL has a team of dedicated and experienced Australian and expatriate qualified lawyers and local Lao lawyers, providing international standard legal and tax advice and services for local and foreign investors operating in or seeking to invest in Lao PDR.</p> <p>MPAL has specialist expertise in large-scale investment projects and concession activities in Lao PDR including energy and mining, banking and finance, construction and infrastructure, agriculture and corporate activities, and has represented local and international investors, project developers, lenders and the Government of Lao PDR.</p> <p>As one of the longest standing law firms in Lao PDR, MPAL is a trusted and reliable operator and acted as legal counsel for the Australian Embassy, the British Embassy and the Embassy of the Republic of Singapore in the country. MPAL also has a strong local community presence and is a member of the Australian Chamber of Commerce, the European Chamber of Commerce and Industry and the British Business Group in Lao PDR.</p>
Telephone No.:	+856 21 313 718
Email:	soulignasack.lpc@mpalawyers.com rosiecole@mpalawyers.com
Website:	www.mpalawyers.com



12. MACAU

Macau Special Administrative Region of the People's Republic of China ("Macau SAR")



**BY: MR. PEDRO CORTÉS
MS. MARTA MOURÃO, FCI Arb**

12.1 Which laws apply to arbitration in Macau SAR?

Macau SAR ("Macau") has a new law governing arbitration – Law no. 19/2019, dated 5 November 2019 (the "Arbitration Law")¹⁸⁹, that has revoked the previous dual regime enshrined in Decree-Law no. 29/96/M of 11 June and Decree-Law no. 55/98/M of 23 November.

12.2 Is the Macau SAR arbitration law based on the UNCITRAL Model Law?

The new Macau Arbitration Law is based on the UNCITRAL Model Law on International Commercial Arbitration of 2006.

Unlike the previous regime that included a different set of rules for international arbitration and for domestic arbitration, the new Arbitration Law establishes a unitary system, in line with the more recent international rules and practices.

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

No. Currently, the same law will apply to both domestic and international arbitration.

12.4 Has Macau SAR acceded to the New York Convention?

¹⁸⁹

<https://images.io.gov.mo/bo/i/2019/44/lei-19-2019.pdf>



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Macau is a party to the New York Convention through the Extension Declaration of the New York Convention applicability made by China on 19 July 2005, subject to the reciprocity reservation (i.e. it will only enforce arbitration awards from other signatory states) and the commerciality reservation (i.e. it will only enforce arbitration awards deemed commercial under national law).

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?

Under the Arbitration Law, in both situations' parties may agree on a foreign arbitration institution.

12.6 Does the Macau SAR arbitration law contain substantive requirements for the arbitration procedures to be followed?

Chapter VI (Articles 46 to 68) of the Arbitration Law sets out the basis on which the arbitral proceedings are held. Most of the rules are subsidiary or auxiliary except the mandatory rule that the agreement to submit to arbitration is made in the written form (Article 11 paragraph 1 of the Arbitration Law).

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

In case there is a valid arbitration clause and one party submits the dispute to a state court, the state court shall, upon request of the defendant, acquit him/ her.

12.8 What are the main arbitration institutions in Macau SAR?

There are five established arbitration institutions in the Macau SAR. The principal institutions designated for commercial arbitration are:

- **World Trade Center Macau Arbitration Center;** and



- **Voluntary Arbitration Center** of the Macau Lawyers' Association.

Although these two are generally of equal status, the World Trade Center Macau Arbitration Center is generally considered to be more suited to disputes with an international component.

The Macau Lawyers' Association is promoting Macau as an international centre to resolve the disputes between Chinese and Portuguese speaking countries' entities.

12.9 Addresses of major arbitration institutions in Macau SAR?

World Trade Center Macau Arbitration Centers:

<http://www.wtc-macau.com/arbitration/eng/index.htm>.

Voluntary Arbitration Center of the Macau Lawyers' Association:

<http://bo.io.gov.mo/bo/ii/98/10/desp26.asp>.

12.10 Arbitration Rules of major arbitration institutions?

World Trade Center Macau Arbitration Center have its own regulation available at:

<http://www.wtc-macau.com/arbitration/eng/statute/regulation.pdf>

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

The recommended clauses of the World Trade Center Macau Arbitration Center are:

Recommended Clause for Domestic and International Conciliation

“Any dispute, controversy or claim arising out of or relating to this contract, shall be settled by conciliation in MACAO S.A.R. at World Trade Center Macau Arbitration Center and in accordance with its Internal Regulations. If the said dispute, controversy or claim could not be resolved by conciliation, with the parties’ will, it can be settled through the arbitration process.”



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Recommended Clause for Domestic and International Arbitration

“Any dispute, controversy or claim arising out of or relating to this contract, shall be settled by arbitration in MACAO S.A.R. at World Trade Center Macau Arbitration Center and in accordance with its Internal Regulations as at present in force.

The arbitration procedure will be carried out by single Tribunal, except any further agreement made by both parties. / The arbitration procedure will be carried out by collective Tribunal, except any further agreement made by both parties.

The arbitrator is appointed by both parties or, in the absence of an agreement for that purpose, by the World Trade Center Macau Arbitration Center.

The language(s) to be used in the arbitral proceedings shall be Chinese / Portuguese / English.”

12.12 How many arbitrators are usually appointed?

Under article 21 of the Arbitration Law, the parties can freely decide on the number of arbitrators. Unless they have decided otherwise, the arbitral tribunal will be composed of three arbitrators.

The new Arbitration Law does not entail the requisite of the odd number of arbitrators that was present in the previous regime, therefore the parties can now appoint any number of arbitrators, even or odd.

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

Arbitrators can be challenged only if circumstances exist that give rise to justifiable doubts as to their impartiality or independence, or if they do not possess qualifications agreed to by the parties.

A party can challenge an arbitrator appointed by him/her, or in whose appointment he/she has participated, only for reasons of which he/she becomes aware after the appointment has been made. (Article 28 of the Arbitration Law).

The challenge procedure is set out in Article 29 of the Arbitration Law.



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

There are no restrictions as to the parties' representation in arbitration proceedings. However, if the parties have chosen to resort to mediation before the arbitral tribunal has been constituted, then the person who has acted as mediator cannot represent or assist any party in the arbitral procedure unless the parties agree otherwise (Article 48 of the Arbitration Law).

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

The arbitral tribunal can, on its own or by demand of any of the parties, request the court's assistance in specific matters, such as gathering evidence, executing decisions within the arbitration proceedings and appointing arbitrators when they are not appointed by the arbitration agreement, among other interventions.

The Base Judicial Court (Tribunal Judicial de Base) is referred by arbitration law as the competent court.

If the parties agree on arbitration, the local courts must declare themselves not competent to settle the case.

The Arbitration Law provides for a "principle of minimum intervention by the courts" according to which, in all matters regulated by this law, the courts can only intervene in cases where it provides for it.

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

Unless otherwise agreed by the parties, the arbitral tribunal can order (at the request of either party) either party to take any interim measure of protection considered necessary in respect of the subject-matter of the dispute, including an order to provide appropriate security.



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All civil law remedies are available to the tribunal and can include damages, injunctions, declarations, costs and interest.

Furthermore, the new Arbitration Law lays down the regime of the Emergency Arbitrator, which is one of the innovations of the new law. The Emergency Arbitrator is appointed by the parties before the arbitral tribunal has been set up for the purpose for granting urgent interim measures.

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

- **Formal requirements for arbitral awards:**
The arbitration award shall be reduced in writing and signed by the arbitrator or arbitrators.
- **Deadlines for issuing arbitral awards:**
There are no specific statutory deadlines.
- **Other formal requirements for arbitral awards:**
The award shall be substantiated in most cases, it shall also indicate the date on which it was rendered and the place of the arbitration. Once there is a decision, a copy signed by the arbitrator or arbitrators must be sent to each of the parties.

12.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in Macau SAR?

Under the new Arbitration Law, the arbitral award is not subject to appeal unless the parties have agreed, before the decision has been granted, that the decision is subject to appeal to another arbitral tribunal. This agreement is only valid if the parties also agree on the conditions and terms of the appeal.



This rule is another innovation of the new regime as the previous law provided for the possibility of the parties to agree on the appeal of the decision to the judicial court.

The limitation period applicable to actions to challenge the award can be agreed by the parties. If the parties do not stipulate any period, the law provides for a period of 30 days from the notification of the award, to request for its review, correction to the award or an additional award (Article 66 of the Arbitration Law).

12.19 What procedures exist for enforcement of foreign and domestic awards in Macau SAR?

- **Domestic Awards**

A decision or award issued by an arbitral tribunal has the same status as a decision issued by the common judicial courts.

- **Foreign Awards**

As mentioned in 1.4 above, Macau is a party to the New York Convention hence an award obtained in Macau can be enforced in other countries which are parties to the New York Convention and vice-versa.

In addition, according to an arrangement concerning the mutual enforcement of arbitration awards between mainland China and Macau, commercial arbitration awards made in Macau SAR are enforceable in mainland China, subject to a few exceptions.

All foreign arbitration awards issued by a country that is not a party to the New York Convention or that did not enter into any arrangement with Macau are subject to confirmation by the Macau Court of Appeal before they can be enforced in Macau. Confirmation does not therefore include a retrial on the merits, but is subject to various formal requirements (section 1200, Civil Procedures Code), such as the authenticity of the award and the non-existence of pending proceedings on the Macau courts on the



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same matter. The award, irrespective of the state or territory in which it was made, will be recognised as binding and will be enforced on application in writing to the competent court.

12.20 Can a successful party in the arbitration recover its costs in Macau SAR?

The fees of the arbitrators and other participants in the proceedings as well as the allocation between the parties of any advance of costs and final expenses are typically agreed in the arbitration agreement.

If the parties fail to agree on the costs and expenses of the arbitration, the arbitration tribunal will determine such costs and expenses in accordance with the chart of one of the arbitration institutions of Macau (Article 34 of the Arbitration Law).

12.21 Are there any statistics available on arbitration proceedings in Macau SAR?

Currently there are no statistics available on arbitration proceedings in Macau SAR.

12.22 Are there any recent noteworthy developments regarding arbitration in Macau SAR (new laws, new arbitration institutions, significant court judgments affecting arbitration etc.)?

As mentioned in 1.1 above, a new law governing arbitration was enacted in Macau in November 2019. The new Arbitration Law has entered into force on 4 May 2020.

The new law has replaced the two laws previously in force and applies to both internal and external arbitrations in Macau.

In terms of scope of application, the new law implements the principle of territoriality and generally applies only to arbitrations taking place in Macau.



Name of Author:	MR. PEDRO CORTÉS MS. MARTA MOURÃO (FCI Arb)
Name of Law Firm:	Rato, Ling, Lei & Cortés – Advogados e Notários (Lektou)
Brief Profile:	Rato, Ling, Lei & Cortés – Advogados (Lektou) is a general business law firm based in the Macau SAR of the People's Republic of China ("Macau") with offices also in Portugal, in Hengqin (Zhuhai), and, more recently in Shenzhen, the latter through a partnership. It has begun operations in 1985 and has currently a total team of 27 fee-earners, being four of the Senior Partners also Private Notaries, and two China Attesting Officers. With more than 30-year history in private and public law with solid academic and professional profile and the long experience and strong ties to Macau are a guarantee of the quality of the services. The constant updating and specialization of our lawyers, coupled with the proven practice of our professionals in various fields of law, provide the tools to deliver prompt, effective, and efficient response to our Clients worldwide, which include small, single-purpose public entities to larger public departments, as well as clients of different industries: banking and finance, insurance, gaming, airlines and airport infrastructures, energy, construction, tourism and hospitality, or IT. The firm has been ranked as a leading law firm by several international guides such as Chambers, IFLR1000, Asialaw, and Legal500.
Telephone No.:	+853 2856 2322
Fax No.:	+853 2858 0991
Email:	mail@lektou.com
Website:	www.lektou.com



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13. MALAYSIA

BY: MR. THAYANANTHAN BASKARAN

13.1 Which laws apply to arbitration in Malaysia?

The Arbitration Act 2005 applies to arbitration in Malaysia.

13.2 Is Malaysian arbitration law based on the UNCITRAL Model Law?

The Arbitration Act 2005 is based on the UNCITRAL Model Law.

13.3 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.

The Federal Court, in *Tan Sri Dato' Seri Vincent Tan Chee Yioun & Anor v. Jan De Nul (M) Sdn Bhd & Anor and another appeal* [2019] 1 MLJ 557, recognized the distinction made by Section 3(2) between domestic and international arbitration. The Federal Court also held that, if a party to the arbitration was a foreign party, the arbitration would be an international arbitration and Part III would accordingly not apply unless the parties agreed otherwise. The parties' agreement that the laws of Malaysia would apply to the arbitration agreement that the courts of Malaysia would have exclusive jurisdiction did not mean that the parties agreed that Part III would apply.

13.4 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.

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?

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.

13.6 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.

13.7 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



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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 Federal Court, in *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd* [2016] 9 CLJ 1 and *Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1, has recognized that under section 10(1) of the Arbitration Act 2005, it is mandatory for court proceedings to be stayed.

The Federal Court, in *Tindak Murni Sdn Bhd v. Juang Setia Sdn Bhd and anor* [2020] 3 MLJ 545, held that a party to an arbitration agreement breached such an agreement by commencing civil proceedings. Therefore, if such a party obtains a judgment in default in the civil proceeding, the courts will set aside such judgment in default upon the application of the other party. If the court did not set aside a judgment in default, the courts would be condoning the breach of the arbitration agreement.

13.8 What are the main arbitration institutions in Malaysia?

The main arbitration institution in Malaysia is the Asian International Arbitration Centre (AIAC).

13.9 Addresses of major arbitration institutions in Malaysia?

The address of the **AIAC** is:

Bangunan Sulaiman, Jalan Sultan Hishamuddin, 50000 Kuala Lumpur, Malaysia.

Tel: +603 2271 1000

Fax: +603 2271 1010

Email: enquiry@aiac.world

Website: www.aiac.world



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13.10 Arbitration Rules of major arbitration institutions?

The arbitration rules published by the AIAC are the AIAC Arbitration Rules, the AIAC Fast Track Arbitration Rules and the AIAC i-Arbitration Rules:

- <https://www.aiac.world/Arbitration-Arbitration>
- <https://www.aiac.world/Arbitration-i-Arbitration>
- <https://www.aiac.world/Arbitration-Fast-Track-Arbitration>.

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

The Model Clause for the **AIAC 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 AIAC Arbitration Rules.”

The recommended additions to the Model Clause for the AIAC Arbitration Rules are:

- *The seat of arbitration shall be [...].*
- *The language to be used in the arbitral proceedings shall be [...].*
- *This contract shall be governed by the substantive law of [...].*
- *Before referring the dispute to arbitration, the parties shall seek an amicable settlement of that dispute by mediation in accordance with the AIAC Mediation Rules as in force on the date of the commencement of mediation.*

The Model Clause for the **AIAC 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 AIAC Fast Track Arbitration Rules.”



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The recommended additions to the Model Clause for the AIAC Fast Track Arbitration Rules are:

- *The seat of arbitration shall be [...].*
- *The language to be used in the arbitral proceedings shall be [...].*
- *This contract shall be governed by the substantive law of [...].*

And, the Model Clause for the AIAC 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 AIAC i-Arbitration Rules.”

The recommended additions to the Model Clause for the AIAC i-Arbitration Rules are:

- *The seat of arbitration shall be [...].*
- *The language to be used in the arbitral proceedings shall be [...].*
- *This contract shall be governed by the substantive law of [...].*
- *Before referring the dispute to arbitration, the parties shall seek an amicable settlement of that dispute by mediation in accordance with the AIAC Mediation Rules as in force on the date of the commencement of mediation.*

13.12 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.



13.13 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.

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

There are no restrictions as to a party's representation in arbitral proceedings in Malaysia. Section 3A of the Arbitration Act 2005 provides that, unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by any representative appointed by the party.

13.15 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;



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- (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 44(1): taxed costs by the High Court in certain circumstances;
- (j) Section 44(2): power of the High Court to order the arbitral tribunal to deliver the award in certain circumstances;
- (k) Section 45: power of the High Court to extend time for the commencing arbitral proceedings; and
- (l) section 46: power of the High Court to extend time for the making of the award.

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

Section 19 of the Arbitration Act 2005 provides that the arbitral tribunal may grant interim measures to:

- (a) maintain or restore the status quo pending the determination of the dispute;
- (b) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;
- (c) provide a means of preserving assets out of which a subsequent award may be satisfied;
- (d) preserve evidence that may be relevant and material to the resolution of the dispute; or
- (e) provide security for the costs of the dispute.

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 the party to:



- (a) maintain or restore the status quo pending the determination of the dispute;
- (b) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process;
- (c) provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;
- (d) preserve evidence that may be relevant and material to the resolution of the dispute; or
- (e) provide security for the costs of the dispute.

Interim measures should only be granted by the High Court, where such measures will aid, facilitate or support the arbitral proceedings and not where they will impede such proceedings.

Within this broad principle, the question arises as to what the applicant should do when both the High Court and the arbitral tribunal are empowered to grant the same type of interim measures under sections 11 and 19 of the Arbitration Act 2005.

Initially, the courts took the position that where the High Court and the arbitral tribunal's power to grant interim measures overlapped, a party should first apply to the arbitral tribunal for such interim measures as can be seen from *Jiva Harmoni Offshore Sdn Bhd v. Ishi Paower Sdn Bhd* [2009] 1 LNS 849.

Subsequently, the High Court, in *Cobrain Holdings Sdn Bhd v. GDP Special Projects Sdn Bhd* [2010] 1 LNS 1834, while recognizing that an application for interim measures should first be made to the arbitral tribunal, where there was an overlap between the powers of the High Court and the arbitral tribunal, allowed for circumstances where an application may be made directly to the High Court. This would include circumstances where third parties over whom the arbitral tribunal had no jurisdiction were involved, where matters were very urgent or where the court's coercive powers were required.



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The first of these circumstances, where a third party was involved, arose in *Metrod (Singapore) Pte Ltd v. GEP II Beteiligungs GmbH & Anor* [2013] 1 LNS 324, and the High Court followed *Cobrain Holdings supra* and allowed the application to be made directly to the High Court.

Thereafter, the High Court, in *Interactive Brokers LLC v. Neo Kim Hock & Ors* [2014] 8 CLJ 747 and *Bumi Armada Navigation Sdn Bhd v. Mirza Marine Sdn Bhd* [2015] 5 CLJ 652, appears to have taken a broader position and allowed an application to be made to the High Court for interim measures, even where the powers of the High Court and arbitral tribunal overlapped, without apparently considering the circumstances outlined in *Cobrain Holdings supra*.

The position should be that where there is an overlap between the powers of the High Court and the arbitral tribunal under sections 11 and 19, an application for interim measures should be made to the arbitral tribunal first. However, where there is a third party involved, an emergency or a need for coercive powers, an application may be made to the High Court immediately.

Apart from this, as emphasized in *IJM Construction Sdn Bhd v. Lingkaran Luar Butterworth (Penang) Sdn Bhd* [2018] 7 MLJ 341, the High Court may reconsider an application for interim relief after an order by an arbitral tribunal. However, based on *Obnet Sdn Bhd v. Telekom Malaysia Berhad* [2018] MLJU 1400, the High Court's reconsideration of any decision by the arbitral tribunal will be limited, as the High Court will be bound by the findings of fact made by the arbitral tribunal.

The Court of Appeal, in *KNM Process Systems Sdn Bhd v. Lukoil Uzbekistan Operating Co LLC* [2020] MLJU 85, held that, for an application under section 11(1)(a) of the Arbitration Act 2005, the usual test for an interim injunction would apply, where the Courts would consider whether:

- (a) there is any bona fide serious issue to be tried;
- (b) damages are an adequate remedy; and
- (c) where the balance of convenience lies.



13.17 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; 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.



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There are no deadlines for the delivery of an award under the Arbitration Act 2005.

13.18 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 be 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 Federal Court, in *Jan De Nul (M) Sdn Bhd & Anor v. Vincent Tan Chee Yioun & Anor* [2019] 2 MLJ 413 and *Pancaran Prima Sdn Bhd v. Iswarabena Sdn Bhd and another appeal* [2021] 1 MLJ 1, emphasized that an application to set aside an award is not an appeal. The courts would be slow to set aside an award.

The Federal Court, in *Master Mulia Sdn Bhd v. Sigur Rus Sdn Bhd* [2020] 12 MLJ 198, set out the general principles applicable to an application to set aside an award on the grounds of breach of natural justice, which is contrary to the public policy of Malaysia. These general principles are as follows:

- (a) first, the court must consider: (a) which rule of natural justice was breached; (b) how it was breached; and (c) in what way the breach was connected to the making of the award;
- (b) second, the court must consider the seriousness of the breach in the sense of whether the breach was material to the outcome of the arbitral proceeding;
- (c) third, if the breach is relatively immaterial or was not likely to have affected the outcome, discretion will be refused;
- (d) fourth, even if the court finds that there is a serious breach, if the fact of the breach would not have any real impact on the result and that the arbitral tribunal would not have reached a different conclusion the court may refuse to set aside the award;
- (e) fifth, where the breach is significant and might have affected the outcome, the award may be set aside;
- (f) sixth, in some instances, the significance of the breach may be so great that the setting aside of the award is practically automatic, regardless of the effect on the outcome of the award;
- (g) seventh, the discretion given the court was intended to confer a wide discretion dependent on the nature of the breach and its impact. Therefore, the materiality of the breach and the possible effect on the outcome are relevant factors for consideration by the court; and
- (h) eighth, whilst materiality and causative factors are necessary to be established, prejudice is not a pre-requisite or



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requirement to set aside an award for breach of the rules of natural justice.

In particular, the Federal Court, in *Pancaran Prima supra*, considered whether the arbitrator may rely on his or her own knowledge to decide an issue, without giving the parties prior notice of this. The Federal Court decided that an arbitrator appointed for his or her special knowledge, skill or expertise, was entitled to draw on his or her own special knowledge to decide issues of general fact, without giving prior notice to the parties. There would be no breach of natural justice in such circumstances.

13.19 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.

The Federal Court, in *Siemens Industry Software GmbH & Co Kg (Germany) (formerly known as Innotec GmbH) v. Jacob and Toralf Consulting Sdn Bhd (formerly*



known as Innotec Asia Pacific Sdn Bhd) (M) & Ors [2020] 3 MLJ 1 held that only the dispositive part of an award should be recognised and enforced as a judgment of the court under section 38 of the Arbitration Act 2005, inter alia, on the grounds that “confidentiality of the arbitral proceedings would otherwise be undermined if recognition and enforcement applied only to the entire award.”.

13.20 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.

The Court of Appeal, in *SDA Architects v. Metro Millennium Sdn Bhd* [2014] 3 CLJ 632, held that, as costs were at the discretion of the arbitral tribunal under section 44, the courts would not intervene based on a question of law under section 42. Section 42 has since been removed by the Arbitration (Amendment) (No. 2) Act 2018 which came into force on 8th May 2018.

13.21 Are there any statistics available on arbitration proceedings in Malaysia?

Statistics on arbitration proceedings in Malaysia are available upon request from the AIAC.



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

The Arbitration Act 2005 was amended in 2018 to bring it closer to the 1985 UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006. Malaysia has become even more arbitration friendly after these recent amendments.

Name of Authors:	MR. THAYANANTHAN BASKARAN
Name of Law Firm:	Baskaran
Brief Profile:	Baskaran is an international arbitration boutique based in Kuala Lumpur. Baskaran advises clients throughout Malaysia and around the world.
Telephone No.:	+60 3 2083 0888
Fax No.:	+60 3 2083 0880
Email:	thaya@baskaranlaw.com
Website:	www.baskaranlaw.com



14. MONGOLIA



**BY: MS. ENKHTSETSEG NERGUI
MS. MARALGOO DASHDOOROV**

14.1 Which laws apply to arbitration in Mongolia?

The main source of law for arbitration in Mongolia is the Arbitration Law (“Arbitration Law”) which was revised and adopted on 26 January 2017 and came into force on 27 February 2017¹⁹⁰.

14.2 Is the Mongolian arbitration law based on the UNCITRAL Model Law?

Yes. The current Arbitration Law is based on the UNCITRAL Model Law, including its amendments in 2006. However, there are some additional provisions that can be found in the Arbitration Law:

- (i) difference of international and domestic arbitration (Article 3, Arbitration Law).
- (ii) exclusive jurisdiction of courts in arbitration proceedings (Article 6, Arbitration Law). The Arbitration Law specifically states the exclusive jurisdiction of courts regarding the court intervention in arbitration procedures.
- (iii) consumer protection mechanism in respect of arbitral clauses (Article 8.11, Arbitration Law). To protect consumer rights, the parties shall make an arbitration agreement in writing only after a dispute arises and such agreement shall indicate the seat of arbitration.
- (iv) provision on confidentiality of the arbitration procedures (Article 50, Arbitration Law). The Arbitration Law obliges the arbitral tribunal, the parties and institution arbitrators to maintain the confidentiality of confidential information which were revealed

¹⁹⁰ <https://www.wipo.int/edocs/lexdocs/laws/en/mn/mn025en.pdf>;
<https://www.legalinfo.mn/law/details/15775?lawid=15775>



ADWA

during the arbitration proceedings and arbitral awards and orders unless the parties otherwise agreed.

- (v) regulation on bankruptcy (Article 51, Arbitration Law). If a dispute of bankruptcy occurs in connection with one of the parties to the arbitration agreement and the receiver and executor did not renounce the agreement, the arbitration agreement shall be valid to such party.

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

Where the seat of arbitration is in Mongolia, Arbitration Law is applicable for both domestic and international arbitration.

14.4 Has Mongolia acceded to the New York Convention?

Yes, Mongolia is one of the contracting states of the New York Convention. Mongolia officially ratified the New York Convention on 24 October 1994. However, Mongolia 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. Furthermore, the Arbitration Law specifically states that the procedure of recognizing and enforcing foreign arbitral awards shall be regulated in accordance with the New York Convention and Chapter Eight (Recognition and Enforcement of Awards) of the Arbitration Law.

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?

There are no restrictions on the choice of arbitration institutions by the parties. Further, the Arbitration Law provides determination of



international and domestic arbitration. Under Article 3 of the Arbitration Law, arbitration is considered as international arbitration if:

- the parties have their place of business in different countries at the time of conclusion of the arbitration agreement;
- a seat of arbitration determined or indicated in the arbitration agreement is in a different location other than the place of business of the parties;
- the place where a substantial part of the obligations of the commercial relationship is to be carried out or the place with which the subject matter of the dispute is different from the place of business of the parties;
- the parties have expressly agreed that the subject matter of the arbitration agreement concern more than one country.

If a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration, and if a party does not have a place of business, the permanent habitual residence of such party shall be considered as the place of business.

14.6 Does the Mongolian arbitration law contain substantive requirements for the arbitration procedures to be followed?

Under the Arbitration Law, the parties are free to agree on the arbitration procedure to be followed by the arbitrators. However, under Article 50 of the Arbitration Law, there is an obligation of arbitral tribunals and parties as well as institutional arbitrations to maintain confidentiality regarding matters that were revealed during the proceedings, arbitral awards and orders unless such confidential information is disclosed under the law or if such disclosure is necessary to enforce the legal rights or if either party started a motion to set aside the award or to enforce the award. Also, the parties to arbitration shall have to be treated with equality and be given a full opportunity for presenting his/her case according to Article 30 of the Arbitration Law.



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

Yes. According to the Arbitration Law and Civil Procedure Code, if there is an arbitration agreement or clause in the contracts, the disputes should be resolved through arbitration. If a party to a valid arbitration agreement files a claim to the courts and when a party requests to resolve the claim by the arbitral tribunal before making its statement on the substance of the case, the courts will refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

14.8 What are the main arbitration institutions in Mongolia?

Under Article 7.3 of Arbitration Law, an institutional arbitration can be established at the chambers of commerce and industry, trade unions, professional associations, or non-governmental organizations such as customer protection centers.

The best-known arbitration institution in Mongolia is the Mongolian International Arbitration Center (“MIAC”) at the Mongolian National Chamber of Commerce and Industry (“MNCCI”) which was founded in 1960. MIAC has its 21-arbitration branch centers in provinces encouraging the settlement of domestic disputes through arbitration.

Besides the MIAC, the Ulaanbaatar Chamber of Commerce Arbitration (“UBCC Arbitration”) was established in 2015.

14.9 Addresses of major arbitration institution in Mongolia?

- Mongolian International Arbitration Center

Suite 502, MNCCI Building,
Mahatma Gandhi Street,
15th Khoroo, Khan-Uul District,
Ulaanbaatar

Tel/Fax: +976-70111545

Email: info@arbitr.mn

Website: <http://www.arbitr.mn>



- Ulaanbaatar Chamber of Commerce Arbitration

14F, Express tower,
Chingeltei district,
Ulaanbaatar city, Mongolia

Tel: +976 7700 3883

Fax: +976 7700 3883

Email: info@ubchamber.mn

Website: <https://www.ubchamber.mn>

14.10 Arbitration Rules of major arbitration institutions?

The Arbitration Rules of 2017, Rules on Assistance to Ad-hoc Arbitration of 2014 and Regulation of Arbitration Fee and Additional Costs of MIAC are available on the website of MIAC.

UBCC Arbitration has its Arbitration Rules, Rules on Mediation and Conciliation, Rules of Expedited Arbitration which are available on its website.

14.11 What is the Model Clause of the arbitration institutions?

The Model Clause of the **MIAC** Arbitration Rules:

“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 Arbitration Center at the Mongolian National Chamber of Commerce and Industry in Mongolia under its Rules on Arbitration in Mongolia.”

The Model Clause of **UBCC** Arbitration:

“Any dispute arising out of or relating to this contract, or breach, termination or invalidity thereof, shall be resolved by Ulaanbaatar Chamber of Commerce Arbitration in accordance with the UBCC Arbitration Rules for the time being in force. The tribunal shall consist of _____.”

14.12 How many arbitrators are usually appointed?



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An arbitral tribunal may consist of one 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.

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

Yes. Arbitrators may only be challenged if there are circumstances that give rise to justifiable doubts as to their impartiality or independence or if they do not possess the qualifications agreed to by the parties. According to the Arbitration Law, the parties are free to agree on a procedure for challenging an arbitrator. If the parties do not have such agreement, the challenging party may submit its request to the arbitral tribunal within 14 days after becoming aware of the constitution of the arbitration tribunal or after becoming aware of any circumstance of challenge (Article 15.2, Arbitration Law). The arbitral tribunal shall decide the request within 30 days unless the challenged arbitrator withdraws from his/her office or the other party agrees to the challenge. If a challenge is not successful, in case of international arbitration, the challenging party may submit a request to the court within 30 days after having received notice of the decision rejecting the challenge. The decision of the court on this matter shall be subject to no appeal. For domestic arbitration, the period to make such request is 14 days (Article 15.3, Arbitration Law). While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitration procedures and make an award.

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

The Arbitration Act does not impose any restrictions as to the parties' representation in arbitration proceedings.

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



In general, the courts cannot intervene in arbitration proceedings in matters governed by Arbitration Law.

Under the Arbitration Law, in case of international arbitration, the Court of Appeal of the Capital City has the competency to decide the following matters:

- requests to grant interim measures (Article 11.1, Arbitration Law)
- appointment of arbitrators (Article 13.4 and Article 13.5, Arbitration Law)
- challenge of arbitrators (Article 15.3, Arbitration Law)
- arbitrator's failure or impossibility to act (Article 16.1, Arbitration Law)
- dispute on arbitration jurisdiction (Article 18.7, Arbitration Law)
- court assistance in taking evidence (Article 39.1, Arbitration Law)
- setting aside of an arbitral award (Article 47, Arbitration Law)

For domestic arbitration, the above matters are under the jurisdiction of the civil appeal court of seat of arbitration.

The first instance court of the residential place of the defendant or place of location of the property of the defendant shall have jurisdiction to decide the following matters:

- enforcement of a decision of interim measures (Article 27, Arbitration Law)
- court-ordered interim measures (Article 29, Arbitration Law)
- recognition and enforcement of an arbitral award (Article 48, Arbitration Law)
- bankruptcy matters (Article 51, Arbitration Law)

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



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Yes. According to Article 19 of the Arbitration Law, unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures in order to:

- maintain or restore the status quo until the dispute is finally resolved;
- take action that would prevent, or refrain from taking action that is likely to increase current or imminent harm or cause difficulties in arbitration proceedings;
- provide a means of preserving assets out of which a subsequent award may be satisfied;
- preserve evidence that may be relevant and material to the resolution of the dispute.

The arbitral tribunal may also require any party to provide appropriate financial security in connection with such measures.

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

- **Formal requirements for arbitral awards**

An arbitral award must be made in writing and must be signed by the arbitrator/s. In a tribunal with more than one arbitrator, the signature of the majority members of the arbitral tribunal is sufficient. However, the reason why such signature is omitted must be stated clearly in the award. The arbitral award shall state the reasons of the decision unless the parties have agreed that no reasons are to be provided or the award is an award on agreed terms. It also shall state the date of the award and seat of arbitration. The award shall be deemed to have been made at that place. After the arbitral award is made, a copy of the award signed by the arbitrators shall be delivered to each party (Article 44, Arbitration Law).

- **Deadlines for issuing arbitral awards**

There is no provision on the deadline for arbitral tribunals to issuing arbitral awards under Arbitration Law.



A party, with notice to the other party, may request the arbitration tribunal to correct any errors in computation, any clerical or typographical errors or any errors of similar nature within 30 days after receiving the award unless the parties have agreed the different period (Article 46.1, Arbitration Law). Also, if agreed by the parties, a party, by notifying to the other party, may request the arbitral tribunal to provide interpretation of certain parts of the award (Article 46.2, Arbitration Law).

Unless otherwise agreed by the parties, a party with notice to the other party, may request, within 30 days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitration proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within 60 days (Article 46.5, Arbitration Law).

- **Other formal requirements for arbitral awards:**

There are no other formal requirements for arbitral awards.

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

Under Arbitration Law, the court may set aside an arbitral award only under the following circumstances if the party making the application proves that:

- (i) a party to the arbitration agreement was under some incapacity or, the arbitration agreement was invalid under the law chosen and agreed by the parties or, if there is no indication of law by the parties, under the law of Mongolia;
- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitration procedures or was otherwise unable to present his/her 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



ADWA

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 Arbitration Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with Arbitration Law;

The court may also set aside the award if the court finds that:

- (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Mongolia; or
- (ii) the award is in conflict with the public policy of Mongolia.

The parties shall submit a request for setting aside the award within 30 days for domestic arbitration and within 90 days for international arbitration, after the receipt of the arbitral award or after deciding the request regarding the correction and interpretation of the award or additional award (Article 47.3, Arbitration Law). The court shall decide the request to set aside the award within 30 days after the receipt of such request.

14.19 What procedures exist for enforcement of foreign and domestic awards in Mongolia?

Under the Arbitration Law and Civil Procedure Code, both foreign and domestic awards are enforceable.

An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and shall be enforced in accordance with the Arbitration Law by submitting the written request to the competent court.

The procedure of recognizing and enforcing foreign arbitral awards is regulated in accordance with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Award.



The party applying for the enforcement of an award shall supply the original award or a duly certified copy thereof. If an arbitral award or agreement is written in a language other than Mongolian, the court may request the party requesting the enforcement to submit a translation of the award in Mongolian. According to Law on Execution of Court Judgments, the statute of limitation for commencing execution proceedings of the arbitral award is three years after the arbitral award became legally valid.

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

Unless otherwise agreed by the parties, the arbitral tribunal shall decide the arbitration costs, responsible parties to pay and the payment procedure. The arbitration costs include the arbitral tribunal's fees and expenses, the arbitration service fee of the arbitration institution and other costs related to witnesses and experts and other legal services or expertise analysis.

14.21 Are there any statistics available on arbitration proceedings in Mongolia?

MIAC reported handling a total of 105 cases in 2020, 87 cases in 2019 and 74 cases in 2018. The number of cases where one of the parties is a foreign business entity or individual is 7 in 2020 and 2 in 2019.

14.22 Are there any recent noteworthy developments regarding arbitration in Mongolia (new laws, new arbitration etc)?

The Arbitration Law was revised based on the UNCITRAL Model Law on International Commercial Arbitration with amendments as adopted in 2006. The purpose of the Arbitration Law is stated as "to regulate relations concerning arbitration of legal disputes in accordance with international standards". Also, a new part on court intervention in arbitration was added to the Civil Procedure Code. Moreover, amendment was made in some laws such as the Law on Telecommunication, Law on Petroleum, Law on Energy, Law on Land, Law on Common Minerals and Law on Concession



ADWA

to resolve certain disputes between the relevant parties by arbitration if such parties have an arbitration agreement.

Name of the authors:	MS. ENKHTSETSEG NERGUI MS. MARALGOO DASHDOOROV
Name of the law firm:	Anand Advocates LLP
Brief profile:	Anand Advocates LLP is recognized as one of the leading full services law firms in Mongolia. Our firm is distinguished by the depth and scope of its legal advisory services and a deep understanding of the business culture in Mongolia. As a result, Anand Advocates listed in Chambers and Partners and Legal 500 as a leading law firm. The firm's practice has strong focus on assisting both foreign and local companies in investing and doing business in Mongolia and is particularly experienced in such areas as banking and finance, mining and petroleum, corporate and M&A, real estate, litigation, dispute resolution, intellectual property, and tax, as well as infrastructure and foreign direct investment.
Tel No:	+976-11-75753322
Fax No:	+ 976-70119442
E-mail:	enkhtsetseg@anand-advocates.mn
Website:	www.anand-advocates.mn



15. MYANMAR



BY: MR. JAMES FINCH
(Retired Partner, DFDL Myanmar Limited)
MRS. THIDA AYE
(Country Partner, DFDL Myanmar Limited)

15.1 Which laws apply to arbitration in Myanmar?

On January 5, 2016 the Myanmar *Pyidaungsu Hluttaw* (Parliament) passed Law No. 5/2016 the Arbitration Law (the "Law")¹⁹¹.

15.2 Is the Myanmar arbitration law based on the UNCITRAL Model Law?

Yes, the Law is based on the UNCITRAL Model Law.

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

The Law applies to both international arbitration and domestic arbitration. International arbitration is defined in the Law as arbitration in which (1) one party's place of business and trading activity is outside Myanmar or (2) the place the parties agree to conduct the arbitration outside the country where the parties have their places of business or (3) the place a substantial part of the obligations under the agreement are to be performed or the closest place connected to the subject matter of the dispute is outside the country where the parties have their place of business or (4) the parties to the arbitration have agreed that the subject matter relates to more than one country. The Law defines "domestic arbitration" as arbitration that is not international arbitration, as defined above.

¹⁹¹ <https://www.mlis.gov.mm/mLsView.do?sessionId=8A2E6B90F83F1199F7453B49FBB58EDB?lawordSn=9668>



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15.4 Has Myanmar acceded to the New York Convention?

Myanmar acceded to the New York Convention on April 16, 2013. The primary purpose of the Law is to give effect to the New York Convention.

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?

Both parties can agree on foreign arbitration institutions either if they are domiciled in Myanmar or if one is domiciled in Myanmar and one abroad. The Law does not expressly allow or prohibit foreign arbitration institutions to administer arbitrations in Myanmar. The Law, however, provides that arbitrators may be of any nationality and an arbitrator may be an individual or association. It could therefore be concluded that parties may appoint foreign institutions as arbitrator either if they are domiciled in Myanmar or if one is domiciled in Myanmar and one abroad. It should also be noted that under section 1 of the Law, if the seat of arbitration is in Myanmar, the Law must apply to the arbitration. Meaning that foreign arbitration institutions must conduct arbitration in Myanmar in accordance with the Law, not their own arbitration procedures. Of course, the Law allows parties to agree on the arbitration procedure for their arbitration proceedings as long as the procedure is not against the Law.

15.6 Does the Myanmar arbitration law contain substantive requirements for the arbitration procedures to be followed?

The Law contains substantive requirements for arbitration procedures. As mentioned above, they are based on those laid out in the UNCITRAL Model Law.



15.7 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 an agreement that includes an arbitration clause commences legal proceedings with respect to the subject matter of such agreement, the other party has a right to get such proceedings referred to arbitration. The court must then refer the parties to arbitration and then give an order to stay the suit unless it finds that the agreement is null and void, inoperative or incapable of being performed.

15.8 What are the main arbitration institutions in Myanmar?

On 3 August 2019, the Union of Myanmar Federation of Chambers of Commerce and Industry launched the Myanmar Arbitration Centre. The Myanmar Arbitration Centre has yet to become actively functional. It is now the main arbitration institution in Myanmar.

15.9 Addresses of major arbitration institutions in Myanmar?

Myanmar Arbitration Centre

No. (29) Room (801), 8th Floor, UMFCCI Office Tower, Mine Ye Kyaw Swar Street, Lanmadaw Township, Yangon, Myanmar.

15.10 Arbitration Rules of major arbitration institutions?

The Myanmar Arbitration Centre has published its own arbitration procedures. The procedures will be effective on the date specified by the Myanmar Arbitration Centre. It has not yet done so.

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

The Model Clause is as follows:



ADWA

“Any dispute arising out of (or) in connection with this contract or the breach, termination (or) invalidity thereof shall be settled by Arbitration in accordance with the 2016 Myanmar Arbitration Law. Governing Law shall be Myanmar governing Law. The Language to be used in the arbitral proceeding shall be (Myanmar/English). The seat of Arbitration shall be Myanmar Arbitration Centre (MAC) Yangon Myanmar. The Appointing Authority Shall be Myanmar Arbitration Centre (MAC) Yangon Myanmar.”

15.12 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. If the parties agree on a larger number of arbitrators, it must be an odd number.

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

An arbitrator may be challenged if there are circumstances that raise justifiable doubts as to the arbitrator’s independence or neutrality or if the arbitrator does not possess the qualifications mutually set forth by the parties.

15.14 Are there any restrictions as to the parties’ representation in arbitration proceedings?

Subject to the provisions of the Law, any arbitral procedure for appointment of arbitrators adopted by the parties is acceptable.

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



First, the Law provides that in matters governed by the Law no court may intervene other than as provided in the Law.

The court may set aside a domestic arbitral award only if:

- (1) a party to the arbitration agreement was under some incapacity; or
- (2) the arbitration agreement is not valid under the law to which the parties have agreed or, failing any indication thereon, under the law of the Republic of the Union of Myanmar; or
- (3) 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
- (4) the award deals with a dispute not in accordance the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration.
 Proviso: 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 arbitration may be set aside; or
- (5) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or does not comply with this Law.
 Proviso: Such agreement shall not be in conflict with a provision of this Law which the parties cannot derogate.
- (6) the subject-matter of the dispute is not capable of being settled by arbitration under the existing law; or
- (7) the award is in conflict with the national interest of the Republic of the Union of Myanmar.

The court can refuse to enforce a foreign award if it is proven that:

- (1) the party to the arbitration agreement referred to was under some incapacity; or



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-
- (2) the said agreement is not valid under the law to which the parties have subjected to it or, failing any indication thereon, under the law of the country where the award was made; or
 - (3) the party against whom the award is invoked 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
 - (4) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or
 - (5) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (6) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

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

The arbitral tribunal may issue interim orders, which include decisions, orders and instructions. It should be pointed out, moreover, that the arbitral tribunal may make orders for securing the amount in dispute. Interim orders, may include those pre-judgment attachment, garnishment and injunctions, subject to the rules or procedures to be issued under the Law.

The court will have the following powers with respect to interim measures:

- (1) taking evidence;
- (2) the preservation of any evidence;



- (3) passing an order related to the property in dispute during the arbitration or any property which is related to the subject-matter of the dispute;
- (4) inspection, taking photos for evidence, preservation and seizure of the property which is related to the dispute;
- (5) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;
- (6) allow to enter the premises owned by or under the control of the parties to the dispute for the purpose of the above mentioned matters;
- (7) sale of any property which is the subject-matter of the dispute;
- (8) an interim injunction or appointment of a receiver.

The court may, moreover, refuse to enforce the arbitral award if it determines that the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Republic of the Union of Myanmar; or the enforcement of the award would be contrary to the national interest (public policy) of the Republic of the Union of Myanmar.

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

The award must be in writing and signed by a majority of the arbitrators. The award must state the reasons for the award, unless the parties have agreed otherwise. The award must state the date and place of its making and be delivered to each party.

The Law makes no mention of a time limit when the arbitral award must be rendered.

Except an award directing a partition, or one made by an order of the court where the amount or value of the property to which the award relates as set forth in such award exceeds kyat 1,000,000, an award is chargeable with a



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stamp duty in a maximum amount of Kyat 2500 plus kyat 250 for every additional kyat 100,000 or part thereof in excess of kyat 1,000,000. If the award directs the partition of property, the stamp duty must be paid at the rate of 0.5 % on the value of the property.

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

Setting aside and refusal to enforce were discussed in No. 15.15 above.

The Law provides that the following orders passed by an arbitral tribunal may be appealed to the competent Court: (i) Those on the arbitral tribunal's jurisdiction, including objections with respect to the existence or validity of the arbitration agreement as discussed above. (ii) An order granting or denying interim measures.

The following court orders may be appealed from the court with competent jurisdiction to a higher court:

- (i) An order resolving not to refer a matter to arbitration;
- (ii) An interim order granting or refusing to perform an interim measure;
- (iii) A refusal to recognize or enforce a foreign arbitral award;
- (iv) An order setting aside or refusing to set aside an award.

15.19 What procedures exist for enforcement of foreign and domestic awards in Myanmar?

A domestic award shall be enforced under the Code of Civil Procedure in the same manner as if it were a decree of the court, unless the respondent can prove that the arbitral tribunal was not competent to make the award. As for a foreign award, in order to enforce it, a foreign arbitral award or a copy thereof must be authenticated in the manner required by the law of the country where it was made. This must be submitted with the original or a duly certified copy of the agreement for arbitration to the Court. Where



the above documents are in any language other than the Myanmar language, translations into the Myanmar language, certified as correct in accordance with Myanmar law or by the ambassador or consulate in Myanmar, must also be submitted to the Court. Following the above submission, the award shall be enforced under the Myanmar Code of Civil Procedure as if it was a court decree. The court may refuse to recognize the award if the party against the award is sought to be enforced presents to the court proof that (1) the parties to the arbitration agreement referred were under some incapacity; or (2) the said agreement is not valid under the law to which the parties have subjected to it or, failing any indication thereon, under the law of the country where the award was made; (3) the party against whom the award is invoked 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 (4) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; or (5) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (6) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

The court may refuse to enforce the arbitral award if it determines that the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Republic of the Union of Myanmar; or the enforcement of the award would be contrary to the national interest (public policy) of the Republic of the Union of Myanmar.

15.20 Can a successful party in the arbitration recover its costs in Myanmar?

The Law provides that the award may allocate costs. A successful party in the arbitration could, therefore, recover its costs in Myanmar.



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15.21 Are there any statistics available on arbitration proceedings in Myanmar?

No statistics are available on arbitration proceedings in Myanmar.

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

As mentioned above, the passage of the Law in 2016 constituted a major development. The primary objective of the Law is to implement Myanmar's accession to the New York Convention.

Name of Authors:	MR. JAMES FINCH (Retired Partner, DFDL Myanmar Limited) MRS. THIDA AYE (Country Partner, DFDL Myanmar Limited)
Name of Firm:	DFDL Myanmar Limited
Brief Profile	Chambers has to say the following about the firm: "This firm is widely commended for "its practical application of the law and its understanding of the local situation." It is currently benefiting from an increasing amount of inward investment from companies in India and China. The firm handles work which traverses several practice areas, including maritime and energy, aircraft leases, corporate matters, and tax. It also has strong links with companies in the tourism and hospitality sector and is regarded as a "dependable firm which offers reasonable fees." James Finch has an impressive background of working in the fields of banking and finance, real estate, hotel development and IP, and is described as "highly responsive and the go-to lawyer for foreign investors into Myanmar."
Telephone No.:	+959 4200 40319
Fax No.:	+951 548835
Email:	jamesfinch1023@yahoo.com thida.aye@dfdl.com



16. NEPAL

BY: MR. ANUP RAJ UPRETI

16.1 Which laws apply to arbitration in Nepal?

The Arbitration Act, 1999 (2055)¹⁹² and the Arbitration Court Procedure Rules, 2002 (2059)¹⁹³ apply to arbitrations in Nepal.

16.2 Is the Nepalese arbitration law based on the UNCITRAL Model Law?

Nepalese arbitration law is generally based on UNCITRAL Model Law.

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

No. The Arbitration Act deals with both domestic and international arbitration and enforcement of foreign arbitral award in Nepal.

16.4 Has Nepal acceded to the New York Convention?

Yes. Nepal is a party to New York Convention which was ratified on March 04, 1998 and became effective from June 02, 1998. Nepal has ratified the New York Convention with the following declaration: (a) Nepal will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another contracting state, and (b) Nepal will apply the Convention only to the differences arising out of legal relationship, whether contractual or not, which are considered as commercial disputes under the law of Nepal.

¹⁹² <https://cn.nepalembassy.gov.np/wp-content/uploads/2017/11/arbitration-act-2055-1999.pdf>

¹⁹³ <http://www.lawcommission.gov.np/en/wp-content/uploads/2018/09/arbitration-court-procedure-rules-20592002.pdf>



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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?

The Arbitration Act provides autonomy to the parties to agree on arbitration rules and the arbitration institutions irrespective of the domicile status of the parties to the arbitration agreement. While the Arbitration Act itself provides autonomy to the parties in relation to selection of arbitration rules and institutions, there are certain legislations which prescribes arbitration rules that need to be followed.

For example, the Foreign Investment and Transfer of Technology Act 2019¹⁹⁴ provides that subject to the agreement between the parties, disputes between foreign investors and local entities/local investors need to be settled through arbitration held in Nepal as per the UNCITRAL Rules.

16.6 Does the Nepalese arbitration law contain substantive requirements for the arbitration procedures to be followed?

Section 18 of the Arbitration Act provides that Nepalese law shall apply in arbitration proceedings except where the arbitration agreement provides otherwise. Section 18 further provides that arbitrators shall make decisions subject to the provision of the agreement and the commercial usages with regards to the concerned transaction.

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

Yes. The Arbitration Act provides that where the agreement contains an arbitration clause, the dispute should be resolved through arbitration as per the procedures provided in the agreement and as per the provisions of the Arbitration Act if the procedures have not been specified in the agreement.

¹⁹⁴ <http://www.lawcommission.gov.np/en/wp-content/uploads/2019/09/The-Foreign-Investment-and-Technology-Transfer-Act-2019-2075.pdf>



Section 40 of the Arbitration Act provides that the courts do not have jurisdiction over the matter regulated by the Arbitration Act. The courts of Nepal have interpreted and established clear jurisprudence that the courts do not have jurisdiction to decide on disputes which are governed by arbitration. The parties that are subject to an arbitration agreement may take recourse to the courts only on limited grounds like (a) appointment of arbitrators, (b) seeking injunctive relief (usually prior to formation of the arbitration tribunal), (c) review against the award on the defined grounds and (d) enforcement of the award.

16.8 What are the main arbitration institutions in Nepal?

The “Nepal Council of Arbitration” (NEPCA) is the only arbitration institution in Nepal. NEPCA is registered as Non-Government Organization (NGO) under the Societies Registration Act, 1977 (2034).

16.9 Addresses of major arbitration institutions in Nepal?

NEPCA is situated at:
Jwagal-10, Kupondole, Lalitpur, Nepal
Tel: +977 1 5530894
Email: info@nepca.org.np
Website: <https://www.nepca.org.np/>

16.10 Arbitration Rules of major arbitration institutions?

The “Statute of the Nepal Council of Arbitration” (NEPCA), 1991 and the “Arbitral Procedures Regulations of Nepal Council of Arbitration” (NEPCA) 2015 are the arbitration rules of NEPCA which are available on the website of NEPCA.



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

The Model Clause of NEPCA is available on its website.

16.12 How many arbitrators are usually appointed?

The Arbitration Act provides that the number of arbitrators shall be as provided in the agreement and in the absence of a specific provision, the number of arbitrators shall consist of three arbitrators. In practice in relation to domestic arbitration, it is common to appoint three arbitrators. The Arbitration Act also requires that the arbitrators shall consist of odd numbers and further provides that if the arbitration agreement provides for appointment of arbitrators in even numbers, one additional arbitrator nominated by such arbitrators shall have to be appointed to make the number of arbitrator's an odd number.

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

Yes. Section 11 of the Arbitration Act provides as a general rule that the provision related to the removal of arbitrators shall be as provided in the agreement and if no provision is provided, the statutory provision as outlined in Section 11 will apply. An application should be submitted to the arbitrator requesting to remove the arbitrator within 15 days from the date of his/her appointment or from the date when the party learns that the concerned arbitrator has failed to act as required. The application may be submitted if any of the following activities carried out by any of the arbitrators.

- a) bias towards or discriminates against any party,
- b) improper conduct or fraud in the course of arbitration,
- c) frequent mistakes or irregularities during the proceedings,



- d) absence in the meetings or refusal to take part in the meeting for more than three times without furnishing satisfactory reasons with the intent of delaying the arbitral proceeding,
- e) any actions taken opposing the principles or rules of natural justice,
- f) lack of required qualifications or cease to be qualified.

In case the arbitrator whose removal has been requested does not relinquish his/her post voluntarily, or the grounds of removal are not agreed upon by the other party, then the arbitrator has to take a decision on the matter within 30 days from the date of application. The decision can be challenged before the High Court the decision of which is final.

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

The Arbitration Act does not impose any restrictions as to the parties' representation in arbitration proceedings.

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

The courts can intervene in arbitration proceedings only in the following circumstances:

- a) For the appointment and removal of the arbitrator.
- b) Granting of interim relief (this usually until the period of formation of the arbitration tribunal).
- c) Review of the award.
- d) Enforcement of the award.



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

As provided under Section 21 of the Arbitration Act, an arbitration panel can issue preliminary orders, or interim or interlocutory orders in respect to any matter connected with the dispute on the request of any party, or take a conditional decision.

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

Sections 24 to Section 29 in Chapter 5 of the Arbitration Act deal with the arbitral award.

The arbitral award should contain the following matters:

- a) Award must be in written form and must be signed by the member of the arbitration tribunal;
- b) Short descriptions of the issues referred for settlement and of the terms of reference approved;
- c) Grounds to accept jurisdiction if any party raises questions on the jurisdiction of the arbitration;
- d) Summary of the expert's report if such expert has been appointed;
- e) Decision of the arbitrator, and reasons and grounds taken for such decision; if a partial award has already been made, details thereof;
- f) The amount or goods to be recovered or compensated;
- g) If there is interest chargeable on amount, details thereof;
- h) Place of the Arbitration Office and date of the award and
- i) Any other necessary matters.



The Arbitration Act also defines the timeline applicable to the arbitration proceedings. For example, the Arbitration Act requires the tribunal to give a final award generally within four months (120 days) from the date of submission of claim, counter claim and the documents.

There are other formal requirements for arbitral awards such as the arbitrator must read out the award to the parties, provide a copy of it to each party and record the evidence of the receipt in the original file. After the final award, the original file should be submitted to the District Court having its jurisdiction.

The decision of the majority shall be deemed to be the decision of the arbitration. In case the arbitrators have dissenting opinions because of which the majority (opinion) cannot be ascertained, the opinion of the chief arbitrator shall be deemed to be the decision of the arbitration, except when otherwise provided for in the agreement.

In case any arbitrator does not agree with the decision of the arbitration, he/she may express his/her dissenting opinion.

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

The Arbitration Act provides few grounds which permits the dissatisfied party to challenge the arbitral award before the High Court.

The High Court may either set-aside the award or pass an order for re-arbitration on the following grounds as provided under Section 30 of the Arbitration Act:

- a) If the agreement is illegal due to lack of capacity of the party or illegal under the law;
- b) Lack of notice to the other party of the arbitration proceeding,
- c) Lack of jurisdiction,
- d) If formation of the tribunal is against the agreement or the Arbitration Act.



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Under the following grounds as provided by Section 30(3) of the Arbitration Act, the High Court will set the arbitral award aside:

- a) If the dispute is not subject to arbitration under the law;
- b) If the award is against public interest or policies.

The petition to challenge the award may be filed before the High Court within thirty-five (35) days from the date of the receipt of the award or the notice received thereof.

16.19 What procedures exist for enforcement of foreign and domestic awards in Nepal?

a) In the case of a domestic award:

Section 31 of the Arbitration Act and Rule 12(1) of the Arbitration Rule requires the parties to implement the award within 45 days from the date of receiving the copy of the award.

Section 32 of the Arbitration Act provides that if the award is not implemented within the period as stipulated above, any party may file an application to the court after 30 days from the date of expiry of such time limit prescribed for that purpose to implement the award.

As per Section 32 of the Arbitration Act and Rule 12(2) of the Arbitration Rule, the application for enforcement is to be submitted to the Enforcement Section of the respective District Court. After the application, the District Court implements the award as if it was its own judgment.

Section 41 of the Arbitration Act has fixed the enforcement fee as 0.5 percent of the amount recovered through the enforcement. If the amount cannot be determined at market value than the fee of Rs.500 (approximately 4.5 USD) is payable.

b) In the case of a foreign award:

Section 34 of the Arbitration Act deals with the implementation of foreign awards in Nepal.



A party willing to enforce the foreign award in Nepal has to submit an application to the High Court along with the original or certified copy of the arbitration award, the original or certified copy of the arbitration agreement and an official translation of the award in Nepali in case it is drafted in any other language.

In case Nepal is a party to a treaty which provides for the recognition of a foreign award taken within the area of a foreign country which is also a party to that treaty, then the award shall be recognized under the following conditions:

- (i) If the arbitrators are appointed and the award is made according to the agreement,
- (ii) If the parties were duly notified about the arbitration proceedings,
- (iii) If the award was taken under the conditions of the agreement,
- (iv) If the award was within the subject matter referred to by the arbitrators,
- (v) If the laws of the foreign country do not contain provisions under which the arbitration awards taken in Nepal cannot be enforced,
- (vi) In case the application for implementation has been filed within 90 days from the date of the award,
- (vii) If the High Court is satisfied with the conditions above, then it shall forward the award to the District Court for its enforcement.

However, a foreign award shall not be enforced if: (a) the dispute cannot be settled through arbitration under the laws of Nepal or (b) the enforcement of the award would be detrimental to the public policy.

16.20 Can a successful party in the arbitration recover its costs in Nepal?

Section 35 of the Arbitration Act provides that the costs of arbitration shall be borne by the parties as provided in the arbitration agreement. If the arbitration agreement does not provide specific provisions on the costs of arbitration, the costs of the arbitration shall be borne by the parties in the proportion decided by the arbitration tribunal. In the case of enforcement



ADWA

of an award from the court, Section 41 of the Arbitration Act provides that the party on whose favor the award is made can recover the enforcement costs from other parties. However, in practice the recovery is rare.

16.21 Are there any statistics available on arbitration proceedings in Nepal?

No.

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

No.

Name of Author:	MR. ANUP RAJ UPRETI
Name of Law Firm:	Pioneer Law Associates
Brief Profile:	Pioneer Law Associates is one of the leading commercial law firms in Nepal. Pioneer Law covers a wide array of practice areas ranging from Foreign Investment, Company Law, Dispute Resolution to Project Finance. Our services extend to a large spectrum of sectors ranging from industrial projects to the financial sector. Legal reform projects have always been a subject matter of keen interest of Pioneer Law. We also strongly believe in knowledge sharing and disseminating our knowledge to the legal fraternity and stakeholders, through academic presentations and publications.
Telephone Nos.:	+977-1-5706295/ +977-9801065418
Email:	anup@pioneerlaw.com
Website:	www.pioneerlaw.com



17. PAKISTAN

BY: JUSTICE S. AHMED SARWANA

17.1 Which laws apply to arbitration in Pakistan?

Pakistan currently has the following arbitration regimes:

- 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 national 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”).

17.2 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.



ADWA

17.3 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.

17.4 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.

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?

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.

17.6 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 appointment of arbitrators, umpire, recording of evidence on oath, production of documents and costs of arbitration.



17.7 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 parties if a stay is granted.

Under the REA arbitration agreements can be enforced by making an application to the Court for the 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.

17.8 What are the main arbitration institutions in Pakistan?

Centre for International Investment and Commercial Arbitration is the only arbitration institution in Pakistan that provides institutional arbitration, mediation and other dispute avoidance and resolution services.

17.9 Addresses of major arbitration institutions in Pakistan?

Centre for International Investment and Commercial Arbitration

3rd Floor

7-A Turner Road, Lahore

Pakistan

Tel: +92 42 3711 2468

Fax: +92 42 3711 2467

Website: www.ciica.org



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17.10 Arbitration Rules of major arbitration institutions?

The Institution's arbitration rules are available on its website.

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

The model clauses of the arbitration institute are available on its website.

17.12 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.

17.13 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.



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

The parties may be represented by 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.

17.15 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).

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



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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.

17.17 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 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.

17.18 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



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- (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.

17.19 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.

17.20 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 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.

17.21 Are there any statistics available on arbitration proceedings in Pakistan?

No statistics are currently available on arbitration proceedings in Pakistan.

17.22 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 under 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



ADWA

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.

In the case of *Abdullah v. CNAN Group SPA*, PLD 2014 Sindh 349, the High Court of Sindh in relation to international commercial arbitration, after considering several English and US cases, has held that an award debtor cannot bring a suit for declaration and injunctive relief against recognition and/or enforcement of a New York Convention award in so far as the ground taken falls under paragraph 1 of Article V of the Convention.

Name of Author:	JUSTICE S. AHMED SARWANA Former Judge, High Court of Sindh, (Court of Appeal) Pakistan
Name of Law Firm:	Abraham & Sarwana
Brief Profile:	As Pakistan's finest in conflict resolution in and out-of-court, ABRAHAM & SARWANA is a dedicated, experienced, quick and cost-efficient full-service law firm. With over 50 years of experience in international practice and partnerships with leading law firms around the globe, the Firm offers peerless legal expertise to anyone wishing to do business in Pakistan.
Telephone Nos.:	+92 3586 7360, +92 3568 7370
Fax No.:	+92 3568 7364
Email:	info@abrahamslaw.net
Website:	www.abrahamslaw.net



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18. PHILIPPINES

BY: MS. RENA RICO-PAMFILO

18.1 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.

Domestic arbitration is governed by Republic Act 876¹⁹⁵. 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 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 covers mediation and international arbitration proceedings.

International arbitration is governed by the Republic Act 9285¹⁹⁶ or the “Alternative Dispute Resolution Act of 2004,” enacted on 13 April 2004¹⁹⁷. The Philippines adopted with this law the UNCITRAL Model Law on International Commercial Arbitration.¹⁹⁸ 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 are applicable to domestic arbitration. These provisions include the enforcement of the arbitration agreement (Article 8), number and

¹⁹⁵ https://lawphil.net/statutes/repacts/ra1953/ra_876_1953.html

¹⁹⁶ https://www.lawphil.net/statutes/repacts/ra2004/ra_9285_2004.html

¹⁹⁷ https://www.lawphil.net/statutes/repacts/ra2004/ra_9285_2004.html

¹⁹⁸ Section 19, R.A. 9285. The Philippines adopted the 1985 version of the UNCITRAL Model Law and has not adopted the 2006 amendments to the UNCITRAL Model Law.



ADWA

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 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 mediation¹⁹⁹ 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.²⁰⁰ 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.

¹⁹⁹ Administrative issuances of the Supreme Court govern court annexed mediation.

²⁰⁰ Section 4, Executive Order 1008 dated 4 February 1985.



18.2 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.²⁰¹

18.3 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.

18.4 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 1967.²⁰² The Philippines 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.²⁰³

²⁰¹ Section 19, Republic Act 9285.

²⁰² 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.

²⁰³ Section 43, Republic Act 9285.



ADWA

Rule 13 of the Special Rules of Court on Alternative Dispute Resolution (the “Special ADR Rules”) promulgated by the Supreme Court in 2009²⁰⁴ provides specific procedures for the recognition and enforcement of foreign arbitral awards under the Convention. A petition shall be filed, at the option of the petitioner, with the Regional Trial Court (a) where the assets to be attached or levied upon is located, (b) where the act to be enjoined is being performed, (c) in the principal place of business in the Philippines of any of the parties, (d) if any of the parties is an individual, where any of those individuals resides, or (e) in the National Capital Judicial Region.²⁰⁵ Rule 13 reproduces Article V of the Convention as grounds to refuse enforcement of the award and further proscribe any ground for opposing the recognition and enforcement of a foreign arbitral award other than those enumerated.²⁰⁶ Rule 13 expressly provides for the presumption that the award is enforceable and mandates the court to recognize the award unless a ground to refuse recognition or enforcement of the foreign arbitral award under this rule is “fully established”.²⁰⁷ The decision of the court enforcing an award is immediately executory.²⁰⁸

18.5 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?

Both Republic Act 876 (for domestic arbitration) and Republic Act 9285 (for international arbitration) do not prohibit parties from designating a foreign arbitration institution to administer the arbitration proceedings. Thus, where either or both parties are domiciled in the Philippines, the parties may designate a foreign arbitration institution to administer the arbitration proceedings.

The rule is different however, with respect to construction disputes or disputes arising from, or connected with contracts entered into by parties

²⁰⁴ A.M. No. 07-11-08-SC , September 1, 2009.

²⁰⁵ Rule 13.3, Special ADR Rules.

²⁰⁶ Rule 13.4, Special ADR Rules.

²⁰⁷ Rule 13.11, Special ADR Rules.

²⁰⁸ Rule 13.11, Special ADR Rules.



ADWA

involved in construction in the Philippines.²⁰⁹ Where parties in a construction contract in the Philippines have agreed to submit their disputes to arbitration, the arbitration shall be conducted under the auspices of the Construction Industry Arbitration Commission (CIAC), without reference to any foreign arbitration institution that may be specified in the arbitration agreement.²¹⁰ Thus, where parties, whether one or both is domiciled in the Philippines, agree in a contract involving a construction project in the Philippines to submit their dispute to arbitration, the CIAC shall have jurisdiction over the dispute regardless of any reference to a foreign arbitration institution in the contract.²¹¹

18.6 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.²¹² 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

²⁰⁹ Section 4, Executive Order 1008 or the Construction Industry Arbitration Law.

²¹⁰ This is a result of the new Rules of Procedure Governing Construction Arbitration issued by the Construction Industry Arbitration Commission and as interpreted by the Philippine Supreme Court in *China Chang Jiang Energy Corporation (Philippines) v. Rosal Infrastructure Builders et al.* (GR No. 125706, September 30, 1996); *National Irrigation Administration v. Court of Appeals* (318 SCRA 255, November 17, 1999) and *LM Power Engineering Corporation vs. Capitol Industrial Construction Groups, Inc.* (G.R. No. 141833, March 26, 2003).

²¹¹ The writers believe that in light of Republic Act 9285, there is good reason to revisit the rule.

²¹² Section 4, Republic Act 876 as amended.



ADWA

registered mail.²¹³ 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.²¹⁴ In domestic arbitration proceedings, arbitrators are required to be sworn, by any officer 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.²¹⁵

18.7 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.²¹⁶ 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.

²¹³ Section 5(a), Republic Act 876 as amended.

²¹⁴ Section 5(c), Republic Act 876 as amended.

²¹⁵ Section 13, Republic Act 876 as amended.

²¹⁶ 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.



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18.8 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 appointment of arbitrators when designated by the parties as an appointing authority.

The Philippine International Center for Conflict Resolution (PICCR) was formally launched in 2019 and was established by the Integrated Bar of the Philippines (IBP)²¹⁷.

18.9 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 8822-4102 (telefax)

Mobile No.: + 63 908-146-1426

Email : secretariat@pdrci.org

Website : www.pdrci.org

²¹⁷ The Integrated Bar of the Philippines is the official organization of all Philippine lawyers whose names appear in the Roll of Attorneys of the Supreme Court of the Philippines.



ADWA

The address of **PICCR** is as follows :
 Integrated Bar of the Philippines
 IBP Building
 No.15 Doña Julia Vargas Avenue
 Ortigas Center, Pasig City
 Philippines 1600
 Phone : +63 (2) 86313016 (loc 203)
 Email : secretariat@piccr.com.ph
piccr.secretariat@piccr.com.ph
 Website : <https://piccr.com.ph/index.php>

18.10 Arbitration Rules of major arbitration institutions?

The arbitration rules of the PDRCI and PICCR are available on their respective websites²¹⁸.

18.11 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 finally resolved by arbitration in accordance with the rules of the Philippine Dispute Resolution Center (PDRC).”

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)***

218 PDRCI: <https://www.pdrci.org/our-rules/arbitration-rules-pdrci-arbitration-rules-2/>; for
 PICCR: <https://piccr.com.ph/rules.php>



ADWA

(d) *The language(s) to be used in the arbitral proceedings shall be...(language)*

The model clause of PICCR as published on their website is:

“Any dispute, controversy, difference or claim arising out of or in relation to this agreement, including any question as to the interpretation, implementation, existence, validity, breach or termination thereof or as to any non-contractual obligation arising out of or relating thereto, shall be referred to and finally resolved by arbitration administered by the Philippine International Center for Conflict Resolution (“PICCR”) in accordance with the PICCR Arbitration Rules in force at the time of the commencement of the arbitration (“PICCR Arbitration Rules”), which rules are deemed incorporated by reference in this clause.

The arbitration shall be conducted by one or more arbitrators to be appointed in accordance with the PICCR Arbitration Rules.

The seat of the arbitration shall be [the Philippines].

The language of the arbitration shall be [English].

This arbitration agreement shall be governed by the laws of [the Philippines].”

18.12 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.²¹⁹ If 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

²¹⁹ 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.



ADWA

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.²²⁰ 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.²²¹

18.13 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.

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

Republic Act 9285 provides that for 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.²²² Thus, local counsel will need to be engaged for proceedings before Philippine courts even if related to international

²²⁰ Section 26, Republic Act 9285 and is applicable to domestic proceedings by virtue of Section 33 of Republic Act 9285.

²²¹ Section 27, Republic Act 9285 and is applicable to domestic proceedings by virtue of Section 33 of Republic Act 9285.

²²² Section 22, Republic Act 9285.



arbitration proceedings. Republic Act 9285 makes this provision applicable to domestic arbitration proceedings.

18.15 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:

18.15.1 Protective orders to preserve confidentiality²²³

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.

18.15.2 Failure or refusal to act by the Appointing Authority²²⁴

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.

18.15.3 Ruling on a Jurisdictional Issue as a Preliminary Question²²⁵

²²³ Section 24, Republic Act 9285.

²²⁴ Section 27, Republic Act 9285.

²²⁵ Article 16(3), UNCITRAL Model Law in relation to Article 6, UNCITRAL Model Law and Section 3(k), Republic Act 9285.



ADWA

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.

18.15.4 Issuance and Enforcement of Interim Measures of Protection²²⁶

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.

²²⁶

Sections 28 and 29, Republic Act 9285.



18.15.5 Assistance in Taking Evidence²²⁷

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.

18.15.6 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.²²⁸ The recognition and enforcement of an award in an international commercial arbitration shall be governed by Article 35 of the UNCITRAL Model Law.²²⁹

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.²³⁰

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

²²⁷ Article 27, UNCITRAL Model Law

²²⁸ Article 34, UNCITRAL Model Law in relation to Section 3(k), Republic Act 9285.

²²⁹ Section 40, Republic Act 9285.

²³⁰ Section 42, Republic Act 9285.



ADWA

to the dispute resides or has his place of business; or (iv) in the National Judicial Capital Region, at the option of the applicant.²³¹

The above matters are specifically implemented by the Special ADR Rules.

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

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.²³²

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.²³³

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.²³⁴

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

²³¹ Section 47, Republic Act 9285.

²³² Section 28, Republic Act 9285.

²³³ Section 28, Republic Act 9285.

²³⁴ Section 28, Republic Act 9285.



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.²³⁵

18.17 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

²³⁵

Section 29, Republic Act 9285.



ADWA

in lieu of hearing closed. This period may be extended by mutual consent of the parties.²³⁶

- **Other formal requirements for arbitral awards**

There are no other formal requirements to be followed.

18.18 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

²³⁶ Section 19, Republic Act 876.



ADWA

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:²³⁷

- (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

²³⁷

Section 24, Republic Act 876.



ADWA

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.

18.19 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.²³⁸ 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 the 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

²³⁸ Section 42, Republic Act 9285.



Supreme Court. The Court may, on grounds of comity and reciprocity, recognize and enforce a non-convention award as a convention award.²³⁹

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.²⁴⁰ Further, a foreign arbitral award, when confirmed by the Regional Trial Court, shall be enforced in the same manner as final and executory decisions of courts of law of the Philippines.²⁴¹

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.²⁴²

The recognition and enforcement of an award in an international commercial arbitration shall be governed by Article 35 of the UNCITRAL Model Law.²⁴³

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.²⁴⁴ 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.²⁴⁵

The above provisions of law are specifically implemented by the Special ADR Rules.

²³⁹ Section 43, Republic Act 9285.

²⁴⁰ Section 44, Republic Act 9285.

²⁴¹ Section 44, Republic Act 9285.

²⁴² Section 45, Republic Act 9285.

²⁴³ Section 40, Republic Act 9285.

²⁴⁴ Section 23, Republic Act 876 in relation to Section 40, Republic Act 9285.

²⁴⁵ Section 40, Republic Act 9285.



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18.20 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 Court dealing with this issue.²⁴⁶ 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.

18.21 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 2019 to 2020, a total of 21 arbitration cases (domestic and international) were submitted under the auspices of the PDRCI. Out of the 21 cases, only four cases were for use of facilities of PDRCI (room hire, transcription, secretarial services) and the remaining 17 cases were administered arbitration proceedings under PDRCI Rules. The majority of the cases are domestic arbitration proceedings. Only five out of the 21 cases are international arbitration proceedings. These cases involved parties from Singapore, Micronesia, Russia and the United Kingdom. . The total sum in dispute for 2019 was approximately USD 14.5 million, and in 2020 it was approximately USD 60 million.

Since 2010, PDRCI has handled on average, about seven arbitration cases per year, a majority of which constitute domestic arbitration proceedings administered under the PDRCI arbitration rules.

²⁴⁶ 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.



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The PICCR officially launched its services for administered and ad hoc arbitration proceedings in 2019. As of January 2021, the PICCR has received four requests for arbitration involving private entities and government agencies. All of the cases are administered under the PICCR Rules and are domestic arbitrations. The total amount of claims involved in these disputes amount to approximately USD 950,000.00.

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

From 2019 to 2020, there are no significant developments in legislation or in jurisprudence regarding international arbitration in the Philippines.



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Name of Author:	MS. RENA M. RICO-PAMFILO
Name of Institution:	Ateneo de Manila University School of Law
Brief Profile:	<p>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 a leading 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 an investment firm based in the Philippines and a Professor of Law at the Ateneo de Manila University School of Law teaching International Commercial Arbitration. She is also an accredited lecturer of the Philippine Judicial Academy on Arbitration. She has lectured 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.</p>
Telephone No.:	+ 63 2 818 5888
Email:	renarico@gmail.com



19. SINGAPORE

**BY: PROF. LAWRENCE BOO
MR. EUGENE THONG**

19.1 Which laws apply to arbitration in Singapore?

There are three primary arbitration statutes in Singapore:

- i. The International Arbitration Act (Cap. 143A) (“**IAA**”), which is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration (“**Model Law**”) and also gives effect to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“**New York Convention**”);
- ii. The Arbitration Act (Cap. 10) (“**AA**”); and
- iii. The Arbitration (International Investment Disputes) Act (Cap. 11) (“**AIIDA**”), which implements the Convention on the Settlement of Investment Disputes between States and Nationals of other States (“**ICSID Convention**”).²⁴⁷

When the seat of arbitration is Singapore, either the IAA or AA will apply to arbitral proceedings. The main distinction between the IAA and the AA lies in the degree of possible court intervention in the arbitral process, with the former providing for a narrower scope of court intervention that is restricted to instances expressly provided by law.

Subject to the parties’ express agreement, the IAA applies to international arbitrations, where an arbitration is considered international if:²⁴⁸

²⁴⁷ The texts of the IAA, AA and AIIDA are available online at <https://sso.agc.gov.sg/>
²⁴⁸ S. 5(2) of the IAA.



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-
- (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;
 - (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 arbitrations where Part II of the IAA does not apply.²⁴⁹

Parties are free to opt out of the regime (i.e., the IAA or AA, as the case may be) that would otherwise apply, by expressly agreeing whether they wish for the Model Law or Part II of the IAA to apply.²⁵⁰ In respect of the IAA, an alternative way to opt out is to agree expressly that the AA shall apply.²⁵¹

In contrast with the legal regimes under the IAA and AA, the regime under the ICSID Convention, which deals with investment disputes between contracting States and nationals of other contracting States, provides for proceedings which are delocalised from domestic procedures, i.e., national courts do not intervene in the arbitral process. Accordingly, the AIIDA pertains only to recognition and enforcement of arbitral awards made under the ICSID Convention. To date, no attempt has been made to enforce an ICSID award in Singapore.

²⁴⁹ S. 3 of the AA.

²⁵⁰ S. 15(1)(a) of the IAA and s. 3 of the AA.

²⁵¹ S. 15(1)(b) of the IAA.



19.2 Is the Singapore arbitration law based on the UNCITRAL Model Law?

Yes, the IAA is based on the 1985 UNCITRAL Model Law. Specifically, section 3(1) of the IAA gives the Model Law, with the exception of Chapter VIII thereof (which deals with recognition and enforcement of awards), the force of law in Singapore.

The IAA was amended in 2012 to incorporate Option I of Article 7 of the 2006 Amendments to the 1985 UNCITRAL Model Law (“**2006 Amendments**”) on the definition and form of arbitration agreements, such that the definition of an arbitration agreement was broadened to encompass agreements concluded orally, by conduct or by other means, so long as their content is recorded in any form.²⁵²

The 2006 Amendments concerning interim measures and preliminary orders have not been adopted in Singapore as the IAA has existing provisions that empower arbitral tribunals to grant interim measures not subject to court intervention.

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

Yes. Generally, the IAA applies to international arbitrations while the AA applies to domestic arbitrations, though this is subject to the parties’ express agreement otherwise. Please refer to paragraph 19.1 above for more details.

19.4 Has Singapore acceded to the New York Convention?

Yes. The New York Convention is given effect under Part III of the IAA.

²⁵²

S. 2A of the IAA.



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19.5 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 in either case.

19.6 Does the IAA contain substantive requirements for the arbitration procedures to be followed?

The IAA grants parties and arbitral tribunals broad discretion in terms of procedures to be followed. Notwithstanding this, it lays out the following requirements to be followed:

- The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.²⁵³
- The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.²⁵⁴
- All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party.²⁵⁵
- Any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.²⁵⁶

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

Generally speaking, a valid arbitration clause bars access to state courts for arbitrations governed by the IAA if certain conditions are fulfilled, but not for those that are governed by the AA.

253 Art. 18 of the Model Law.

254 Art. 24(2) of the Model Law.

255 Art. 24(3) of the Model Law.

256 Art. 24(3) of the Model Law.



Under both the IAA and AA, when a party to a valid arbitration clause commences court proceedings against any other party in respect of the subject matter of such clause, a court application may be made to stay such proceedings. The applicant must however make the application after appearance and before delivering any pleading or taking any other step in the proceedings.

Assuming the above conditions are fulfilled, the IAA provides that the court must grant a stay, whereas the AA leaves the court with discretion whether or not to grant a stay.²⁵⁷

19.8 What are the main arbitration institutions in Singapore?

The main arbitration institutions with a presence in Singapore are as follows:

- (a) The **Singapore International Arbitration Centre** (“SIAC”), headquartered in Singapore;
- (b) The **Singapore Chamber of Maritime Arbitration** (“SCMA”), headquartered in Singapore;
- (c) The **International Chamber of Commerce** (“ICC”), including a case management team operating under the name Secretariat of the International Court of Arbitration Singapore (“**SICAS, Inc.**”);
- (d) The **International Centre for Dispute Resolution** (“ICDR”), the international division of the American Arbitration Association;
- (e) The **Permanent Court of Arbitration** (“PCA”), including a case management team; and
- (f) The **World Intellectual Property Organization** (“WIPO”) **Arbitration and Mediation Center**.

²⁵⁷

S. 6 of the IAA and s. 6 of the AA.



In addition, the Law Society of Singapore set up in 2007 the Law Society Arbitration Scheme (“**LSAS**”), under which awards are generally expected to be made within 120 days from the commencement of arbitration. Although its streamlined procedure is designed for less complex claims, the LSAS can be applied to a wide range of civil disputes, including those relating to employment, tenancy, renovation works, media, entertainment and travel. The Law Society of Singapore only assists in LSAS arbitrations by constituting the tribunal if parties cannot agree, and also offering facilities for the conduct of the arbitration, subject to availability.

19.9 Addresses of major arbitration institutions in Singapore?

The institutions are all housed in Maxwell Chambers, a purpose-built facility, and their addresses and contact details are as follows:

(a) **Singapore International Arbitration Centre**

28 Maxwell Road #03-01

Maxwell Chambers Suites

Singapore 069120

Tel: +65 6713 9777

Fax: +65 6713 9778

Website: <https://www.siac.org.sg/>

(b) **Singapore Chamber of Maritime Arbitration**

28 Maxwell Road #03-09

Maxwell Chambers Suites

Singapore 069120

Tel: +65 6324 0552

Fax: +65 6324 1565

Website: <https://www.scma.org.sg/>

(c) **SICAS, Inc.**

28 Maxwell Road #02-01

Maxwell Chambers Suites

Singapore 069120

Tel: +65 6971 1000

Website: <https://iccwbo.org/contact-us/contact-sicas/>



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- (d) **ICDR Singapore Office**
28 Maxwell Road #02-25
Maxwell Chambers Suites
Singapore 069120
Tel: +65 6227 2879
Email: LeeM@adr.org

- (e) **PCA Singapore Office**
28 Maxwell Road #02-07
Maxwell Chambers Suites
Singapore 069120
Tel: +65 6509 8424 / +65 6509 8425
Fax: +65 6634 0981
Website: <https://pca-cpa.org/en/about/singapore-office/>

- (f) **WIPO Arbitration and Mediation Center Singapore Office**
28 Maxwell Road #02-14
Maxwell Chambers Suites
Singapore 069120
Tel: +65 6225 2129
Fax: +65 6225 3568
Website: <https://www.wipo.int/amc/en/center/singapore/>

19.10 Arbitration Rules of major arbitration institutions?

The latest editions of relevant arbitration rules are as follows:

- (a) **SIAC Rules** (6th Edition, 1 August 2016):
<https://www.siac.org.sg/our-rules/rules/siac-rules-2016>

- (b) **SCMA Rules** (3rd Edition, October 2015):
https://www.scma.org.sg/SiteFolders/scma/387/rules/rules_201510_eng.pdf

- (c) **ICC Arbitration Rules** (entered into force on 1 January 2021):
<https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>



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- (d) **ICDR International Arbitration Rules and International Expedited Procedures** (effective from 1 June 2014):
https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-intl
- (e) **PCA Arbitration Rules 2012**, which are a consolidation of four prior sets of PCA procedural rules:
<https://pca-cpa.org/en/services/arbitration-services/pca-arbitration-rules-2012/>
- (f) **WIPO Arbitration Rules** (effective from 1 January 2020):
<https://www.wipo.int/amc/en/arbitration/rules/>

For the LSAS, the relevant arbitration rules are the **LawSoc Arbitration Rules** (effective from 1 December 2017).

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

- (a) The **SIAC**'s standard model clause is as follows:

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 administered by the Singapore International Arbitration Centre ("SIAC") 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 seat of the arbitration shall be [Singapore].*²⁵⁸

*The Tribunal shall consist of _____*²⁵⁹ *arbitrator(s).*

The language of the arbitration shall be _____.

²⁵⁸ Parties should specify the seat of arbitration of their choice. If the parties wish to select an alternative seat to Singapore, please replace "[Singapore]" with the city and country of choice (e.g., "[City, Country]").

²⁵⁹ State an odd number. Either state one, or state three.



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SIAC also has an expedited procedure model clause, which is as follows:

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 administered by the Singapore International Arbitration Centre ("SIAC") 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 parties agree that any arbitration commenced pursuant to this clause shall be conducted in accordance with the Expedited Procedure set out in Rule 5.2 of the SIAC Rules.

The seat of the arbitration shall be [Singapore].²⁶⁰

The Tribunal shall consist of one arbitrator.

The language of the arbitration shall be _____.

Finally, SIAC has a model clause for its Arb-Med-Arb process, which is a tiered dispute resolution mechanism administered by SIAC and the Singapore International Mediation Centre ("**SIMC**"):

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 administered by the Singapore International Arbitration Centre ("SIAC") 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 seat of the arbitration shall be [Singapore].²⁶¹

The Tribunal shall consist of _____²⁶² arbitrator(s).

²⁶⁰ Parties should specify the seat of arbitration of their choice. If the parties wish to select an alternative seat to Singapore, please replace "[Singapore]" with the city and country of choice (e.g., "[City, Country]").

²⁶¹ Parties should specify the seat of arbitration of their choice. If the parties wish to select an alternative seat to Singapore, please replace "[Singapore]" with the city and country of choice (e.g., "[City, Country]").

²⁶² State an odd number. Either state one, or state three.



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The language of the arbitration shall be _____.

The parties further agree that following the commencement of arbitration, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre (“SIMC”), in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force. Any settlement reached in the course of the mediation shall be referred to the arbitral tribunal appointed by SIAC and may be made a consent award on agreed terms.

- (b) The **SCMA**’s standard model clause is as follows:

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 for use with the contracts and forms of the Baltic and International Maritime Council (known as BIMCO), the Singapore Bunker Claims Procedure (for bunker-related disputes), as well as its Arb-Med-Arb process. These are available on its website.

- (c) The **ICC** recommends that parties wishing to make reference to ICC arbitration in their contracts use the following model clause:

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

The ICC also recommends that parties stipulate in the arbitration clause:

- The law governing the contract;
- The number of arbitrators;
- The place of arbitration; and/or
- The language of the arbitration.

- (d) The **ICDR**’s standard model clause is as follows:



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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 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 ____.

The ICDR also has a model concurrent arbitration-mediation clause as well as a model mediation-arbitration step clause, both of which are available on its website.

- (e) The **PCA**'s standard model clause 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 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 variety of other slightly different model clauses, depending on the specificities of the matter. All of these are available on its website.

- (f) The **WIPO**'s standard model clause is as follows:

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].



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The WIPO also has model clauses for expedited arbitration, as well as arbitration in combination with mediation or expert determination, all of which are available on its website.

- (g) For the **LSAS**, the model clause is as follows:

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 applicable at the commencement of the arbitration.

19.12 How many arbitrators are usually appointed?

Parties are free to agree on the number of arbitrators they wish to appoint.

The number of arbitrators may also be determined according to the procedural rules agreed to by the parties (e.g., the SIAC Rules 2016). Where no agreement is reached between the parties or no procedural rules are applicable, the default under both the IAA and the AA is a single arbitrator.²⁶³

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

Yes. Aside from what is provided for under any procedural rules the parties have agreed to, an arbitrator may be challenged under the IAA and AA only if (1) circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or (2) if he does not possess qualifications agreed to by the parties. In addition, 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.²⁶⁴

The standard of bias or partiality applied by the Singapore courts is whether there is actual bias, imputed bias or apparent bias.

²⁶³ S. 9 of the IAA and s. 12 of the AA.

²⁶⁴ Art. 12(2) of the Model Law and s. 14(3) of the AA.



Actual bias will disqualify a person from sitting in judgment.

Imputed bias arises where an arbitrator may be said to be acting in his own cause: for instance, if he has a pecuniary or proprietary interest in the case. In such a case, disqualification is certain without the need to investigate whether there is likelihood or even suspicion of bias.

As regards apparent bias, the test to be applied is the reasonable suspicion test, for which a two-stage inquiry is undertaken: first, the party applying to challenge an arbitrator must establish the factual circumstances that would have a bearing on the suggestion that the arbitrator was or might be seen to be partial. The second inquiry is then to ask whether a hypothetical fair-minded and informed observer would view those circumstances as bearing on the arbitrator's impartiality in the resolution of the dispute before him.²⁶⁵ Such an observer is presumed to be a lay-person who is (1) informed of the relevant facts and able to consider them in their proper context, (2) not wholly uninformed and uninstructed about the law in general or the issues to be determined in the proceedings, (3) aware of the traditions of integrity and impartiality that persons who exercise adjudicative functions generally have to uphold, and (4) fair-minded in the sense of being neither complacent nor unduly sensitive or suspicious.²⁶⁶

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

There are no restrictions as to parties' representatives, who need not be lawyers nor Singaporean.

If court proceedings are necessary, however, a Singapore advocate and solicitor will have to be engaged as counsel, unless the matter is being heard before the Singapore International Commercial Court, in which case there is a carve-out permitting foreign lawyers to appear as counsel in court.

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

²⁶⁵ *PT Central Investindo v Franciscus Wongso* [2014] 4 SLR 978.

²⁶⁶ *BYL v BYN* [2020] 4 SLR 1.



The court may intervene in arbitration proceedings in Singapore only in the following instances:

- (a) When a party applies to stay court proceedings commenced in breach of a valid arbitration agreement, the court has the power to order a stay to enforce the arbitration agreement.²⁶⁷ Please refer to paragraph 19.7 above for more details.
- (b) When a party challenges an arbitrator according to agreed procedure and such challenge is unsuccessful, the court may then decide on the challenge if the party so requests.²⁶⁸
- (c) When there is failure or impossibility to act without undue delay on the part of an arbitrator, the court may remove such arbitrator if a party so requests.²⁶⁹ For arbitrations governed by the AA in particular, the requesting party must first have exhausted any available recourse to an institution or person empowered to remove an arbitrator.²⁷⁰
- (d) When a party appeals to the court on the arbitral tribunal's ruling of jurisdiction, whether positive or negative, the court may hear such appeal.²⁷¹
- (e) When a party takes out a subpoena to testify or a subpoena to produce documents, the court may order that such subpoena be issued to compel the attendance of a witness before the arbitral tribunal.²⁷²
- (f) The court has the power to set aside awards made in Singapore, and to refuse recognition and enforcement of foreign awards.²⁷³

²⁶⁷ S. 6 of the IAA and s. 6 of the AA.

²⁶⁸ Art. 13 of the Model Law and s. 15 of the AA.

²⁶⁹ Art. 14 of the Model Law and s. 16 of the AA.

²⁷⁰ S. 16(2) of the AA.

²⁷¹ S. 10 of the IAA and ss. 21(9)-21A of the AA.

²⁷² S. 13 of the IAA and s. 30 of the AA.

²⁷³ Ss. 24 and 31 of the IAA, Art. 34 of the Model Law and s. 48 of the AA.



- (g) Where the AA is applicable, the court may also, subject to party agreement otherwise and if certain conditions are fulfilled:
- (i) determine a preliminary point of law upon application by a party;²⁷⁴ and
 - (ii) hear appeals on a question of law arising out of an award made in proceedings.²⁷⁵

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

Yes. Arbitrators have powers to grant interim and conservatory relief under both the IAA²⁷⁶ and AA.²⁷⁷ Under the IAA, though, arbitrators have the general power to grant “*an interim injunction or any other interim measure*”,²⁷⁸ whereas under the AA, such general power is reserved for the courts and not arbitrators.²⁷⁹

In addition, the court has supportive powers to grant interim measures if the arbitral tribunal and any relevant institution or person has no power or is unable to act effectively to do so. Any order made by the court is subject to any subsequent order the tribunal may make.²⁸⁰

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

• Formal requirements for arbitral awards

With regard to the form and contents of the award:

- The award must be made in writing and signed by the arbitrator or arbitrators. For arbitral proceedings with more than one arbitrator,

²⁷⁴ S. 45 of the AA.

²⁷⁵ S. 49 of the AA.

²⁷⁶ S. 12(1) of the IAA.

²⁷⁷ S. 28(2) of the AA.

²⁷⁸ S. 12(1)(i) of the IAA.

²⁷⁹ S. 31(1)(d) of the AA.

²⁸⁰ S. 12A(7) of the IAA.



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the signatures of the majority of the arbitral tribunal will suffice, provided that the reason for any omitted signature is stated.

- The 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 award by consent.
- The award must state its date and the place of arbitration.
- The award must be delivered to each party.²⁸¹
- If the tribunal makes an award on an issue affecting the whole 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.²⁸²

As regards deadlines, neither the IAA nor AA contains a specific deadline as to when the award must be made. For arbitrations governed by the AA, where the arbitration agreement or applicable rules provide for such a deadline, the court has the power to extend the deadline to avert substantial injustice if it is satisfied that exceptional circumstances exist.²⁸³ This is however subject to (1) any party agreement to the contrary, and (2) exhaustion of all available arbitral process for application of time extension.²⁸⁴

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

Appeals against arbitral awards are only available under the AA but not under the IAA. Such appeals are permissible only on a question of law.

Under the AA, an appeal on any question of law is conditional on all of the following being fulfilled:²⁸⁵

²⁸¹ Art. 30 of the Model Law and s. 38 of the AA.

²⁸² S. 19A of the IAA and s. 33 of the AA.

²⁸³ *Ting Kang Chung John v Teo Hee Lai Building Constructions Pte Ltd* [2010] 2 SLR 625.

²⁸⁴ S. 36 of the AA.

²⁸⁵ Ss. 49 and 50 of the AA.



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- (a) Either all the parties must agree to the appeal or leave of the court must be obtained.
- (b) All available arbitral processes of appeal or review, as well as statutory recourse (under section 43 of the AA, i.e., by way of correction or interpretation of the award, or additional award) must first be exhausted.
- (c) The appeal must be brought within 28 days of the date of the award or of the date when the appellant is notified of the result of any arbitral process of appeal or review.
- (d) The court must be satisfied of all of the following:
 - (i) The determination of the question will substantially affect the rights of at least one party.
 - (ii) The question is one which the arbitral tribunal was asked to determine.
 - (iii) Based on the findings of fact in the award, the decision of the arbitral tribunal on the question is obviously wrong, or the question is one of public importance and the decision of the arbitral tribunal is at least open to serious doubt.
 - (iv) It is just and proper in all the circumstances for the court to determine the question.
- (e) An application for leave to appeal must identify the question of law to be determined and state the grounds on which leave should be granted.



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An award may be set aside (vacated or nullified) by the court under the IAA only if:²⁸⁶

- (a) the party making the application furnishes proof that:
 - (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 laws 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;
 - (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 Model Law from which parties cannot derogate, or, failing such agreement, was not in accordance with the Model Law;
- (b) the court finds that:
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Singapore; or
 - (ii) the award is in conflict with Singapore public policy;

²⁸⁶

S. 24 of the IAA read in conjunction with Art. 34 of the Model Law.



- (c) the making of the award was induced or affected by fraud or corruption; or
- (d) 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.

The grounds for setting aside an award are exhaustive and the court hearing an application to set aside an award has no power to investigate the merits of the dispute or to review any decision of law or fact made by the arbitral tribunal.

An application for setting aside must be made within three months from the date on which the applicant received the award or from the date on which any request for correction and/or interpretation of the award and/or an additional award has been disposed of by the arbitral tribunal.²⁸⁷

The conditions for rescission of or setting aside an award under the AA are similar to those described above.²⁸⁸

19.19 What procedures exist for enforcement of foreign and domestic awards in Singapore?

The party seeking enforcement (“**Creditor**”) will in the first instance request compliance with the award from the party against whom enforcement is sought (“**Debtor**”).

Awards made in places where the State has ratified, acceded or succeeded to the New York Convention are treated as foreign awards and may be enforced in a Singapore court under the IAA.²⁸⁹ Recognition and enforcement must be brought within six years from the date of the award.²⁹⁰

²⁸⁷ Art. 34(3) of the Model Law.

²⁸⁸ S. 48 of the AA.

²⁸⁹ S. 29 of the IAA.

²⁹⁰ S. 6(1)(c) of the Limitation Act.



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Awards made in places where the State is not a party to the New York Convention may also be enforced in Singapore under the AA.²⁹¹

In any case, the Creditor must obtain permission from the High Court by submitting an originating summons with a supporting affidavit, which must include:²⁹²

- the arbitration agreement or a duly certified copy thereof;²⁹³
- the duly authenticated original award or a duly certified copy thereof;²⁹³
- the name and usual or last known address of each of the Creditor and Debtor; and
- any information on the extent to which the award has not been complied with.

In addition, an order giving leave must also be drawn up by or on behalf of the Creditor and submitted to the court (“**Order**”).

After the court grants leave, the Order must be served on the Debtor by (1) delivering a copy thereof to him personally or (2) sending the copy to him at his usual or last known address or in such other manner as the court may direct. Service of the Order out of Singapore is permissible without leave and the relevant Singapore Rules of Court²⁹⁴ for service out of jurisdiction will apply accordingly.

The Debtor will have 14 days following service (or if the order is 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, and the award will not be enforced until after the expiration of this period or, if the

²⁹¹ S. 46(3) of the AA.

²⁹² O. 69A, r. 6 of the Rules of Court.

²⁹³ If this document is not in English, the affidavit must also include a translation of it in the English language, duly certified in English as a correct translation by a sworn translator, an official or a diplomatic or consular agent of the country in which the award was made.

²⁹⁴ Namely, Order 11, Rules 3, 4 and 6 of the Rules of Court.



Debtor applies to set aside the Order, until such application is finally disposed of.

The right of the Debtor to apply to set aside the Order within the relevant time (as described in the preceding paragraph) must be stated in the copy of the Order served on the Debtor.

Once the Order is obtained, the award can be enforced in the same manner as a judgment of the High Court. The usual enforcement procedures prescribed in the Rules of Court will apply thereafter for the various methods of enforcement such as an application for writ of seizure and sale, garnishee order, etc.

The 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 Order granting leave to enforce the award in Singapore if any of the grounds set out in the IAA is proven. Such grounds are substantially similar to the grounds for setting aside an award under the IAA as set out in paragraph 19.18 above, save that:

- the grounds under (c) and (d) as set out in paragraph 19.18 are not applicable; and
- enforcement may in addition be refused if the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.²⁹⁵

19.20 Can a successful party in the arbitration recover its costs in Singapore?

Generally speaking, a successful party can recover its costs in Singapore.

²⁹⁵ S. 31(2)(f) of the IAA.



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Under the AA, arbitral tribunals may award costs according to their discretion.²⁹⁶

Under the IAA, although there is no similar express provision granting arbitral tribunals such discretion, it is implied under certain sections that tribunals do have such powers. For example, section 12(5) of the IAA empowers tribunals to grant “*award any remedy or relief that could have been ordered by the General Division of the High Court*”, while sections 20 and 21 refer respectively to “*costs awarded or ordered by the arbitral tribunal in the arbitral proceedings*” and “*costs directed by an award to be paid*”.

Given that tribunals have discretion to award costs in Singapore, most tribunals generally adopt as a starting point the principle that ‘costs follow the event’, i.e., the prevailing party is entitled to costs incurred. The degree to which such party will recover its costs may then depend on other factors, namely the parties’ conduct and the reasonableness of their costs.

19.21 Are there any statistics available on arbitration proceedings in Singapore?

The main source of statistics available on arbitration proceedings relating to Singapore is SIAC’s Annual Report, which is publicly accessible online and the latest edition of which is for 2019.²⁹⁷ SIAC’s caseload has generally been increasing over the last few years, with 1005 new cases reported for 2020 as of 30 October 2020,²⁹⁸ an increase from the 479 new cases filed in 2019.

19.22 Are there any recent noteworthy developments regarding arbitration in Singapore (new laws, new arbitration

²⁹⁶ S. 39 of the AA.

²⁹⁷ The Annual Report for 2020 is anticipated to be published in March 2021 and will be available at <https://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/annual-report>

²⁹⁸ <https://www.siac.org.sg/69-siac-news/684-siac-opens-office-in-new-york-and-announces-new-record-caseload>



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institutions, significant court judgments affecting arbitration etc.)?

The following laws that have come into operation in recent times are noteworthy:

- **The Intellectual Property (Dispute Resolution) Act 2019 (Act 23 of 2019):** intellectual property rights are now considered arbitrable in Singapore, with arbitral awards pertaining thereto (including declaratory awards) given effect as judgments of the High Court.
- **The International Arbitration (Amendment) Act (Act 32 of 2020):** there is now a default procedure for appointment of arbitrators in multi-party ad hoc proceedings with a three-member tribunal, including appointment of all three arbitrators by the President of the Court of Arbitration of the Singapore International Arbitration Centre (or any other person appointed by the Chief Justice) in the absence of party agreement and any joint appointment by parties. In addition, arbitrators are now empowered to enforce any obligation of confidentiality in arbitration imposed by law or by agreement of the parties.

The Singapore courts have often been described as pro-arbitration. In recent years they have made pronouncements on aspects of arbitration that have contributed to international arbitral jurisprudence, e.g.:

- Failure to set aside the award at the place of arbitration does not of itself deprive an award debtor from seeking to resist its enforcement before the same court (*PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372).
- A non-participating respondent that objected to jurisdiction may seek to set aside the award under Article 34 of the Model Law (*Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited* [2019] SGCA 33).

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- The right to be given a ‘full opportunity’ to be heard in Article 18 of the Model Law is impliedly limited by considerations of reasonableness and fairness. What constitutes a ‘full opportunity’ is a contextual inquiry to be undertaken within the specific context of each case (*China Machine New Energy Corp v Jaguar Energy Guatemala LLC* [2020] 1 SLR 695).
- An arbitration agreement does not have a purpose or life independent of the substantive obligations it attaches to, and accordingly, the assignment of debt results in an assignment of the right to arbitrate a dispute in relation to that debt (*BXH v BXI* [2020] 1 SLR 1043).



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Names of Authors:	PROF. LAWRENCE BOO MR. EUGENE THONG
Name of Law Firm:	The Arbitration Chambers
Brief Profile:	<p>The Arbitration Chambers is a firm of full-time professional arbitrators and mediators, independent of affiliation to any law firm or business. Its residents are neutrals who elect not to represent or to give advice to parties, and are committed to the professions of arbitration and mediation as independents. Frequently appointed in high stakes cases and widely sought after as speakers at conferences, they are also recognised names in international dispute resolution.</p> <p>Lawrence heads The Arbitration Chambers since its inception in 1996. Formerly the Deputy Chairman (2004–2009), first Chief Executive Officer and Registrar (1991–1996) of the Singapore International Arbitration Centre (SIAC), Lawrence is one of Singapore’s founding voices of arbitration. He now serves on the SIAC Court of Arbitration and the ICC Court of Arbitration, and with more than 25 years of experience as an arbitrator, he has also sat in more than 300 cases, presiding or acting as sole arbitrator in over 200 cases. He is also no stranger to mediation, having mediated in no fewer than 100 disputes, with mediations reaching settlement at a success rate of 75%.</p> <p>Eugene serves as tribunal law clerk to the residents of The Arbitration Chambers, where he is involved in both ad hoc and institutional arbitrations, including those administered by ICSID. He worked at the Secretariat of the ICC International Court of Arbitration in Hong Kong and Singapore previously, and is educated in both the civil and common law traditions.</p>
Telephone No.:	+65 6538 1277
Email:	Lawrence: lawboo@arbiter.com.sg Eugene: eugenethong@arbiter.com.sg
Website:	www.arbiter.com.sg



20. SRI LANKA

**BY: MR. CHANAKA DE SILVA PC
MS. SEWWANDI KARALLIADDE**



20.1 Which laws apply to arbitration in Sri Lanka?

The Arbitration Act No. 11 of 1995 (Arbitration Act) is the primary piece of legislation which governs arbitration in Sri Lanka. It repealed and replaced the Arbitration Ordinance No. 15 of 1856 and Sections 693 to 698 of the Civil Procedure Code which previously provided for enforcement of arbitral awards. There have been no amendments to the Arbitration Act since its inception in 1995.

The Arbitration Act was the first arbitration law in South Asia to be based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law (UNCITRAL Model Law) on International Commercial Arbitration and it also implemented Sri Lanka's obligations under the 1958 New York Convention on the Recognition of Enforcement of Foreign Arbitration Awards (the "New York Convention")

The other main piece of legislation applicable to arbitrations in Sri Lanka is the Civil Procedure Code (Civil Procedure Code). The Arbitration Act makes provision for the enforcement of arbitral awards as a Decree of Court. Accordingly, the provisions of the Civil Procedure Code relating to enforcement of Decrees of Court are applicable for the enforcement of arbitral awards in Sri Lankan courts.

Additionally, where parties wish to opt for institutional arbitration, there are several arbitration centres in Sri Lanka including the ICLP Arbitration Centre and the Sri Lanka National Arbitration Centre, rules of which will apply to such arbitral proceedings. In terms of Section 17 of the Arbitration Act, parties are free to agree on rules for conducting arbitration proceedings, which differ from those prescribed by the Arbitration Act.



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20.2 Is the Sri Lankan arbitration law based on the UNCITRAL Model Law?

Yes. The Arbitration Act of Sri Lanka is substantially based on the UNCITRAL Model law.

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

No.

The Arbitration Act governs both domestic and international arbitrations in Sri Lanka. Provisions providing for the enforcement of foreign arbitral awards are contained in the Arbitration Act.

Part VII of the Arbitration Act contains provisions on applications to courts relating to awards which included recognition and enforcement of foreign awards. Section 33 of the Arbitration Act specifically provides that a foreign arbitral award, irrespective of the country it was made in, is recognized in Sri Lanka and, upon application to court by a party, can be enforced in Sri Lanka.

20.4 Has Sri Lanka acceded to the New York Convention?

Yes. Sri Lanka acceded to the New York Convention on the 30th December 1958 and ratified the convention on the 9th April 1962²⁹⁹.

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?

Yes, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

²⁹⁹ <http://www.newyorkconvention.org/countries>



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There are no restrictions in the Arbitration Act on the freedom of the parties to agree on the rules and the procedure for the conduct of an arbitration, the seat of arbitration or the law governing an arbitration and the parties are free to contractually agree for arbitration under foreign arbitration institutions.

The Arbitration Act contains specific provisions which provide for the recognition and enforcement of foreign arbitral awards³⁰⁰.

20.6 Does the Sri Lankan arbitration law contain substantive requirements for the arbitration procedures to be followed?

As stated previously, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings³⁰¹.

However, Part V of the Arbitration Act contains certain default provisions which apply in circumstances where the parties have not agreed on a specific procedure.

The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance and weight of any evidence³⁰².

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

A valid arbitration agreement does not operate as an absolute bar to parties accessing state courts.

However, Section 5 of the Arbitration Act provides that where a party to an arbitration agreement institutes legal proceedings in a court against another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement, the Court shall have no

³⁰⁰ See paragraph 1.3 above.

³⁰¹ Section 17 of the Arbitration Act.

³⁰² Section 17 of the Arbitration Act.



jurisdiction to hear and determine such matter if the other party objects to the court exercising jurisdiction in respect of such matter.

Accordingly, where a valid arbitration clause exists, it will operate as a bar to a court exercising jurisdiction only if the other party to the agreement objects to the court exercising such jurisdiction. Therefore, it is open to the parties to a dispute which is subject to a valid arbitration clause, to litigate such matter in Court, if both parties expressly or tacitly consent to such action being litigated in Court.

20.8 What are the main arbitration institutions in Sri Lanka?

The Sri Lanka National Arbitration Centre (SLNAC) established and thereafter incorporated in 1985, is the leading arbitration institution for commercial arbitrations in Sri Lanka. The SLNAC recommends the adoption of and adopts as its rules, the UNCITRAL Arbitration Rules.

The Institute for the Development of Commercial Law and Practice also has established a modern Arbitration Centre (CCC - ICLP ADR Centre) as a neutral venue for arbitration. It now operates as a collaboration with the Ceylon Chamber of Commerce. The CCC - ICLP ADR Centre has its own set of rules.

20.9 Addresses of major arbitration institutions in Sri Lanka?

Sri Lanka National Arbitration Centre

No. 120/7, Vidya Mawatha (off Wijerama Mawatha), Colombo 07.

Tele: +94 112 688 263 | +94 113 133 761

Fax: +94 112 688 264

Website: <https://slnarbcentre.com/>

Email: info@slnarbcentre.com / slnac@eureka.lk

CCC - ICLP Arbitration Centre

No. 53, Ananda Coomaraswamy Mawatha, Colombo 07.

Phone: 0112 574 145



20.10 Arbitration Rules of major arbitration institutions?

The SLNAC does not have its own set of arbitration rules. As stated in 20.8 above, the SLNAC adopts the UNCITRAL Arbitration Rules as its arbitration rules. Moreover, the SLNAC recommends that the parties adopt the UNCITRAL Arbitration Rules in respect of arbitrations intended to be conducted through SLNAC.

The CCC - ICLP ADR Centre has its own set of rules, the ICLP Rules, which are also compatible with the Arbitration Act and the UNCITRAL Arbitration Rules.

The institutions of the Government of Sri Lanka have a preference for the use of UNCITRAL Arbitration Rules, where it considers it necessary to use international arbitration rules.

UNCITRAL, ICC and SIAC Arbitration Rules are frequently used in commercial contracts in Sri Lanka, where parties opt to use international arbitration rules.

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

The SLNAC recommends that the parties adopt the model clause of the UNCITRAL Arbitration Rules in the arbitration agreement, specifying that SLNAC will administer the arbitration.

A modified model clause of the UNCITRAL Arbitration Rules, providing for arbitration through **SLNAC**, may be 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 UNCITRAL Arbitration Rules through the Sri Lanka National Arbitration Centre

·
[Note. Parties should consider adding:]



- (a) *The appointing authority shall be the Sri Lanka National Arbitration Centre;*
- (b) *The number of arbitrators shall be ... [one or three];*
- (c) *The place of arbitration shall be Colombo, Sri Lanka;*
- (d) *The language to be used in the arbitral proceedings shall be English.*

The recommended arbitration clause of the **CCC- ICLP ADR Centre** is:

“Any doubt, difference, dispute, controversy, or claim arising from, out of or in connection with this contract, or on the interpretation thereof or on the rights, duties, obligation, or liabilities of any parties thereto or on the operation, breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Rules of the Arbitration Centre of the Institute for the Development of Commercial Law and Practice.”

20.12 How many arbitrators are usually appointed?

Section 6 of the Arbitration Act contains provisions relating to the number of arbitrators to be appointed to the arbitral tribunal.

“Section 6 of the Arbitration Act:

- (1) *The parties shall be free to determine the number of arbitrators of an arbitral tribunal subject to the provisions of subsection (3) of this section.*
- (2) *Where no such determination is made, the number of arbitrators shall be three.*
- (3) *Where the parties appoint an even number of arbitrators, the arbitrators so appointed shall jointly appoint an additional arbitrator who shall act as Chairman.”*



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

Parties to an arbitration have a right to challenge arbitrators in terms of Section 10 of the Arbitration Act, which provides as follows.

“Section 10 of the Arbitration Act:

- (1) Where a person is requested to accept appointment as an arbitrator, he shall first disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence, and shall from the time of his appointment and throughout the arbitral proceedings, disclose without delay any circumstances referred to in this subsection to all the parties and to the other arbitrators, unless they have already been so informed by the arbitrator.*
- (2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. 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 was made.*
- (3) A party who seeks to challenge an arbitrator shall, unless the parties have decided that the decision shall be taken by some other person, first do so before the arbitral tribunal, within thirty days of his becoming aware of the circumstances which give rise to doubts about the arbitrator’s impartiality or independence.*
- (4) Where a party who makes an application to an arbitral tribunal under this section, is dissatisfied with the order of the tribunal on such application, he may within thirty days of receipt of the decision, appeal from that order to the High Court.”*

20.14 Are there any restrictions as to the parties’ representation in arbitration proceedings?



Section 23 of the Arbitration Act contains provisions relating to the representation of parties in arbitration proceedings.

“Section 23 - unless otherwise agreed in writing by the parties to the arbitration agreement, a party to an arbitration agreement:

- a) may appear before the arbitral tribunal personally or, where the party is a body of persons, whether corporate or unincorporate by an officer, employee or agent of that body; and*
- b) may be represented by an attorney-at-law if the party so desires.”*

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

The courts can intervene in arbitrations only in instances where a party to an arbitration makes an application to the High Court for such intervention, in circumstances where the Arbitration Act permits a party to seek the intervention of the court. Such applications for intervention of the courts could be made by a party:

- i) Under Section 7(2) of the Arbitration Act, where, in the absence of an agreed procedure for appointment, the parties are unable to agree on a sole arbitrator or where the party appointed arbitrators are unable to agree on the third arbitrator or where a party having the right to appoint an arbitrator fails to do so;
- ii) Under Section 7(3) of the Arbitration Act, where a person fails to act as required under the appointment procedure agreed by the parties;
- iii) Under Section 8(2) of the Arbitration Act, where an arbitrator unduly delays discharging his duties, a party may make an application to remove such arbitrator and appoint another arbitrator in his place, unless the arbitration is supervised by an institution, in which event such institution will so remove and appoint;



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-
- iv) Under Section 10(4) of the Arbitration Act, where a party dissatisfied may, within thirty days of the receipt of the decision of the tribunal on a challenge to the impartiality or independence of an arbitrator, appeal from that decision to the High Court;
 - v) Under Section 11(1) of the Arbitration Act, where the High Court has concurrent jurisdiction with the tribunal to rule on the jurisdiction including any question, with respect to the existence or validity of the arbitration agreement or as to whether such agreement is contrary to public policy or is incapable of being performed;
 - vi) Under Section 13(2) of the Arbitration Act, where an application may be made for the enforcement of interim measures granted by a tribunal;
 - vii) Under Section 20(1) of the Arbitration Act, where a party having obtained the prior consent in writing of the arbitral tribunal, may apply to the High Court for summons requiring a person to attend before the tribunal for examination or to produce any document or thing specified in the summons;
 - viii) Under Section 21(1) of the Arbitration Act, where upon the application of a party, the High Court may order a person who refuses to appear before the tribunal to give evidence or produce a document, to appear before the Court for examination or to produce to the Court the relevant document;
 - ix) Under Section 31(1) of the Arbitration Act, where a party may, within one year after the expiry of fourteen days of the making of the award, apply to the High Court for the enforcement of the award;
 - x) Under Section 32(1) of the Arbitration Act, where within sixty days of the receipt of an arbitral award made in an arbitration held in Sri Lanka, an application may be made to the High Court to set aside such award, on the limited grounds set out therein;



- xi) Under Section 33 read with Sections 34 and 31(1) of the Arbitration Act, where a party may apply to the High Court for the enforcement of a foreign award;
- xii) Under Section 37(2) of the Arbitration Act, where a party may appeal to the Supreme Court directly from a Judgment of the High Court relating to an application to set aside an award under section 32 or to enforce an award under section 31, upon obtaining leave therefor, from the Supreme Court. In terms of Section 37(4) of the Arbitration Act, such right of appeal to the Supreme Court could be excluded by the parties, by an Exclusion Agreement; and
- xiii) Under Section 39(4) of the Arbitration Act, where a party may appeal to the High Court from an order of the tribunal terminating the arbitration proceedings due to undue delay by a claimant in instituting or prosecuting a claim.

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

In terms of Section 13 (1) of the Arbitration Act, an arbitral tribunal may, upon the application of a party, order any other party to take such interim measures as it may consider necessary to protect or secure the claim which forms the subject matter of the dispute.

The arbitral tribunal may also order the applying party to provide security for any expense, loss or damage that may be caused in taking such interim measures.

Other than in exceptional cases, no such order should be made except after hearing the other parties.

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



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- **Formal requirements for arbitral awards**

Section 25 of the Arbitration Act provides the form and content of the award.

“Section 25

(1) The award shall be made in writing and shall be signed by the arbitrators constituting the arbitral tribunal. In arbitral proceedings with more than one arbitrator, the signatures of the majority of the members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) 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 section 14.

(3) The award shall state its date and place of arbitration as determined in accordance with section 16. The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators constituting the arbitral tribunal in accordance with subsection (1) of this section shall be delivered to each party.”

- **Deadlines for issuing arbitral awards**

There are no specific deadlines prescribed in the Arbitration Act, to issue an award. However, Section 15(1) of the Arbitration Act states that the tribunal should deal with a dispute in an expeditious manner.

Additionally, Section 8(2) of the Arbitration Act provides that where an arbitrator unduly delays discharging his duties, a party may make an application to court for the removal of an arbitrator and the appointment of a substitute, in arbitrations which are not institutionally supervised.

- **Other formal requirements for arbitral awards**



Section 26 of the Arbitration Act provides that the award is final and binding on the parties to the arbitration agreement, subject to the provisions relating to setting aside an award and the registration and enforcement of an award.

Additionally, Section 27 makes provision for correction, modification and interpretation of awards and to make an additional award. Within 14 days of the receipt of an award, a party may with notice to the other party request the tribunal;

- (i) to correct any errors of computation, clerical or typographical errors or omissions, or errors of a similar nature;
- (ii) to modify an award where a part of the award is upon a matter not referred to arbitration (provided that such part can be separated without affecting the rest of the award);
- (iii) if agreed by parties, to give an interpretation on a specific point or part of the award; or
- (iv) to give an additional award on claims presented in the proceedings but omitted in the award.

Such correction, modification, interpretation or additional award forms part of the original award and the finality set out in Section 26 applies thereto.

20.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in Sri Lanka?

There is no right of appeal to court from arbitral awards, in Sri Lanka.

However, Section 32 of the Arbitration Act provides for an arbitral award made in an arbitration held in Sri Lanka to be set aside on the limited grounds set out therein.

“Section 32



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(1) *An arbitral award made in an arbitration held in Sri Lanka may be set aside by the High Court, on application made therefore, within sixty days of this receipt of the award ---*

(a) *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 on that question, under the law of Sri Lanka ; or*

(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 however that, if the decision 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 the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act: or*

(b) *where the High Court finds that ---*

(i) *the subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka: or*

(ii) *the arbitral award is in conflict with the public policy of Sri Lanka.*

(2) *Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into Court or otherwise secured pending the determination of the application.”*

Additionally, Section 10(4) of the Arbitration Act, provides for a party dissatisfied with the decision of the tribunal on a challenge to the impartiality or independence of an arbitrator, to appeal from that decision



to the High Court, within thirty days of the receipt of the decision of the tribunal.

Similarly, Section 37 provides for appeals to the Supreme Court having first obtained leave therefrom, in respect of judgments of the High Court on applications for registration and enforcement of awards and applications for setting aside local awards. As stated previously, this right of appeal to the Supreme Court could be excluded by an appropriate exclusion agreement.

Section 39(4) of the Arbitration Act provides for an appeal to the High Court from an order of the tribunal terminating proceedings for undue delay by a claimant in instituting or prosecuting a claim.

20.19 What procedures exist for enforcement of foreign and domestic awards in Sri Lanka?

Sri Lanka is a party to the New York Convention. Therefore, the Arbitration Act implements the provisions of the New York Convention. Accordingly, a foreign arbitral award will be recognized and enforced in Sri Lanka. Such recognition and enforcement will be regardless of the country in which it was made.

Applications for recognition and enforcement of foreign arbitral award are required to be made in accordance with Section 31 of the Arbitration Act. Accordingly, such an application should be made to the High Court within 01 year after the expiry of 14 days of the making of the award and should be accompanied by the original or a duly certified copy of the award and an original or a duly certified copy of the arbitration agreement pursuant to which the award was made. Such award and the arbitration agreement should be certified by the arbitral tribunal or a member of the tribunal or should otherwise be certified to the satisfaction of court. Any documents which are in a language other than the official language of the court or English should be accompanied by a translation in English or the official language, duly certified by a sworn translator, or by an official or a diplomatic or consular agent in Sri Lanka of the country in which the award was made or otherwise to the satisfaction of court.



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An application for recognition or enforcement of foreign arbitral awards may only be refused on the limited grounds set out in Section 34, which reads as follows.

“Section 34:

(1) Recognition or enforcement of a foreign arbitral award, irrespective of the country in which it was made, may be refused only ---

(a) on the objection of the party against whom it is invoked, if that party furnishes to the Court where recognition or enforcement is sought, 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 as to the law to which the parties have subjected such agreement, 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 an arbitrator or of the arbitral proceeding or was otherwise unable to present his case; or

(iii) the award deals with the dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

Provided, however that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contain a decision on matters submitted to arbitration, may be recognized and enforced: or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, in the absence of such agreement, 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 court of the country in which, or under the law of which, that award was made: or

(b) if the Court finds that ---



- (i) *the subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka; or*
 - (ii) *the recognition or enforcement of the award would be contrary to the public policy of Sri Lanka.*
- (2) *If an application for setting aside or suspension of an award has been made to a court on the ground referred to in sub-paragraph (v) of paragraph (a) of subsection (1) of this section, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.”*

Applications for registration and enforcement of domestic arbitral awards should also be made in terms of Section 31 of the Arbitration Act. If an application for setting aside such domestic award has not been made, court will proceed to file the award and enter judgment and decree according to the award. In terms of Section 35 of the Arbitration Act, where an application to set aside a domestic award has been filed, such application and the application for the enforcement of the domestic award shall be consolidated by court and determined together.

20.20 Can a successful party in the arbitration recover its costs in Sri Lanka?

Yes, a successful party in arbitration may claim the fees for an arbitral tribunal, the administrative costs of the arbitration centre, hearing costs and party-related costs.

20.21 Are there any statistics available on arbitration proceedings in Sri Lanka?

There are no statistics publicly available since arbitrations are considered private proceedings. However, it is noteworthy to observe that commercial arbitration is a popular method of dispute resolution in Sri Lanka.



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20.22 Are there any recent noteworthy developments regarding arbitration in Sri Lanka (new laws, new arbitration institutions, significant court judgments affecting arbitration etc.)?

It is significant to note that the Institute for the Development of Commercial Law and Practice recently entered into a collaboration with the Ceylon Chamber of Commerce to form the CCC - ICLP Arbitration Centre. It is currently in the process of updating its Arbitration Rules. The Centre is presently conducting a process of stakeholder consultations and the new rules will be adopted following that process.

Name of Authors:	MR. CHANAKA DE SILVA PC MS. SEWWANDI KARALLIADDE
Name of Law Firm:	Nithya Partners
Brief Profile:	<p>Nithya Partners was established in 1997 with the goal of delivering a modern and responsive service in corporate, financial and arbitration law. The Firm is led by a group of Partners who combine a unique blend of multi-disciplinary experience along with an extensive knowledge base of several years of legal practice in the public and private sector. These strengths have allowed the Firm to deliver innovative, timely and commercially viable solutions to clients, and thereby position itself as one of the leading corporate law firms in Sri Lanka, within a relatively brief period.</p> <p>Nithya Partners is listed as a Top Tier Law Firm in Dispute Resolution, by The Legal 500, Chambers and Partners and ILFR1000</p>
Telephone No.:	+94 (0)11 2335 579/2335 908/4712 625/4712 628
Email:	cdes@nithyapartners.com sewwandi@nithyapartners.com
Website:	www.nithyapartners.com



21. TAIWAN



**BY: MS. WENDY CHU
MS. JAMIE CHEN**

21.1 Which laws apply to arbitration in Taiwan?

Arbitration conducted in Taiwan is governed by the Arbitration Law of the Republic of China (the “Arbitration Law”).³⁰³ 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 2015.

In addition to the Arbitration Law, the Rules on Arbitration Institution, Mediation Procedures and Fees³⁰⁴ also regulate arbitration 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.

21.2 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 with a view to legislation in the U.S., UK, Germany and Japan. Unlike most national arbitration laws, however, Taiwan’s Arbitration Law contains detailed

³⁰³ “仲裁法”, available at <http://www.arbitration.org.tw/law01-en.php>

³⁰⁴ “仲裁機構組織與調解程序及費用規則”. The Rules are promulgated jointly by the Executive Yuan and the Judicial Yuan in 1999, last amended on 22 January 2003; an English version of the text available at <http://www.arbitration.org.tw/law02-en.php>



arbitrator qualification requirements and requires training of arbitrators, which is not entirely consistent with international norms.

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

No, the Arbitration Act applies to both domestic and international arbitration conducted in Taiwan. For the recognition and enforcement of international/foreign arbitration awards, there are slightly more complicated procedures to be followed, as explained below.

21.4 Has Taiwan acceded to the New York Convention?

No, Taiwan is not a signatory to the New York Convention. The requirements for recognition of foreign judgements and arbitral awards are therefore somewhat different, as explained in detail below.

21.5 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 is no restriction for domestic parties regarding the choice of jurisdiction, i.e. including with regard to foreign or domestic arbitration institutions and arbitration rules. However, if a matter cannot be settled in accordance with the law, the parties may not submit the dispute to litigation proceedings, as further explained below.

21.6 Does the Taiwan arbitration law contain substantive requirements for arbitration procedures to be followed?

The Arbitration Law only provides general guidelines of arbitration procedures. In principle, the parties can choose the applicable procedural rules. If there is no agreement on the procedural rules and where the Arbitration Law is silent, the arbitral tribunal may adopt the Code of Civil



Procedure, mutatis mutandis, or other appropriate rules of procedure.³⁰⁵ In practice, parties tend to select either CAA Arbitration Rules or other major international procedural rules such as UNCITRAL or ICC arbitration rules.

Some general procedural rules addressed in the Arbitration Law include:

- To submit a dispute to arbitration, a party shall provide a written notice to the respondent; unless otherwise agreed, the arbitral proceedings for a dispute shall commence on the date when the written notice of arbitration is received by the respondent.³⁰⁶
- The place of arbitration, unless agreed by the parties, shall be determined by the arbitral tribunal.³⁰⁷
- The arbitral tribunal shall ensure that each party has a full opportunity to present its case, and it shall conduct necessary investigations; unless otherwise agreed, the arbitral proceedings shall not be made public.³⁰⁸
- 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, the arbitral tribunal may apply for a court order compelling the witness to appear.³⁰⁹
- If expressly authorized by the parties, the arbitral tribunal may apply the rules of equity.³¹⁰
- The arbitrator shall be independent, impartial and uphold the principle of confidentiality in conducting the arbitration.³¹¹

In addition, for arbitration proceedings to be legally valid, it needs to be based on an arbitral agreement between the parties. "Arbitral agreement" is

³⁰⁵ Article 19 of the Arbitration Law
³⁰⁶ Article 18 of the Arbitration Law
³⁰⁷ Article 20 of the Arbitration Law
³⁰⁸ Article 23 of the Arbitration Law
³⁰⁹ Article 26 of the Arbitration Law
³¹⁰ Article 31 of the Arbitration Law
³¹¹ Article 15 of the Arbitration Law



an agreement between the parties, in writing, to submit to arbitration any dispute that has arisen or may arise in connection with a defined legal relationship between them. The definition is worded similarly to Article 7 of the Model Law on International Commercial Arbitration.³¹² Article 1 therefore limits the scope of arbitrable disputes (i.e. arbitrability) to those which may be settled in accordance with the law, Article 1 Paragraph 2 of the Act. For example, parties may not enter into an agreement to arbitrate criminal matters, domestic violence issues or some family disputes.

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

Yes. If there is already a valid arbitration agreement and one party brings the dispute before the court, the other party may require the court to suspend the litigation proceeding and order the plaintiff to submit to arbitration within a specified period of time. If the plaintiff fails to submit to arbitration, the court shall dismiss its legal action.³¹³

21.8 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 **Chinese Arbitration Association, Taipei** ("中華民國仲裁協會", "CAA") is the leading arbitral institution in Taiwan. It is based in Taipei and has two branch offices in Taichung and Kaohsiung. In addition to arbitration, it provides a wide range of dispute settlement administration services, including mediation, dispute review boards and other alternative dispute resolution proceedings.
- (2) The **Taiwan Arbitration Association** ("臺灣仲裁協會", TAA), established in 2001, specializes in construction disputes.

³¹² See YANG, CHONG-SEN (楊崇森) ET AL., *On Arbitration* (仲裁法新論), pp. 56 (3rd ed. 2008).

³¹³ Article 4 of the Arbitration Law



ADWA

- (3) The **Chinese Construction Industry Arbitration Association** (“中華工程仲裁協會”, CCIAA) also specializes in construction disputes.
- (4) The **Chinese Real Estate Arbitration Association** (“中華不動產仲裁協會”, CREAA) specializes in real estate disputes.

21.9 Addresses of major arbitration institutions in Taiwan

The addresses of the above-mentioned arbitration institutions are:

(1) Chinese Arbitration Association³¹⁴

- Taipei Main Office:
14F, No. 376, Renai Road, Sec. 4, Taipei 106, Taiwan
- Taichung Branch:
20F, No. 83, Sec. 4, Wenxin Road, Beitun District, Taichung 406, Taiwan
- Kaohsiung Branch:
14F, No. 128, Yisin 2nd Road, Kaohsiung 806, Taiwan

(2) Taiwan Arbitration Association³¹⁵

- Taipei Main Office:
4F, No. 141 and 143, Keelung Road, Sec. 2, Taipei 110, Taiwan
- Taichung Branch:
4F.-2, No. 629, Sec. 1, Chongde Rd., North Dist., Taichung 404, Taiwan
- Kaohsiung Branch:
13F., No. 335, Wenxin Rd., Gushan Dist., Kaohsiung 804, Taiwan

(3) Chinese Construction Industry Arbitration Association³¹⁶

³¹⁴ <http://en.arbitration.org.tw/>

³¹⁵ <http://www.tcaa.org.tw/> (in Chinese)

³¹⁶ <https://www.cciaa.org.tw/> (in Chinese)



ADWA

8F, No. 25, Nanjing East Road, Sec. 4, Songshan District, Taipei
105, Taiwan

- (4) **Chinese Real Estate Arbitration Association**³¹⁷
6F.-4, No. 495, Guangfu S. Rd., Xinyi Dist., Taipei 110, Taiwan

21.10 Arbitration rules of major arbitration institutions?

Both the CAA, CCIAA and CREAA have published their arbitration rules online. The CCIAA and CREAA arbitration rules are only available in Chinese.³¹⁸³¹⁹ The CAA arbitration rules, which are more widely used in Taiwan, are available in Chinese and English.³²⁰

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

The CAA has published its model clause online:³²¹

“Any dispute, controversy, difference or claim arising out of, relating to or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration referred to the Chinese Arbitration Association, Taipei in accordance with the Association’s arbitration rules. The Seat of arbitration shall be Taipei, Taiwan. The language of arbitration shall be _____. The arbitral award shall be final and binding upon both parties.”

21.12 How many arbitrators are usually appointed?

Parties are free to agree on the method of appointment of arbitrators and the number of arbitrators 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

³¹⁷ <http://www.creaa-wks.org.tw/homeweb/index.php> (in Chinese)

³¹⁸ <http://www.cciaa.org.tw/law-4>

³¹⁹ <http://www.creaa-wks.org.tw/hyfiles/pdf/7-4-4.pdf>

³²⁰ <http://www.arbitration.org.tw/rule01-en.php>

³²¹ <http://www.arbitration.org.tw/model-clause.php>



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 "*in the event that a corporate entity or any other organization which is not an arbitration institution is appointed as an arbitrator in an arbitration agreement, 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.

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 chairperson of the arbitration, 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.³²² The process of appointing arbitrators and constituting the arbitral tribunal will usually resemble the following:³²³

- (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.

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 both parties in writing of the final appointment.

³²² Article 10, Paragraph 1 of Arbitration Law

³²³ See HU,YUAN-JHEN (胡元禎), An Introduction to Arbitration. FT Law Review, Vol. 159, pp. 71.



ADWA

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

In principle, 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.³²⁴ A conflict of interest includes:

- i) The existence of any of the causes requiring a judge to withdraw from a judicial proceeding in accordance with Article 32 of the Code of Civil Procedure³²⁵;
- ii) The existence or history of an employment or agency relationship between the arbitrator and a party;
- iii) The existence or history of an employment or agency relationship between the arbitrator and an agent of a party or between the arbitrator and a key witness; and,
- iv) The existence of any other circumstances which raise any justifiable doubts as to the impartiality or independence of the arbitrator³²⁶

In addition, if the appointment falls into any of the circumstances listed in Article 40 of the Arbitration Law, a party may still file a petition with the court to set aside the arbitral award.

In arbitration cases administered by the CAA, if a party wishes to remove an arbitrator from a panel of more than one arbitrator, the arbitral tribunal shall determine whether to sustain the challenge with the challenged arbitrator refrained from taking part. On the other hand, if a party wishes to remove a sole arbitrator, the request shall be submitted to the court for determination.

³²⁴ See YANG, CHONG-SEN (楊崇森) ET AL., *supra* note 1, pp. 167.

³²⁵ Article 32 of the Code of Civil Procedure further includes several types of relationship, such as spouse, blood relative within eighth degree, relative by marriage within fifth degree etc.

³²⁶ Article 15 of the Arbitration Law



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

Article 24 of the Arbitration Law only regulates that parties may appoint representatives in writing to appear before the arbitral tribunal to make statements for and on their behalf. There are no further restrictions on the qualification or number of representatives. Most notably, representatives for arbitration do not have to be lawyers, so foreign lawyers (i.e. not locally registered) may represent clients in arbitration proceedings. In practice, parties are often represented by lawyers who specialize in arbitration procedures or are familiar with the matter at hand.

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

As discussed above, courts may intervene during the process of arbitration when the selection of arbitrators is challenged. A party may also file injunctions, attachments and other conservatory measures before the court prior to the arbitration proceeding, as described below. In addition, pursuant to Article 28 of the Arbitration Law, the arbitral tribunal, when necessary, may also request assistance from a local court, including exercising its investigation power, during the arbitral proceedings.

After an arbitral award is issued, the parties may also challenge the award by filing a revocation case before the court. A revocation will allow the court to set aside the arbitral award and allow the parties to resolve the dispute through further legal actions. This will be further discussed in detail below.

Finally, the court may also intervene when the award is a foreign arbitral award that requires recognition of the court. It is possible for the counterparty to defend and reject the recognition of foreign arbitral awards, of which the procedure will be discussed below.



ADWA

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

Parties may apply for injunctions, attachments and other interim or conservatory actions to the court, before submitting to arbitration. The applicants need to initiate the arbitration procedure within the time period specified by the court, in order to satisfy the procedural requirements of these interim actions.³²⁷

However, the Arbitration Law is silent on the powers of arbitrators to grant interim relief. According to Article 19 of the Arbitration Law, where the Law is silent, the arbitral tribunal may adopt the Code of Civil Procedure *mutatis mutandis* or other rules of procedure which it deems proper. It is therefore possible for the arbitrators to make interlocutory decisions when appropriate, as defined in Article 383 of the Code of Civil Procedure. Article 40 of the CAA Arbitration Rules also states that the arbitral tribunal may make interim or partial awards.

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

- **Formal requirements for arbitral awards:**

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:³²⁸

- 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

³²⁷ Article 39 of the Arbitration Law; Article 529 of the Code of Civil Procedure

³²⁸ Article 33 of the Arbitration Law



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;³²⁹
- 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). The arbitral tribunal shall deliver a certified copy of the arbitral award to 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. 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.³³⁰

• **Deadlines for issuing arbitral awards:**

Unless agreed otherwise, the arbitral tribunal shall issue the arbitral award within six months. This deadline for the final decision may be extended for

³²⁹ Article 34, Paragraph 1 of the Rules on Arbitration Institution, Mediation Procedures and Fees

³³⁰ Articles 34 and 35 of the Arbitration Law



an additional three months if required.³³¹ After declaring the conclusion of a hearing procedure, the arbitral tribunal shall deliver its arbitral award within ten days.³³²

- **Other formal requirements for arbitral awards:**

Finally, the deliberations of an arbitral award shall not be made public. If there is more than one arbitrator, the arbitral award shall be decided 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 obtained³³³.

In the event that a majority consensus of the arbitrators cannot be reached, the arbitral proceedings shall be deemed terminated³³⁴, unless otherwise agreed to by the parties, and the arbitral tribunal shall notify the parties of the reason(s) for failing to reach a majority consensus. After notification, both parties may turn to other mechanisms for resolving the dispute.

21.18 On what conditions can arbitral awards be appealed or rescinded in Taiwan?

During the arbitration proceedings, any objections raised shall be considered by the arbitral tribunal. The decisions made with respect to these objections shall not be subject to appeal, and the assertion and consideration of an objection shall not suspend the arbitral proceedings.³³⁵

An arbitral award can, however, be rescinded or revoked before a competent court. Following international norms, the court may never conduct a substantive review and can only set aside an award for one of the following circumstances:³³⁶

³³¹ Article 21 of the Arbitration Law

³³² Article 33 of the Arbitration Law

³³³ Article 32, Paragraph 3 of the Arbitration Law

³³⁴ Article 32, Paragraph 4 of the Arbitration Law

³³⁵ Article 29 of the Arbitration Law

³³⁶ Article 40 of the Arbitration Law



-
- i). In case of the existence of any circumstances stated in Article 38 of the Arbitration Law.³³⁷
 - 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.³³⁸
 - 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 partial or has been requested to withdraw, but continues to participate, provided that the request for withdrawal has not been dismissed by the court.³³⁹
 - vi). If an arbitrator violates any duty in the entrusted arbitration and such violation carries criminal liability, partial or has been requested to withdraw, but continues to participate, provided that the request for withdrawal has not been dismissed by the court.
 - vii). If a party or any representative has committed a criminal offense in relation to the arbitration.

³³⁷ Article 38 includes: i) the arbitral awards goes beyond the scope of arbitration agreement; ii) the lack of reason in the arbitral award; and iii) the arbitral award requires a party to act contrary to the law.

³³⁸ UNCITRAL Model Law, Article 34 (2) (a) (i).

³³⁹ Article 15 requires the arbitrators to be independent, impartial and uphold the principle of confidentiality in conducting the arbitration as well as fully disclose any conflicts of interests.



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- 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 have been 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. 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 avoidance 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.

In terms of procedure, an application to revoke an arbitral award may be filed at the district court at the place of arbitration. The Arbitration Law adopts the word "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).³⁴⁰ 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 (vi) to (ix) exists, and if sufficient evidence is offered to show that the failure of a party to apply to 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.³⁴¹

³⁴⁰ See YANG, CHONG-SEN (楊崇森) ET AL., *supra* note 1, pp. 321.

³⁴¹ Article 41 of the Arbitration Law



Finally, 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. 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.³⁴² 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.³⁴³

21.19 What procedures exist for enforcement of foreign and domestic awards in Taiwan?

- **Domestic awards**

In general, an arbitral award shall be binding on the parties and have the same force as the final judgment of a court. The award binds not only both parties but also the following persons with respect to the arbitration:³⁴⁴

- 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.

In terms of enforcement, 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 converting the award into a judgment or court

³⁴² Article 42 of the Arbitration Law

³⁴³ Article 43 of the Arbitration Law

³⁴⁴ Article 37 of the Arbitration Law



ADWA

order does not involve a factual investigation.³⁴⁵ However, the arbitral award may be enforced without an enforcement order if both parties agreed so in writing and the arbitral award concerns only the following:³⁴⁶

- i). Payment of a specified sum of money or a certain amount of fungibles or valuable securities;
- ii). Delivery of a specified movable property.
With the exception of the circumstances discussed above, an enforcement order is necessary for the enforcement of the award. The court shall nevertheless reject an application for enforcement where:³⁴⁷
- iii). 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;
- iv). 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
- v). The arbitral award directs a party to act contrary to the law.

• Foreign awards

As Taiwan is not a signatory to the New York Convention, the requirements for recognition of a 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

³⁴⁵ See also Taiwan Supreme Court 87 Tai-Kang-Tzu No. 266.

³⁴⁶ Article 37 of the Arbitration Law

³⁴⁷ Article 38 of the Arbitration Law



the territory of Taiwan or issued pursuant to foreign laws within the 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.³⁴⁸ 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 authentication made by the embassies, consulates, representative and 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.³⁴⁹

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.

³⁴⁸ Article 47 of the Arbitration Law

³⁴⁹ Article 48 of the Arbitration Law



ADWA

- 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 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.³⁵⁰

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 counterparty applies to the court for recognition of a foreign arbitral award that concerns any of the following circumstances:³⁵¹

- 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.

³⁵⁰ Article 49 of the Arbitration Law

³⁵¹ Article 50 of the Arbitration Law



- vi) The arbitral award is not yet binding upon the parties or has been suspended or revoked by a competent court.

• Awards from China, Hong Kong and Macau

Due to the special political status of Taiwan, the recognition of arbitral awards from China, Hong Kong and Macau is structured differently with a separate legal basis. 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, with minor variations on implementation.³⁵²

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.³⁵³ 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 counterparty should still be able to request the court to dismiss the application on the grounds listed in Article 50 of the Arbitration Law.³⁵⁴

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.³⁵⁵ 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

³⁵² 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 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

³⁵³ Article 74, Paragraph 1 of the Act Governing Relations Between Peoples of the Taiwan Area and Mainland Area.

³⁵⁴ See Leyda, José Alejandro Carballo, *supra* note 34, Paragraph 57.

³⁵⁵ Article 74, Paragraph 3 of the Act Governing Relations Between Peoples of the Taiwan Area and Mainland Area .



ADWA

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. Generally speaking, the courts nowadays recognize Chinese arbitration awards. To date, more than dozens of Chinese awards have been successfully applied for recognition and enforcement in Taiwan.

Nevertheless, although Article 19 of the "*Provisions of the Supreme People's Court on Recognition and Enforcement of the Arbitral Awards of the Taiwan Region*" 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 be submitted to a competent intermediate court in accordance with the provisions of the Civil Procedure Law of China. At the same time, Article 14 of the "*Provisions of the Supreme People's Court on Recognition and Enforcement of the Arbitral Awards of the Taiwan Region*" requires that 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, recognition and enforcement will still depend on cross-strait politics.³⁵⁶

Later developments have seen a stabilization of cross-strait recognitions. In the latest case, the court analyzed 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.³⁵⁷ In 2004, a Taiwanese CAA arbitral award has applied for recognition and enforcement before 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.

Hong Kong and Macau:

³⁵⁶ See Leyda, José Alejandro Carballo, *supra* note 34, Paragraphs 59 and 60.

³⁵⁷ Shihlin District Court 100 Sheng No. 276



According to the "*Laws and Regulations Regarding Hong Kong & Macao Affairs*", Articles 30 to 34 of the old Commercial Arbitration Act, which are actually Articles 47 to 51 of the Arbitration Law, shall apply to the validity, petition for court recognition, and suspension of execution proceedings in cases involving civil arbitral awards made in Hong Kong or Macau.³⁵⁸ 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.³⁵⁹ Therefore, although the 2015 "*Provisions of the Supreme People's Court on Recognition and Enforcement of the Arbitral Awards of the Taiwan Region*" 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.³⁶⁰

21.20 Can a successful party in the arbitration recover its costs in Taiwan?

Yes. According to Article 34, Paragraph 1 of the "*Rules on Arbitration Institution, Mediation Procedures and Fees*", the costs and arbitration fees should be allocated and decided together with an arbitral award. However, this does not include any attorneys' fees, unless agreed explicitly in the arbitration agreement of the parties.

21.21 Are there any statistics available on arbitration proceedings in Taiwan?

³⁵⁸ Article 42, Paragraph 2 of the Laws and Regulations Regarding Hong Kong & Macao Affairs.

³⁵⁹ 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.

³⁶⁰ See Leyda, José Alejandro Carballo, supra note 34, Paragraph 62.



ADWA

There is currently no complete statistics available on arbitration proceedings in Taiwan.

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

Taiwan's Arbitration Law was basically formulated with reference to the 1985 UNCITRAL Model Law. Although some provisions have been updated separately, the overall arrangement and content of the provisions still lag behind the current UNCITRAL Model Law which was amended in 2006. In recent years, the CAA has actively invited experts to draft amendments to Taiwan's Arbitration Law. In the past, the CAA was the institution that mainly promoted the implementation of the Arbitration Law in Taiwan.

The current draft is still under discussion in the public hearings held by the CAA. According to the CAA, there are four aspects of the amendment: "Provisions of Model Law to be adopted", "current provisions worth retaining ", "additional part - emerging issues" and "revocation of arbitration awards and refusal to recognize arbitration rewards". However, the detailed draft has not yet been made public.

The CAA plans to propose a draft of the new Arbitration Law with input from the public. After that, this draft will be taken into consideration of the legislators when they review and amend the Arbitration Law.

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3. Court Organic Act of R.O.C. (Taiwan)
4. Code of Civil Procedure of Japan



5. (Abolished) Provisional Act Governing the Judge Selection for Civil Litigation of R.O.C.(Taiwan)
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7. UNCITRAL Notes on Organizing Arbitral Proceedings, 1996
8. The Rules on Arbitration Institution, Mediation Procedures and Fees
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Name of Authors:	MS. WENDY CHU MS. JAMIE CHEN
Name of Law Firm:	Eiger
Brief Profile:	Eiger is a full-service law firm with Asia Pacific and Greater China practice strengths providing counseling and assistance in their corporate, commercial, dispute-resolution and intellectual-property matters. Eiger's clients range from major multinationals and financial heavyweights through to SMEs across a wide range of industries
Telephone No.:	+886 2 2771 0086
Email:	wendy.chu@eiger.law jamie.chen@eiger.law
Website:	http://www.eiger.law/



22. THAILAND



**BY: DR. ANDREAS RESPONDEK
MS. TASHA LIM
MS. SUTTHIDA NORASARN
MS. CHONLITA SAIKANDOK**

22.1 Which laws apply to arbitration in Thailand?

The relevant arbitration law is the “Thai Arbitration Act B.E. 2545 (2002)”, which came into force on 30 April 2002 (“Arbitration Act”) and was amended by the “Arbitration Act (No. 2) B.E. 2562 (2019)” which became effective on 15 April 2019, as well as Sections 210 to 222 of the Civil Procedure Code B.E. 2477 (1934).

22.2 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 exempted from civil 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).

In addition, apart from the fact that normally, arbitration will be used to settle disputes arising from civil contracts, under the Thai Arbitration Act, arbitration can also be used to settle disputes arising from administrative contracts between government agencies and private enterprises if agreed by such contracts’ parties (Sec. 15 Arbitration Act).



ADWA

22.3 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 administrative contracts 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, without prior approval from the Cabinet. The validity of this 2004 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. This Cabinet resolution received a backlash from foreign investors. In this respect, Thai Supreme Court Judgment No. 7277/2549³⁶¹ is also of interest. This exuded the impression that the Thai government does not support arbitration.

To improve the investment scene in Thailand, on 14 July 2015, the Cabinet relaxed the 2009 resolution to limit the contracts that require Cabinet's approval. In effect, Cabinet approval for contracts between state agencies and (Thai or foreign) private parties will now only be required for contracts under the Public-Private Partnership Act, and concession agreements.

³⁶¹ 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.



22.4 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.

22.5 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?

The Arbitration Act does not require any party domiciled in Thailand to select Thai arbitration institutions for the arbitration.

22.6 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, 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. Normally, the parties will agree on the number of arbitrators, but in the event that the parties cannot agree on the number of arbitrators, there should be only one arbitrator in such case.
- The arbitrators must be impartial and independent, and possess the qualifications prescribed by the arbitration agreement or the institution administering the arbitration.
- Unless otherwise agreed by the parties, arbitral awards of the arbitral tribunal shall be made by a majority of votes. If a majority of votes



ADWA

cannot be obtained, the chairman of the arbitral tribunal shall solely issue arbitral awards.

The chairman of the arbitral tribunal can resolve procedural issues if authorized by the parties or all members of the arbitral tribunal.

- The arbitral award must be in writing and signed by all or a majority member of the arbitral tribunal.

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

22.7.1 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. In addition, according to Sec. 40 paragraph 3 (1)(d) of the Arbitration Act, the court can set aside an arbitral award if one of the parties objects to such arbitral award by filing a motion to the court requesting the court to set aside the arbitral award and the party can prove that the arbitral award dealing with the dispute is not within the scope of the arbitration agreement or contains a decision on matters



beyond the scope of the arbitration agreement. In case that the court has an order/judgement not to set aside the arbitral award, the party can also appeal against the court's order/ judgement to the Supreme Court in case the court's order/judgment is contrary to provisions of law concerning public policy. In the event that one of the parties already filed a petition to the court to enforce the arbitral award, the opposing party can also appeal against the court's order/judgement to the Supreme Court if the enforcement of the award is contrary to provisions of law concerning public policy (Sec. 45 (2) of the Arbitration Act) (Thai Supreme Court Judgement No. 4750 - 4751/2561).

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 denies that the arbitral tribunal has jurisdiction to decide 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.

22.7.2 Proceedings started abroad



ADWA

If the proceedings 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.

22.7.3 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 had been conducted in the courts, then it will proceed as above. If the court orders provisional relief before the arbitral proceedings have started, then the party who filed the above application to the court must commence the arbitration proceedings within 30 days of the date of the court's order (or such other period that is specified by the court). In the event that such party fails to act accordingly, the court's order shall be deemed cancelled upon the expiration of such respective period of time.



22.8 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), the “Office of the Arbitration Tribunal of the Board of Trade Thailand” (OAT) and the “Thailand Arbitration Center” (THAC).

In addition to these three 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.

22.9 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, Chatuchak, Bangkok 10900
Tel: +66 2 541 2298/9
Fax: +66 2 512 8432/4/6
E-mail: tai@coj.go.th
Website: <https://tai.coj.go.th/>

- **Office of the Arbitration Tribunal of the Board of Trade of Thailand, Thai Commercial Arbitration Institute**

150/2 Ratchabophit Road, Wat Ratchabophit,
Phranakorn, Bangkok 10200
Tel: +66 2 018 6888 Ext. 4450, 4670, 5400
Fax: +66 2 226 4525, +66 2 622 1879, +66 2 225 3372
E-mail: legal@thaichamber.org, bot@thaichamber.org
Website: <http://www.thaichamber.org>

- **Thailand Arbitration Center (THAC)**

689 Bhiraaj Tower, 26th Floor, Prommit, Klong Ton Nua, Vadhana,
Bangkok 10110



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Tel: +66 2 018 1615
 Fax: +66 2 018 1632
 E-mail: info@thac.or.th
 Website: <https://thac.or.th/>

22.10 Arbitration Rules of major arbitration institutions?

The Arbitration Rules of the Thai Arbitration Institute, Office of the Judiciary A.D. 2017 which took effect on 30 January 2017.

http://www.tai-en.coj.go.th/doc/data/tai-en/tai-en_1510115486.pdf

http://www.jla.coj.go.th/doc/data/jla/jla_1499074236.pdf

The Rules of the Thailand Arbitration Center can be accessed under the following link:

https://www.thac.or.th/law_index

22.11 What are the Model Clauses 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.”

The Thailand Arbitration Center (“THAC”) recommends the following model clause:

“Any dispute, controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof, shall be referred to and finally resolved by arbitration in accordance with the



Arbitration Rules of the Thailand Arbitration Center for the time being in force and the conduct of the arbitration thereof shall be under the administration of the Thailand Arbitration Center.”

22.12 How many arbitrators are usually appointed?

Pursuant to Sec. 17 of the Arbitration Act, the arbitral tribunal shall be composed of an uneven number of arbitrators. 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.

Article 14, 15, 16 of The Arbitration Rules, the Thai Arbitration Institute, Office of the Judiciary A.D. 2017 contain detailed regulations regarding the appointment of arbitrators:

“In the absence of an agreement by the parties as to the number of arbitrators, a sole arbitrator shall be appointed.”

Also, the general rule under THAC Rules (Art. 17) provides for a sole arbitrator.



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22.13 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).

Furthermore, Sec. 23 of the Arbitration Act also imposes liability on arbitrators for civil actions conducted as an arbitrator with the intent to cause gross negligence giving rise to damage to any party.

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).

One of the parties can also challenge an arbitral award made by the arbitral tribunal by filing a motion to the court requesting the court to set aside such arbitral award, provided that such party can prove that the arbitral award dealing with a dispute is not within the scope of the arbitration agreement or contains a decision on matters beyond the scope of the arbitration agreement or the composition of the arbitral tribunal or the arbitral proceedings were not in accordance with the agreement of the parties or, unless otherwise agreed by the parties, in accordance with this Act (Sec. 40 of the Arbitration Act). Furthermore, in the event that an arbitral award is enforced already by the court as requested by one of the parties (Sec. 41 of the Arbitration Act), provided that such party needs to fulfil conditions stated under Sec. 42 of the Arbitration Act, if the opposing party does not agree with the enforcement, the opposing party can appeal against the court’s order/judgement made to enforce the arbitral award to the Supreme Court or the Supreme Administrative Court, as the case may be, provided that the reason for the appeal shall fall under one of the reasons stated in Sec. 45 of the Arbitration Act e.g. to accept or enforce such arbitral award is contrary to provisions of law concerning public policy.



Additionally, the TAI has its own code of ethics for arbitrators. Meanwhile in 2015, the arbitration rules adopted by the THAC included rules relating to the conduct of arbitrators.

22.14 Are there any restrictions as to the parties' representation in arbitration proceedings" (Royal Decree No. 3 B.E. 2543 (2000))?

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.

"The Arbitration Act (No. 2) B.E. 2562 (2019)" which became effective on 14 April 2019 addresses only the appointment of foreign arbitrators, but not the representation of parties by foreign counsel. However, according to amendments under the Arbitration Act (No. 2) B.E. 2562 (2019), arbitrators can request for a certificate from an institution legally established for the purposes of settling disputes by arbitration for which they work and use such certificate as a supporting document to apply for a visa and a work permit.

22.15 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.



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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.

A party may request the court to appoint the arbitrator pursuant to the conditions provided in Sec. 18 of the Arbitration Act.

The court can also set aside an arbitral award if requested by one of the parties, provided that conditions under Sec. 40 of the Arbitration Act shall apply. And for any court's judgement or order made under the Arbitration Act, one of the parties can also appeal it against the Supreme Court or the Supreme Administrative Court, as the case may be, to have the Supreme Court or the Supreme Administrative Court re-consider such judgement or order in order to have such judgement or order changed.

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

The parties may file with the 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 had been conducted in the courts.

Further, Article 39 of the Arbitration Rules, the Thai Arbitration Institute, Office of the Judiciary A.D. 2017 grants the tribunal the right to order interim measures. In practice, interim measures granted by the TAI arbitral tribunal will not be enforceable in Thailand without a separate court order.

22.17 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**

The Arbitration Act does not stipulate a time limit for delivery of the award. Institutional Rules (TAI Rules Art. 45) do have a 30-day rule. The THAC Rules provide for a 45-day deadline (THAC Rules Art. 70).

- **Other formal requirements for arbitral awards**

Apart from the aforementioned there are no other formal requirements for arbitral awards.

22.18 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 Article 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:



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- (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 the 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).

Further, the Supreme Court Judgment No. 13534/2556 (A.D. 2013) is also noteworthy. The court therein held that Thai courts have no authority to set aside awards made in foreign countries, it would be of best interest to follow the comity principle and not exercise jurisdiction to set aside foreign awards according to Sec. 40 of the Arbitration Act.



22.19 What procedures exist for enforcement of foreign and domestic awards?³⁶²

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,

³⁶² Respondek, Enforcement of Foreign Arbitral Awards and Foreign Judgments in Thailand; Singapore Law Gazette, November 2015, p. 30 ff (<https://www.rf-arbitration.com/upload/document/rechtsanwalt-thailand-enforcement-of-foreign-arbitral-awards.pdf>)



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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)

22.20 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.



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

No.

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

Foreign arbitrators faced all kinds of regulatory immigration hurdles in arbitration proceedings governed by Thai law and conducted in Thailand. A new amendment to the Thai Arbitration Act B.E. 2545 (2002) came into force on 15 April 2019 and aims to make appointments and the required official approvals for foreign arbitrators easier.

It remains to be seen how the amendments to the Act will finally be implemented. But the amendments are certainly a positive signal to make Thailand a more attractive place for foreign arbitrators.

In addition, another recent regulatory change concerns the introduction of a special “Smart Visa” program. This visa is a special type of visa designed to attract highly skill personnel and investors working or investing in certain target industries as well as highly skill professionals, including foreign arbitrators.



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Name of Author:	DR. ANDREAS RESPONDEK MS. TASHA LIM MS. SUTTHIDA NORASARN MS. CHONLITA SAIKANDOK
Name of Law Firm:	Respondek & Fan Ltd
Brief Profile:	RESPONDEK & FAN is “breathing” dispute resolution. The firm’s founder and Managing Director started his career by challenging the LSBA in 1983 in the Louisiana Supreme Court for not admitting foreign lawyers to the bar exam and won twice. Dr. Andreas Respondek established his own firm in 1998 with offices in Singapore and Bangkok. He is a Chartered Arbitrator (FCIArb), American Attorney at Law and a German Rechtsanwalt. The firm is regularly involved in handling complex commercial, multi-faceted international disputes in multiple jurisdictions across the region under the ICC, HKIAC, SIAC, Swiss Chamber’s, TAI and other rules and is also involved in ad hoc arbitrations. Dr. Respondek is regularly appointed as Chairman, Sole Arbitrator, Co-Arbitrator, Emergency Arbitrator and Counsel and has helped international clients win or resolve a wide variety of disputes before arbitral tribunals around the world.
Telephone No.:	+66 2 635 5498
Fax No.:	+66 2 635 5499
Email:	Respondek@rf-arbitration.com
Website:	www.rf-arbitration.com ; www.rflegal.com



23. VIETNAM



**BY: MR. CHRISTIAN A. BRENDDEL
MR. TIM HOLTORF**

23.1 Which laws apply to arbitration in Vietnam?

Arbitration in Vietnam is mainly regulated by the Law on Commercial Arbitration³⁶³ which provides the legal framework for arbitration.

Resolution No. 01³⁶⁴ guides the implementation of certain provisions of the Law on Commercial Arbitration and Decree 63³⁶⁵ provides further rules and regulations concerning governmental management and establishment and operation of arbitration centers in Vietnam.

Further regulations are provided in the Civil Procedure Code³⁶⁶ and the Law on Enforcement of Civil Judgments³⁶⁷.

23.2 Is the Vietnamese arbitration law based on the UNCITRAL Model Law?

Yes. The Law on Commercial Arbitration is generally based on the UNCITRAL Model Law.

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

The Law on Commercial Arbitration applies to both domestic and foreign arbitration, whereby foreign arbitration means arbitration institutions

³⁶³ Law No. 54-2010-QH12.

³⁶⁴ Resolution No. 01-2014-NQ-HDTP.

³⁶⁵ Decree 63-2011-ND-CP, last amended by Decree 124-2018-ND-CP.

³⁶⁶ Law No. 92-2015-QH13.

³⁶⁷ Law No. 26-2008-QH12, last amended by Law No. 64-2014-QH13.



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established in accordance with foreign law executing arbitration in Vietnam or overseas.³⁶⁸

23.4 Has Vietnam acceded to the New York Convention?

Vietnam acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) in 1995, meaning that Vietnamese courts should respect foreign arbitral awards rendered by a recognized international arbitration institution without a review of the case’s merit. This accession, however, was not made without reservations. Vietnam will apply the New York Convention only to the recognition and enforcement of awards made in the territory of another contracting state. With regard to awards made in the territory of non-contracting states, Vietnam will apply the New York Convention only to the extent to which those states grant reciprocal treatment. Moreover, Vietnam will apply the New York Convention only to disputes arising out of legal relationships, whether contractual or not, that are considered commercial under Vietnamese law. And, last but not least, Vietnam declared that the interpretation of the New York Convention before Vietnamese courts or competent authorities should be made in accordance with the constitution and the laws of Vietnam.³⁶⁹

23.5 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?

Disputing parties may agree on foreign arbitration institutions irrespective of the dispute has foreign element or not (however, this view is controversial). Please be aware that foreign arbitral awards must be formally recognized and held enforceable by the competent court in Vietnam which can be cumbersome.

³⁶⁸ Cl. 11 Art. 3 Law on Commercial Arbitration.

³⁶⁹ <http://www.newyorkconvention.org/list+of+contracting+states>



23.6 Does the Vietnamese arbitration law contain substantive requirements for the arbitration procedures to be followed?

A commercial dispute shall be settled by arbitration if the parties to the dispute have agreed in writing (via a clause in a contract or a separate agreement) prior to the dispute, or after it arises, that such dispute would be settled by recourse to arbitration. Emails, telex and fax meet the formal requirement if the intention of the parties to conclude an arbitration agreement is clearly shown.³⁷⁰ With regard to disputes between Vietnamese parties, Vietnamese law applies, whereas disputes with a foreign element can be solved by recourse to the law as chosen by the parties.³⁷¹ Such a dispute does not only comprise disputes with a foreign person or entity but also disputes where the grounds for the matter in dispute arise abroad or where assets involved are located abroad.³⁷²

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

In general, yes.

23.8 What are the main arbitration institutions in Vietnam?

The most popular arbitration institution in Vietnam is (still) the Vietnam International Arbitration Center (VIAC) with its head office in Hanoi and a branch in Ho Chi Minh City.³⁷³ In addition to the VIAC there are a number of arbitration institutions such as the Pacific International Arbitration Center (PIAC) in Ho Chi Minh City and the Asian International Commercial Arbitration Center (ACIAC) in Hanoi, Ho Chi Minh City and Vinh City.

23.9 Addresses of major arbitration institutions in Vietnam?

³⁷⁰ Art. 16 Law on Commercial Arbitration.

³⁷¹ Art. 14 Law on Commercial Arbitration.

³⁷² Cl. 2 Art. 663 Civil Code (Law No. 91-2005-QH13).

³⁷³ VIAC is closely linked to the Vietnam Chamber of Commerce.



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- **Vietnam International Arbitration Center (VIAC)**

Head office:

9 Dao Duy Anh Street, Dong Da District, Hanoi, Vietnam

Tel: +84 24 3 574 6916

Email: info@viac.org.vn

Website: <http://www.viac.vn>

Branch:

171 Vo Thi Sau Street, District 3, Ho Chi Minh City, Vietnam

Tel: +84 28 3 932 1632

- **Pacific International Arbitration Center (PIAC)**

39 Street No. 5, Binh Thoi Area, Ward 8, District 11, Ho Chi Minh City, Vietnam

Tel: +84 28 3962 7401

Fax: +84 28 3962 6500

Email: piac.vnn@gmail.com

Website: <http://www.piac.vn>

- **Asian International Commercial Arbitration Center (ACIAC)**

Head office:

3th Floor, 37 Le Hong Phong Street, Ba Dinh District, Hanoi, Vietnam

Tel: +84 24 3734 4677

Fax: +84 24 3734 3327

Email: ttmachau@vnn.vn /

Website: <http://www.aciac.com>

Branches:

89 Nguyen Du, District 1, Ho Chi Minh City, Vietnam

Tel: +84 28 3823 4114

Fax: +84 28 3823 5325

68 Ha Huy Tap Street, Vinh City, Nghe An Province, Vietnam

Tel: +84 38 866 8898



23.10 Arbitration Rules of major arbitration institutions?

- VIAC's Arbitration Rules:
<https://www.viac.vn/en/rules-of-arbitration.html>
- PIAC's Arbitration Rules:
<http://en.piac.vn/Default.aspx?tabid=62>
- ACIAC's Arbitration Rules:
<http://aciac.com/?page=quy-tac-to-tung>

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

- VIAC recommends:

“Any dispute arising out of or in relation with this contract shall be resolved by arbitration at the Vietnam International Arbitration Centre (VIAC) in accordance with its Rules of Arbitration”.

or

“Any dispute arising out of or in relation with this contract shall be resolved by arbitration at the Vietnam International Arbitration Centre at the Vietnam Chamber of Commerce and Industry (VIAC) in accordance with its Rules of Arbitration”.

Parties may add:

- (a) *“The place of arbitration shall be [city and/or country].”*
- (b) *“The governing law of the contract [is/shall be] the substantive law of [...].”*
- (c) *“The language to be used in the arbitral proceedings shall be [...].”*



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- PIAC recommends:

“Any dispute arising out of or in relation with this contract shall be finally resolved by the Pacific International Arbitration Centre (PIAC) in accordance with its Rules of Arbitration.”

Parties may add:

- (a) *“The number of arbitrators shall be [one or three].”*
- (b) *“Place of arbitration shall be [city and/or country].”*
- (c) *“The governing law of the contract [is/shall be] the substantive law of [...].”*
- (d) *“The language to be used in the arbitral proceedings shall be [...].”*

- ACIAC recommends:

“All disputes arising out of or in relation shall be finally settled by the Asean International Commercial Arbitration Center (ACIAC).”

23.12 How many arbitrators are usually appointed?

In general, an arbitration tribunal shall consist of three arbitrators. However, the parties may agree on one or more.³⁷⁴ According to our experience, three arbitrators seem to be the preferred number.

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

Yes. An arbitrator shall reject the arbitration process, and the disputing parties may request the replacement of an arbitrator if:

- (a) the arbitrator is a relative or a representative of one of the parties; and/or

³⁷⁴ Art. 39 Law on Commercial Arbitration.



- (b) the arbitrator has an interest which is related to the dispute; and/or
- (c) there are clear reasons showing that the arbitrator is not impartial or objective; and/or
- (d) the arbitrator was a mediator or (legal) representative for either of the parties in this case, unless both parties provide written consent.³⁷⁵

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

The law entitles the disputing parties to authorize a representative and a person to “protect their legal rights and interests”³⁷⁶ without stating explicit restrictions.

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

As a general rule, courts have no jurisdiction over a dispute legally agreed by the parties to be settled by arbitration.

However, there are some exemptions:

- **Appointment of “ad hoc” arbitrator for the respondent**

If the respondent fails to appoint an arbitrator within 30 days as of its receipt of the claimant's petition and if the parties don't have another agreement on the appointment of an arbitrator, the claimant may request the competent court to appoint an arbitrator for the respondent.³⁷⁷

In the event 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 don't have another agreement on the appointment of an arbitrator, either party or the parties

³⁷⁵ Cl. 1 Art. 42 Law on Commercial Arbitration.

³⁷⁶ Cl. 2 Art. 55 Law on Commercial Arbitration.

³⁷⁷ Cl. 1 Art. 41 Law on Commercial Arbitration.



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may request the competent court to appoint the arbitrator for the respondents.³⁷⁸

- **Appointment of “ad hoc” arbitrator as chairman**

If the appointed arbitrators fail to appoint an “ad hoc” arbitrator as a chairman within 15 days from their appointment, and unless the parties do not agree otherwise, then the parties may request the competent court to appoint the chairman.³⁷⁹

- **Appointment of “ad hoc” sole arbitrator**

If the parties fail to appoint an ad hoc sole arbitrator within 30 days from the respondent’s receipt of the petition, and unless the parties do not agree to request the arbitration institution to appoint the ad hoc sole arbitrator, either party may request the competent court to appoint the ad hoc sole arbitrator.³⁸⁰

- **Replacement of “ad hoc” arbitrator**

If the replacement of an arbitrator is not agreed upon by the remaining arbitrators, or if an arbitrator or the sole arbitrator refuses to handle the settlement of the dispute, the chief judge of the competent court shall, within 15 days from the receipt of the request filed by the arbitrator/s and one or all disputing parties, assign a judge to decide the replacement of such arbitrator.³⁸¹

In case where an arbitrator cannot continue participating in the arbitration proceedings due to a force majeure event or other objective reasons or is replaced, the selection and appointment of the replaced arbitrator shall be conducted along similar procedures.³⁸²

³⁷⁸ Cl. 2 Art. 41 Law on Commercial Arbitration.

³⁷⁹ Cl. 3 Art. 41 Law on Commercial Arbitration.

³⁸⁰ Cl. 4 Art. 41 Law on Commercial Arbitration.

³⁸¹ Cl. 4 Art. 42 Law on Commercial Arbitration.

³⁸² Cl. 6 Art. 42 Law on Commercial Arbitration.



- **Jurisdiction and arbitration agreement**

Any party disagreeing with the arbitration tribunal's decision on the validity and effectiveness of the relevant arbitration agreement or on the tribunal's jurisdiction may, within 5 working days from its receipt of the decision, file a complaint with the competent court to request the court's review of such decision.³⁸³

- **Collection of evidence**

If the arbitration tribunal or the parties cannot collect evidence by themselves after exhausting all means, a petition may be made to the competent court to request assistance in collecting the evidence.³⁸⁴

- **Summoning witness**

If a witness who has been orderly summoned by the arbitration tribunal fails to show up at the arbitration hearing without a good cause and the absence obstructs the settlement of the dispute, the arbitration tribunal may request the competent court to issue a decision to summon the witness to the hearing.³⁸⁵

- **Interim/conservatory relief**

The disputing parties may request a court to grant interim/conservatory relief during arbitration proceedings if a party's rights and interests have been infringed or there is a direct risk of infringement.

Within 3 working days after interim relief/conservatory relief is applied for, the chief judge of the competent court shall assign a judge to hear and resolve the application, whereby such decision shall be made within 3 working days. In the same way, applications for amendment, supplement or removal are handled.³⁸⁶

³⁸³ Cl. 1 Art. 44 Law on Commercial Arbitration.

³⁸⁴ Cl. 5 Art. 46 Law on Commercial Arbitration.

³⁸⁵ Cl. 2 Art. 47 Law on Commercial Arbitration.

³⁸⁶ Art. 53 Law on Commercial Arbitration.



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- **Setting aside**

Any party disagreeing with the arbitral award has the right to request a court for the arbitral award to be set aside in certain cases provided for by law.³⁸⁷

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

Yes. The arbitration tribunal may grant interim/conservatory relief by way of:

- (a) Prohibition of changing the status quo of assets in dispute;
- (b) Prohibition or the order of certain actions by a disputing party to prevent disadvantage to the arbitration proceedings;
- (c) Attachment of assets in dispute;
- (d) Preservation, storage, sale or disposal of assets of one or all parties;
- (e) Interim payments between the parties; and
- (f) Prohibition of transferring rights attached to the assets in dispute.³⁸⁸

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

- **Formal requirements for arbitral awards**

The formal requirements for an arbitral award are as follows:

- (a) Date and location of issuance of the award;
- (b) Names and addresses of the claimant and the respondent;
- (c) Full names and addresses of the arbitrator(s);
- (d) Brief abstract of the statement of claim and matters in dispute;

³⁸⁷ Art. 68 Law on Commercial Arbitration.

³⁸⁸ Cl. 2 Art. 49 Law on Commercial Arbitration.



- (e) Grounds for the issuance of the award, unless the parties agree otherwise;
- (f) Result of the dispute resolution;
- (g) Time-limit for enforcement;
- (h) Allocation of arbitration fees and other relevant fees; and
- (i) Signatures of the arbitrator(s).³⁸⁹

• **Deadlines for issuing arbitral awards**

The arbitral award shall immediately be issued in the session but not later than 30 days from the end of the final session.³⁹⁰

• **Other formal requirements for arbitral awards**

An ad hoc arbitral award may only be enforced after such has been duly registered with the competent court, whereby the registration or non-registration shall not affect the arbitral award's content or validity.³⁹¹

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

Any party disagreeing with the arbitral award has the right to apply for the arbitral award to be set aside, i.e. to be rescinded. Competent authority is the provincial court in the place where the domestic arbitral award was issued, unless otherwise agreed upon.³⁹² The time limit for such application is 30 days from the receipt of the arbitral award. The court will then establish an examination council consisting of three judges.

Article 68 of the Law on Commercial Arbitration lists the grounds for which an arbitral award can be set aside:

- (a) No or an invalid arbitration agreement;

³⁸⁹ Cl. 1 Art. 61 Law on Commercial Arbitration.

³⁹⁰ Cl. 3 Art. 61 Law on Commercial Arbitration.

³⁹¹ Cl. 1 Art. 62 Law on Commercial Arbitration.

³⁹² Cl. 2 g Art. 7 Law on Commercial Arbitration.



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- (b) The arbitration tribunal or the arbitration proceedings were inconsistent with the arbitration agreement or the provisions of the Law;
- (c) The dispute or parts thereof was/were out of the jurisdiction of the arbitration tribunal;
- (d) During the proceedings an arbitrator breached his/her obligations (bribery, breach of impartiality and objectivity etc.);
- (e) The arbitral award is contrary to the interest of the Socialist Republic of Vietnam.

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

23.19.1 Recognition and Enforcement of foreign arbitral awards in Vietnam

Main provisions for the recognition and enforcement of foreign arbitral awards in Vietnam are provided for by the Civil Procedure Code.

In order to enforce a foreign arbitral award in Vietnam, such must be recognized and approved by the courts of Vietnam. Therefore, a petition must be filed by the person or legal entity seeking enforcement resp. its representative.

- **Competent authority and formal requirements³⁹³**

Petitions have to be filed within three years from the day the foreign arbitral award became legally effective with the competent Vietnamese court or, if an international treaty to which Vietnam is a member provides for, the Ministry of Justice and shall contain:

- (a) Name and address of the person or organization seeking enforcement;

³⁹³

Art. 451 - 453 Civil Procedure Code.



- (b) Name and address of the person or organization against whom/which enforcement is sought or the location and specification of the assets in Vietnam which are related to the enforcement;
- (c) Brief outline of the case;
- (d) The relevant arbitration agreement;
- (e) The arbitral award.

Further documents as specified in the international treaty on the basis of which enforcement is sought (if applicable).

- **Competent court**³⁹⁴

If the petition was not filed with the court but with the Ministry of Justice, the latter will forward the file to the competent provincial court (People's Court of provinces or cities under central authorization) within five working days from the receipt of a valid petition.

The place of jurisdiction is either the legal residence or working place of the person against whom enforcement is sought or, in case of an organization the corporate domicile or the locality of the property concerned by the award.

Within five working days the relevant court has to check the file and notify the person or entity against whom/which enforcement is sought as well as the procuracy.

Within two months, provided that no further clarification is required, the court will decide on the commencement of a court meeting and within 20 days after such decision, the court shall open the meeting.

- **Examination**³⁹⁵

The scope of the examination comprises the verification of the arbitral award in regard to Vietnamese laws and applicable international treaties.

³⁹⁴ Art. 454, Cl. 1 (b) Art. 37, Cl. 5 Art. 31, Cl. 2 (e) Art. 39; Art. 455 - Art. 457 Civil Procedure Code.

³⁹⁵ Art. 459 Civil Procedure Code.



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Arbitral awards shall not be recognized and enforced, if

- (a) one of the parties was legally incapable when signing the arbitration agreement;
- (b) the arbitration agreement is invalid;
- (c) the person or entity against whom/which enforcement is sought was not granted the right to be sufficiently heard during the arbitration proceedings;
- (d) the award concerns a subject or parts thereof that was/were not covered by the arbitration agreement;
- (e) the foreign arbitration panel or procedure was inconsistent with the arbitration agreement or the applicable law;
- (f) the arbitral award is not yet finally binding;
- (g) the arbitral award has been revoked or suspended;
- (h) the resolved dispute shall not be subject to arbitral proceedings under Vietnamese laws;
- (i) the recognition and enforcement is contrary to the basic principles of the laws of Vietnam.

23.19.2 Enforcement of domestic awards

Domestic arbitral awards getting enforced under the Law on Commercial Arbitration, the Civil Procedure Code and the Law on Enforcement of Civil Judgments. The procedure shall be briefly outlined as follows:

If the award debtor neither voluntarily implements the award within the enforcement term set out in the award nor files with the court to request that the award be set aside within 30 days from the receipt of the award, the award creditor may request the enforcement of the award.³⁹⁶

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

Yes. Unless otherwise agreed by the disputing parties, stated by procedural rules or allocated by the arbitration tribunal, the losing party shall bear the costs which comprise:

³⁹⁶ Cl. 1 Art. 66 Law on Commercial Arbitration.



- (a) Remuneration, travelling and other expenses of the arbitrator/s;
- (b) Costs for additional assistance (expert etc.);
- (c) Administrative fees;
- (d) Costs for ad hoc arbitration;
- (e) Further costs for necessary services.³⁹⁷

23.21 Are there any statistics available on arbitration proceedings in the Vietnam?

The **VIAC** constantly publishes statistics:
<https://www.viac.vn/en/statistics>

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

The Ministry of Justice of Vietnam plans to improve the quality of arbitration and to intensify promotion of arbitration as an alternative to conventional court proceedings. Measures to be implemented shall comprise the enhancement of the capacity of arbitration institutions, its arbitrators as well as related legal provisions.

³⁹⁷ Art. 34 Law on Commercial Arbitration.



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Name of Author:	MR. CHRISTIAN A. BRENDEL MR. TIM HOLTORF
Name of Law Firm:	BRENDEL & ASSOCIATES LAW CO., LTD.
Brief Profile:	<p>Brendel & Associates is a wholly German owned law firm with offices in Ho Chi Minh City (Head Office), HaNoi (Branch) and DaNang (Branch). The focus of our legal service provision is Vietnamese Corporate, Economic and Labor Law as well as related tax advice. Additional advisory services concerning VAS based accounting issues complete the service package and thus clients can receive experienced and comprehensive support from early market entry to project implementation stage.</p> <p>The majority of our clients stems from Europe and the South East Asian Region and engages in various business sectors such as Logistics, Electronics, Garments, Banking, Finance, Renewable Energy, Heavy Duty Industry etc.</p> <p>Brendel & Associates is devoted to provide custom-tailored services and can thus count on a large number of long-term client-relationships which have been developed starting from 2004 and are carefully maintained. We take pride in assisting our clients in realizing growth and stability in a developing and challenging market by providing reliable as well as practically sensible advice.</p> <p>Our team currently consists of two German lawyer's RA Christian A. Brendel and RA Tim Holtorf, and 14 Vietnamese professionals (lawyers, accountants).</p>
Telephone No.:	+84 28 39112008
Fax No.:	+84 28 39112010
Email:	info@brendel-associates.com
Website:	http://www.brendel-associates.com/



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R E S P O N D E K & F A N

RECHTSANWÄLTE • ATTORNEYS AT LAW

S I N G A P O R E

Respondek & Fan Pte Ltd

1 North Bridge Road

#16-03 High Street Centre

Singapore 179094

Tel: +65 6324 0060

Fax: +65 6324 0223

B A N G K O K

Respondek & Fan Ltd

323 Silom Road, United Center, 39th Fl., Suite 3904 B

Bangkok 10500 / Thailand

Tel: +66 2 635 5498

Fax: +66 2 635 5499

www.rf-arbitration.com