ASIA

ARBITRATION GUIDE

DR. ANDREAS RESPONDEK, LL.M.

(EDITOR)

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NOTICE

The information provided in this Arbitration Guide has been researched with the utmost diligence, however laws and regulations in the Asia Pacific Region are subject to change and we shall not be held liable for any information provided. It is suggested to seek updated detailed legal advice prior to commencing any arbitration proceedings.
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Amendments for the 5th edition
Each country report has been completely revised and updated and was finalized in February 2017. The Nepal chapter has been newly added.
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 2017 edition contains a review of 21 jurisdictions. By including Nepal it has increased by one the number of jurisdictions covered in the last edition.

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

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

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

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
Dear Reader,

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

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

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

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

Singapore, February 2017
RESPONDEK & FAN
Dr. Andreas Respondek
Chartered Arbitrator (FCIArb)
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 (FCI Arb).

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

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

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¹ In re application of Andreas Respondek 434 So.2d 413 (La.1983); 442 So.2d 435 (La.1983)
STRUCTURE OF EACH COUNTRY REPORT

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

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

BY: MR. MOIN GHANI,
    MS. MAHERIN KHAN

1.1 Which laws apply to arbitration in Bangladesh?

The Arbitration Act 2001 (the “Act” or the “2001 Act”) governs international commercial arbitration, recognition and enforcement of foreign arbitral award and other arbitrations.

The 2001 Act represents a significant improvement over its predecessor, the Arbitration Act, 1940. The improvement of the law relating to international commercial arbitration in Bangladesh by the 2001 Act provides for an efficient and cost-effective venue for dispute resolution in the field of international trade, commerce, and investment.

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

The Arbitration Act 2001 is based on the UNCITRAL Model Law. However, there are some differences between the provisions of the 2001 Act and the Model Law. These can be summarized as follows:

• Section 11 of the 2001 Act deals with the number of arbitrators and provides that, unless otherwise agreed between the parties, the number shall not be even;

• The Model Law permits the parties to approach a court or authority for the appointment of a third arbitrator or sole arbitrator, as the case may be, in cases where the parties fail to reach an agreement. Under the 2001 Act this power, in the case of the domestic arbitration, is vested with the district judge and, in case of international commercial arbitration, is given to the chief justice or any judge of the Supreme Court designated by him;
Matters that are dealt with by the 2001 Act on which the Model Law is silent are:

- Award of interest by the tribunal (Section 38(6));
- Costs of arbitration (Section 38(7));
- Enforceability of an award in the same manner as if it were a decree of a court under Section 44 in situations where the award is not challenged within the prescribed period or the challenge has been unsuccessful;
- Appeals in respect of certain matters (Section 48);
- Fixing the amount of deposit as an advance for the cost of arbitration (Section 49);
- Non-discharge of arbitration agreement by death of a party (Section 51);
- Rights of a party to an arbitration agreement in relation to insolvency proceedings (Section 52);
- Identification of court having exclusive jurisdiction over the arbitral proceedings (Section 53); and
- Applicability of the Limitation Act 1908 to arbitrations as it applies to proceedings in court and related issues.

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

The 2001 Act deals with both domestic and international arbitration. The term 'domestic arbitration' is not defined in the 2001 Act. 'International commercial arbitration' is defined in Section 2(c) of the 2001 Act as an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in Bangladesh and where at least one of the parties is:
• 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.

However, it should be noted that in the context of interim preservatory orders under Section 7A, the courts have held that the provisions of the 2001 Act are not applicable to foreign arbitrations, namely, those where the place of arbitration is outside Bangladesh, except as provided in Section 3(2).

1.4 Has Bangladesh acceded to the New York Convention?

Bangladesh is a party to the New York Convention. The 2001 Act provides for enforcement of foreign arbitral awards in accordance with the New York Convention. The date of accession was 6 May 1992 and the Convention entered into force on 4 August 1992.

Bangladesh is also a party to the ICSID Convention 1965 (Conventions on the Settlement of Investment Dispute between States and Nationals of Other States).

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?

Procedural law

In general, if the place of arbitration is Bangladesh then the 2001 Act will usually be the procedural law. However, the parties have the freedom to lay down the procedure to be followed by the arbitral tribunal for conducting the proceedings.

In procedural matters the arbitral tribunal is allowed some flexibility and freedom and is not bound to follow the provisions of the Bangladesh Code of Civil Procedure, 1908 or the Bangladesh Evidence Act, 1872. On the question of the determination of rules of procedure, the 2001 Act endorses the fundamental principle of the parties' freedom to choose such rules and, failing such choice by the parties, the arbitral tribunal's freedom as enshrined in the UNCITRAL Model Law. However, like the English Arbitration Act, 1996, the 2001 Act has gone beyond the Model Law prescription on the matter, in that it enumerates objectively certain aspects of procedural and evidential matters, which include:

- time and place of holding the proceedings either in whole or in part;
- language of the proceedings and to supply translation of a document concerned;
- written statement of claim, specimen copy of defence, time of submission, and range of amendment;
- publication of document and presentation thereof;
- the questions asked of the parties and the replies thereto;
- written or oral evidence as to the admissibility, relevance, and weight of any materials;
- power of the arbitral tribunal in examining the issues of fact and of law; and
- submission or presentation of oral or documentary evidence.
The list is not exhaustive and is but a reminder of certain obvious procedural and evidentiary matters serving as a roadmap in the procedural journey of the arbitral tribunal. The provisions of the 2001 Act on matters such as 'place of arbitration', 'statements of claim and defence', and 'hearings and proceedings' are taken verbatim from the UNCITRAL Model Law. Similarly, on other procedural matters such as 'consolidation of proceedings and concurrent hearings', 'legal or other representation', 'power to appoint experts, legal advisors or assessors', and 'powers of the arbitral tribunal in case of default of the parties', the 2001 Act has followed verbatim the provisions of the English Arbitration Act, 1996.

Following Article 19(1) of the UNCITRAL Model Law, the 2001 Act provides in Article 25(1) that 'subject to this Act, the arbitral tribunal shall follow the procedure to be agreed on by all or any of the parties in conducting its proceedings'. Thus, it would seem that parties are allowed to choose a foreign procedural law or international arbitration rules, but any such choice is subject to the provisions of the 2001 Act. The question of when such provisions are 'inconsistent' with the 2001 Act will have to be judged on a case-by-case basis.

**Substantive law**

The parties have considerable freedom to choose the substantive law of their choice. Section 36 of the 2001 Act provides that the tribunal will decide the dispute in accordance with the law chosen by the parties. The parties are therefore free to decide the substantive law to be applied to the merits of the dispute. The 2001 Act allows the arbitral tribunal, in the absence of the parties' choice of applicable law, the freedom to apply any rules of law as it objectively deems appropriate in the circumstances of the dispute (Sec. 36(2)).

The 2001 Act further provides that if the law or the legal system of a country is designated by the parties, such designated law is meant to refer directly to the substantive law of that country and not to its conflict of laws rules. Like the UNCITRAL Model Law, the 2001 Act thus expressly avoids the renvoi situation. However, unlike the Model Law, the 2001 Act allows
the arbitral tribunal, in the absence of the parties' choice of applicable substantive law, of the dispute. Thus, in the absence of the parties’ choice the arbitral tribunal is no longer required to have recourse to the applicable conflict of laws rules as under the Model Law to determine the applicable substantive law. It should be noted that this prescription reflects the recent trend in many international institutional arbitration rules as well as in some national legislative enactments on international commercial arbitration. As in the case of the UNCITRAL Model Law, the tribunal is also mandatorily required under the 2001 Act to decide in accordance with the terms of the contract and to take into account the usages of the trade applicable to the transaction. However, unlike the Model Law, the Act expressly states the purpose of this specific requirement to be the 'ends of justice'.

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

Where any contractual dispute is covered by an arbitration clause contained in the contract providing for arbitration within Bangladesh, it must be resolved through arbitration. Court assistance in the form of interim orders is available before and after arbitration proceedings or until enforcement of the award has been initiated. Under section 7A of the 2001 Act the court may provide assistance in respect of the following matters:

• to appoint a guardian for a minor or an insane person to conduct arbitral proceedings on his or her behalf;

• to take interim custody of or sale of or other protective measures in respect of goods or property, which are subject matter of the arbitration agreement;

• to restrain any party from transferring property which is subject to arbitration and to pass an order of injunction on transfer of such property;

• to empower any person to seize, preserve, inspect, photograph, collect specimens of, examine, or take evidence of any goods or
property included in arbitration agreement and for that purpose to enter into land or building in possession of any party;

- to issue an interim injunction;
- to appoint a receiver; and
- to take any other interim protective measures which may appear reasonable or appropriate to the court.

1.8 What are the main arbitration institutions in Bangladesh?

There are a number of arbitration institutions in Bangladesh, some of which are mentioned below.

The **Bangladesh Council of Arbitration** (BCA) was established in 2004 under the auspices of the Federation of Bangladesh Chambers of Commerce and Industry (FBCCI) as an arbitral body for the resolution of commercial disputes.

In addition, on 9 April 2011, the **Bangladesh International Arbitration Centre** (BIAC) was launched, at the initiative of the International Chamber of Commerce, Bangladesh (ICC-B) in partnership with the Dhaka Chamber of Commerce and Industry (DCCI) and the Metropolitan Chamber of Commerce and Industry (MCCI), Dhaka.

1.9 Addresses of major arbitration institutions?

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

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E-mail: fbcci@bol-online.com
Bangladesh International Arbitration Centre (BIAC):
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Fax: +88-02-862-4351
E-mail: info@biac.org.bd
Web: www.biac.org.bd

1.10 Arbitration Rules of major arbitration institutions?

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

BIAC Arbitration Rules 2011 are available online at: http://www.biac.org.bd/biac-rules

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

Bangladesh Council for Arbitration (BCA) Model Arbitration Clause:

The Bangladesh Council of Arbitration (BCA) of the Federation of Bangladesh Chambers of Commerce and Industry (FBCCI) 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.”

BIAC Model Arbitration Clause:

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

1.12 How many arbitrators are usually appointed?

Chapter IV of the 2001 Act deals with the composition of the Arbitral Tribunal and the number of arbitrators and the appointment of arbitrators.

Parties are free to choose the number of arbitrators under the 2001 Act. In the event that the arbitration agreement is silent the default size of the tribunal is three arbitrators.

In case of an appointment of an even number of arbitrators by the parties, the appointed arbitrators are required to mutually appoint an additional arbitrator to act as a Chairman of the tribunal. If there is no agreement as to the number of arbitrators, one party may request the other party in writing for an appointment of a sole arbitrator which has to be accepted by the other party within 30 days of receipt of the request.

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

The grounds for challenging appointment of an arbitrator are provided for in Section 13 of the Act, which states that such appointment can be set aside if circumstances exist that give rise to justifiable doubts as to the arbitrator’s independence or impartiality, or if he or she does not possess the qualifications agreed to by the parties.
Section 14 sets out the challenge procedure. A party is duty bound to put the objection on record. Parties are free to agree on a challenge procedure. In absence of an agreement, the arbitral tribunal can itself decide on the challenge to its independence and impartiality. Any party aggrieved by the decision of the arbitral tribunal can appeal to the High Court Division. The Act requires the arbitral tribunal to wait until the challenge procedure is finally disposed of and sets a stringent time limit of three months within which the High Court must decide the appeal (section 14(6)). If a challenge to the arbitral proceedings fails, the tribunal continues the proceedings and renders an award.

Section 15 sets out the circumstances which result in the termination of the mandate of the arbitrator. These are: (i) withdrawal from the office by an arbitrator; (ii) death of arbitrator; (iii) agreement of all the parties on the termination of the mandate of the arbitrator; and (iv) inability of the arbitrator to perform his functions. Section 16 provides the procedure for substitution of an arbitrator whose mandate has been terminated.

If an arbitrator has incurred disqualifications referred to above and fails to withdraw himself from his office and all the parties fail to agree on his termination, then on the application by any party, the chief justice or a judge of the Supreme Court (in case of international commercial arbitration) or district judge (for all other arbitrations) may terminate the said arbitrator.

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

In respect of legal representation, section 31 of the 2001 Act provides that unless otherwise agreed by the parties, a party to an arbitral proceeding may be represented in the proceedings by the lawyer or other person chosen by him.

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 work.
The court’s power to intervene is restricted as follows; it can:

- refer parties to arbitration where there is an arbitration agreement (Section 10(2));
- appoint arbitrators on parties’ failure to approve arbitrators or on failure of the two appointed arbitrators to appoint the third arbitrator (Section 12);
- hear an appeal against the decision of the arbitral tribunal challenging arbitrator (Section 14(4));
- decide on termination of mandate of the arbitrator in the event of his inability to perform his functions or failing to act without undue delay (Section 15(2));
- (in the case of the High Court Division) decide jurisdiction of the arbitral tribunal (Section 20);
- enforce interim measures taken by the arbitral tribunal (Section 21(4));
- issue summons upon the application of the arbitral tribunal (Section 33);
- set aside awards (Section 42);
- enforce a foreign arbitral award (Section 45);
- (in the case of the High Court Division) hear appeals against an order of a district judge and additional district judge (Section 48):
  - refusing to set aside an arbitral tribunal;
  - refusing to enforce an arbitral award under section 44;
  - refusing to recognise or enforce any foreign arbitral award under Section 45;
- resolve dispute as to arbitrator’s remuneration or costs (Section 50);
- direct determination of any question in connection with insolvency proceeding by arbitration under certain circumstances (Section 52); and
(in the case of the Supreme Court) make rules in certain cases (Section 58).

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

Yes, under section 7A of the Act, the court may make interim orders in respect of the following matters:

• to appoint a guardian for minors or the insane to conduct arbitral proceedings on their behalf;
• to take interim custody of or sell or take other protective measures in respect of goods or property, which are subject matter of the arbitration agreement;
• to restrain any party from transferring property which is subject to arbitration and to pass an order of injunction on transfer of such property;
• to empower any person to seize, preserve, inspect, take photograph, collect specimen, examine, take evidence of any goods or property included in the arbitration agreement and for that purpose to enter into land or building in possession of any party;
• to issue ad interim injunction;
• to appoint receiver; and
• to take any other interim protective measures that may appear reasonable or appropriate to the court.

The 2001 Act empowers the tribunal to make interim orders upon request of a party, requiring a party to take protective measures regarding the subject matter of the dispute with no provision of appeal against such order, subject to furnishing security as the tribunal may consider appropriate. Before the passing of such an order, notice must be served to the other party.

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

Section 38 of the 2001 Act sets out the form and content of arbitral award and requires, inter alia, the award to be written, signed by the majority of the members of the arbitral tribunal, contain a valid reason for any omitted signature and state the date and place of arbitration. Signed copies of the arbitral award must be delivered to each party.

An arbitral award need not state any reasons if the parties agree that reasons are not to be given (Section 38(2)). The arbitral award shall state its date and the place of arbitration and the award shall be deemed to have been made at that place (Section 38(3)). Unless otherwise agreed by the parties, if the arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made, interest at such rate as it deems reasonable, on the whole or any part of money, 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.

Deadlines for issuing arbitral awards

There is no deadline for issuing the arbitral award under the 2001 Act.

Other formal requirements for arbitral awards

Under the 2001 Act each arbitration award must contain the date of the award and the place of arbitration. After the arbitral award is made, a copy signed by the arbitrator or arbitrators has to be delivered to each party.

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

Section 43 of the Act provides the grounds for setting aside arbitral awards.

The court (within the local limits of whose jurisdiction the arbitral award is finally made and signed) may set aside any arbitral award made in Bangladesh (other than an international commercial arbitration) on the application of a party within 60 days of receipt of the award.
The High Court Division may set aside any arbitral award made in an international commercial arbitration held in Bangladesh on the application of a party within 60 days of the receipt of the award.

Section 43 of the 2001 Act sets out the specific grounds, and states that an arbitral award may be set aside if:

(a) the party making the application furnishes proof that

(i) a party to the arbitration agreement was under some incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it;

(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 tribunal 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; 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, unless such agreement was in conflict with the provisions of this [the 2001] Act, or, in the absence of such agreement, was not in accordance with the provisions of the 2001 Act.

(b) The court or the High Court Division, as the case may be, is satisfied 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;

(ii) the arbitral award is prima facie opposed to the law for the time being in force in Bangladesh;

(iii) the arbitral award is in conflict with the public policy of Bangladesh; or

(iv) the arbitral award was induced or affected by fraud or corruption.

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

A distinction should be drawn between an award made in Bangladesh and a foreign award.

In the case of an award made in Bangladesh, where the time for making an application to set aside the arbitral award has expired, or such an application has been rejected, the award maybe enforced under the Code of Civil Procedure, in the same manner as if it were a decree of the court within the local limits of whose jurisdiction the arbitral award was made.

Bangladesh is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Chapter X of the Act sets out provisions dealing with recognition and enforcement of foreign arbitral awards. Section 45 of the Act provides that, notwithstanding anything contained in any other law for the time being in force, subject to section 46, a foreign arbitral award shall be treated as binding for all purposes on the persons 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. Section 45(1)(b) also provides that, on an application made by a party to the award, a foreign arbitral award is enforceable by execution by the court under the Code of Civil Procedure, in the same manner as if it were a decree of the court. Application for the
execution has to be accompanied by original arbitral award or an authenticated copy of the award, original or authenticated agreement for arbitration and evidence proving that the award is a foreign award.

Grounds for refusing recognition or execution of foreign arbitral awards are set out in Section 46 of the Act and include, among others, incapacity of any party, invalidity of the arbitration agreement, inadequate notice of arbitration to the party against whom award is invoked, subject matter of the dispute not capable of being settled by arbitration and award being in conflict with public policy of Bangladesh. These are exactly the same as those provided for in article V of the New York Convention. Finally, Section 47 of the Act provides that to fulfil the objects of Chapter 9, the government may make notifications in the Official Gazette declaring a state as a specified state.

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

Under Section 38(7), the Arbitral Tribunal will fix the costs of arbitration unless the parties agreed otherwise. The arbitral tribunal shall specify the following related to costs in an arbitral award: (i) the party entitled to costs (ii) the party who shall pay the costs (iii) the amount of costs or method of determining that amount, and (iv) the manner in which the cost shall be paid.

Under the above provision, arbitration costs include 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?

In the field of arbitration Bangladesh has begun to respond to the needs of reform and the 2001 Act can be considered as a decisive step in that direction. Since its enactment, there has been a positive response both from the business community as well as from foreign investors.

At present there is strong support for arbitration in Bangladesh. Arbitration and other alternative dispute resolution mechanisms are being encouraged and preferred as an alternative to court proceedings, which are generally seen to be cumbersome. A specific Bench of the High Court Division of the Supreme Court of Bangladesh deals with matters arising out of the 2001 Act. The Supreme Court of Bangladesh is largely supportive of arbitrations. A recent decision of the High Court Division has stated that the provisions of the 2001 Act requires ‘any court in Bangladesh to stay proceedings and refer the parties to arbitration where the proceedings have been initiated in respect of the subject matter of the proceedings’ (HRC Shipping Ltd v MVX-Press Manaslu, 12 MLR 2007 (HC) 265.)

Although the 2001 Act is modern, in practice the lower courts in Bangladesh are not yet completely supportive of arbitration. Occasionally international commercial arbitrations are hindered by frivolous litigation and injunctions from the lower courts. Furthermore, the domestic courts are overburdened, which lengthens the process of enforcement of arbitral awards.

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2. **BRUNEI**

**BY: PROF. AHMAD JEFRI ABD RAHMAN**

### 2.1 Which laws apply to arbitration in Brunei Darussalam?

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

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

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

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

i. The AO allows the Brunei court a slightly greater degree of supervision over arbitrations than under the IAO. The AO allows appeals against arbitral awards (in limited circumstances) whilst there is no right to appeal under the IAO.

ii. Unlike Article 10 of the Model Law which provides for 3 Arbitrators; Section 10 of the IAO provides that there is to be a single arbitrator.
In addition to the grounds under Article 34(2) of the Model Law, the IAO allows for two additional grounds of challenge under Section 36: where the making of the award was induced or affected by fraud or corruption; or where a breach of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

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

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

2.4 **Has Brunei Darussalam acceded to the New York Convention?**

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

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

There are no restrictions for parties to use foreign arbitration institutions in the circumstances stated above.
2.6 Does the Brunei Darussalam arbitration law contain substantive requirements for the arbitration procedures to be followed?

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

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

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 has been set up 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.

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

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

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

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

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

This is not available yet.

2.12 How many arbitrators are usually appointed?

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

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

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

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

Under both the IAO (at Article 16(3) of the Model Law) and the AO (at Section 31(9)), a party wishing to challenge the arbitral tribunal on jurisdiction has to make an appeal to the Brunei High Court within 30 days of receipt of such a decision.
A further appeal to the Brunei Court of Appeal is permitted only with leave of the High Court, however, the arbitral tribunal may continue with the arbitration proceedings and may make an award under both the AO and the IAO pending the appeal on the issue of jurisdiction.

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

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

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

There are no restrictions for persons representing any party in arbitration proceedings. This recent change in the law therefore removes the previous requirement to hold a valid Practicing Certificate under the Legal Professions Act of Brunei Darussalam for the purposes of representing a party in an arbitration.

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.

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3 See Legal Profession Act (Amendment) Order, 2016
for failure or impossibility to act under the IAO (Article 14(1) of the Model Law) and under the AO (Section 16).

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

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

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

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

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

a) security for costs;

b) discovery of documents and interrogatories;

c) preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;

d) giving of evidence by affidavit;

e) samples to be taken from any property which is or forms part of the subject-matter of the dispute; and
f) the preservation and interim custody of any evidence for the purpose of the proceedings.

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

a) maintain or restore the status quo pending determination of the dispute;

b) prevent a party from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings itself;

c) provide a means of preserving assets out of which a subsequent award may be satisfied; and

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

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

• Formal requirements for arbitral awards

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

a) the award must be in writing;

b) the award must be signed by all the arbitrators (where there is more than one arbitrator) or by the majority of the arbitrators, unless the reason for omission of signature of any arbitrator is stated);

c) the award has to state the reasons upon which it was based, unless parties have agreed that no grounds are to be stated or the award is on agreed terms pursuant to a settlement;
d) the date of the award and the place of arbitration must be stated; and

e) a copy of the signed award must be delivered to each of the parties.

- **Deadlines for issuing arbitral awards**

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

  Under Section 36(1) of the AO, an extension of time may be applied for. The court will not make such an order unless it is satisfied that substantial injustice would otherwise be done and unless all available tribunal processes for the application of extension of time have been exhausted.

- **Other formal requirements for arbitral awards**

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

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

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

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

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

a) the determination of the question will substantially affect the rights of one or more of the parties;

b) the question is one which the arbitral tribunal was asked to determine; or

c) on the basis of the findings of fact in the award:

d) the decision of the arbitral tribunal on the question was obviously wrong;

e) the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and

f) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

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

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

2.19 What procedures exist for enforcement of foreign and domestic awards in Brunei Darussalam?
Brunei has both signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the only reservation is reciprocity.

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

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

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

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

These are not currently available.

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

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

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3. CAMBODIA

BY: DR. NARYTH H. HEM
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.

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

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

5 http://www.ncac.org.kh/
6 http://www.ncac.org.kh/?page=detail&menu1=216&menu2=389&ctype=article&id=389&lg=en
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?
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” and the “National Commercial Arbitration Center”.

3.9 **Addresses of major arbitration institutions in Cambodia?**
3.10 Arbitration Rules of major arbitration institutions?

The National Arbitration Center released their arbitration rules on 11 July 2014. They can be found online at: http://ncac.org.kh/items/Abitration_Rules_%28NCAC%29_Adopted_Jul _2014_E.pdf

The Labor Arbitration Council’s rules can be found online at: http://www.arbitrationcouncil.org/en/

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

There is no model clause yet.

3.12 How many arbitrators are usually appointed?

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, 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.

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

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).

- Deadlines for issuing arbitral awards

In labor arbitration, 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.


### 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 again appealable to the Supreme Court. See 3.15 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 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.\(^7\)

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

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

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

So far, statistics are available only for labor related disputes. Since the inception of the Arbitration Council to the present (November 25, 2016), 2,643 cases of collective disputes have been submitted to the Council, with 235 cases in 2016.

The NCAC has only accepted three cases since its official launching in 2013.

3.22 Are there any recent noteworthy developments regarding arbitration in Cambodia (new laws, new arbitration

\(^7\) 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.
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.

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4. CHINA

BY: MR. RAINER BURKARDT
MR. JAN-MICHAEL HÄHNEL

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, latest on August 27, 2009. Next 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 in China.

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

No.

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

Generally, the Arbitration Law applies to domestic as well as foreign-related arbitration, but distinguishes between domestic arbitration and foreign-related arbitration. In the past, only CIETAC was permitted to handle
foreign-related arbitration. 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 denial of enforcement of foreign-related arbitral awards (refer below Nos 4.18 and 4.19).

The definition of the term “foreign-related” is under dispute though. The Supreme Court released an interpretation⁸ 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 the China.

• Other circumstances that may be determined as foreign-related civil relations.

Please find the recent developments at No. 4.22.

4.4 Has China acceded to the New York Convention?

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⁸ Article 1, Fa Shi, 2012 No 24, Interpretation of the Supreme People’s Court on Certain Issues Concerning the Application of the “Law of the PRC on the Application of Laws to Foreign-Related Civil Relations” (I);
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.

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”.

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, two domestic parties should refrain from agreeing on a foreign arbitration institution, a foreign seat of arbitration and 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.

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 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 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 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.

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” (“BAC”) is well known.

By now the SCIA and the SHIAC are well established. However to avoid ambiguities regarding the appointment of arbitration commissions (refer Nos 4.18 and 4.19 below), the arbitration clause should 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 : 010-82217788,64646688
Fax : 010-82217766,64643500
Email : info@cietac.org Website : http://www.cietac.org

South China International Economic and Trade Arbitration Commission (Shenzhen Court of International Arbitration)
19/F, Block B, Zhongyin Building, 5015 Caitian Road, 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
Website: www.shiac.org
E-mail: info@shiac.org
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: (8610) 6566-9856
Fax: (8610) 6566-8078
Email:bjac@bjac.org.cn
Website: [http://www.bjac.org.cn/english/](http://www.bjac.org.cn/english/)

4.10 Arbitration Rules of major arbitration institutions?

**CIETAC arbitration rules:**

**SHIAC Rules 2015**

**SHIAC Free Trade Zone Rules 2015**

**BAC Arbitration Rules:**

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 (e.g. 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 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. USD145,000.-).
4.13 **Is there a right to challenge arbitrators, and if so under which conditions?**

According to the Arbitration Law\(^9\) 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 before 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, the commission shall decide.

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

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\(^9\) Art. 34 Arbitration Law of the PRC
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. 18 and No. 19 below).

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

Arbitrators do not have the power to grant interim or conservatory relief. However, upon application by a party before the arbitration procedure 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 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 for the same reasons for denying enforcement (See No 19 below).

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

In case of foreign-related awards (See No 3 above), 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 consult the responsible Higher People's Court and in case the Higher People`s Court agrees, the Supreme People's Court shall examination the opinions of the lower courts.

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

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 mainland China, which are
foreign-related and foreign awards, meaning awards, which are issued outside the territory of mainland 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 court shall deny the enforcement of a domestic arbitral award, in case a party can prove that:

• the parties did not conclude an arbitration clause / 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 parties conceal evidence from the arbitral organ, which was sufficient to affect the impartiality of the arbitral award; or
• the arbitrators have committed embezzlement, accepted bribes or done 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 his 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 organ 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 reason of a bilateral agreement or reciprocity principle.

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 mainland China.

State courts considered the New York Convention applicable, only in case of awards rendered outside the territory of mainland 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 mainland China, such non-Chinese arbitration institutions under which the tribunal, who 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 (also see latest development below 22).

Recently a change in jurisprudence is indicated, as arbitration verdicts by commissions subject to the ICC were occasionally enforced\(^\text{10}\). 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.

Further 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 been shown 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 attorney fees.

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The CIETAC Rules for example permit the tribunal to decide that the losing party shall compensate the prevailing party for the expenses reasonably incurred by it pursuing in the 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 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:  

SHIAC:  

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 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 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.

Recently in the case Ningbo Xinhui /./ Meikang\textsuperscript{11} International as well as Shanghai Golden Landmark /./ Siemens International Trade\textsuperscript{12} 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 Free Trade Zone. According to the verdicts goods which were pending clearance at the free trade zone are similar to foreign goods and goods, which are processed within the Shanghai Free Trade Zone 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.

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

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 relation, as the court did not restrict its argument to the legal nature of the parties, but considered other factors as well.

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

As already mentioned in No 19 the enforcement of awards by tribunals subject to non-Chinese arbitration institution made in the territory of China

\textsuperscript{11} Beijing No 4 Intermediate People’s Court 2015, (2015) si zhong min (shang) te zi No. 00152 Ningbo Xinhui /./ Meikang international
\textsuperscript{12} 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.
has been under dispute in the past and mostly the ICC has been standing in 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 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.

However, the Taizhou intermediate court\(^\text{13}\) made clear that a decision made about the invalidity of an arbitration clause shall not be revised. In a recent decision the court refused to enforce an award issued by a tribunal subject to ICC rules seated in Hong Kong, based on the social and public interest of China. The award by the tribunal subject to ICC rules in Hong Kong was based on an arbitration clause, which has already been declared invalid by a Chinese court under a different subject. The validity of the clause should however not have been subject to the decision of the Taizhou court as verdicts from Hong Kong should be enforced based on the agreement between China and Hong Kong (refer No 1 above). The Taizhou Intermediate Court declared that as the clause was already held as invalid, enforcing such award would interfere with the judicial sovereignty of China.

\(^\text{13}\) Taizhou Intermediate People’s Court 2015, Tai Zhong Shang Zhong Shen Zi, Taizhou Haopu Investment Co., Ltd. ./. Wicor Holding AG
It is not clear however, if a state court would uphold the same decision in case of enforcement through the New York Convention.

- **No arbitration in case of anti-monopoly cases**

The Jiangsu Higher Provincial Court upheld a decision of the Intermediate Court and clarified that arbitration shall not be applicable in anti-monopoly cases due to the following reasons:

1) The relevant laws and interpretations expressly consider civil litigation as a means to resolve civil monopoly disputes;
2) Public policy consideration favor litigation over arbitration;
3) The cases involve public interest, third party interest and consumer interest and therefore supersede the choice of the parties for arbitration.

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5. THE CHINESE EUROPEAN ARBITRATION CENTRE – HAMBURG

BY: Prof. Dr. Eckart Brödermann, LL.M. (Harvard), 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) is an arbitration institution founded in 2008 and specialized in Sino-European disputes which has its seat in Hamburg, Germany (see www.ceac-arbitration.com). The idea to build up an arbitration institution that is specialized in China-related disputes arose in 2004 after the Hamburg Bar Organisation had closed a cooperation agreement with the Tianjin Bar Association. Preparing the visit of Hamburg’s then Mayor Ole von Beust to China, the City asked the Hamburg Bar Organisation to contribute to improve relations with China.

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

In July 2008, the non-profit Chinese European Legal Association e.V. (CELA) was founded to support the exchange between China and Europe in legal and legal cultural issues as well as education in these topics. This also included the foundation of CEAC which was finally inaugurated on 18 September 2008. Ever since, CEAC arbitration clauses were integrated in
Sino-European business contracts worldwide, CEAC has been perceived as a good alternative for neutral dispute resolution between Chinese and European parties in China and in Europe and CEAC has built good ties with China International Economic and Trade Arbitration Commission (CIETAC), Hong Kong International Arbitration Center (HKIAC) and Kuala Lumpur Regional Centre for Arbitration (KLRCA).

Eight years after the foundation of CEAC as arbitration institution tailored to China related disputes, CEAC has received and ever since is administering its first eleven cases with a total amount in dispute of approximately EUR 60 Mio.

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

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

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

Moreover, dispute resolution by institutional arbitration is one of the most effective ways for parties in China and in Europe as judgements of ordinary courts of law are hard to be enforced in the other parties’ country due to lack of reciprocity.

However, already 156 states including China and all EU states have signed the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in order to guarantee the recognition and enforcement of arbitral awards in member states. This gives the parties the opportunity to get an arbitral award recognised and enforced abroad. CEAC is an excellent neutral solution for China-related matters as it has rules
tailor-made for China-related disputes and guarantees the principles of party autonomy and neutrality in its CEAC Rules, which are based on the UNCITRAL Arbitration Rules in their revised 2010 version. The CEAC Arbitration Rules were marginally revised again in 2012 to adopt these further to specifics of China-related arbitration based on observations of CEAC management in the initial phase of administering the first CEAC cases.

These issues comprise but are not limited to a clarification of deadlines as e.g. in Art. 31a CEAC Rules for the rendering of the arbitral award (now starting to run as of the constitution of the tribunal), questions of VAT etc. The most important amendment concerns Art. 1 para. 1a CEAC Rules, which now stipulates that references to the CEAC Rules shall be deemed to be references to arbitration administered by CEAC under the CEAC Arbitration Rules where it is likely that parties not represented by lawyers familiar with the specifics of arbitration at the time of negotiation of a Sino-European business contract have a risk to agree on a clause with ambiguities when drafting an arbitration clause which is not exactly identical to the CEAC Model Clause.

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

5.2 CEAC Model Arbitration Clause and Model Choice of Law Clause

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

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

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

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

a) “The number of arbitrators shall be ___ ((i) one or (ii) three or unless the amount in dispute is less than € ___ [e.g. 100.000 €] in which case the matter shall be decided by a sole arbitrator).

b) Regardless of the seat of arbitration, the arbitral tribunal is free to hold hearings in ___________ (town and country).

c) The language(s) to be used in the arbitral proceedings shall be __________.

d) Documents also may be submitted in __________________ (language).

e) The arbitration shall be confidential.
f) The parties agree that also the mere existence of an arbitral proceeding shall be kept confidential except to the extent disclosure is required by law, regulation or an order of a competent court.

g) The arbitral tribunal shall apply the CEAC Hamburg Arbitration Rules as in force at the moment of the commencement of the arbitration unless one of the parties requests the tribunal, within 4 weeks as of the constitution of the arbitral tribunal, to operate according to the CEAC Hamburg Arbitration Rules as in force at the conclusion of this contract.”

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

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

The contract shall be governed by

a) the law of the jurisdiction of _____________ [country to be 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 is part of Chinese law and of about 72 other laws around the globe. Thus, for example, the international law of sales in
China, Germany, Italy, New York and Russia is identical (except for national reservations which the model clause excludes to provide for an international neutral ground). The UNIDROIT Principles are also well known worldwide. They provide an excellent neutral ground and have inspired not only the Chinese legislator but also numerous other legislators including Germany.

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

5.3 How many Arbitrators are usually appointed?

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

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

The Appointing Authority of the CEAC is divided in chambers, whereas each chamber is responsible for countries whose names begin with certain letters of the alphabet to preserve its neutrality. The Appointing Authority is always a neutral body to decide on the arbitrator to be appointed as its chambers shall always consist of three members, one from China, one from Europe and one from other parts of the world beyond China and Europe. This leads to a division of power between China, Europe and the 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.

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 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 appointed arbitrator was successfully challenged can appoint a new arbitrator, Art. 14 para. 1 CEAC Rules).

This procedure also complies with German Civil Procedural Law.
5.5 **Are there any Restrictions as to the Parties’ Representation in Arbitration Proceedings?**

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

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

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

A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement (Art. 26 para. 9 CEAC Rules).
The German Civil Procedure Code also provides for interim relief in § 1041 ZPO – which corresponds to Art. 17 of the UNCITRAL Model Law on International Commercial Arbitration. According to this provision, the arbitral tribunal may take any measures to secure any claims. Therefore, it can ask each party for any security in connection with such interim measures. The right to be heard, however, has to be observed.

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

- **Formal Requirements for Arbitral Awards**

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

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

  Also according to § 1054 of the German Civil Procedure Code (ZPO) – which corresponds to Art. 31 of the UNCITRAL Model Law on International Commercial Arbitration – the award has to be in a written form signed by the arbitrator(s). Unless otherwise agreed by the parties, the
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 themselves 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.

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

- if it is not possible to dispute this issue in an arbitral proceeding,
- if the recognition and enforcement of the arbitral award would violate the *ordre public*,
- if the constitution of the arbitral tribunal or the arbitral proceeding violated German Civil Procedural Law (which is based on the UNICITRAL Model Law on International Commercial Arbitration), or
if the petitioner claims that he had not been properly informed about the appointment of an arbitrator or the arbitral proceeding (§ 1059 ZPO).

An arbitral award cannot be appealed.

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

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

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

5.10 **Further Information about the Chinese European Arbitration Centre**

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

The Chinese European Arbitration Centre can be reached under:

**Chinese European Arbitration Centre**
Adolphsplatz 1
D-20457 Hamburg / Germany
Phone:  +49-40-6686 4085
Fax:  +49-40-6686 40699
Email:  contact@ceac-arbitration.com
The Managing Directors are Prof. Dr. Eckart Brödermann and Dr. Ma Lin. Dr. Christine Heeg-Weimann is Secretary General of the CEAC.

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

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6. **HONG KONG**

**BY: DR. NILS ELIASSON**

### 6.1 Which laws apply to arbitration in Hong Kong?

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

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

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

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

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

Section 4 of the Arbitration Ordinance states that the provisions of the Model Law that are expressly stated in the Ordinance as having effect, have the force of law in Hong Kong, subject to the modifications and/or additions expressly provided for in the Ordinance. To a significant extent, the Arbitration Ordinance reproduces the full text of the Model Law.
Where the Arbitration Ordinance modifies or supplements the Model Law, this is expressly set out in the relevant Section of the Arbitration Ordinance. For further clarity, Schedule 1 of the Arbitration Ordinance also reproduces the Model Law in its entirety, with Sections that are not applicable having been underlined.

The following changes to the Model Law should be noted:

- There is no provision in the Arbitration Ordinance providing that the default number of arbitrators is three. In absence of an agreement between the parties, the Hong Kong International Arbitration Centre (the “HKIAC”) is authorised to determine whether the number of arbitrators shall be one or three (Section 23(3) of the Arbitration Ordinance);

- The Arbitration Ordinance:
  - provides that the parties shall have a “reasonable opportunity” to present their case (Section 26(3) of the Arbitration Ordinance), rather than a “full opportunity”, as stated in Article 18 of the Model Law;
  - contains provisions on confidentiality (Section 18 of the Arbitration Ordinance);
  - allows the Hong Kong courts to enforce relief granted by an emergency arbitrator whether made in or outside Hong Kong (Sections 22A and 22B of the Arbitration Ordinance);
  - contains provisions on mediators-arbitrators (Section 33 of the Arbitration Ordinance);
  - allows arbitrators to limit the amount of recoverable costs (Section 57 of the Arbitration Ordinance); and
  - contains a provision that limits the liability of the arbitrators (Section 104 of the Arbitration Ordinance).

Sections 22A and 22B of the Arbitration Ordinance came into force on 19 July 2013 and were introduced in response to the new emergency arbitrator procedure included in the updated version of the HKIAC’s Administered Arbitration Rules (see further Sections 5.10 and 5.22 below).
In addition, Schedule 2 of the Arbitration Ordinance contains provisions to which the parties can opt in or opt out.

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

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

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

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

Since the Model Law provisions of the Arbitration Ordinance applies to international as well as domestic arbitration, the provisions of Schedule 2 will, when applicable, apply *in addition* to the Model Law provisions.
6.4 Has Hong Kong acceded to the New York Convention?

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

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

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

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

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

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

- The parties are free to agree on how the dispute should be resolved, subject to the observance of safeguards that are necessary in the public interest (Section 3(2)(a) of the Arbitration Ordinance);

- Courts are only allowed to interfere in the arbitration where it is expressly provided for in the Arbitration Ordinance (Sections 3(2)(a) and 12 of the Arbitration Ordinance);

- The arbitrators must treat the parties equally (Section 46(2) of the Arbitration Ordinance);

- The parties are to be given a reasonable opportunity to present their case and deal with the case of their opponents (Section 46(3)(b) of the Arbitration Ordinance); and

- The tribunal is to use procedures that are appropriate to the particular case and avoid unnecessary delay or expense (Section 46(3)(c) of the Arbitration Ordinance).

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

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

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

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

Arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.
6.8 What are the main arbitration institutions in Hong Kong?

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

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

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

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

Ad hoc arbitration also has a strong position in Hong Kong. The UNCITRAL Arbitration Rules and the HKIAC Domestic Arbitration Rules are popular sets of rules for parties that choose to arbitrate on an ad hoc basis.

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

6.9 Addresses of major arbitration institutions in Hong Kong?

**Hong Kong International Arbitration Centre**
38th Floor Two Exchange Square
8 Connaught Place
6.10 Arbitration Rules of major arbitration institutions?

The main set of rules issued by the HKIAC is the HKIAC Administered Arbitration Rules (the “HKIAC Rules”). The HKIAC Rules are based on the UNCITRAL Arbitration Rules and provides for a “light-touch administration” by the HKIAC that mainly consists of getting the arbitration started and lending its support to the parties and the arbitrators with respect to the conduct of the proceedings. The HKIAC Rules do not provide for terms of reference or scrutiny of the award as provided for in the ICC Rules.

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

In particular the provisions on joinder and consolidation were ground-breaking when introduced and have been very well received by users of arbitration in Hong Kong. As a testament to their success, these provisions have been copied by other arbitration institutions.

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

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

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

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

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

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

“The law of this arbitration clause shall be [Hong Kong law]. The seat of arbitration shall be [Hong Kong]. The number of arbitrators shall be [one/three]. The arbitration proceedings shall be conducted in [insert language].”

The model clause includes specific wording to encourage parties to consider agreeing on an appropriate law to govern their arbitration agreement. This amendment to the model clause which was introduced in 2014 was made in response to recent case law in Hong Kong, England, India and Singapore which demonstrate that there is no unanimous view as to the question of which law should govern the arbitration agreement in the absence of an express choice by the parties. Such uncertainty, and with that potential complications at the enforcement stage, can be overcome if the parties expressly agree on a law to govern their arbitration agreement. This innovative provision of the HKIAC model clauses has received worldwide recognition and has led to HKIAC winning the Global Arbitration Review award for ‘innovation by an individual or organisation in 2014’.

6.12 How many arbitrators are usually appointed?

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

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

An arbitrator may be challenged if there are circumstances that give rise to justifiable doubts as to the arbitrator’s impartiality and independence, or if he or she does not possess the qualifications agreed upon by the parties. A party can only challenge an arbitrator that it has itself appointed if the reasons for the challenge were unknown to such party at the time of the appointment. Challenge of arbitrators is dealt with in Sections 25 and 26 of the Arbitration Ordinance.
Section 26(1) of the Arbitration Ordinance gives effect to Article 13 of the Model Law and provides that the parties are free to agree on a procedure for challenging an arbitrator. Failing such agreement, the arbitral tribunal shall decide on the challenge. If a challenge is unsuccessful, the challenging party may request the Court of First Instance to decide on the challenge.

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

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

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

In the Hong Kong courts, only Hong Kong-admitted barristers and solicitors may appear and represent parties. In any court proceeding that may arise out of an arbitration agreement or which result from arbitral proceedings, local counsel must, thus, be retained.

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

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

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

Powers reserved for the Court of First Instance include, for example, the power to decide on challenges of arbitrators where a challenge has not been successful before the arbitral tribunal (Section 26 of the Arbitration Ordinance), the power to terminate an arbitrator’s mandate, where the arbitrator is unable to perform his functions (Section 27 of the Arbitration Ordinance), the power to make decisions on the jurisdiction of the tribunal, where the tribunal has ruled on its jurisdiction as a preliminary question in the arbitration (Section 34 of the Arbitration Ordinance), the power to set aside awards (Section 81 of the Arbitration Ordinance) and the power to offer assistance in the taking of evidence (Section 55).

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

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

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

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

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

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

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

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

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

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

- **Formal requirements for arbitral awards**

Under Section 67 of the Arbitration Ordinance (Article 31 of the Model Law), the award must be made in writing and signed by the arbitrator/s. If there is more than one arbitrator, it is sufficient that the award is signed by a majority of the arbitrators, provided that the reasons for omitting any of the signatures are given. The date and place of arbitration must be stated in the award. The award will be deemed to have been made at the place stated therein.
The award is to contain the reasons upon which it is based, unless the parties have agreed that no reasons are to be given, or the award is an award on agreed terms pursuant to Article 30 of the Model Law.

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

- **Deadlines for issuing arbitral awards**

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

- **Other formal requirements for arbitral awards**

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

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

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

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

- a party to the arbitration agreement was under some incapacity;
• the arbitration agreement is not valid under the law applicable to it;

• the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;

• the award deals with a dispute or contains decisions on matters that does not fall within the terms and scope of the submission to arbitration;

• the composition of the tribunal or the arbitral process was not in accordance with the parties’ agreement;

• the subject matter of the dispute is not capable of settlement by arbitration under the laws of Hong Kong; or

• the award is in conflict with Hong Kong public policy.

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

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

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

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

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

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

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

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

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

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

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

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

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

The grounds for refusing enforcement of an award are the same for all types of award (awards issued in Hong Kong, Mainland awards, New York Convention Awards and foreign non-Convention awards) and largely correspond to the grounds for refusal set out in the New York Convention. An award can only be refused enforcement if:

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

it would be contrary to public policy to enforce it.

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

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

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

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

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

As a means of controlling the costs of the proceeding, the tribunal has been given the power to cap the level of costs that the parties can recover (Section 57 of the Arbitration Ordinance). Parties that are aware that the recoverable costs are limited will likely try to avoid excessive and unreasonable costs. Under Section 56(1)(a) of the Arbitration Ordinance, the tribunal has also the possibility to make an order requiring a claimant to give security for costs.
The HKIAC Rules also address the issue of costs. Article 33.2 of the Rules provides that the tribunal may apportion all or part of the costs of the arbitration, taking into account the circumstances of the case. Article 33.3 of the HKIAC Rules further provides that with respect to costs of legal representation and assistance, the tribunal may direct that the recoverable costs shall be limited to a specified amount.

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

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

The HKIAC handled 520 dispute resolution matters in 2015, of which 271 were arbitrations, 227 were domain name disputes and 22 were mediation matters.\(^\text{14}\) In 2000, the HKIAC managed 298 dispute resolution matters. There has thus been a clear increase in the number of the arbitrations handled by the HKIAC in the last decade.

Of the 271 new arbitration cases handled by the HKIAC in 2015, 79% were international and 21% were domestic. Apart from Hong Kong parties, the most frequent users of the HKIAC came from Mainland China, Taiwan, the US, Singapore, the British Virgin Islands, Korea, the Cayman Islands, Australia, Japan, Germany and the Philippines.\(^\text{15}\)

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

Being recognised as a neutral, reliable and convenient place of arbitration with an excellent arbitral infrastructure, Hong Kong is an attractive seat of arbitration for parties from all over the world. The entry into force of the 2011


Arbitration Ordinance made the Hong Kong arbitration legislation more user-friendly and introduced a unitary regime for both domestic and international arbitration.

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

As mentioned in Section 5.10 above, the amendments of the Arbitration Ordinance coincided with a revision of the HKIAC Rules, effective as of 1 November 2013. In addition to bringing the Rules up to date with the latest developments in international commercial arbitration on a general level, the amendments included some notable changes such as the introduction of comprehensive rules on joinder and consolidation and the introduction of emergency arbitrator procedures (the latter prompting the above-mentioned amendments of the Arbitration Ordinance).

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

Two new bills to amend the Arbitration Ordinance were introduced to the Legislative Council in 2016 and will likely be adopted in 2017.

First, the ‘Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016’, if passed into legislation, will ensure that third party funding of arbitration and mediation is not prohibited by the common law doctrines of maintenance and champerty.

Second, the ‘Arbitration (Amendment) Bill 2016 regarding IPR disputes’, if passed into legislation, will clarify that disputes over intellectual property rights (including those arising over patents, trademarks, domain names and “any
other intellectual property right of whatever nature.") are arbitrable and that enforcement of awards involving intellectual property rights does not breach public policy.

These two new bills further confirm the legislature’s ambition to keep Hong Kong at the forefront among modern arbitration jurisdictions.

Hong Kong’s position as one of the world’s leading seats of arbitration was recently confirmed by Queen Mary University’s ‘International Arbitration Survey’. According to this empirical study, which collates the views of a comprehensive range of stakeholders, Hong Kong is the most preferred and most widely used seat of arbitration in Asia, and number three globally, after London and Paris. Similarly, the HKIAC is the most preferred and most widely used arbitration institution in Asia, and number three globally, after the ICC and the LCIA.16

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<td>Name of law firm:</td>
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<td>Brief profile:</td>
<td>Shearman &amp; Sterling has a dedicated international arbitration practice group comprising over 100 lawyers of different nationalities and backgrounds, working out of the Firm’s offices in Abu Dhabi, Beijing, Frankfurt, Hong Kong, London, Milan, New York, Paris, Shanghai, Singapore and Washington, D.C. We have acted as counsel in more than 100 international arbitrations related to Asia, including a number of the most high profile disputes in the region. Members of our team have extensive experience of international arbitration involving Asian parties and can thus address the specific cultural, linguistic and legal aspects of disputes with an Asian nexus. Shearman &amp; Sterling has a long-standing commitment to China and for more than 35 years we have advised clients on the opportunities and challenges offered by</td>
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16 Queen Mary 2015 International Arbitration Survey, p. 12 and 17.
China’s rapidly evolving markets. Our office in Hong Kong was opened in 1978, and we were one of the first international firms to establish a Beijing office approved and licensed by China’s Ministry of Justice in 1993. The Shanghai office opened in 2007 in response to client demand. We were one of the first US-headquartered firms to establish a Hong Kong law capability.

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7. **INDIA**

BY: MRS. ZIA MODY
MR. ADITYA VIKRAM BHAT

### 7.1 Which laws apply to arbitration in India?

The Arbitration and Conciliation Act, 1996 (“Arbitration Act”)\(^1\), is the principal legislation that applies to arbitration. The Arbitration Act was amended by the Arbitration and Conciliation (Amendment) Act, 2015, which came into effect on October 23, 2015 (“Amendment 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 in support of arbitration. The rules of arbitration institutions will apply to arbitration proceedings, where institutional arbitration is adopted.

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


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

Currently, India has a consolidated legislation i.e. the Arbitration Act, under which Part I applies to domestic arbitrations held in India, and Part II

relates to the enforcement of certain foreign awards, such as awards under
the Convention on the Recognition and Enforcement of Foreign Arbitral
Awards (“New York Convention”), 1958 and the Convention on the
Execution of Foreign Awards, 1923 (“Geneva Convention”). Pursuant to
the Amendment Act, certain provisions of Part I of the Arbitration Act
such as seeking interim relief from courts, have been made applicable to
international arbitrations, 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.
However, in the absence of clarity in the Arbitration Act and due to
conflicting judicial pronouncements, it is unclear whether two domestic
parties could agree on foreign seated arbitration i.e. where both the judicial
seat of the arbitration and the procedure governing the arbitration derogate
from Indian law.
7.6 Does the Indian arbitration law contain substantive requirements for the arbitration procedures to be followed?

The Arbitration Act permits the parties to agree on the procedure to be followed by the arbitral tribunal. There are no substantive requirements for the procedure to be followed under the Arbitration Act. In the event that parties are unable to agree on the procedure to be followed, the procedure may be decided by the arbitral tribunal. Proceedings conducted by arbitration institutions will be governed by the procedure laid down in the institutional rules.

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

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

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

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

7.8 What are the main arbitration institutions in India?

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

7.9 **Addresses of major arbitration institutions in India?**

Mumbai Centre for International Arbitration (MCIA)
20th Floor, Express Towers,
Nariman Point,
Mumbai – 400021 (India)
Phone: 091-022-61058888
Website: mcia.org.in

7.10 **Arbitration Rules of major arbitration institutions?**

The above-mentioned arbitration institution has a specific set of rules which is available on its website, 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 clause18:

“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] arbitrator(s).
The language of the arbitration shall be ________________.
The law governing this arbitration agreement shall be ________________.
The law governing the contract shall be________________.”

18 [http://www.icaindia.co.in/htm/clouse.htm](http://www.icaindia.co.in/htm/clouse.htm)
7.12 **How many arbitrators are usually appointed?**

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

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

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

(i) if circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(ii) if he does not possess the qualifications agreed to by the parties.

A separate procedure for challenging the arbitrator(s) is provided for in Section 13 of the Arbitration Act.

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

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

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

For arbitrations 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 to set aside an arbitral award under Section 34;

(viii) enforcement of the award under Section 36;

(ix) appeals from certain orders of the court under Section 37;

(x) application to order the tribunal to deliver the award to the applicant on payment to the court under Section 39;

(xi) application for jurisdiction under Section 42;

(xii) extension of time period under Section 43;

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

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

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

Furthermore, the rules of certain arbitration institutions also allow an arbitral tribunal to grant interim relief. For instance, under the MCIA Rules, 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 must include the sum, the rate of interest as considered reasonable by the tribunal and the duration for the interest to be paid.
• Section 31 A inserted by the Amendment Act 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 Arbitration and Conciliation (Amendment) Act, 2015 stipulates that the arbitral tribunal is to render its award within twelve months from when the matter was referred to the tribunal. The arbitral tribunal is deemed to be in reference on that date on which the arbitrator, or all the arbitrators, have received notice of their appointment to the case. There can be a further extension of a maximum period of six months with the consent of both the parties. If the tribunal is in requirement of more than eighteen months for issuing an award, then it may apply for such an extension to the Court having jurisdiction. 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.

• **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.
(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.

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

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

(i) if a party was under some incapacity;

(ii) the arbitration agreement is not valid under law;

(iii) the party making the application was not given proper notice as required;

(iv) the arbitral award deals with a dispute not contemplated in the submission; or

(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 ground that there was 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;

(iii) the award deals with a difference not contemplated by the submission to arbitration;

(iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties;

(v) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country under the law of which that award was made;

(vi) the subject matter of the dispute is not capable of being settled under the laws of India;

(vii) if the enforcement of the award would be contrary to the public policy of India.

In order to harmonise various decisions of the courts, the Amendment Act 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?

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

ii. Enforcement of Foreign Awards

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

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

The Amendment Act 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 cost 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 Emergency Arbitrator’s fees and expenses, where applicable; (b) the MCIA’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?**

The available statistics are somewhat dated:

1. **Domestic awards**

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

---

## High Court (Domestic Awards)

<table>
<thead>
<tr>
<th>Sl No</th>
<th>Grounds</th>
<th>Total No of Challenges</th>
<th>Allowed</th>
<th>Rejected</th>
<th>Modified</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Jurisdiction</td>
<td>246</td>
<td>43</td>
<td>197</td>
<td>6</td>
</tr>
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<tr>
<td>2</td>
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<td>25</td>
<td>112</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td></td>
<td>26.72%</td>
<td>16.55%</td>
<td>74.17%</td>
<td>9.27%</td>
</tr>
<tr>
<td>3</td>
<td>Limitation</td>
<td>77</td>
<td>9</td>
<td>66</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td>13.62%</td>
<td>11.68%</td>
<td>85.71%</td>
<td>2.50%</td>
</tr>
<tr>
<td>4</td>
<td>Violation of natural justice</td>
<td>37</td>
<td>8</td>
<td>24</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td></td>
<td>6.54%</td>
<td>21.62%</td>
<td>64.86%</td>
<td>13.51%</td>
</tr>
<tr>
<td>5</td>
<td>Bias</td>
<td>22</td>
<td>1</td>
<td>21</td>
<td></td>
</tr>
<tr>
<td></td>
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<td>3.89%</td>
<td>4.54%</td>
<td>95.45%</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>Non-appreciation of facts/evidence</td>
<td>14</td>
<td>1</td>
<td>13</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>2.47%</td>
<td>7.14%</td>
<td>92.85%</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>Not a reasoned award or no grounds</td>
<td>9</td>
<td>-</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>Not signed/stamped</td>
<td>3</td>
<td>-</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>Not a party</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>Non-application of mind</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Wrongful rejection of defence (filing beyond time)</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>12</td>
<td>No arbitration agreement</td>
<td>1</td>
<td>1</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>Typographical error</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>Withdrawn (challenge not pursued)</td>
<td>1</td>
<td>-</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>565</strong></td>
<td><strong>(1996 to Sept 2007)</strong></td>
<td><strong>94</strong></td>
<td><strong>443</strong></td>
<td><strong>28</strong></td>
</tr>
</tbody>
</table>

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

One of the most notable changes in the arbitration regime in India is the Amendment Act which came into effect on October 23, 2015 which has introduced various new provisions while some of these have been discussed above, they are briefly summarized below:
(i) Exclusive jurisdiction to the high courts for matters arising out of international commercial arbitrations

(ii) Subject to any agreements to the contrary, Section 9 (which deals with interim reliefs), Section 27 (which deals with court assistance in taking evidence in an arbitration), Section 37(1)(a) (which refers to the appeals against the orders granted under section 9) and Section 37(3) (which restricts a second appeal from an order passed under Section 37), have been made available to foreign-seated arbitrations

(iii) A model schedule of fees for controlling the cost of the arbitration

(iv) The cost follows the loser principle has been introduced as a general rule

(v) The arbitral award must be rendered within 12 months with an extension of 6 months for sufficient cause being shown

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

(i) *Union of India v. Reliance Industries and Others,*20 the Supreme Court clarified the concept of necessary implication of exclusion formulated in the case of *Bhatia International v. Bulk Trading S.A.*,21, read in the context of the case of *Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical Services Inc.*,22 where the Supreme Court held that where the juridical seat of arbitration is outside India and the law governing the arbitration agreement is one besides the Arbitration Act, then Part I of the Arbitration Act, which provides jurisdiction to the local courts for various reliefs that parties may seek, is excluded. This means that local Indian courts would not have jurisdiction to entertain matters connected to an international arbitration case, where the juridical seat of arbitration and the substantive laws governing the dispute or the arbitration agreement are ones besides the Indian laws.

20 (2015) 10 SCC 213
21 (2002) 4 SCC 105
22 (2012) 9 SCC 552
(ii) *Indian Rare Earths Ltd. v. Unique Builders Ltd*\(^3\) - The Supreme Court held that an arbitral award cannot be set aside merely on the ground that it does not contain reasons in support of its conclusion/decision unless the arbitration agreement requires the arbitrator to give reasons.

(iii) *Sasan Power Limited v. North American Coal Corporation India Private Limited*\(^4\) was a case that reached the Supreme Court by way of an appeal from the decision of the Madhya Pradesh High Court. The High Court had held that Indian parties are free to opt for a foreign seat of arbitration. The Supreme Court while faced with the same question did not clarify the legal position and held that in the facts and circumstances of the case at hand, since there was an involvement of a foreign party to the arbitration whose rights also have to be adjudicated, the autonomy of the parties in such a case to choose the governing law is well recognised in law. Though the Supreme Court has upheld the decision of the Madhya Pradesh High Court, it did not comment on the decision rendered by the Bombay High Court in *M/s Adhar Mercantile Private Limited v Shree Jagdamba Agrico Exports Private Ltd* which holds that Indian parties cannot opt out of an Indian seated arbitration.

(iv) *Arun Dev Upadhyaya v. Integrated Sales Services Ltd*\(^5\) The question before the Supreme Court was whether a Division Bench had the jurisdiction to sit in appeal against a Single Judge’s decision in an international commercial arbitration. Based on an interpretation of Sections 5 (Commercial Appellate Division) read with Sections 13 and 50 of the Arbitration Act. Section 50(1)(b), it was held that an order refusing to enforce a foreign award under section 48, to the court authorised by law to hear appeals from such order is an appealable order.

(v) McDonalds v. Vikram Bakshi26 - This was a case where the Delhi High Court had to decide on the jurisdiction of civil courts to entertain a dispute arising from an agreement despite a subsisting arbitration agreement. The Single Judge of the Delhi High Court had restrained the arbitration, however, in appeal, a division bench of the Delhi High Court overturned the decision of the single judge and held that while the existence of an arbitration agreement will not oust the jurisdiction of the civil courts, such a power must be exercised sparingly. Further, unless a party seeking such an injunction can show that the arbitration agreement is null and void, inoperative or incapable of being performed, no such relief can be granted and mere pendency of a proceeding before court will not render an arbitration agreement to be null void and inoperative by waiver.

(vi) Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd27 - The Delhi High Court has clarified that even if the arbitration was commenced prior to the Amendment, the provisions of the Amendment Act will be applicable to all court proceedings instituted after the Amendment Act was in force. Therefore all arbitration related court proceedings commenced after October 23, 2015, will be proceeded on the basis of the Amended Arbitration Act, even if the related arbitration was instituted prior to October 23, 2015. Moreover, the Delhi High Court determined that Indian Courts would have jurisdiction on international commercial arbitration matters, where the substantive laws are foreign laws and the seat of arbitration is also located abroad, thus contravening the principle of necessary implication of exclusion of jurisdiction of Indian Courts, as decided in the case of Union of India v. Reliance Industries and Others28, by the Supreme Court of India.

26 Delhi High Court, decided on 21st July 2016. Available at MANU/DE1684/2016
28 (2015) 10 SCC 213
| Name of Authors: | MRS. ZIA MODY  
| MR. ADITYA VIKRAM BHAT |
|-------------------|---------------------------------------------------------------|
| Name of Law Firm: | AZB & Partners |
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| Email:            | zia.mody@azbpartners.com  
|                   | aditya.bhat@azbpartners.com |
8. **INDONESIA**

**BY: MS. KAREN MILLS**
**MR. ILMAN RAKHMAT**

### 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)* 29, *Het Herzien Inlandsch Reglement (HIR)* 30 and *Rechtsreglement Buitengewesten (RBg)* 31 and for more than 150 years all arbitrations in Indonesia were governed under these laws. There was no specific law which governs arbitration in Indonesia, until at last in late 1999 Indonesia promulgated Law No. 30 of 1999 on Arbitration and Alternative Dispute Resolution that superseded the former Dutch laws.

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

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

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

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

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29 Article 615 – 651, *Reglement op de Rechtsreglement (RV)*
30 Article 377, *Herzien Inlandsch Reglement (HIR)*
31 Article 705, *Rechtsreglement Buitengewesten (RBg)*
prior legislation under the RV, as referred to above, the Arbitration Law makes it clear that all arbitrations held within Indonesia are considered “domestic”, and all those held outside of this archipelago are characterized as “international” arbitrations, regardless of the nationality of the parties, location of the subject of the dispute, governing law, etc. Thus, there is, and need be, only the one Arbitration Law, which applies to all arbitrations held within Indonesia, and to enforcement in Indonesia of any international award as well.

8.4 **Has Indonesia acceded to the New York Convention?**

Indonesia ratified the New York Convention in 1981 with the issuance of Presidential Decree No. 34 of 1981.\(^{32}\) 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:

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\(^{32}\) Published in the state Gazette of 1981, as No. 40, of 5 August, 1981. Indonesia made both the commerciality and the reciprocity reservations in its accession.
“Resolution of a dispute through arbitration may be referred to a national or international arbitration institution if so agreed upon by the parties.”

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

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

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

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

1. Submissions shall be made in writing (this would be mandatory, whatever rules are followed);

2. The Statement of Claim shall include at least, the full name and address or the parties’ domicile;

3. The examination of witnesses and experts shall be governed by the provisions contained in the Civil Procedural Law;

4. The hearing shall be completed within 180 days from the date the arbitrator is confirmed or the tribunal is established. This is mandatory, unless the parties specifically waive it;

5. The award shall be issued within 30 days as of the close of the hearings. This is also mandatory, but also may be specifically waived.

8.7 Does a valid arbitration clause bar access to state courts?
Yes, Article 3 of the Arbitration Law clearly states that the District Court has no jurisdiction to try disputes between parties bound by an arbitration agreement. Further, Article 11 of Arbitration Law upholds the provision under Article 3 which states that the existence of a written arbitration agreement eliminates the right of the parties to submit resolution of the dispute or difference of opinion contained in the agreement to the District Court. The District Court also must refuse to and must not interfere in any dispute settlement which has been determined by arbitration.

8.8 **What are the main arbitration institutions in Indonesia?**

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

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

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33 See http://www.baniarbitration.org
34 See http://www.bapmi.org
35 See http://www.bakti-arb.org
There is also an Indonesian Chapter of the Chartered Institute of Arbitrators based in Jakarta. The Chapter is involved primarily in the 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](http://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](http://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
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.36


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”.

36 See http://www.baniarbitration.org/ina/procedures.php (Indonesian version) and http://www.baniarbitration.org/procedures.php (English version)
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 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 whomever 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.37
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 ties with either party. Furthermore, judges, prosecutors, court clerks or other officials of justice may not be appointed or designated as arbitrators.38

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

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38 Article 12 Law No.30 of 1999
the dispute.\textsuperscript{39} 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.

\section*{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.\textsuperscript{40}

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.

\section*{8.16 Do arbitrators have powers to grant interim or conservatory relief?}

Article 32 of the Arbitration Law provides:

\textsuperscript{39} BANI Rule No.5
\textsuperscript{40} Article 13, Law No.30 of 1999
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 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 KETUHATAN 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, unless such time limit is extended by mutual written consent of the parties), the tribunal is allowed only thirty days to render its award, 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. 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. This time limit does not apply to registration of foreign-
rendered awards as this stipulation is only regulated under the chapter of the enforcement of national arbitration awards, but in either case the award must be registered in order to be enforceable.\textsuperscript{46} Domestic awards (those rendered in Indonesia) are registered in the District Court having jurisdiction over the respondent. \textsuperscript{47} International awards are registered in the District Court of Central Jakarta.\textsuperscript{48}

In order to register an award the court will require an original or authenticated copy to be submitted in the Indonesian language.\textsuperscript{49} 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.\textsuperscript{50} 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 \textbf{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

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{46} Article 59 (4), Law No. 30 of 1999
\item \textsuperscript{47} Articles 59 (1) and 1 (4), Law No. 30 of 1999
\item \textsuperscript{48} Article 65, Law No. 30 of 1999
\item \textsuperscript{49} Article 67, Law No. 30 of 1999
\item \textsuperscript{50} BANI Rule 14 (d)
\end{itemize}
\end{footnotesize}
domestic or international, but on very limited grounds which primarily involve withholding of decisive documentation, forgery or fraud. Any such application must be submitted within 30 days of registration of the award, 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.

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, 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 Law (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. There is no recourse against rejection by the court of execution.

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51 Article 70, Law No. 30 of 1999
52 Article 71, Law No.30 of 1999
53 Article 72, Law No. 30 of 1999
54 Article 62 (4), Law No. 30 of 1999
55 Articles 4 and 5, law No. 30 of 1999
56 Article 62 (2), Law No. 30 of 1999
57 Article 62 (3), Law No.30 of 1999
8.19.2 International Awards

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

“(i) the original or a certified copy of the International Award, in accordance with the provisions for authentication of foreign documents, together with an official translation thereof into Indonesian58;"

“(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.”59

58 Unless the original award is rendered in Indonesian
59 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.
Despite the Arbitration Law having been in effect for more than fifteen 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.

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

### 8.19.3 Execution

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

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

#### 8.20.1 Costs of Arbitration

Under the Arbitration Law, arbitrators shall determine the arbitration fee, which consists of the arbitrators’ honoraria, expenses incurred by the arbitrators and costs for (expert) witnesses and administrative matters. 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.

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60 Elucidation of Article 66 b, Arbitration Law. “Commercial” refers to activities in trade, banking, finance, investment, industry, and intellectual property.
61 Article 66 (c), Law No. 30 of 1999.
62 Article 76, Law No. 30 of 1999
63 Article 77, Law No. 30 of 1999
8.20.2 Legal Costs

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

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

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

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

8.22 Are there any recent noteworthy developments regarding arbitration in Indonesia (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?
In early 2014, the Constitutional Court received a request to test the Arbitration Law specifically the elucidation of Article 70. The Applicants stated that the elucidation of Article 70 of the Arbitration Law caused legal uncertainty.

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

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

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

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

On 8 September 2016, a new arbitration institution was launched in Jakarta, confusingly calling itself BANI Pembaharuan, translated as the “Renewed BANI”. The further developments in this respect should be closely monitored.
successively 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.

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9. **JAPAN**

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

### 9.1 Which laws apply to arbitration in Japan?

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

### 9.2 Is the Japanese Arbitration Law based on the UNCITRAL Model Law?

Although generally based on the UNCITRAL Model Law of 1985, the Arbitration Act contains several deviations. Their background is the Arbitration Act's distinct objective: Whereas the Model Law focuses on commercial arbitration, the Arbitration Act was also designed for arbitration involving parties with the need for special protection, particularly consumers and employees. Accordingly, arbitration agreements in labour disputes can exclusively be concluded after a dispute arose. However, any provisions promoting resolution of individual labour disputes that may arise in the future are null and void. Similarly, a consumer may cancel an arbitration agreement if the counterparty initiates arbitration against the consumer. Moreover, the Arbitration Act does not contain the Model

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64 Act No. 138 of 2003, amended in 2006, hereinafter referred to as “Arbitration Act”.
66 Supplementary Provision Art. 4.
67 Supplementary Provision Art. 3.
Law's amendment as to the detailed regulation of arbitral interim measures and their enforcement.

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

In contrast to other national arbitration laws, the Japanese Arbitration Act does not distinguish between domestic and international arbitration. As long as the arbitral seat is in Japan, all of the Arbitration Act's provisions apply.\(^{68}\) The provisions on recognition and enforcement apply even regardless of the place of arbitration.\(^{69}\)

9.4 **Has Japan acceded to the New York Convention?**

Japan is party to the New York Convention since 1961.

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

The Arbitration Act exclusively subjects the choice of the arbitration procedure to the restrictions of public policy.\(^{70}\) 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

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68 Art. 3 (1), (2) Arbitration Act.
69 Art. 3 (3) Arbitration Act.
70 Art. 26 (1) Arbitration Act.
equally. Subject to further restrictions of public policy, the parties are free to determine the arbitration procedure to be followed. Particularly, they may select the seat of the tribunal, the applicable substantive law, the language of the arbitration, place of the hearings, time restrictions for procedural participation such as defences or statements, the appointments of experts and the potential attempt of the tribunal to settle a dispute. If the parties did not agree on any of these aspects, the arbitral tribunal determines them.

The Arbitration Act comprises a formal requirement for arbitration agreements. An arbitration agreement has to be in writing. However, electromagnetic records, e.g. e-mails, conform to this requirement. In relation to the arbitration agreement, the Arbitration Act upholds the Doctrine of Separability. With regard to confidentiality, the rules of the major arbitration institution in Japan, the JCAA, ensure that the parties, the arbitrators and official secretaries keep all information relating to the arbitration, including the files and all documents, confidential.

Suspending any period of limitation, 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. During the proceedings, any provision of evidence requires the party relying on it to ensure the availability of such evidence to the other party. Correspondingly, when the arbitral tribunal relies on expert witnesses, it has to ensure that every witness statement is available to both parties. If any party fails to conform to its duty to provide evidence or does not attend the arbitral proceedings, they are deemed to have withdrawn from the arbitration.

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71 Art. 25 (1) Arbitration Act.
72 Art. 37 Arbitration Act.
73 Art. 36 Arbitration Act.
74 Art. 30 Arbitration Act.
75 Art. 31 Arbitration Act.
76 Art. 34 Arbitration Act.
77 Art. 38 Arbitration Act.
78 Art. 13 (2) Arbitration Act.
80 cf. below 8.8.
82 Art. 29 (1) Arbitration Act.
hearing, the tribunal has the competence to issue an award based on the evidence available and fairness considerations. Accordingly, the tribunal has to inform the parties adequately about their duty of participation.

Since Japan is not a litigious country, it is not unlikely that arbitrators encourage amicable dispute settlements during the proceedings. In addition, arbitrators are free to issue interim measures upon a party's request. This can be subject to the providing of adequate security.\textsuperscript{84}

The JCAA Rules contain specifically accelerated procedural rules for disputes of comparatively low economic value, i.e. below twenty million Japanese Yen.\textsuperscript{85}

9.7 \textbf{Does a valid arbitration clause bar access to state courts?}

Yes, if sued before state courts, parties to an arbitration agreement may invoke an objection.\textsuperscript{86}

9.8 \textbf{What are the main arbitration institutions in Japan?}

The major Japanese arbitration institution is the Japan Commercial Arbitration Association (“JCAA”). The JCAA was established within the Japan Chamber of Commerce and Industry as an arbitration committee in 1950. In 1953, the JCAA has become independent. Aside from arbitration administration, it provides a vast range of services, \textit{inter alia} mediation administration, seminars and conferences, in addition it maintains a large reference library.

Other arbitration institutions include the Japan Intellectual Property Arbitration Center, an organisation established by the Japan Federation of Bar Associations in corporation with the Japan Patent Attorneys Association. Further institutions are the Japan Shipping Exchange Inc. and the National Committee of the International Chamber of Commerce (ICC).

\textbf{References:}

\textsuperscript{84} Art. 24 Arbitration Act.
\textsuperscript{85} Art. 75-82 JCAA Rules.
\textsuperscript{86} Art. 14 (1) Arbitration Act.
It comprises leading companies and business associations in their countries or territories. National committees shape ICC policies and alert their governments to international business concerns.

9.9 Addresses of major arbitration institutions in Japan?

Japan Commercial Arbitration Association
Tokyo Office
3rd Floor, Hirose Building,
3-17 Kanda Nishiki-cho, Chiyoda-ku,
Tokyo, 101-0054 Japan
Telephone: +81 3 5280 5171
Telefax: +81 3 5280 5170
Website: http://www.jcaa.or.jp

The National Committee of the International Chamber of Commerce (ICC)
Tokyo Chamber of Commerce & Industry Bldg. 7F
3-2-2 Marunouchi, Chiyoda-ku,
Tokyo, 100-0005 Japan
Telephone: +81 3 3213 8585
Telefax: +81 3 3213 8589
Website: http://www.iccjapan.org

Japan Shipping Exchange Inc.
TOMAC (Tokyo Maritime Arbitration Commission of Japan Shipping Exchange Inc)
3rd Floor, Wajun Building,
2-22-2 Koishikawa, Bunkyo-ku,
Tokyo, 112-0002 Japan
Telephone: +81 3 5802 8361
Telefax: +81 3 5802 8371
Website: http://www.jseinc.org/en/tomac/index.html

Japan Intellectual Property Arbitration Center
3-4-2 Kasumigaseki, Chiyoda-ku, Tokyo 100-0013, Japan
Telephone: +81(0)3 3500 3793
Telefax: +81(0)3 3500 3839
E-mail: jimu@ip-adr.gr.jp
9.10  **Arbitration Rules of major arbitration institutions?**

Japan Commercial Arbitration Association:
http://www.jcaa.or.jp/e/arbitration/docs/e_shouji.pdf

The National Committee of the International Chamber of Commerce (ICC):
http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf

Japan Shipping Exchange Inc.:

Japan Intellectual Property Arbitration Center:
http://www.ip-adr.gr.jp/eng/

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

The model clause of the Japan Commercial Arbitration Association (JCAA) is:

“All disputes, controversies or differences which may arise between the parties hereto, out of or in relation to or in connection with this Agreement shall be finally settled by arbitration in (name of city) in accordance with the Commercial Arbitration Rules of the Japan Commercial Arbitration Association.”

9.12  **How many arbitrators are usually appointed and which qualifications are required for the arbitrators?**
As an expression of party autonomy, the parties are free to determine the number of arbitrators and the appointment procedure. Absent any agreement on the number of arbitrators, there shall be three arbitrators where only two parties arbitrate. If more than two parties arbitrate, the court competent for matters of the arbitration shall specify the number of arbitrators.

Japan's most popular arbitration rules, the JCAA Rules equally uphold party autonomy for the appointment of arbitrators. However, the default number of arbitrators is not three, but one. 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.

If three arbitrators shall be appointed, under both, the Arbitration Act and the JCAA Rules, both parties appoint one arbitrator each. The two party-appointed arbitrators eventually appoint the presiding arbitrator. It is further noteworthy that the JCAA Rules contain specific proceedings for appointing a panel with three arbitrators in case of multi-party arbitrations.

Under their distinct autonomy, the parties are additionally free to determine any particular qualification for the arbitrators to be appointed. However, in any case, every arbitrator is required to be impartial. Further requirements are not imposed, neither by the Arbitration Act nor the JCAA Rules. As a factual influence on the appointment of arbitrators, the JCAA maintains a panel of more than one hundred experts in various fields, including both Japanese and non-Japanese.
9.13 **Is there a right to challenge arbitrators, and if so under which conditions?**

In order to preserve efficiency, party autonomy and due process, the Arbitration Act provides an opportunity to challenge arbitrators. The grounds for challenging an arbitrator are (i.) a discrepancy between the arbitrator's qualification and the party-specified requirements and (ii.) a lack of impartiality. If, particularly in case of three arbitrators, a party challenges the arbitrator which the party itself appointed, the party must have become aware of the grounds for challenge after the appointment. 94

The procedure is subject to the parties' agreement. Absent such an agreement, the challenging party shall first submit its request to the tribunal itself. Upon rejection of the tribunal, the party may file a petition before the competent court. 95 If the party additionally bases its challenge on the grounds that (i.) the arbitrator is unable to perform his duties or (ii.) delays his performance, the party may directly petition the court. 96

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

There are no restrictions in Japan with regard to party representatives particularly under the Japanese arbitration law. However, the general restrictions of Japanese Law apply: Exclusively attorneys (*Bengoshi*) are allowed to practise law in Japan. 97 Additionally, “foreign lawyers admitted to practice in Japan” (*Gaikokuhou Jimu Bengoshi*) which are commonly referred to as *Gaiben* may represent parties in arbitration proceedings. In any case, lawyers both practising and appointed as party counsel outside of Japan may represent a party in arbitration proceedings. 98

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94 Art. 18 Arbitration Act.
95 Art. 19 Arbitration Act.
96 Art. 20 Arbitration Act.
97 Art. 72 Lawyers Act.
9.15 When and under what conditions can courts intervene in arbitration?

Comparable to many national arbitration laws, the Arbitration Act states that a court must not intervene in arbitration except where explicitly provided in the Arbitration Act. This restriction does not apply to the application for interim measures before state courts. Consequently, if a party to an arbitration agreement files a lawsuit before a court, the court will dismiss the claim on jurisdictional grounds. Beyond that simple principle, there are numerous situations where the complicated relationship between the parties' interests such as party autonomy, efficiency, due process and enforcement raises issues with regard to court interventions.

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?

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99 Art. 15 Arbitration Act.
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.\textsuperscript{101} However, in contrast to the UNCITRAL Model Law as amended in 2006, the Arbitration Act contains no specific provisions concerning the modification of an interim measure, lifting the measures are the possibility to claim damages for wrongful damages. Furthermore, the difficult issue of parallel interim proceedings before state courts and arbitral tribunal is not addressed.\textsuperscript{102}

9.17 What are the formal requirements for arbitral awards (form; contents; deadlines; other requirements)?

As to the formal requirements, an arbitral award has to be written and signed. It must state the place of the arbitration as well as the date of the award. Moreover, it shall state the reasons of the decision unless otherwise agreed upon by the parties.\textsuperscript{103} The JCAA Rules additionally require that the contact data of the representing counsels and that the specific relief sought and granted are stipulated within the award.\textsuperscript{104} Whereas the Arbitration Act does not contain any time requirements, the JCAA Rules formally did. During the 2014 revision, however, such deadlines have been removed from the arbitral rules.\textsuperscript{105}

A tribunal has to notify the parties of the arbitral award and send them a copy thereof. In case the JCAA Rules have been agreed, the original award remains with the JCAA.\textsuperscript{106} A deposit of the arbitral award at the competent district court, in contrast, is unnecessary.

\begin{footnotes}
\item[101] Art. 24 Arbitration Act.
\item[103] Art. 39 Arbitration Act.
\item[104] Art. 61 JCAA Rules.
\item[105] Art. 58 et. seqq. JCAA Rules, Art. 53, 59 JCAA Rules 2008. See further supre, 9.22-
\item[106] Art. 62 JCAA Rules.
\end{footnotes}
9.18 On what conditions can arbitral awards be appealed or rescinded?

Generally, an arbitral award is final and binding upon the parties. Under the Arbitration Act, a Japanese court may set aside an award where the arbitral seat was in Japan. The Arbitration Act transfers the UNCITRAL Model Law's restricted grounds for setting aside an award, *inter alia* due to a lack of an arbitration agreement and a violation of public policy.\(^{107}\)

The complex issue whether parties can deliberately agree on a more extensive and comprehensive appeal of arbitral awards before courts is not addressed in the Arbitration Act. Hence, the validity of a contractually agreed appeal mechanism and a potential invalidity's effect on the arbitration agreement can be subject to debate. As an illustration: Whereas the German Federal Court of Justice generally upholds a party agreed appeal mechanism,\(^{108}\) the Supreme Court of New Zealand restricted an appeal on the facts.\(^{109}\) Similarly, the US Supreme Court banned independent court intervention beyond the grounds listed in the Federal Arbitration Act.\(^{110}\) It is uncertain which approach Japanese courts would apply if an arbitration clause containing a comprehensive court appeal mechanism was brought before it.

9.19 What procedures exist for the enforcement of foreign and domestic arbitral awards?

Japanese courts generally enforce both foreign and domestic arbitral awards. Arbitral awards shall have the same effect as court judgements.\(^{111}\) 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

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107 Art. 44 JCAA Rules.
110 Hall Street Associates v. Mattel Inc. 170 L.Ed. 2D 254, para. 1.
111 Art. 45 Arbitration Act.
may apply for a civil execution order of an arbitral award before state courts.\textsuperscript{112}

The grounds for refusal of enforcement in the Arbitration Act have been drafted in accordance with 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.\textsuperscript{113}

In this regard, it shall be further mentioned that Japan signed numerous bilateral trade treaties, investment treaties and the Washington Convention. Subject to the statutory provisions concerning Civil Jurisdiction of Japan with respect to a Foreign State\textsuperscript{114}, arbitral awards will consequently be enforced against other states. Of specific importance is the Japan-China Trade Agreement. Japanese court decisions applied this trade agreement in preference to the New York Convention.\textsuperscript{115} Because of a lacking reciprocity requirement\textsuperscript{116} - which is the same concept as for instance in the German Code of Civil Procedure - neither Chinese courts nor Japanese courts are in a position to enforce judgements rendered by courts domiciled outside Japan. Hence, arbitration clauses in contracts not only with China are crucial to ensure later enforcement.\textsuperscript{117}

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

Fees and costs for lawyers, experts, translations and transportation are typically awarded. The Arbitration Act provides that the parties can agree on any cost allocation in their arbitration. If there is no such agreement between the parties, the law provides that each party shall bear the costs it has disbursed with respect to the arbitral proceedings. The Japanese

\begin{itemize}
  \item \textsuperscript{112} Art. 46 (1) Arbitration Act.
  \item \textsuperscript{114} Art. 16 Act on the Civil Jurisdiction of Japan with respect to a Foreign State, Act. No. 24 of April 24 2009.
  \item \textsuperscript{115} Osaka District Court, March 25, 2011, Hanrei Taimizu, 1355, p. 249.
  \item \textsuperscript{116} Art. 118 Japan Civil Procedural Act.
  \item \textsuperscript{117} Osaka High Court, April 9, 2003, Hanrei Jiho, 1841, p. 111.
\end{itemize}
Arbitration Law does accordingly not provide that the unsuccessful party should always bear the costs of the arbitration. The parties have to make specific provisions with regard to cost allocation in advance if they consider it appropriate.\textsuperscript{118} This is in line with the allocation of costs in case of normal court proceedings in Japan.

Most importantly however, the JCAA Rules contain a tribunal’s discretion to allocate the costs between the parties. It shall take both the merits of the dispute and other circumstances into account.\textsuperscript{119} The tribunal’s cost decision will be treated as part of the arbitral award. Therefore, state courts can exclusively review this allocation taking into account the general limitations that state courts have to observe with regard to the judicial review of arbitral awards.

The administrative fees of the JCAA, including VAT, range from JPY 216,000 for disputes with a value of less than JPY 5 million to JPY 15 million for a dispute with a value of more than JPY 5 billion. The detailed table of fees is attached to the official version of the JCAA Rules.

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

Compared to other major arbitration institutions, the number of arbitration matters brought before the JCAA is still comparatively small. Due to the confidential nature of arbitration, however, it remains difficult to obtain more detailed data regarding the JCAA administered cases. The following (somewhat dated) statistic, comparing the annual JCAA cases with those brought before the ICC and the AAA is available.

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\textsuperscript{118} Art. 49 Arbitration Act.

\textsuperscript{119} Art. 83 JCAA Rules.
Recognizing the fact that Japan is a society that heavily emphasizes harmony and amicable dispute resolution, Japan has amongst the lowest ratios of inhabitants and lawsuits. Accordingly, there is only a limited number of arbitrations in Japan taking place, especially with regard to domestic issues. On the other hand, Japan has a long tradition of out-of-court mediation. However, it is very likely for larger Japanese corporations to include an arbitration clause in international contracts which not necessarily leads to Japan as place of arbitration. Therefore, from an international view, arbitration cases with Japanese corporations involved as a party are seen more frequently outside of Japan. Especially if counterparts from China or other Asian countries are involved, Japanese companies increasingly choose arbitration as their preferred dispute resolution mechanism.

**9.22 Are there any recent noteworthy developments regarding arbitration in Japan?**

Aside from a translation into the Chinese language, the JCAA Rules have been recently revised. In 2014 the new version of the JCAA was published. Particularly, the revisions contain revised provisions with regard to multiple claims, multi-party situations, emergency proceedings and expedited procedure.

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

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 its International Committee. He is also registered in Germany at the Berlin District Court and a member of the Berlin Bar Association and is a member of Japan Commercial Arbitration Association (JCAA) as well as The German Institution of Arbitration (DIS).

Maximilian Hocke is a lecturer in civil law and international commercial law at Bucerius Law School, Hamburg, Germany as well as a research assistant to the Dean of Bucerius Law School, Professor Dr. Karsten Thorn.

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10. KOREA

BY: MR. HYUNG SOO LEE
    MR. JOACHIM NOWAK

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

The Korean Arbitration Act (the “Act”) applies to arbitration proceedings held in Korea; the Act is governing institutional and ad-hoc arbitrations in Korea. The complete text of the Act can be found in English on the website of The Korean Commercial Arbitration Board ("KCAB"): http://www.kcab.or.kr.

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

The current Act is based on the 1985 UNCITRAL Model Law (the “Model Law”). The Act was first enacted in 1966, and was fully amended with effect of 31 December 1999, in order to generally adopt the Model Law with minor deviations. The Act had been amended further on 7 April 2001, on 26 January 2002, on 31 March 2010 and on 23 March 2013. In November 2014, the Ministry of Justice of Korea announced the amendment proposal of the Act (the “Proposal”) which adopts the 2006 Model Law with minor deviations. The Korean Congress has finally approved the Proposal, and the amendment came into effect as of 30 November 2016.

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

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

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


Yes, the Republic of Korea is a member of 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 of the Convention.

The reservations made 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?**

Article 19 of the Act requires equal treatment of the Parties in the arbitral process with a full opportunity to present one's case, and in accordance with Article 20, Paragraph 1 of the Act, the Parties may agree on arbitral proceedings. Failing such an agreement on arbitral proceedings, the arbitral tribunal may, subject to the provisions of the Act, conduct arbitration in such manner as it considers appropriate (Article 20, Paragraph 2 of the Act).

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

Yes, if the respondent raises a defense based on the existence of a valid arbitration agreement, the court is required to reject the suit, unless the
arbitration agreement is null and void, inoperative or incapable of being performed.

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

The Korean Commercial Arbitration Board ("KCAB") is the main arbitration institution in the Republic of Korea. It was established in 1966 and has offices in Seoul and Busan. More than 400 arbitration cases and 1,600 mediation cases were administered by KCAB in 2015. There are over 1,000 arbitrators in the KCAB’s Panel of (International) Arbitrators, including 18 arbitrators in the International Arbitration Committee established in 2011. The panels include well recognized professionals from diverse backgrounds, including academia, law, and business. There are more than 200 non-resident arbitrators from which the KCAB may appoint arbitrators. It is not mandatory for Parties to resolve their disputes at the KCAB. Parties may agree to resolve their disputes at any other competent arbitration institution.

The Seoul International Dispute Center ("Seoul IDRC") was established in May 2013 with the support of the Korean Bar Association, the Korean Commercial Arbitration Board, the Seoul Metropolitan Government, the Ministry of Justice of the Republic of Korea and some arbitral institutions including, but not limited to, the Internal Chamber of Commerce ("ICC"), the HKIAC, or the SIAC. It provides rooms and facilities for international arbitrations including those held in Korea under the ICC rules.

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

The main office of the KCAB (Seoul) is located at:
43rd Floor, 511 Yeongdong-daero, Gangnam-gu, Seoul 06164, Republic of Korea
Tel. +82-2-551 2000, Fax: +82-2-551 2020 Website: http://www.kcab.or.kr,
The Busan office of the KCAB is located at: Korea Express Bldg., Room #906, 176 Jungang-daero, Dong-gu, Busan 48822, Republic of Korea.

The Seoul IDRC is located at:
11 Fl. Seoul Global Center, 38 Jongro, Jongro-gu, Seoul 110-792 Korea,
Tel. +82-2-2086/4200
Fax: +82-2-2086 4210
Website: www. http://www.sidrc.org

10.10 Arbitration Rules of major arbitration institutions?

The KCAB has two sets of rules, i.e., the Domestic Arbitration Rules (the “Domestic Rules”) and the International Arbitration Rules (the “International Rules”). The Domestic Rules are designed to govern procedures for domestic arbitration matters and had been revised and fully approved by the Korean Supreme Court to come into effect on 30 November 2016, whereas the 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. However, if the arbitration agreements were reached before 1 September 2011, the International Rules would apply only if the arbitration agreements specify that the International Rules shall apply.
Both arbitration rules can be accessed at the KCAB website in English at http://www.kcab.or.kr

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

The Domestic Rules recommend the following model clause for future disputes:

“Any disputes arising out of or in connection with this contract shall be finally settled by arbitration in Seoul in accordance with the Domestic Arbitration Rules of the Korean Commercial Arbitration Board.”
The Domestic Rules recommend the following model clause 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 Domestic Arbitration Rules: [brief description of the dispute]."

The KCAB International Arbitration Rules recommend the following model clause for future disputes:

“Any disputes arising out of or in connection with this contract shall be finally settled by arbitration in 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 / South Korea]
The language to be used in the arbitral proceedings shall be [language]."

The KCAB International Arbitration Rules recommend 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 [city / country]
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, Paragraph 1 of the Act. Usually, the Parties appoint one (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, Paragraph 2 of the Act.
On the other hand, pursuant to Article 11 of the KCAB International Rules, a dispute under the Rules shall be heard by a sole arbitrator as a general rule. However, said 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.

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

Article 13 of the Act stipulates that an arbitrator may be challenged if impartiality, independence or qualification of the arbitrator is doubtful. The grounds for a challenge by a party who nominated or who participate in the appointment of an arbitrator shall be limited to those that the challenger becomes aware of after the appointment.

10.14 **Are there any restrictions as to the parties’ representation in arbitration proceedings?**

Article 7 of the International Rules provides that a Party may be represented by any person of its choice in proceedings under the Rules, subject to such proof of authority as the arbitral tribunal may require. Article 6 of the Domestic Rules provides that a party may be represented by a 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.

10.15 **When and under what conditions can courts intervene in arbitration?**

There is no anti-arbitration injunction in Korea as of now. While an arbitration proceeding is pending, Korean courts may assist but cannot intervene in the proceedings (Article 6 of the Act), except on an appointment of an arbitrator, a challenge to arbitrators, termination of the
mandate of arbitrators, jurisdiction of arbitrators, challenge to experts, as provided in the Act.
In addition, the arbitral tribunal may, ex officio or in receipt of the application of the parties, entrust the court with the taking of evidence (Article 28, Paragraph 1 of the Act).

10.16 **Do arbitrators have powers to grant interim or conservatory relief?**

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 such cases, the arbitral tribunal may determine the amount of security to be provided by the respondent in lieu of such interim measure. The arbitral tribunal may order the party requesting the interim measure to provide appropriate security. Consequently, the tribunal has the power to grant interim relief under 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. For reference, Korean courts are generally liberal in granting interim measures, particularly those maintaining the status quo.

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

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).

The Act does not provide for the period within which an arbitral award must be issued. Article 38 of the International Rules requires the arbitral award to be delivered within 45 days from the date on which final
submissions are made or the hearings are closed, whichever is later. However, the KCAB Secretariat may 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.

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 rescinded by a court only if one of the following conditions is met: a party seeking rescindment of 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 ii) the party seeking rescindment was not given a proper notice concerning appointment of arbitrators or arbitral proceedings, or was unable to present his/her case for other reasons; or iii) the tribunal had no jurisdiction; or iv) the composition of the arbitral tribunal was not in accordance with the parties’ agreement. The court may also rescind 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.

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

Arbitral awards, both domestic and foreign, are enforced by Korean court judgments. It takes approximately between 4 months and 1 year to obtain such an enforcement judgment for an arbitral award. An enforcement judgment ordering monetary payment is provisionally enforceable pending appeal (and subject to deposit of a reasonable amount as security at the court in case the applicant loses the suit). In general, Korean courts rarely denied enforcement of arbitral awards in Korea.
10.20 Can a successful party in the arbitration recover its costs?

Article 56 of the 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 taking into account the circumstances of the case, unless otherwise agreed between the parties.

Article 52(1) of the 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?

KCAB reportedly handled 413 arbitration cases in 2015, up by 8.12% from the previous year, of which international cases account for 17.9% (or 74 cases). International cases involved parties from such jurisdictions as the United States, China, Vietnam, Germany, France, Italy, Saudi Arabia and other countries. The total claim amount has also increased by 8.1% to KRW 831,800,000,000. Statistics in more detail are available at the KCAB website (in Korean).

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 10.2 and 10.10, the Act, along with the Domestic Rules and International Rules, underwent certain revisions in 2016 as follows:
The Act has now codified interim or provisional measures in detail including requirements, suspension and revocation thereof by accommodating 2006 UNCITRAL Model Law (Article 18 through 18-8). Proceedings concerning the recognition and enforcement of arbitral awards have been streamlined as the court may now issue an order recognizing and enforcing the award without holding a mandatory pleading session while some of the previously required documents no longer need to be filed with the court (Article 37). The Act has also eased requirements for written arbitration clauses (Article 8), reinforced the court’s cooperation with evidence taking (Article 28) and clarified that the arbitral tribunal has power to allocate arbitration costs among the parties and impose delay charges (Articles 34-2 and 34-3).

As for the International Rules, “emergency measures by emergency arbitrator” are now available to improve practicality of international arbitrations by granting parties urgent conservatory and interim relief prior to the composition of the arbitral tribunal (Appendix 3). The Rules have also enabled third parties to be added as another party to the existing proceedings for the sake of judicial economy and prevention of conflict between arbitral awards (Article 21). In addition, the KCAB Secretariat may now refuse to confirm the nomination of those party-appointed arbitrators that it deems clearly inappropriate as a means to ensure impartiality and independence of arbitral tribunals (Article 13).

The Domestic Rules went through rather minor revisions including allocation of arbitration costs as discussed in 10.20.

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**KOREA**

**Brief Profile:** Since its establishment in 1993, Hwang Mok Park P.C., one of Korea’s leading full-service law firms, has been at the forefront in responding to the ever-changing needs of foreign clients doing business in Korea. Having developed strengths in such fields as corporate law, finance, banking and capital markets, litigation and arbitration, fair trade, tax, and of course, pharmaceuticals and healthcare, HMP has forged its international reputation by advising clients and liaising effectively with foreign law firms on complex legal matters. In addition to having Korean and foreign-licensed attorneys, HMP has on its staff Korean and U.S.-licensed certified public accountants, as well as patent and customs specialists. Combining an in-depth knowledge of domestic laws and regulations with a global understanding of the international business environment, HMP is dedicated to providing the highest level of professional service.

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. 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 "Vertrauensanwalt der Österreichischen Botschaft in der Republik Korea". He is also a German Bankkaufmann and Entrepreneur.

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11. LAOS

BY: MR. STEVE GODDARD
MS. FLORENCE LO

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. 06/NA (17 December 2010) (‘Law on Resolution of Economic Disputes’) 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’) 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 laws are not based on the UNCITRAL model.

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

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?**


It is worth noting that Lao PDR is not a member to the *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (entry into force on 1 February 1971) (*The Hague Convention 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 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 Lao PDR or if only one party is domiciled in Lao PDR.

For disputes relating to the performance of a contract or claim for compensation and damages pursuant to a contract, Article 101 of the *Law on Contract and Tort* No 01/NA (8 December 2008) (*Law on Contract and Tort*) stipulates that the parties must first endeavor to resolve their dispute through amicable means or negotiations, failing which they have a right to submit the matter to mediation, arbitration, or file a claim to Court. Similarly, the Law on Contract and Tort permits parties to nominate a foreign arbitration institution regardless of the domicile status of the parties.
11.6  **Does the Lao PDR arbitration law contain substantive requirements for the arbitration procedures to be followed?**

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 economic dispute. Arbitration rules and procedures governing domestic arbitration in Lao PDR at the CEDR or OEDR for economic disputes are provided in Articles 29 to 38 of the *Law on the Resolution of Economic Disputes*.

For an arbitration award to be enforceable in 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 guaranty 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 authorized 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.

11.8  **What are the main arbitration institutions in the Lao PDR?**

There are two main arbitration institutions in Lao PDR for economic disputes.

The “Centre of Economic Dispute Resolutions” (CEDR) operates at the central level and is 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 Office of Economic Dispute Resolution (‘OEDR’) operates at the provincial level and is under the supervision of the Provincial Department of Justice and Chief of Office with status equivalent to the Deputy-Director of the Department of the Province. The OEDR has the same rights and functions as the CEDR.

There are also industry-specific arbitration committees within some government line ministries in 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
T: +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 Phanh Province, Xieng Khuang Province, Khammuan Province, Savannakhet Province and Champasak Province.

11.10 Arbitration Rules of major arbitration institutions?

The arbitration rules and procedures governing the CEDR and OEDR in Lao PDR are provided in Sections 1, 3 and 5 of the Law on the Resolution of Economic Disputes. A separate regulation is expected to be passed relating to the organizational structure and rules of the institutions.
11.11 What is/are the Model Clause/s of the arbitration institutions?

There are no laws, regulations or guidelines in Lao PDR proposing a Model Clause for contracting parties to use arbitration for dispute resolution. The \textit{Law on the Resolution of Economic Disputes} and \textit{Law on Contract and Tort} 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 \textit{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 arbitration committee.

Pursuant to Article 30 of the \textit{Law on the Resolution of Economic Disputes}, the parties may agree on the number of arbitrators to be appointed to the panel, subject to the condition that the arbitration panel must be comprised of more than three arbitrators, the total number of arbitrators must be an odd number and the arbitrators are selected from a published name-list approved by the Minister of Justice.

For domestic arbitration at the CEDR or OEDR in Lao PDR, the parties are each entitled to appoint an equal number of arbitrator(s) below their agreed number on the panel within fifteen days of submitting the matter to arbitration. If either of the parties fail to appoint their respective arbitrator(s) within the given period, the respective CEDR or OEDR, will have the power to make a selection on the party’s behalf within ten days. The appointed arbitrator(s) will then convene and select the final arbitrator who shall also act as the chairperson. If the final arbitrator is not selected within the given time period, the respective CEDR or OEDR, will have the power to make a selection on the party’s behalf within ten days.
11.13 Is there a right to challenge arbitrators, and if so under which conditions?

Yes, pursuant to Article 31 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 OEDR shall 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 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 Peoples’ Court is barred from hearing a matter if the parties have chosen to submit the dispute to arbitration. However, pursuant to Articles 38 and 51 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 Peoples’ Court for an enforcement order of an arbitration award or to challenge the enforceability of the arbitration award, the Peoples’ Court will have jurisdiction to determine the enforceability of the arbitration award.

The enforceability of an arbitration award in Lao PDR will be subject to the determination of the Peoples’ Court on whether there has been any violation of laws and regulations on the conduct of proceedings, if the enforcement of the arbitration award will be 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 Lao PDR. If the Peoples’ Court finds any of the above issues in the positive, it will not issue an order certifying the enforcement of the arbitration 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 arbitration award.

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

While local arbitrators at the CEDR and OEDR in Lao PDR do not have powers to grant interim or conservatory relief, Article 34 of the Law on the Resolution of Economic Disputes provides that the Arbitration Committee can, by application of either party, request the Peoples’ Court to issue an order to seize, confiscate, or take any other appropriate measure to protect the interests and rights of the applicable party within seven 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 37 of the Law on the Resolution of Economic Disputes sets out the contents which are required to be contained in the arbitration 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 Arbitration Committee and the recorder;

  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 arbitration award;

e) The division of fees and service charges and responsible party for payment; and

f) Signatures of the Arbitration Committee, the recorder, and Chief of CEDR or OEDR where the arbitration proceedings took place.

• **Deadlines for issuing arbitral awards**

  Article 33 of the *Law on the Resolution of Economic Disputes* provides that the Arbitration Committee should resolve disputes within three months from the day the Arbitration Committee was appointed, except under exceptional circumstances relating to the presentation of evidence, but does not provide a formal deadline for the issuing of an arbitration award.

• **Other formal requirements for arbitral awards**

  Article 36 of the *Law on the Resolution of Economic Disputes* provides that the decision of the Arbitration Committee shall be read in the presence of the parties or their representatives and shall 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 arbitration award cannot be rescinded. However, a party may appeal the enforceability of the arbitration award in the Peoples’ Court within fifteen days of receiving the arbitration award for reasons outlined in Articles 38 and 51 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 Lao PDR is a party to or if the enforcement of the award will affect the national security, social peace and environment of Lao PDR.
As mentioned previously, if the Peoples’ Court finds any of the above issues in the positive, it will not issue an order certifying the enforcement of the arbitration 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 arbitration award.

11.19 What procedures exist for enforcement of foreign and domestic awards in the Lao PDR?

Domestic arbitration awards from the CEDR or OEDR are recognized as binding on the parties involved and parties are obliged under Article 49 of the Law on the Resolution of Economic Disputes to implement the outcome of the award within a period of 15 days from when the decision was made. In the event that the parties do not self-enforce the obligations of the arbitration award, either party may submit the arbitration award to the Peoples’ Court and seek an enforcement order to be issued pursuant to Article 51 of the Law on the Resolution of Economic Disputes.

Foreign arbitration awards and decisions are recognized by Lao PDR, subject to certification by the Peoples’ Court. Pursuant to Article 52 of the Law on the Resolution of Economic Disputes and Article 41 of the Law on Civil Procedures, the Peoples’ 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 NY Convention; (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 arbitration award has property, activities, shares, money or other assets in Lao PDR; and (4) the arbitration proceedings did not violate any procedural laws and regulations. Once these conditions have been met and the arbitration award or decision is certified by the Peoples’ 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). If the Peoples’ Court dismisses the application for certification of the arbitration 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 Arbitration Award or decision under Article 54 of the Law on the Resolution of Economic Disputes.

11.21 Are there any statistics available on arbitration proceedings in Lao PDR?

Domestic arbitration proceedings are not required to be published in 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 arbitration award which has successfully obtained certification and enforcement from the Peoples’ Court but we are aware of one foreign arbitration award currently in the process of seeking certification from the Peoples’ 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 dated 25 April 2013 (“Draft Decree”) 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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| Brief Profile: | Arion Legal has been operating in Vientiane, Lao PDR since 2008 and is the only Australian law firm registered in Lao PDR. Arion Legal has a team of dedicated Australian qualified lawyers and local Lao lawyers, providing international standard legal and tax advice and services for local and foreign investors operating in or looking to invest in Lao PDR.  
Arion Legal 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, having represented local and international investors, project developers, lenders and the Government of Lao PDR.  
As a trusted and reliable law firm in Lao PDR, Arion Legal has acted as legal counsel for the Australian Embassy, British Embassy and the Singaporean Embassy in Lao PDR. Arion Legal also has strong local community presence and are members of the Australian Chamber of Commerce, the European Chamber of Commerce and Industry and the British Business Group in Lao PDR. |
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12. MALAYSIA

BY: MR. THAYANANTHAN BASKARAN

12.1 Which laws apply to arbitration in Malaysia?

The Arbitration Act 2005 applies to arbitration in Malaysia.

12.2 Is Malaysian arbitration law based on the UNCITRAL Model Law?

The Arbitration Act 2005 is based on the UNCITRAL Model Law.

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

Section 3(2) of the Arbitration Act 2005 provides that Parts I, II and IV of the Act apply to domestic arbitration and Part III shall apply unless the parties agree otherwise in writing. Section 3(2) provides that Parts I, II and IV apply to international arbitration and Part III shall not apply unless the parties agree otherwise in writing.

12.4 Has Malaysia acceded to the New York Convention?

Malaysia is a signatory of the New York Convention. Sections 38 and 39 of the Arbitration Act 2005, which provide for the recognition and enforcement of awards, give effect to the New York Convention.

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

Section 19(1) of the Arbitration Act 2005 provides that, subject to the provisions of the Act, the parties are free to agree on the procedure to be
followed by the arbitral tribunal in conducting the proceedings. The parties are accordingly free to agree on foreign arbitration institutions where both parties are domiciled in Malaysia or one party is domiciled in Malaysia and the other party is abroad subject to fundamental provisions of the Act, like section 20, which provides that the parties shall be treated with equality and each party shall be given a fair and reasonable opportunity of presenting that party’s case.

12.6 Does Malaysian arbitration law contain substantive requirements for the arbitration procedures to be followed?

Sections 20 to 29 of the Arbitration Act 2005 provide for the conduct of arbitral proceedings. The arbitral proceedings must comply with section 20, which gives statutory effect to the rules of natural justice and section 29, which provides for court assistance in taking evidence in arbitral proceedings. However, the parties are not compelled to comply with section 21 to 28 and this is expressly provided for in the Act by use of words like “unless otherwise agreed by the parties” or “the parties are free to agree” which precede all these sections.

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

Section 10(1) of the Arbitration Act 2005 provides that a court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

recognized that under section 10(1) of the Arbitration Act 2005, it is mandatory for court proceedings to be stayed.

The Court of Appeal, in Comos Industry Solution GmbH v. Jacob and Toralf Consulting Letrikon Sdn Bhd & Ors [2012] 4 MLJ 573, held that an application to set aside a writ of summons did not amount to a step in the proceedings under section 10(1) of the Arbitration Act 2005.

12.8 **What are the main arbitration institutions in Malaysia?**

The main arbitration institution in Malaysia is the Kuala Lumpur Regional Centre for Arbitration (KLRCA).

12.9 **Addresses of major arbitration institutions in Malaysia?**

The address of the KLRCA is:

Bangunan Sulaiman, Jalan Sultan Hishamuddin, 50000 Kuala Lumpur, Malaysia.
Tel: +60 3-2271 1000
Fax: +603 2271 1010
Email: enquiry@klrca.org
Website: www.klrca.org

12.10 **Arbitration Rules of major arbitration institutions?**

The arbitration rules published by the KLRCA are the KLRCA Arbitration Rules, the KLRCA Fast Track Arbitration Rules and the KLRCA i-Arbitration Rules ([http://klrca.org/Arbitration-Arbitration-Rules](http://klrca.org/Arbitration-Arbitration-Rules)).

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

The Model Clause for the KLRCA Arbitration Rules is:
“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the KLRCA Arbitration Rules.”

The Model Clause for the KLRCA Fast Track Arbitration Rules is:

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the KLRCA Fast Track Arbitration Rules.”

And, the Model Clause for the KLRCA i-Arbitration Rules is:

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the KLRCA i-Arbitration Rules.”

12.12 How many arbitrators are usually appointed?

One or three arbitrators are usually appointed. Section 12(1) of the Arbitration Act 2005 provides that the parties are free to determine the number of arbitrators. If the parties fail to agree, section 12(2) provides that, in the case of international arbitration, the arbitral tribunal shall consist of three arbitrators, and, in the case of domestic arbitration, the arbitral tribunal shall consist of a single arbitrator.

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

There is a right to challenge arbitrators. The grounds for challenge are set out in section 14 of the Arbitration Act 2005 and the challenge procedure is set out in section 15.

12.14 Are there any restrictions as to the parties’ representation in arbitration proceedings?
The High Court of Malaya, in Zublin Mubibbah Joint Venture v. Government of Malaysia [1990] 3 CLJ Rep 371, held that a foreign lawyer who was not an advocate & solicitor within the meaning of the Legal Profession Act 1976 was not prohibited from representing parties in arbitral proceedings in West Malaysia, as the Legal Profession Act 1976 did not apply to arbitral proceeding in West Malaysia.

The Legal Profession Act 1976 has now been amended, with effect from 3 June 2014, to expressly provide under section 37A that foreign arbitrators, counsel and solicitors may act in arbitration proceedings with a seat in Malaysia.

The High Court of Sabah and Sarawak, In Re Mohamed Azabhari Matiasin [2011] 2 CLJ 630, held that a foreign lawyer who was not an advocate within the meaning of the Advocates Ordinance 1953 was prohibited from representing parties in arbitral proceedings in Sabah, East Malaysia. However, the Court of Appeal, in Mohamed Azabhari Matiasin v. GBB Nandy & Ors [2013] 7 CLJ 277, allowed an appeal against the decision of the High Court of Sabah and Sarawak in Matiasin supra. At present, an application for leave to appeal to the Federal Court against the decision of the Court of Appeal is pending.

Based on these authorities, the present position in Malaysia, is that there are no restrictions as to the parties’ representation in Malaysia. However, the position in East Malaysia will depend on the decision of the Federal Court, in the event leave to appeal is granted.

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

Section 8 of the Arbitration Act 2005 provides that no court shall intervene in matters governed by the Act, except where so provided by the Act. The areas where court intervention is provided for in the Act are:

Part II
(a) section 10: provision for stay of court proceedings where there is an arbitration agreement;
Do arbitrators have powers to grant interim or conservatory relief?

12.16 Section 11(1) of the Arbitration Act 2005 provides that a party may, before or during the arbitral proceedings, apply to the High Court for any interim measures and the High Court may make the following orders for:

(a) security for costs;
(b) discovery of documents and interrogatories;
(c) giving of evidence by affidavit;
(d) appointment of a receiver;
securing the amount in dispute, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;

(f) the preservation, interim custody or sale of any property which is the subject-matter of the dispute;

(g) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the disposition of assets by a party; and

(h) an interim injunction or any other interim measure.

The High Court, in *Jiwa Harmoni Offshore Sdn Bhd v. Ishi Power Sdn Bhd* [2009] 1 LNS 849, recognized that certain power granted to the High Court under sections 11(1) of the Arbitration Act 2005 had also been granted to the arbitral tribunal under section 19(1) and, as such, the High Court should not be troubled with such applications in the first instance unless such an order is necessary to bind third parties or to effectively enforce the relief in cases where it cannot be done by an order of the arbitral tribunal.

The High Court has applied the principle in *Jiwa Harmoni* supra in *Cobrain Holdings Sdn Bhd v. GDP Special Projects Sdn Bhd* (2010) Transcript and *Metrod (Singapore) Pte Ltd v. GEP II Beteiligungs GmbH & Anor* [2013] 1 LNS 324.

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

Section 33(1) of the Arbitration Act 2005 provides that an award shall be in writing and subject to section 33(2) shall be signed by the arbitrator. Section 33(2) provides that, in arbitral proceedings with more than one arbitrator, the signature of the majority of all members of the arbitral tribunal shall be sufficient provided that the reason for any omitted signature is stated.

Section 33(3) provides that an award shall state the reasons upon which it is made unless: (a) the parties have agreed that no reasons are to be given; or (b) the award is an award on agreed terms under section 32.
Section 33(4) provides that an award shall state its date and the seat of arbitration as determined in accordance with section 22 and shall be deemed to have been made at that seat.

Section 33(5) provides that, after an award is made, a copy of the award signed by the arbitrator in accordance with sections 33(1) and (2) shall be delivered to each party.

Section 33(6) provides that, unless otherwise provided in the arbitration agreement, the arbitral tribunal may: (a) award interest on any sum of money ordered to be paid by the award from the date of the award to the date of realization; and (b) determine the rate of interest.

In summary, the formal requirements of an arbitral award under section 33 of the Arbitration Act 2005 are that:

(a) it must be in writing;
(b) it must be signed by a majority of the arbitral tribunal;
(c) it must be reasoned unless otherwise agreed by the parties or it is an agreed award;
(d) it must be dated;
(e) it must state the seat;
(f) it must be delivered; and
(g) it may include interest.

There are no deadlines for the delivery of an award under the Arbitration Act 2005.

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

There are no provisions in the Arbitration Act 2005 to appeal against or rescind an arbitral award as such. Instead, section 37 provides that an award may 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 High Court, in *Kelana Erat Sdn Bhd v. Niche Properties Sdn Bhd & another application* [2012] 5 MLJ 809, recognized that an award under the Arbitration Act 2005 was by and large immune from any interference by the courts unless the award was infected with the infirmities identified in section 37(1).

Similarly, the High Court, in *The Government of India v. Cairn Energy India Pty Ltd & Ors* [2014] 9 MLJ 149, held that the courts do not sit in an appellate capacity under section 37. Furthermore, the courts will be slow to interfere even when there is a specific discretion to do so under section 37.
12.19 **What procedures exist for enforcement of foreign and domestic awards in Malaysia?**

Section 38(1) of the Arbitration Act 2005 provides that, on an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to sections 38 and 39, be recognized as binding and be enforced by entry as a judgment in terms of the award or by action.

Section 38(2) provides that, in an application under section 38(1), the applicant shall produce: (a) the duly authenticated original award or a duly certified copy of the award; and (b) the original arbitration agreement or a duly certified copy of the agreement.

Section 38(3) provides that, where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.

Section 38(4) provides that, for the purposes of the Arbitration Act 2005, “foreign State” means a State which is a party to the New York Convention.

12.20 **Can a successful party in arbitration recover its costs?**

A successful party may recover its costs subject to the agreement between the parties and the discretion of the arbitral tribunal. Section 44(1)(a) of the Arbitration Act 2005 provides that, unless otherwise agreed by the parties, the costs and expenses of an arbitration shall be in the discretion of the arbitral tribunal who may:
The High Court, in Magnificent Diagraph Sdn Bhd v. JWCAriatektura 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.

12.21 **Are there any statistics available on arbitration proceedings in Malaysia?**

Statistics on arbitration proceedings in Malaysia are available upon request from the KLRCA.

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

The Kuala Lumpur Regional Centre for Arbitration (KLRCA) signed a memorandum of understanding on 20 November 2014 with the International Centre for Settlement of Investment Disputes (ICSID), whereby the KLRCA will be the venue for ICSID disputes that arise in the region. This will allow disputes linked to the region to be heard locally should they be referred to ICSID.
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13. MONGOLIA

BY: MS. ENKHTSETSEG NERGUI
MR. MUNKH-ORGIL TUVAANDORJ

13.1 Which laws apply to arbitration in Mongolia?

The main source of law for arbitration in Mongolia is the Arbitration Law 2003. Aside from this, there are also secondary sources of arbitration law which include:

a. International treaties to which Mongolia is a party;

b. The Civil Procedure Code 2002 in relation with procedures on seeking interim injunction in support of arbitration, appeals on the jurisdiction of the tribunal, and enforcing both domestic and foreign arbitral awards;

c. The Law on Court Enforcement 2002 in relation with enforcement of awards and supplementing the Civil Procedure Code 2002 by providing more detail on the process of enforcement of arbitral awards by the Mongolian courts;

d. The Supreme Court Interpretation of the Arbitration Law which provides guidance and greater detail with regard to the Arbitration Law;

e. The Civil Code in relation with jurisdiction of the courts and the arbitral tribunal in conjunction with the Civil Procedure Code 2002; and

f. The 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards in connection with the procedure of recognizing and enforcing foreign arbitral awards in Mongolia, and Mongolian arbitral awards abroad.
13.2 Is the Mongolian arbitration law based on the UNCITRAL Model Law?

Yes. The current Arbitration Law 2003 is based on the UNCITRAL Model Law 1985. However, additional provisions which supplement the Model Law provisions also can be found in the law. Some of the additional provisions that can be found in the Arbitration Law:

(i) prohibiting members of the constitutional court, judges, prosecutors, court officers and others from acting as arbitrators;

(ii) provision on the ‘doctrine of separability’ of the arbitration agreement;

(iii) provision on procedure of appointment of arbitrators where the parties fail to agree;

(iv) Mongolian as default language;

(v) the requirements for the contents of an arbitration claim are the same as those set out in article 62 of the Mongolian Civil Procedure Code (which requires the claim to include the full name and address of the claimant and the respondent, the basis of the claim, the value of the claim, supporting evidence for the claim etc.);

(vi) provision on confidentiality of the arbitral proceedings which obliges the tribunal and the parties to maintain the confidentiality of confidential information which were revealed during the arbitration proceedings.

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

Where the seat of arbitration is in Mongolia, the Arbitration Law 2003 is the only law that is applicable for domestic and international arbitration.
13.4 Has Mongolia acceded to the New York Convention?

Yes, Mongolia is one of the contracting states of the New York Convention, which was officially ratified on 24 October 1994. However, Mongolia has also declared that the Convention shall apply only to recognition and enforcement of awards made in the territory of another contracting State and to differences arising out of legal relationships, contractual or otherwise, that are considered commercial under the national law. Furthermore, the Arbitration Law 2003 in Article 3.2 specifically states that the procedure of recognizing and enforcing foreign arbitral awards should be regulated in accordance with the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Award and Chapter Eight (Recognition and Enforcement of Awards) of the Arbitration Law.

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

This depends solely on the agreement between the parties. In practice, most arbitrations involving Mongolian parties will be carried out in Mongolia and it is rare for Mongolian parties to agree to foreign arbitration, unless one of the parties is a foreign investor and insists on a foreign arbitration. If one of the parties is not Mongolian, the place of arbitration usually depends on the financial volume of the contract and the equality of bargaining power between the parties. Larger foreign companies with larger contracts in dispute usually prefer foreign arbitration institutions with the seat of arbitration in a third neutral country. Smaller foreign companies or foreign individuals with smaller contracts in dispute, on the other hand, usually agree for the seat of arbitration to be in Mongolia.

13.6 Does the Mongolian arbitration law contain substantive requirements for the arbitration procedures to be followed?

Under the Mongolian Arbitration Law there is no specific arbitration procedure to be followed by the parties or the Arbitral Tribunal to conduct the proceedings. However, there is a restriction on persons who can be appointed as an arbitrator, obligation to maintain confidentiality regarding matters that were revealed during the proceedings, and the form and content of the arbitration award. Apart from the aforesaid matters, the parties are free to agree on the procedure of the proceedings starting from the appointment and challenge of arbitrators, seat of arbitration, substantive law and hearing.

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

Yes it does. If a party to a valid arbitration agreement files a law suit in a state court in Mongolia, state courts shall reject to resolve the case as it belongs to the arbitral jurisdiction.

13.8 What are the main arbitration institutions in Mongolia?

The best-known arbitration institution in Mongolia is the “Mongolian International and National Arbitration Court” (MINAC). MINAC is part of the Mongolian National Chamber of Commerce and Industry (MNCCI) which was founded on 2 July 1960. MINAC has its 21 branch arbitration centres in Aimag (cities) encouraging the settlement of domestic disputes through arbitration.

13.9 Addresses of major arbitration institution in Mongolia?

Mongolian International and National Arbitration Court (MINAC)
MNCCI Building

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123 Mongolian Arbitration Law 2003 Art.6 and Civil Procedure Code Art.13 (2)
124 http://mongolchamber.mn accessed 06 December 2014
13.10 Arbitration Rules of major arbitration institutions?

These are the Mongolian International and National Arbitration Court (MINAC) Arbitration Rules 2014.

13.11 What is the Model Clause of the arbitration institutions?

Model Clause of the MINAC Arbitration Rules:\n
"All disputes arising out of or in connection with this contract or related to its violation, termination or nullity shall be finally settled in the Mongolian International and National Arbitration Court at the MNCCI under its Rules on Arbitration in Mongolia."

13.12 How many arbitrators are usually appointed?

The Arbitral Tribunal under the Arbitration Law 2003 may consist of a sole or more arbitrators. The parties have the freedom to determine the number of arbitrators and if the parties fail to agree on a certain number, the default number of arbitrators will be three. Furthermore, the parties also have the freedom to agree on a procedure for appointing arbitrators, failing such agreement the number of arbitrators shall be three and each party shall appoint one arbitrator, and those two appointed arbitrators shall appoint the third arbitrator who will act as the chairman of the Arbitral Tribunal.

As for sole arbitrators, the appointment shall be based on mutual agreement. Failing such agreement, a sole arbitrator shall be appointed by

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the Court of Appeal upon request of a party. If a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made by the Court of Appeal upon request of a party. Where a party fails to act as required under such procedure, or the parties are unable to reach an agreement expected of them under such procedure, or a competent body stated in a statute of institutional arbitration fails to perform any function entrusted to it under such procedure, any party may request the Court of Appeal to take the necessary measures. Any decisions on matters entrusted to the Court of Appeal shall be subject to no further appeal.

In appointing arbitrators, the Court of Appeal should consider the ability of those arbitrators to act as an arbitrator, their independency and impartiality, and qualifications required by the agreement of the parties. Meanwhile, the procedure of appointing and also the number of arbitrators under the MNAC Arbitration Rules are very similar with the procedures under the Arbitration Law 2003. The Arbitral Tribunal may consist of one or three arbitrators. The parties have the freedom to determine the number of arbitrators and if the parties fail to agree, the default number of arbitrators will be three. Every arbitrator shall be and remain independent, impartial, and fair.

Furthermore, the parties also have the freedom to agree on a procedure for appointing arbitrators, failing such agreement the number of arbitrators shall be three - each party shall appoint one arbitrator, and those two appointed arbitrators shall appoint the third arbitrator, who will act as the chairman of the Arbitral Tribunal. If a party fails to appoint the arbitrator within twenty-one days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within twenty-one days of their appointment, the appointment shall be made by the Chairman of the Arbitration Court upon request of a party.

As for sole arbitrators, the appointment shall be based on mutual agreement. Failing such agreement, the sole arbitrator shall also be appointed by the Chairman of Arbitration Court upon request of a party.
In appointing arbitrators, the Chairman of the Arbitration Court should consider the ability of those arbitrators to act as an arbitrator, their independency and impartiality, and qualifications required by the agreement of the parties.

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

Article 16 of the Arbitration Law explains that arbitrators must disclose any circumstances likely to give rise to justifiable doubts as to their impartiality of independence regarding the appointing party, starting from the time of their appointment and throughout the arbitral proceedings. This shows that arbitrators may only be challenged if there are circumstances that give rise to justifiable doubts as to his impartiality or independence.

Furthermore, a party may only challenge an arbitrator appointed by such party, or in whose appointment a party has participated, for reasons such party becomes aware after the appointment has been made.\(^\text{126}\)

Circumstances that allow a party to challenge arbitrators under the MINAC Arbitration Rules are similar to the circumstances under the Arbitration Law 2003 as explained above. However, the MINAC Arbitration Rules also require an arbitrator to sign a Declaration of Independence and Impartiality before their appointment, and the arbitrators are required to disclose whether there are any doubtful circumstances regarding their independence and impartiality in writing. The arbitration court will send this declaration to the parties and set a time limit to submit any challenges.\(^\text{127}\)

13.14 **Are there any restrictions as to the parties’ representation in arbitration proceedings?**

The Mongolian Arbitration Law 2003 expressly prohibits the following persons to act as an Arbitrator:

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\(^{126}\) Mongolian International and National Arbitration Court (MINAC) Arbitration Rules Article 14.3

\(^{127}\) MINAC Arbitration Rules Article 11.6
(i) Members of the Constitutional Court;
(ii) Judges;
(iii) Prosecutors;
(iv) Case Registrars;
(v) Detectives;
(vi) Officers of court decision enforcement;
(vii) Attorneys or notaries who had rendered legal service to any of the parties and
(viii) Other officials who are prohibited to conduct other work which are not related to the legal duties.

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

In general, the courts cannot intervene in arbitration proceedings. However, if the parties agree, they may refer to the court to rule on: the appointment, challenge and termination of authority of Arbitrators, appeal to the competence of an arbitral tribunal to rule on its jurisdiction (Kompetenz-Kompetenz), Interim Measures by the Court, the Court’s assistance in taking evidence and setting aside an arbitral award (by application of one of the parties).\textsuperscript{128}

Arbitration institutions are also statutorily allowed to reserve the rights to rule on the appointment, challenge and termination of authority of arbitrators and appeal to the competence of Arbitral Tribunal to rule on its jurisdiction (Kompetenz-Kompetenz). Any decisions made by the Arbitration Institutions thereof will be considered as final.

Other than any of the above-explained matters, the courts cannot intervene in arbitration proceedings in Mongolia.

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

\textsuperscript{128} Arbitration Law, Article 8
Yes. According to Article 21 Arbitration Law, the arbitral tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute unless otherwise agreed by the parties. The arbitral tribunal may also require any party to provide appropriate security in connection with such measures.

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

- Formal requirements for arbitral awards

The Arbitration Award has to be made in writing and has to be signed by the arbitrator/s. In a Tribunal with more than one arbitrator, the signature of the majority members of the arbitral tribunal should be sufficient. However, the reason why such signature is omitted has to be stated clearly in the award.

The Award has to include the names of the arbitral tribunal or sole arbitrator, place of arbitration and date the award is signed, legal reasons of the arbitral award unless otherwise agreed by parties or settled the dispute by the parties, and arbitration costs.

The arbitral award will be delivered to each party, and after the arbitral award comes into force it is binding and final, the parties or their heirs do not hold a right to appeal to any arbitration and court. The arbitral award will be delivered to each party, and after the arbitral award comes into force it is binding and final, the parties or their heirs do not hold a right to appeal to an arbitration award.129

The MINAC Arbitration Rules provides similar requirements with some additional provisions. The arbitration award has to be made in writing and has to be signed by the arbitrator/s. In a tribunal with more than one arbitrator, the signature of the majority members of the arbitral tribunal is sufficient. However, the reason why such signature is omitted has to be

129 Id, art 37
clearly stated in the award. An arbitrator who has a dissenting opinion may attach his opinion to the award.

The award has to include the names of the arbitral tribunal or sole arbitrator, place of arbitration and date the award is signed, legal reasons of the arbitral award unless otherwise agreed by parties or settled the dispute by the parties, and arbitration costs. The place where the arbitral award is rendered is the place of arbitration and the date when the arbitral tribunal signed and stamped on the award is the date of the arbitral award.

- **Deadlines for issuing arbitral awards**

There is no provision on the deadline for arbitration tribunals to issuing arbitral awards under the Arbitration Law 2003.

- **Other formal requirements for arbitral awards:**

There are no other formal requirements for arbitral awards apart from those described above.

### 13.18 On what conditions can arbitral awards be (i) appealed or (ii) rescinded in Mongolia?

The Court has a right to set aside an arbitration award, by the parties’ application, only under the following circumstances:130

(i) if one party to the arbitration agreement did not have legal capability or, the arbitration agreement was invalid under the laws of a state;

(ii) if the tribunal failed to provide the parties with the opportunity to make explanations on appeal, refusal, statement, evidence documents, and appeal to appointment of arbitrators and arbitration proceedings or;

(iii) if the tribunal breached the procedure agreed upon by the parties on composing the arbitration panel and the arbitration proceedings;

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130 Arbitration Law Article 40.2
(iv) if the Tribunal rendered an award on issues that are not relevant to the arbitration agreement;

(v) if a particular dispute is not subject to the jurisdiction of an arbitration dispute; and

(vi) if a particular arbitration award infringes the interests and national security of Mongolia.

The application for setting aside an award must be made within three months from the date of the parties’ receipt of the award.

13.19 What procedures exist for enforcement of foreign and domestic awards in Mongolia?

Article 3.2 of the Arbitration Law clearly states that the procedure of recognizing and enforcing foreign arbitral awards shall be regulated in accordance with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Award and Article 42 of the Arbitration Law which explained that:

If the relevant party fails to implement the award, the other party may submit its request to the Court to enforce the award by the court enforcement measures within three years after the arbitral award has come into force. The time limit to submit a request to enforce foreign arbitral awards in Mongolia is within three years after the arbitral award became valid.

The party applying for the enforcement of an award shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof. If an arbitration award or agreement is written in a foreign language, it has to be translated into Mongolian and attached to an act on the enforcement of arbitral award.

If the Court considers an appeal to enforce an arbitration award as reasonable, it shall certify that a particular arbitration award and issue an execution notification pursuant to the Law on Civil Procedure. The arbitral
award that came into force in accordance with this law and enforcement notification thereon shall be the grounds to conduct court enforcement measures, and altering the content of the above-mentioned documents shall be deemed as illegal.

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

The basic position in relation to allocation of costs under the Arbitration Law, unless the parties agree otherwise, is that the costs of the arbitration will be borne by the losing party.\(^{131}\)

If the claimant’s claim is fully satisfied, the respondent pays the arbitration costs and if the claimant’s appeal was dismissed, such costs are paid by the claimant and if partially satisfied, payment is allocated proportionally among the parties.

Similar provisions also can be found under the MINAC Arbitration Rules.\(^{132}\) Moreover, 60% of the total basic expenses may be refunded in the event of:

(i) the parties have reached an amicable agreement before the hearing;

(ii) the claimant has called back his statement of claim; or the case was dismissed because the respondent has satisfied the claim.

13.21 Are there any statistics available on arbitration proceedings in Mongolia?

Caseload

According to the MINAC, from 2014 to 2016, a total of 208 cases were resolved by the MINAC, only 23 cases are international and the rest of the

\(^{131}\) Arbitration Law Article 41  
\(^{132}\) MINAC Arbitration Rules Article 25  
\(^{133}\) MINAC Procedure for the Determination of Arbitration Costs Article 5
others cases were domestic. MINAC does not publish the statistics publically, and statistics are available upon request from MINAC.

13.22 Are there any recent noteworthy developments regarding arbitration in Mongolia (new laws, new arbitration etc)?

In relation to the economic growth in Mongolia and expansion of economic foreign relations, from January 2013 onwards the name of the Mongolian National Arbitration Centre (MNAC) has been changed to “Mongolian International and National Arbitration Court (MINAC)”. The charter of the MINAC was adopted on 17 December 2012 by the Council of the MNCCI and became effective from 1 January 2013.

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14. MYANMAR

BY: MR. JAMES FINCH
MRS. THIDA AYE

14.1 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").

14.2 Is the Myanmar arbitration law based on the UNCITRAL Model Law?

Yes, the Law is based on the UNCITRAL Model Law.

14.3 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.

14.4 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.

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?**

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 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.

14.6 **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.

14.7 **Does a valid arbitration clause bar access to state courts?**

The mere existence of a valid arbitration clause included in an agreement does not bar access to state courts. If a party to 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.

14.8 What are the main arbitration institutions in Myanmar?
No arbitration institution exists in Myanmar yet. The Law requires that the support for the arbitration process come from the judicial system.

14.9 Addresses of major arbitration institutions in Myanmar?
Not applicable.

14.10 Arbitration Rules of major arbitration institutions?
Not applicable.

14.11 What is/are the Model Clause/s of the arbitration institutions?
Not applicable.

14.12 How many arbitrators are usually appointed?
Parties are free to agree on the number of arbitrators to be appointed. In the absence of such an agreement, there will be a sole arbitrator. If the parties agree on a larger number of arbitrators, it must be an odd number.

14.13 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.

14.14 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.

14.15 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
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.

the subject-matter of the dispute is not capable of being settled by arbitration under the existing law; or

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:

the parties to the arbitration agreement referred was under some incapacity; or

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

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

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

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

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;
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 any evidence;
3. passing an order related to the property in disputes in 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.
14.17 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.

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

Setting aside and refusal to enforce were discussed in No. 14.15 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.

14.19 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.

14.20 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.

14.21 Are there any statistics available on arbitration proceedings in Myanmar?

No statistics are available on arbitration proceedings in Myanmar.

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

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.

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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."

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15. NEPAL

BY: ANUP RAJ UPRETI

15.1 Which laws apply to arbitration in Nepal?


15.2 Is the Nepalese arbitration law based on the UNCITRAL model law?

Nepalese arbitration is generally based on UNCITRAL model law.

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

No. The Arbitration Act deals with both domestic arbitration and enforcement of foreign arbitral award in Nepal.

15.4 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.

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?**

The Arbitration Act provides autonomy to the parties to agree arbitration rules and the arbitration institutions irrespective of 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 legislation which prescribe arbitration rules that need to be followed. For example, the Foreign Investment and Technology Transfer Act 1992 provides that the disputes between foreign investors and local entities/local investors need to be settled through arbitration held in Kathmandu as per UNCITRAL Rules. However, if the local entity has investments of more than NPR 500 Million (approximately USD 4.5 Million) in fixed assets, in such cases the mandatory requirement of arbitration to be held in Nepal under UNCITRAL Rules does not apply and the parties are free to agree on their dispute settlement mechanism.

15.6 **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 regard to the concerned transaction.

15.7 **Does a valid arbitration clause bar access to state courts?**
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. The courts of Nepal have interpreted and established a clear jurisprudence that the courts do not have jurisdiction to decide on the disputes which are governed by an arbitration clause. 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 grounds and (d) enforcement of award.

15.8 **What are the main arbitration institutions in Nepal?**

The “Nepal Council of Arbitration” (NEPCA) is the only arbitration institution in Nepal.

15.9 **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: nepca@ntc.net.np

15.10 **Arbitration Rules of major arbitration institutions?**

(NEPCA) 2015 are the arbitration rules of NEPCA which are available on the website of NEPCA.\(^{134}\)

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

The Model Clause of NEPCA is available on its website.

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

In practice in relation to domestic arbitration, it is common to appoint three arbitrators. The Arbitration Act provides that the number of the arbitrators shall be as provided in the agreement and in the absence on specific provision, the number of arbitrators shall consist of 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.

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

Yes. Section 11 of the Arbitration Act provides for 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 to the arbitrator requesting for permission to remove an 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. The application can be given if any of the following conditions are present:

a. if the arbitrator shows biasness toward or discriminates any party.

b. if in case of an improper conduct or fraud in the course of arbitration.

c. if in case frequent mistakes or irregularities are committed during the proceedings.

d. if in case the meetings are not attended to or are refused to be part of it for more than three times without furnishing satisfactory reasons.

e. if in case any actions are taken opposing the principles or rules of natural justice.

f. if in case there is a lack of necessary qualifications or the arbitrators have ceased 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. If the decision of the arbitrator is not complied with by any arbitrator adhered to then a complaint can be filed before the High Court.

15.14 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.

15.15 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.

Furthermore, courts can intervene and set aside an award under the following conditions:

a. In case the dispute cannot be settled by arbitration under the laws of Nepal.

b. In case the award is likely to prove detrimental to the public interests or policies.

15.16 **Do arbitrators have powers to grant interim or conservatory relief?**

As provided by 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.

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

Section 24 to Section 29 in Chapter 5 of the Arbitration Act deals with the Arbitral award.

• **Formal requirements for arbitral awards:**
Formal requirements for the arbitration awards are:

- Award must be in written form and must be signed by the member of the arbitration tribunal;

- Short descriptions of the issues referred for settlement and of the terms of reference approved;

- Ground to claim jurisdiction if any party raises questions on the jurisdiction of an arbitrator;

- Summary of the expert's report if such expert has been appointed;

- Decision of the arbitrator, and reasons and grounds taken for such decision;

- If a partial award has already been made, details thereof;

- Things or amount to be recovered or compensated;

- If there is interest chargeable on amount, details thereof;

- Place of the Arbitration Office and date of the award and

- Any other necessary matters.

• **Deadlines for issuing arbitral awards:**

  The Arbitration Act requires the tribunal to give a final award within six months (120 days) after completing the necessary procedures.

• **Other formal requirements for arbitral awards:**

  - The arbitrator must read out the award to parties and 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 properly organized is to 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.

15.18 **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 by 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 party contesting the award;

c) Lack of jurisdiction.;

d) If formation of the tribunal is against the agreement or the Arbitration Act.

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.

15.19 What procedures exist for enforcement of foreign and domestic awards in Nepal?

In case of a domestic award:

- Section 31 of the Arbitration Act and Rule 12(1) of the Arbitration Rule require the parties to implement the award within 45 days from the date of receiving the copy of the decision.

- 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 concerned 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.

In case of a foreign award:

- Section 34 of the Arbitration Act deals with the implementation of a foreign award 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:

a. If the arbitrators are appointed and the award is made according to the agreement.

b. If the parties were duly notified about the arbitration proceedings.

c. If the award was taken under the conditions of the agreement.

d. If the award was within the subject matter referred to by the arbitrators.

e. If the laws of the foreign country do not contain provisions under which the arbitration awards taken in Nepal cannot be enforced.

f. In case the application for implementation has been filed within 90 days from the date of the award.

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.

b. The enforcement of the award would be detrimental to the public policy.
15.20 Can a successful party in the arbitration recover its costs in Nepal?

Section 35 of the Arbitration Act provides that the cost 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 arbitration shall be borne by the parties in the proportion decided by the arbitration tribunal. In practice, it is quite rare of the arbitration tribunal to award the costs.

15.21 Are there any statistics available on arbitration proceedings in Nepal?

No.

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

a) While not recent, a few significant judgments related to arbitration are: Krishnachandra Jha on behalf of Head Office, Agriculture Inputs Company Limited (Krishi Samagri Sansthaan v. Sumit Prakasa Asia) (NKP 2059, vol 5, DN 7089, p. 285)

The court established the principle that the writ petition can be filed before the Supreme Court against the decision of the Court of Appeal (now High Court). This judgment is given against the background that the Arbitration Act itself does not provide for provision to challenge the decision of the High Court given under Section 30 of the Arbitration Act. Based on this case, there is now established principle that either party can challenge the decision of the High Court under writ petition by review or appeal against the decision of the High Court, the parties can file a writ petition against the decision of the High Court.
b) Irrigation Development Committee, Ministry of Water Resources v. District Court, Kathmandu et al (NKP 2064, vol 4, DN 7836, p. 460) The Supreme Court also established the principle that the arbitral award cannot be held final if an application to invalidate such decision has been filed before the High Court.

c) Bikram pandey Vs. Ministry of Physical Infrastructure, Department of Road (NKP 2067, vol 8, DN 8437, p. 1346) In deciding the issue related to the appointing authority of the High Court, the Supreme Court has laid down the principle even where the arbitration agreement provides for UNCITRAL Rules, the parties may apply to the High Court for appointing the arbitrators under the provisions of the Arbitration Act.

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16. PAKISTAN

BY: JUSTICE S AHMED SARWANA

16.1 Which laws apply to arbitration in Pakistan?

Pakistan currently has the following arbitration regimes:


16.2 Is Pakistan’s arbitration law based on the UNCITRAL Model Law?

16.3 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.

16.4 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.

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?

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.

16.6 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.
16.7 **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.

16.8 **What are the main arbitration institutions in Pakistan?**

There is no arbitration institution in Pakistan.

16.9 **Addresses of major arbitration institutions in Pakistan?**

There are no arbitration institutions in Pakistan.

16.10 **Arbitration Rules of major arbitration institutions?**

Since there is no arbitration institution, there are no Arbitration Rules.

16.11 **What is / are the Model Clause / s of the arbitration institutions?**
There are no Model Clauses specific to Pakistan.

16.12 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.

16.13 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.

16.14 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.

16.15 **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(ı)];

vi) issue process to parties and witnesses to attend arbitration proceedings and assist in taking evidence (Section 43);

vii) take interim measures (Second Schedule).

16.16 **Do arbitrators have powers to grant interim or conservatory relief?**

Under the AA the arbitrators do not have powers to grant interim or conservatory relief. It is the Court which has the power to issue orders for interim injunction, appointment of receiver, preservation of property, interim custody or sale of goods which are the subject matter of reference.
16.17 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 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.

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

Under the AA any party to an arbitration agreement or any person claiming thereunder, desiring to challenge the existence or validity of an award or to have its effect determined, shall apply to the court. The court shall then decide the question on affidavits provided that where the court deems it just and expedient, it may, inter alia, hear other evidence and pass an order for discovery and particulars as in an ordinary suit.
However, the Court shall not entertain such application challenging the existence or validity of an award or to have its effect determined unless the applicant has deposited in the Court the amount required to be paid under the award or has furnished security for the payment of such sum or the fulfillment of any other obligation by him under the award.

The court may, inter alia, set aside an award on the following grounds: (i) that the arbitrator or umpire misconducted himself or the proceedings; (ii) that the award has been made after issue, by the court, of an order superseding the arbitration; or (iii) that an award has been improperly procured or is otherwise invalid.

Under the REA recognition and enforcement of a foreign arbitral award may be refused on the following conditions:

(i) the parties to the arbitration agreement were under some incapacity or the agreement was not valid under the law to which the parties have subjected it or under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of arbitrators or the arbitration proceedings or was unable to present his case; or

(iii) the award deals with a difference not contemplated in the submission to arbitration or it contains decisions on matters beyond the scope of arbitration; or

(iv) the arbitration procedure or the composition of the arbitral tribunal was not in accordance with the arbitration agreement or was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority under the law of which that award was made; or

(vi) the subject matter of the difference is not capable of settlement by arbitration under the law of the country; or

(vii) the award is contrary to the public policy of the country.
16.19 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.

16.20 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.

16.21 Are there any statistics available on arbitration proceedings in Pakistan?

No statistics are available on arbitration proceedings in Pakistan.

16.22 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 signature of both parties to be enforceable in law. Metropolitan Steel Corporation Ltd. v. McSteel International U.K. Ltd., PLD 2006 Karachi 664

In Lakhra 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.

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17. **PHILIPPINES**

**BY: MS. RENA RICO-PAMFILO**

17.1 **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 876. Republic Act 876 was enacted on 19 June 1953 and deals with domestic arbitration proceedings in the Philippines, i.e., arbitration between two Philippine entities or individuals with a seat of arbitration in the Philippines. This law provides who may be 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 9285 or the “Alternative Dispute Resolution Act of 2004,” enacted on 13 April 2004. The Philippines adopted with this law the UNCITRAL Model Law on International Commercial Arbitration.¹³⁵ 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 procedure of appointment and challenge of arbitrators (Articles 10-14), the arbitration procedure and making of the award (Articles 18-19, 29-32).

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¹³⁵ 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.
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 mediation\(^\text{136}\) 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.\(^\text{137}\) 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.

\(^{136}\) Administrative issuances of the Supreme Court govern court annexed mediation.

\(^{137}\) Section 4, Executive Order 1008 dated 4 February 1985.
17.2 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.\(^\text{138}\)

17.3 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.

17.4 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.\(^\text{139}\) 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

\(^{138}\) Section 19, Republic Act 9285.

\(^{139}\) 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.
and reciprocity, recognize and enforce a non-Convention award as a Convention award.\textsuperscript{140}

Rule 13 of the Special Rules of Court on Alternative Dispute Resolution (the “Special ADR Rules”) promulgated by the Supreme Court in 2009\textsuperscript{141} 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.\textsuperscript{142} 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.\textsuperscript{143} 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”.\textsuperscript{144} The decision of the court enforcing an award is immediately executory.\textsuperscript{145}

17.5 \textbf{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

\textsuperscript{140} Section 43, Republic Act 9285.
\textsuperscript{141} A.M. No. 07-11-08-SC, September 1, 2009.
\textsuperscript{142} Rule 13.3, Special ADR Rules.
\textsuperscript{143} Rule 13.4, Special ADR Rules.
\textsuperscript{144} Rule 13.11, Special ADR Rules.
\textsuperscript{145} Rule 13.11, Special ADR Rules.
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 involved in construction in the Philippines. 146 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. 147 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. 148

17.6 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. 149 In the institution of arbitration proceedings arising

146 Section 4, Executive Order 1008 or the Construction Industry Arbitration Law.
147 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).
148 The writers believe that in light of Republic Act 9285, there is good reason to revisit the rule.
149 Section 4, Republic Act 876 as amended.
from contracts to arbitrate future controversies, the arbitration shall be instituted by service by either party upon the other of a demand for arbitration in accordance with the contract. Such demand shall set forth the nature of the controversy, the amount involved, if any, and the relief sought, together with a true copy of the contract providing for arbitration. The demand shall be served upon any party either in person or by registered mail.\(^\text{150}\) 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.\(^\text{151}\) 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.\(^\text{152}\)

17.7 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.\(^\text{153}\) 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.

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150 Section 5(a), Republic Act 876 as amended.
151 Section 5(c), Republic Act 876 as amended.
152 Section 13, Republic Act 876 as amended.
153 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.
17.8 **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.

17.9 **Addresses of major arbitration institutions in the Philippines?**

The address of the PDRCI is as follows:

**Philippine Dispute Resolution Center, Inc.**
3rd Floor Commerce and Industry Plaza (PCCI Building)
1030 Campus Avenue corner Park Avenue
McKinley Town Center, Fort Bonifacio Taguig City
Metro Manila, Philippines
Phone: +63 2 555-0798
Fax: +63 2 822-4102
Email: secretariat@pdrci.org
Website: www.pdrci.org

17.10 **Arbitration Rules of major arbitration institutions?**
The arbitration rules of the PDRCI are available on their website and can also be purchased at their office.

17.11 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)

(d) The language(s) to be used in the arbitral proceedings shall be...(language)

17.12 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. If parties fail to agree on the number of arbitrators, there shall be three.


155 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.
For both domestic and international arbitration proceedings, the law provides that the appointing authority for administered arbitration proceedings or arbitration pursuant to institutional rules shall be the appointing authority designated in such rules. For ad hoc arbitration, the default appointing authority shall be the National President of the Integrated Bar of the Philippines or his duly authorized representative. 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.

17.13 **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.

17.14 **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. Thus, local counsel will need to be engaged for

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156 Section 26, Republic Act 9285 and is applicable to domestic proceedings by virtue of Section 33 of Republic Act 9285.
157 Section 27, Republic Act 9285 and is applicable to domestic proceedings by virtue of Section 33 of Republic Act 9285.
158 Section 22, Republic Act 9285.
proceedings before Philippine courts even if related to international arbitration proceedings. Republic Act 9285 makes this provision applicable to domestic arbitration proceedings.

17.15 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:

17.15.1 Protective orders to preserve confidentiality

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.

17.15.2 Failure or refusal to act by the Appointing Authority

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.

17.15.3 Ruling on a Jurisdictional Issue as a Preliminary Question

159 Section 24, Republic Act 9285.
160 Section 27, Republic Act 9285.
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.

17.15.4 Issuance and Enforcement of Interim Measures of Protection

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.

161 Article 16(3), UNCITRAL Model Law in relation to Article 6, UNCITRAL Model Law and Section 3(k), Republic Act 9285.
162 Sections 28 and 29, Republic Act 9285.
17.15.5 Assistance in Taking Evidence

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.

17.15.6 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. The recognition and enforcement of an award in an international commercial arbitration shall be governed by Article 35 of the UNCITRAL Model Law.

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.

It should be noted that proceedings for recognition and enforcement of an arbitration agreement or for vacation, setting aside, correction or modification of an arbitral award, and any application with a court for arbitration assistance and supervision shall be deemed as special proceedings and shall be filed with the Regional Trial Court (i) where arbitration proceedings are conducted; (ii) where the asset to be attached or levied upon or the act to be enjoined is located; (iii) where any of the parties to the dispute resides or has his place of business; or (iv) in the National Judicial Capital Region, at the option of the applicant.

163 Article 27, UNCITRAL Model Law
164 Article 34, UNCITRAL Model Law in relation to Section 3(k), Republic Act 9285.
165 Section 40, Republic Act 9285.
166 Section 42, Republic Act 9285.
167 Section 47, Republic Act 9285.
The above matters are specifically implemented by the Special ADR Rules.

17.16 **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.\(^{168}\)

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.\(^{169}\)

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.\(^{170}\)

Further, unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute following the rules stated above. Such interim

\(^{168}\) Section 28, Republic Act 9285.
\(^{169}\) Section 28, Republic Act 9285.
\(^{170}\) Section 28, Republic Act 9285.
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.\(^{171}\)

### 17.17 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

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\(^{171}\) Section 29, Republic Act 9285.
in lieu of hearing closed. This period may be extended by mutual consent of the parties.\textsuperscript{172}

- \textbf{Other formal requirements for arbitral awards}

There are no other formal requirements to be followed.

\textbf{17.18 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

\textsuperscript{172} Section 19, Republic Act 876.
arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the UNCITRAL Model Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with the UNCITRAL Model Law; or

(v) the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under Philippine law or the award is in conflict with Philippine public policy.

In domestic arbitration proceedings, an award may be vacated upon the petition of any party to the controversy when such party proves affirmatively that in the arbitration proceedings:

(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.

173 Section 24, Republic Act 876.
Where an award in a domestic arbitration is vacated, the court, in its discretion, may direct a new hearing either before the same arbitrators, a new arbitrator or arbitrators to be chosen in the manner provided in the submission or contract for the selection of the original arbitrator or arbitrators, and any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration and to commence from the date of the court's order.

These are specifically implemented by the Special ADR Rules.

17.19 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. The recognition and enforcement of such arbitral awards shall be filed with the Regional Trial Court in accordance with the rules of procedure to be promulgated by the Supreme Court. Republic Act 9285 states that the said procedural rules shall provide that the party relying on the award or applying for its enforcement shall file with the court the original or authenticated copy of the award and the arbitration agreement. If the award or agreement is not made in any of the official languages, the party shall supply a duly certified translation thereof into any of such languages. The applicant shall also establish that the country in which foreign arbitration award was made is a party to the New York Convention.

If the application for rejection or suspension of enforcement of an award has been made, the Regional Trial Court may, if it considers it proper, vacate its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the party to provide appropriate security.

For arbitral awards issued in countries that are not signatories to the New York Convention, the recognition and enforcement of such awards shall be
done in accordance with procedural rules to be promulgated by the Supreme Court. The Court may, on grounds of comity and reciprocity, recognize and enforce a non-convention award as a convention award.\textsuperscript{175}

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.\textsuperscript{176} 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.\textsuperscript{177}

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.\textsuperscript{178}

The recognition and enforcement of an award in an international commercial arbitration shall be governed by Article 35 of the UNCITRAL Model Law.\textsuperscript{179}

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.\textsuperscript{180} 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.\textsuperscript{181}

\textsuperscript{175} Section 43, Republic Act 9285.
\textsuperscript{176} Section 44, Republic Act 9285.
\textsuperscript{177} Section 44, Republic Act 9285.
\textsuperscript{178} Section 45, Republic Act 9285.
\textsuperscript{179} Section 40, Republic Act 9285.
\textsuperscript{180} Section 23, Republic Act 876 in relation to Section 40, Republic Act 9285.
\textsuperscript{181} Section 40, Republic Act 9285.
The above provisions of law are specifically implemented by the Special ADR Rules.

17.20 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.\textsuperscript{182} 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.

17.21 Are there any statistics available on arbitration proceedings in the Philippines?

The Secretariat of the Philippine Dispute Resolution Center, Inc. (PDRCI) compiled statistics on arbitration cases filed with the PDRCI. From 2004 to 2008 a total of 15 arbitration cases (domestic and international) were submitted under the auspices of the PDRCI. Out of these 15 cases, only one case was for use of facilities of PDRCI (room hire, transcription, secretarial services) and the remaining 14 cases were administered arbitration proceedings under PDRCI Rules. The majority of the cases are domestic arbitration proceedings. Only two out of the 15 cases are international arbitration proceedings.

From 2009 to 2013, a total of 39 arbitration cases were filed with the PDRCI, more than double the number of cases filed in the previous 5-year period. Only 25\% of the cases filed from 2009 to 2013 were international arbitration cases. The cases filed with the PDRCI are primarily cases

\textsuperscript{182} 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.
administered under the PDRCI Rules with 80% of the 39 cases classified as administered arbitration.

For 2014 and 2015, a total of 14 arbitration cases were under the auspices of PDRCI. Out of the eight (8) arbitration cases in 2014, four (4) were domestic arbitration proceedings and four (4) were international arbitration proceedings. Out of the six (6) arbitration cases in 2015, four (4) were domestic arbitration proceedings and two (2) were international arbitration proceedings. Seven (7) out of eight (8) cases in 2014 were administered by PDRCI under the PDRCI arbitration rules and (1) case involving only the use of facilities of PDRCI. Five (5) out of the six (6) cases in 2015 were administered by PDRCI under the PDRCI arbitration rules and (1) case involving only the use of facilities of PDRCI.

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

There have been no recent noteworthy developments regarding arbitration.

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<tr>
<th>Name of Author:</th>
<th>MS. RENA M. RICO-PAMFILO</th>
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<tbody>
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<td>Ateneo de Manila University School of Law</td>
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<tr>
<td>Brief Profile:</td>
<td><strong>Ms. Rico-Pamfilo</strong> is admitted to the Philippine Bar (2001) and the New York Bar (2009). She started her career in international arbitration at the SIAC / Singapore. Ever since moving to the Philippines she worked for an international law firm first, focusing on domestic and international commercial arbitration. She was also involved in various corporate transactional and project finance work on energy and infrastructure projects, including oil, gas, and power generation. Ms. Rico-Pamfilo is now Chief Legal Counsel of a private equity firm based in the Philippines and a Professor of Law at the Ateneo de Manila University School of Law teaching International</td>
</tr>
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Commercial Arbitration. She is also an accredited lecturer of the Philippine Judicial Academy on Arbitration. She lectures on Mandatory Continuing Legal Education seminar series both in the Philippines and in the US. She has delivered lectures in various countries in Asia on international arbitration and the UNCITRAL Model Law on International Commercial Arbitration, particularly arbitration in Singapore and in the Philippines.

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18. SINGAPORE

BY: MR. CHAN LENG SUN, SC
MR. SHEIK UMAR

18.1 Which laws apply to arbitration in Singapore?

There are three primary arbitration statutes in Singapore:

i. the International Arbitration Act (Cap. 143A) (“IAA”), which adopts the 1985 UNCITRAL Model Law on International Commercial Arbitration ("Model Law") and is also the implementing legislation for the recognition and enforcement of arbitral awards under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention");

ii. the Arbitration Act (Cap. 10) (“AA”); and

iii. the Arbitration (International Investment Disputes) Act (Cap. 11) (“AIDA”), giving effect to the UN Convention on the Settlement of Disputes between States and Nationals of other States (the "ICSID Convention").

As the ICSID Convention and AIDA come under a different regime administered by the World Bank, they are not relevant here.

The IAA applies to "international" arbitrations and to all arbitrations to which parties agree that the IAA or the Model Law should apply.

An arbitration is considered "international" under the IAA if:

(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:

183 The text of the IAA and AA is available online at http://statutes.agc.gov.sg.
(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; or

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

The AA applies to all arbitrations outside the scope of the IAA.

The main distinction between the IAA and the AA lies primarily in the extent and degree of possible Court intervention in the arbitral process. Generally the AA allows for a greater scope of court intervention as compared to the IAA.

For example, under the IAA, the Court's power to grant interim measures is restricted to situations of urgency, where the arbitral tribunal or institution is unable to act effectively, and by the permission of the arbitral tribunal or the agreement of parties. In contrast, under the AA, the Court's power to grant interim measures is not restricted to the same degree although it must have regard to any applications or orders made by the tribunal when exercising its power to grant interim measures. Under the IAA, the arbitral tribunal has general power to grant "an interim injunction or any other interim measure,"184 whereas under the AA, the arbitral tribunal has no such general power as such power is reserved for the Courts.185

Under the AA, parties may apply to the Court to determine any question of law arising in the course of the arbitration proceedings which substantially affects the rights of the parties.186 Such application may be made with the agreement of all parties to the proceedings or the permission of the arbitral tribunal, provided that the Court is satisfied that the application is timely and will result in cost-savings. A party may also appeal an award on a question of law arising out of the award by agreement of the parties or by leave of Court provided the conditions under Section 49 of the AA are satisfied.187

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184 S. 12(1)(i), IAA. All references to "S." are an abbreviation of the word "Section" and "Art." are an abbreviation of the word "Article."
185 S. 28, AA read with S. 31 of the AA.
186 S. 45, AA.
187 S. 45, AA.
Both the AA and the IAA were amended in 2012 to allow parties to appeal on both positive and negative jurisdictional rulings by the tribunal. \(^{188}\)

**18.2 Is the Singapore arbitration law based on the UNCITRAL Model Law?**

The IAA largely adopts the 1985 UNCITRAL Model Law (excluding Chapter VIII of the UNCITRAL Model Law which deals with recognition and enforcement of awards), with a few modifications. While the IAA requires arbitration agreements to be in writing, it was amended in 2012 to adopt a corresponding amendment to the 2006 UNCITRAL Model Law by expanding the definition of "in writing" to include agreements concluded by any means (orally, by conduct or otherwise), as long as their content is recorded in any form.

The 2006 UNCITRAL Model Law amendments to enforce interim measures have not been adopted in Singapore.

**18.3 Are there different laws applicable for domestic and international arbitration?**

Yes. Generally, the IAA governs international arbitration, while the AA governs domestic arbitrations seated in Singapore. Please refer to paragraph 1 above for further detail.

**18.4 Has Singapore acceded to the New York Convention?**

Yes. It is given effect under Part III of the IAA.

**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?**

Yes. There are no restrictions.

\(^{188}\) S. 21A, AA and s. 10, IAA.
18.6 **Does the IAA contain substantive requirements for the arbitration procedures to be followed?**

Yes. However, many of the provisions in Part II of the IAA and in the Model Law adopted pursuant to the IAA allow for parties to agree otherwise. For example, provisions relating to the power of the Courts to grant interim measures and public policy grounds to challenge an award do not provide for parties to agree otherwise.

18.7 **Does a valid arbitration clause bar access to state courts?**

Under the IAA and the AA, arbitration agreements may be enforced by a party making an application to the Courts for a stay of the Court proceedings commenced in breach of the arbitration agreement.

Under the IAA, a Court *must* grant a stay if the conditions provided under the IAA are fulfilled unless the arbitration agreement is null and void, inoperative or incapable of being performed. Under the AA, a Court has discretion whether or not to grant a stay.

Under the IAA and the AA, the Courts also have the power to discontinue Court proceedings in respect of which no further step has been taken for at least two years after a stay order was made.

18.8 **What are the main arbitration institutions in Singapore?**

Main arbitration institutions with presence in Singapore include the following:

(a) the **Singapore International Arbitration Centre ("SIAC")**, which was established in 1991 (see: [www.siac.org.sg](http://www.siac.org.sg));

(b) the **Singapore Chamber of Maritime Arbitration ("SCMA")** (see: [http://www.scma.org.sg](http://www.scma.org.sg));

(c) the **WIPO Arbitration and Mediation Center Singapore Office ("WIPO")** (see [http://www.wipo.int/amc/en/center/singapore/](http://www.wipo.int/amc/en/center/singapore/))

(d) **International Centre for Dispute Resolution – Singapore ("ICDR"),** which was set up jointly between the International Division of the American Arbitration Association and the SIAC;
In addition, the Law Society of Singapore has also set up the Law Society Arbitration Scheme ("LSAS"). (See:

18.9 **Addresses of major arbitration institutions in Singapore?**

**SIAC**'s address and contact details are as follow:

**Singapore International Arbitration Centre**
32 Maxwell Road
#02-01, Maxwell Chambers
Singapore 069115
Tel: +65 6221 8833
Fax: +65 6224 1882
Website: [www.siac.org.sg](http://www.siac.org.sg)

**SCMA**'s address and contact details are as follows:

**Singapore Chamber of Maritime Arbitration**
32 Maxwell Road
#02-14 Maxwell Chambers
Singapore 069115
Tel: +65 6324 0552
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18.10 Arbitration Rules of major arbitration institutions?


The **ICDR's Arbitration Rules** can be found at the ICDR's website at [www.icdr.org](http://www.icdr.org).


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

(a) **SIAC's standard model clause provides as follow:**

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") for the time being in force, which rules are deemed to be incorporated by reference in this clause."
The seat of the arbitration shall be Singapore. [Parties may select an alternative seat to Singapore - if so, then replace "Singapore" with the city and country choice]

The Tribunal shall consist of __________* arbitrator(s) [to state an odd number - either one or three].

The language of the arbitration shall be ________________.

SIAC also has model clauses for adoption of its expedited procedure and the Arb-Med-Arb process, which is a tiered dispute resolution mechanism administered by SIAC and SIMC.

The SCMA recommends the use of the following model clause:

"Any and all disputes arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore Chamber of Maritime Arbitration ("SCMA Rules") for the time being in force at the commencement of the arbitration, which rules are deemed to be incorporated by reference in this clause".

The SCMA also has model clauses specifically designed for use with the Documents, Agreements and Forms of The Baltic and International Maritime Council ("BIMCO") as well as for use with its Bunker Claims Procedure for bunker-related disputes.

(b) WIPO recommends the use of the following model arbitration clause by parties to a contract:

"Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including, without limitation, its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules. The arbitral tribunal shall consist of [a sole arbitrator][three arbitrators]. The place of arbitration shall be [specify place]. The language to be used in the arbitral
proceedings shall be [specify language]. The dispute, controversy or claim shall be decided in accordance with the law of [specify jurisdiction]."

WIPO also has model clauses for mediation-arbitration clauses, for binding expert determination followed by arbitration, etc.

(c) The ICDR recommends the use of the following model clause for international commercial contracts:

"Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules."

The parties should consider adding:

“The number of arbitrators shall be (one or three)”;

“The place of arbitration shall be [city, (province or state), country]”;  

“The language(s) of the arbitration shall be ____.”

(d) The PCA recommends the use of the following model clause by parties to a contract:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the PCA Arbitration Rules 2012.

(a) The number of arbitrators shall be ... (one, three, or five);

(b) The place of arbitration shall be ... (town and country);

(c) The language to be used in the arbitral proceedings shall be ..."
The PCA also has a slightly different model arbitration clause for treaties and other agreements.

(e) For the LSAS, the following model clause is recommended:

"Any dispute arising out of or in connection with this Contract, including any question regarding its existence, validity or termination, shall be determined by arbitration in Singapore in accordance with the LawSoc Arbitration Rules in force at the commencement of the arbitration."

18.12 How many arbitrators are usually appointed?

Parties are free to determine how many arbitrators they wish to appoint. If the parties have not determined the number of arbitrators, as a general rule, a single arbitrator will be appointed under the IAA (s. 9) and the AA (s. 12). Certain institutional arbitration rules also provide for a default number of arbitrators if parties have not reached any agreement on the number. As such, if parties have agreed to adopt such rules, the default provisions in such rules will apply. For example, pursuant to the Rule 9.1 of the SIAC Rules (6th Ed.), if the parties have not agreed on the number of arbitrators, then generally a sole arbitrator will be appointed, unless it appears to the Registrar of the SIAC, giving due regard to any proposals by the parties, that the complexity, quantum involved or other relevant circumstances of the dispute warrants the appointment of three arbitrators. All nominations of arbitrators are subject to the appointment by the President of the Court of Arbitration of SIAC in his discretion (Rule 9.3).

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

Art. 12(2) of the Model Law provides that:

"An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware the appointment has been made."
Similar provision is made in respect of domestic arbitrations in S. 14(3) of the AA. The SIAC Rules also provide for a similar standard for the challenge of arbitrators (Rule 14.1 of the SIAC Rules (6th Ed.)).

The IBA Guidelines on Conflicts of Interest in International Arbitration (2014) is often referred to in practice to determine whether there is a possible conflict of interest.

The standard of bias or partiality that has been applied by the Singapore Courts is whether there is an actual bias, imputed bias or apparent bias.

Proof of an actual bias will disqualify a person from sitting in judgment. Imputed bias arises where a judge or arbitrator may be acting in his own cause, for instance, if he has a pecuniary or proprietary interest in the case. If this is proven, disqualification is certain without the need to investigate whether there is a likelihood or a reasonable suspicion of bias.

The test for determining apparent bias is whether:

(a) there are factual circumstances that have a bearing on the suggestion that the tribunal was or might be seen to be impartial; and

(b) whether a reasonable and fair-minded person knowing all the facts would have a reasonable suspicion that the circumstances might result in the proceedings being affected by apparent bias if the arbitrator was not removed.

If the Court has issued an order to remove the arbitrator but an award has already been issued, a party need only furnish proof of the Court order for removal to support its application to set aside the award and the Court will most likely set aside the award in the absence of compelling evidence to the contrary.\(^\text{189}\)

18.14 Are there any restrictions as to the parties’ representation in arbitration proceedings?

For international arbitration proceedings, there are no formal restrictions and parties are free to choose their representatives. There are no nationality

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\(^{189}\) PT Central Investindo v Franciscus Wongso [2014] 4 SLR 978.
restrictions and parties can choose to be represented by any counsel they deem fit, including non-Singaporean counsel. In terms of rules governing the conduct of party representatives, parties are free to adopt the new IBA Guidelines on Party Representation in International Arbitration (2013). Party representatives who are lawyers may be bound by ethical rules in the jurisdiction(s) in which they practice.

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

The courts may intervene in arbitration proceedings in Singapore in the following instances:

(a) the courts may hear appeals on tribunal's rulings on jurisdiction, whether positive or negative (s. 10 of the IAA and s. 21A of the AA);

(b) the court may hear applications to challenge an arbitrator if there is justifiable doubt regarding an arbitrator's impartiality or independence or if he does not possess the qualifications agreed by the parties (Art. 13 of the Model Law (First Schedule of the IAA) read with s. 3 of the IAA and s. 15(6) of the AA);

(c) the court has powers to grant interim measures in aid of arbitration (as elaborated upon below);

(d) the court has the power to compel the attendance of witnesses (s. 13 of the IAA and s. 30 of the AA);

(e) with respect to domestic arbitrations, the court may in limited circumstances hear appeals:

   (i) against a decision of the tribunal on a question of law;\textsuperscript{190} and

   (ii) to determine a preliminary point of law;\textsuperscript{191} and

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\textsuperscript{190} S. 45, AA.

\textsuperscript{191} S. 49, AA.
the court also has power to set aside awards made in Singapore, or to refuse to recognize or enforce foreign awards.

In relation to interim measures, the High Court has the same powers as a tribunal to order any interim measure, except security for costs and discovery of documents and interrogatories,\(^\text{192}\) irrespective of whether the seat of arbitration is in Singapore.\(^\text{193}\) Although the court may order interim measures to aid, promote or support foreign arbitrations, it may refuse to make such an order if, in its opinion, the fact that the place of arbitration is outside or likely to be outside Singapore makes such an order inappropriate.\(^\text{194}\) Importantly, the High Court shall exercise its power to order interim measures "only if and to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively."\(^\text{195}\)

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

An arbitral tribunal has the power to grant interim and conservatory relief under the IAA (s. 12(1) of the IAA, see for example s. 12(1)(d), (f) and (i); preservation and interim custody of property, interim injunctions and other interim measures) and the AA (s. 28(2), see for example 28(2)(e) and (g); preservation and interim custody of evidence and property). Under the IAA, the tribunal has general power to grant "an interim injunction or any other interim measure,"\(^\text{196}\) whereas under the AA, the tribunal has no such general power as such power is reserved for the Courts.\(^\text{197}\) Institutional rules such as the SIAC Rules may also provide for powers of the arbitral tribunal to grant interim and conservatory relief, e.g., Rule 30 of the SIAC Rules (6th Ed.) (Interim and Emergency Relief).

\(^{192}\) S. 12A(2), IAA. However, where the law governing the arbitration is not the IAA, the power to order security for costs and discovery orders is not excluded: see s. 31(1), AA.

\(^{193}\) S. 12A(1)(b), IAA.

\(^{194}\) S. 12A(3), IAA.

\(^{195}\) S. 12A(6), IAA. This restriction does not apply where the governing law is not the IAA. Where the IAA does not apply, the High Court only needs to have regard to any application before or order made by the arbitral tribunal in respect of the same interim measure when exercising its powers to make interim orders: see s. 31(3), AA.

\(^{196}\) S. 12(1)(i), IAA.

\(^{197}\) S. 28, AA read with s. 31, AA.
18.17 What are the formal requirements for an arbitral award (form; contents; deadlines; other requirements)?

- **Formal requirements for arbitral awards**
  The IAA regulates the form and contents of an arbitral award (Model Law, Art. 31). The award shall be made in writing and shall be signed by the arbitrator or arbitrators. For arbitral proceedings with more than one arbitrator, the signature of a majority of the tribunal shall suffice, provided that the reason for any omitted signature is stated.

  The award shall state the reasons upon which it is based and state its date and the place of arbitration. The award must be delivered to each party.

  The AA contains an almost identical regulation in s. 38.

  If the tribunal makes an award on an issue, claim or part of a claim, it must specify in its award the issue, claim or part of a claim which is the subject matter of the award (s. 19A of the IAA and s. 33 of the AA).

- **Deadlines for issuing arbitral awards**
  The IAA and the AA do not contain a specific deadline as to when the award must be rendered. Parties may apply to court to terminate an arbitrator's mandate if the arbitrator fails to act without undue delay under Art. 14 of the Model Law read with s. 3 of the IAA.¹⁹⁸

  For domestic arbitrations, in cases where the arbitration agreement or arbitration rules provide that an arbitrator has to issue his award within a specified time, the Singapore Court has power under s. 36 of the AA to extend such time if the failure to grant an extension causes substantial injustice. Parties may agree to exclude such power of the Court. However, the Singapore Court would not grant an extension unless exceptional circumstances can be shown, provided there is no prejudice. It has been held by the High Court of Singapore that the longer the delay in making the application to extend time, the less likely the Court would exercise its discretion to extend time.¹⁹⁹

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Other formal requirements for arbitral awards

Institutional rules may further provide for rules to be followed with regard to the issue of the award. For example, according to Rule 32.3 of the SIAC Rules (6th Ed.) the Tribunal shall, before issuing the award, submit it in draft form to the Registrar within 45 days from the date on which the Tribunal declares the proceedings closed. Until approved by the Registrar as to its form, the final award shall not be issued by the Tribunal.

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

There is no right of appeal from an award under the IAA.

There is a limited and conditional right of appeal on questions of law for domestic arbitrations under the AA. Institutional rules such as the SIAC Rules also often provide that the award is final and binding and cannot be appealed (Rule 32.11 of the SIAC Rules (6th Ed.)).

Under the IAA, an award can only be set aside by the High Court:

(a) if the making of the award was induced or affected by fraud or corruption;

(b) if a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced; or

(c) under the grounds provided in Art. 34 of the Model Law, namely if:

(i) a party to the arbitration agreement was under some incapacity or the arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the law of Singapore;

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the
submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to the arbitration may be set aside;

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Model Law from which parties cannot derogate, or failing such agreement, was not in accordance with the Model Law;

(v) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Singapore; or

(vi) the award is in conflict with Singapore public policy.

The grounds to set aside an award are exhaustive and the Court hearing an application to set aside an award under the IAA has no power to investigate the merits of the dispute or to review any decision of law or fact made by the tribunal.

The grounds for setting aside an award under section 48 of the AA are similar to that under the IAA. In addition, as mentioned in paragraph 1 above, it may be possible to appeal against an award with the agreement of all parties or leave of Court under limited circumstances.

18.19 What procedures exist for enforcement of foreign and domestic awards in Singapore?

For international arbitrations seated in Singapore and for domestic arbitrations, an arbitral award may by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award (s. 19 of the IAA and s. 46 of the AA).

For international arbitrations seated outside of Singapore, a foreign arbitral award rendered in any of the countries that have acceded to the New York Convention may be enforced in a Singapore Court under the IAA either by action or in the same manner as a judgment or order to the same effect,
with the leave of the High Court (s. 29 of the IAA). The detailed procedure is set out in Part III of the IAA. A foreign award from a non-New York Convention country is enforceable like a domestic award under s. 46 of the AA.

No action to enforce an award shall be brought after the expiration of six years from the date of the award (s. 6(1)(c) of the Limitation Act).

Parties seeking the enforcement of a Singapore or foreign award must file an application for leave to enforce the award in the High Court of Singapore, along with a supporting affidavit. The supporting affidavit must:

(a) exhibit the arbitration agreement (or any record of the content of the arbitration agreement) and the duly authenticated original award (or duly certified copies). Where the award, agreement or record is in a language other than English, a translation of it in the English language (duly certified) must be included;

(b) state the name and the usual or last known place of abode or business (or in relation to a body corporate, its registered or principal address) of the applicant (the “creditor”) and the person against whom it is sought to enforce the award (the “debtor”); and

(c) as the case may require, state either that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

In Singapore, the persons appointed to authenticate original awards and certify copies of the award and original arbitration agreement are:

(a) the Registrar and Deputy Registrar of the Singapore International Arbitration Centre;\(^\text{200}\)

(b) the Chief Executive and Deputy Chief Executive of Maxwell Chambers Private Limited;\(^\text{201}\) and

(c) the Registrar and Chairman of the Singapore Chamber of Maritime Arbitration,\(^\text{202}\)

\(^\text{201}\) See International Arbitration (Appointed Persons under S. 19C) Order 2009.
An order giving leave must be drawn up by or on behalf of the creditor and submitted to the Court (the "Order").

After the Court grants leave, a copy of the Order must be duly served on the debtor by delivering a copy to the usual or last known place of abode or business (or in relation to a body corporate, its registered or principal address) or in such manner as the Court may direct. The copy of the Order served on the debtor must state the right of the debtor to apply to set aside the Order within the relevant time (see paragraph immediately below). Service out of jurisdiction is permissible with leave and the relevant Singapore Rules of Court for service out of jurisdiction will apply in relation to such an order.

The debtor will have 14 days following service (or if the order to be served out of jurisdiction, such other period as the Court may fix) to contest recognition and enforcement by applying to set aside the Order. The award shall not be enforced until after the expiration of the above-mentioned period or, if the debtor applies to set aside the Order, until the application is finally disposed of.

Once the Order is obtained, the award can be enforced in the same manner as a judgment of the Singapore High Court. The usual enforcement procedures prescribed in the Singapore Rules of Court will apply thereafter for various methods of enforcement such as an application for writ of seizure and sale, garnishee order, etc.

A Court hearing the application for enforcement of a foreign award cannot review the case on the merits. It may, however, refuse to grant enforcement of the award and set aside the Court order granting leave to enforce the award in Singapore if the grounds set out in the IAA are proven. Such grounds are substantially similar to the grounds for setting aside of an award for Singapore-seated arbitrations (as described above), with an additional ground that recognition and enforcement may be refused if the award has not yet become binding on parties, or has been set aside or suspended by a competent authority in which, or under the law of which the award was made.  

18.20 Can a successful party in the arbitration recover its costs in Singapore?

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203 See s. 31(2), IAA, as well as Art. V of the New York Convention (Second Schedule to the IAA).
The tribunal may award costs in its discretion or parties may request costs to be taxed by the Registrar of the SIAC pursuant to s. 21 of the IAA for international arbitrations or by the Registrar of the Supreme Court pursuant to s. 39 of the AA for domestic arbitrations.

As a general rule, the majority of tribunals will apply the principle that costs will follow the event, i.e., the prevailing party will get (at least) part of their costs paid by the losing party. The degree to which a successful party would recover its costs will depend on various factors, such as the circumstances of the specific matter and the conduct of the parties in the matter.

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

SIAC's caseload has generally been increasing over the last few years. Their active caseload as of 1 June 2016 is about 600 cases. The table below, obtained from SIAC's website, provides a breakdown of the new cases handled by SIAC from 2005-2015:

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Number of New Cases Handled by SIAC</th>
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<tbody>
<tr>
<td>2005</td>
<td>74</td>
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<tr>
<td>2006</td>
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</tr>
<tr>
<td>2014</td>
<td>222</td>
</tr>
<tr>
<td>2015</td>
<td>271</td>
</tr>
</tbody>
</table>
In October 2016, the SIAC released a cost and duration study based on actual cases filed in SIAC. The study can be found here:


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

There have been a number of court decisions and legislative changes affecting arbitration in Singapore.

**Court clarifies that minority oppression claims are arbitrable**

In *Tomolugen Holdings Limited and another v Silica Investors Limited* [2016] 1 SLR 373, the Singapore Court of Appeal clarified that minority oppression claims (unlike claims arising from the liquidation of an insolvent company) are generally arbitrable. The Court of Appeal disagreed with the reasons of the first-instance judge for concluding that minority oppression claims were non-arbitrable. The first-instance judge had expressed two main concerns: remedial inadequacy and procedural complexity. According to the Court of Appeal, with respect to remedial inadequacy, the fact that there are jurisdictional limitations on an arbitral tribunal’s ability to grant certain relief (such as an order for the winding up of the company) will not in itself render the subject matter of a dispute non-arbitrable.

As for procedural complexity, the Court of Appeal accepted that there will be a measure of procedural difficulty (which the Court appreciated may even cause substantial inconvenience to the parties) whenever a dispute involving some common parties and issues has to be resolved before two different fora, if only part of the dispute falls within the scope of the arbitration clause. However, this alone will not render the dispute non-arbitrable.

**Promissory note holders not bound by arbitration clause in underlying contract**
In *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza Sp.A* [2016] 5 SLR 455, the Singapore Court of Appeal was asked to consider the application of an arbitration agreement in a supply agreement to a dispute arising out of promissory notes provided as payment under the supply agreement. The Court of Appeal held that the dispute in connection with the promissory notes was not governed by the arbitration agreement in the supply agreement. The Court of Appeal held that, in the absence of express language or express incorporation, an arbitration clause in an underlying contract will generally not be treated as covering disputes arising under an accompanying bill of exchange. Therefore, in this case, the fact that the obligations under the promissory notes were “separate and autonomous” from the obligations arising under the supply agreement meant that the arbitration agreement did not extend to cover the dispute.

**Scope of a de novo hearing in an application to set aside**

In *AQZ v. ARA* [2015] 2 SLR 972, the Singapore High Court laid down guidelines on the scope of hearings to review a tribunal’s decision *de novo*. The Court observed that it was settled law that it will undertake a *de novo* hearing of a tribunal’s decision on its jurisdiction in an application to set aside an award on the ground that it lacked jurisdiction to hear the dispute. On the scope of *de novo* hearings, the Court made the following points:

(a) A *de novo* hearing does not necessarily require a rehearing of all the evidence in every application to set aside an award.

(b) A *de novo* hearing contemplates that generally, the matter will be resolved by affidavit evidence. Affidavits filed in support of the application should include, among other things, the arbitral tribunal’s award, the official transcripts of the proceedings before the arbitral tribunal (if any) and the documents that the parties relied on at the arbitration.

(c) Courts may, however, allow oral evidence and/or cross-examination if they consider: (1) that there was or may be a dispute as to fact; and (2) that to do so would secure the “just, expeditious and economical” disposal of the application.

(d) Therefore, in view of the above conditions, the mere existence of substantial disputes of fact as to whether a party has made the relevant arbitration agreement is not sufficient reason to allow oral evidence and/or cross-examination.
(e) Parties are not restricted from adducing new material that was not before the arbitrator.

(f) If a party considers that the just way to deal with the application is for the oral evidence to be re-taken, that party should, at an early stage, and preferably at the time he files an application, if he is the applicant, file the affidavits of evidence of the witnesses he intends to call and a further application to have these witnesses and the witnesses for the other side heard and cross-examined in Court.

Setting aside for failure to consider important pleaded issues

In AKN and another v. ALC and others and other appeals [2015] 3 SLR 488 ("AKN v. ALC No. 1"), the Singapore Court of Appeal confirmed that a failure to consider an important issue pleaded in an arbitration amounts to a breach of natural justice and is a basis for setting aside an award. In this case, disputes arose in relation to the sale of assets of a company under liquidation. The appellant purchasers commenced arbitration in accordance with an arbitration clause in the sale agreement and secured a favorable award. Displeased with the arbitrator’s decision, the liquidator and secured creditors applied to the High Court to set aside the award on the grounds that the tribunal failed to consider the liquidator’s arguments, evidence and submissions on whether the contractual obligation to deliver a clean title was qualified by the fact that the parties had procured a Tax Amnesty Agreement ("TAA") from the municipal authorities. The High Court held that the tribunal failed to take into account the TAA and that the entire award should be set aside on this basis alone. The appellant-purchasers appealed, arguing that the High Court had overstepped its bounds by scrutinizing the merits of the award.

On the evidence, the Court of Appeal disagreed with the High Court’s finding that the tribunal failed to take into account the TAA, and upheld the award on this basis. However, it decided to set aside two aspects of the award broadly referred to as the loss of profits claim and lost land claims. In respect of the former, the Court of Appeal held that the award of damages for loss of an opportunity to earn profits was made in breach of natural justice. This was so for two main reasons: First, the parties had, throughout the course of the arbitration, proceeded on the basis that the appellant-purchasers’ claim was for actual loss of profits, not loss of an opportunity to earn profits; and, second, the liquidator and secured creditors were not afforded the opportunity to address the case on loss of opportunity, either when it was raised or at all. In respect of the latter claim, the Court of
Appeal decided that the tribunal failed to engage with the merits of the secured creditors’ case, because it mistakenly found that the secured creditors had conceded an important issue on its liability for breach of the obligations of the sale agreement. In reaching its decision, the Court of Appeal acknowledged that failure to consider an important issue pleaded in an arbitration would constitute a breach of natural justice. However, the court made the following cautionary statements:

(a) An inference of the arbitrator’s failure would only be drawn if it was clear and virtually inescapable, on the basis of the award that the tribunal failed to apply its mind to the parties’ arguments.

(b) The mere fact that the tribunal made a general statement that it had considered the submission of the party in question is not conclusive that it actually did so.

(c) Even if the arbitrator simply misunderstood the case, was mistaken as to the law, or mischaracterized certain arguments (such as the argument in this case on whether the TAA qualified the terms of the sale agreement), the arbitrator would not necessarily have acted in breach of natural justice and parties would not be entitled to set aside an award on this basis.

**Award cannot be remitted to the tribunal after being set aside**

Following the decision in *AKN v. ALC No. 1*, the parties applied for leave to hear certain outstanding issues related to the consequences of setting aside an award. The Singapore Court of Appeal in *AKN and another v. ALC and others and other appeals* [2016] 1 SLR 966 considered these issues and held that Courts can either remit or set aside an award; they cannot do both. Once an award is set aside, Courts have no power to remit the award. Where an award is set aside, the original tribunal remains *functus officio* (i.e., its mandate is spent), and it cannot be asked to reconsider any matters covered by the award. In the interests of finality, any matters covered by the award cannot be re-arbitrated before a different Tribunal. The Court further cautioned that where a party could have been expected to raise certain issues in an arbitration but chose not to do so, it will be precluded from reopening such issues, although there may be exceptions in some circumstances.
Court reviews the scope of an arbitrator's jurisdiction in an investment arbitration

In *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536, the Court of Appeal considered, for the first time, a dispute arising out of an investment-treaty arbitration.

The dispute was between a Macanese investor, Sanum Investments ("Sanum"), and the Government of the Lao People's Democratic Republic ("Lao Government"). Sanum had invested in Laos' gaming and hospitality industry *via* a joint venture with a Laotian entity. Subsequently, Sanum alleged that the Lao Government had levied unfair and discriminatory taxes, therefore depriving it of the benefits it otherwise would have derived from its investment. It commenced arbitration proceedings against the Lao Government pursuant to a People's Republic of China-Laos Business Investment Treaty ("BIT") which was signed in 1993. The basis of the claim was Article 8(3) of the BIT, which states:

"If a dispute involving the amount of compensation for expropriation cannot be settled through negotiations within six months... it may be submitted at the request of either party to an ad hoc arbitral tribunal."

The Lao Government raised two preliminary objections to the Tribunal's jurisdiction. Firstly, the BIT's protection did not extend to a Macanese investor. Secondly, the claim was not arbitrable as it had gone beyond the permitted subject matter prescribed under Article 8(3) (they had submitted that only the amount or quantum of compensation was arbitrable, while the question of whether there was expropriation, or whether parties were entitled to compensation, was not). The Tribunal dismissed these jurisdictional challenges. Singapore was the seat of the arbitration and so the Lao Government appealed the jurisdictional finding to the High Court. The High Court found that while the BIT did in fact apply to Macau, the Tribunal did not in fact have jurisdiction to hear Sanum's expropriation claims.

Sanum appealed to the Court of Appeal, who allowed the appeal, holding that the BIT's protection in fact extended to Macanese investors. The Court of Appeal affirmed the High Court's decision that the BIT applied to Macau, but on slightly different grounds.
Did the BIT protect Macanese investors?

In seeking to answer whether the BIT protected Macanese investors, the Court first identified the "moving treaty frontier" rule ("MTF Rule") which presumptively provides for the automatic extension of a treaty to a new territory as and when it becomes part of that state. This was solely a presumption, and can thus be displaced on two grounds. After considering a number of materials and state practice, the Court of Appeal ruled that there was nothing to displace the presumptive effect of the MTF Rule. Therefore, the BIT, which was entered into in 1993 between China and Laos, extended to Macau when it became part of China in 1999.

Does a compensation claim fall within Article 8(3) of the BIT?

Sanum argued that Article 8(3) meant that any dispute concerning compensation for expropriation could be submitted for arbitration (the "broad interpretation"). The Lao Government contended that Article 8(3) should be interpreted restrictively, providing only for the amount or quantum of compensation to be arbitrable (the "restrictive interpretation").

The Court of Appeal noted that Article 8(3) was a provision which limited an investor's access to arbitration if the investor had at the start made recourse to the national courts. Given that the restrictive interpretation would require the investor to first seek recourse in the national courts to determine whether expropriation had occurred, this would then render the ability to submit disputes to arbitration illusory, since arbitration would no longer be available once recourse was made to state courts. This would effectively be contrary to the principle of effective interpretation under international law. The Court therefore ruled that the broad interpretation was to be preferred.

New SIAC Rules

On 1 August 2016, the SIAC Rules (6th Ed., 2016) (the “2016 Rules”) came into effect. The changes are significant and in some instances implement innovative arbitration procedures not otherwise available under other institutional arbitral rules. For example, the 2016 Rules introduced an early dismissal mechanism in arbitration proceedings. Other changes include a 6-month expedited procedure and a 16-day fixed fee emergency arbitration. These changes, whether alone or in combination with each other, can be potentially used to put an efficient end to low value or unmeritorious disputes. The key changes are summarised below.
Consolidation and Joinder

Changes common to both consolidation and joinder. The Court of Arbitration of SIAC decides consolidation and joinder applications before a Tribunal is constituted and the Tribunal decides such applications after its constitution.

The parties’ obligation to keep the arbitral proceedings confidential has been modified to allow for disclosure to third parties for the purposes of consolidation and joinder applications.

If a joinder application is granted by the Court of Arbitration or the Tribunal, the joining party is deemed to have waived its right to nominate an arbitrator but remains entitled to challenge an existing member of the Tribunal (Rule 7 of the 2016 Rules). Similarly, once a consolidation application has been granted by the Court of Arbitration or the Tribunal, any party who has not nominated an arbitrator or otherwise participated in the constitution of the tribunal is deemed to have waived its right to nominate an arbitrator, without prejudice to the right of such party to challenge an arbitrator.

If a joinder or consolidation application is granted by the Court of Arbitration of SIAC before the constitution of the Tribunal, it may revoke the appointment of any arbitrators appointed prior to its decision on joinder. In this scenario, it seems that the parties to the consolidated or joined arbitration will go through the process for appointment of the tribunal pursuant to Rules 9 to 12 of the SIAC Rules.

Consolidation of multi-contract disputes. Claimants may now file a single notice of arbitration for multiple contracts. By doing so, they will be deemed to have commenced multiple arbitrations in respect of each arbitration agreement invoked and filed an application to consolidate these arbitrations (Rule 6 of the 2016 Rules).

To consolidate arbitrations, one of the following criteria must be satisfied:

- all parties have agreed to the consolidation;
- all the claims in the arbitrations are made under the same arbitration agreements; or
- the arbitration agreements are compatible and (i) the disputes arise out of the same legal relationship(s); (ii) the disputes arise out of
contracts consisting of a principal contract and its ancillary contract(s); or (iii) the disputes arise out of the same transaction or series of transactions (Rule 8 of the 2016 Rules).

If an application for consolidation is made after the constitution of any tribunal in the arbitrations sought to be consolidated, the same tribunal must be constituted in each of the arbitrations if no tribunal has been constituted in the other arbitrations.

**Joinder.** Parties and non-parties may apply for a non-party to join an arbitration at any time. This is in contrast with the 2013 Rules where only existing parties to the arbitration could apply for the joinder of non-parties. One of the following criteria must be satisfied to join an additional party:

- the additional party is *prima facie* bound by the arbitration agreement; or
- all parties, including the additional party, consent.

**Early Dismissal**

**Early Dismissal of Claims and Defences.** A party can now apply for the early dismissal of claims or defences on the basis that the claims or defences are either:

- manifestly without legal merit; or
- manifestly outside the jurisdiction of the Tribunal.

The Tribunal has 60 days from the filing of the application in which to issue its order or award (Rule 29 of the 2016 Rules).

**Streamlined Expedited Procedure**

The SIAC’s expedited procedure ("Expedited Procedure") allows for parties to apply for a shortened arbitration procedure where the award shall be made within 6 months from the date of the constitution of the Tribunal unless extended by the Registrar in exceptional circumstances. The Expedited Procedure is available where parties have agreed, in cases of exceptional urgency or where the aggregate amount in dispute does not exceed a certain amount (now S$6 million).
Claims of up to S$6 million may now be submitted to the Expedited Procedure. The monetary threshold has increased by S$1 million (previously S$5 million). This will enable more cases to enjoy the benefits of the fast track procedure (Rule 5.1 of the 2016 Rules).

Expedited Procedure arbitrations can be determined based on documentary evidence only, at the Tribunal’s discretion. Previously, a hearing could only be dispensed with where the parties had agreed to it (Rule 5.2 of the 2016 Rules).

Expedited Procedure provisions trump arbitration agreement. In the event of any conflict between the terms of the arbitration agreements and the provisions under the Expedited Procedure, the latter will apply (Rule 5.3 of the 2016 Rules).

Enhanced procedures for Interim and Emergency Interim Relief and Emergency Arbitration

16 days for emergency arbitration from start to end. The 2016 Rules provide that the Emergency Arbitrator is to be appointed within 1 day of receipt by the Registrar of the application for emergency interim relief and payment of the appropriate administration fee and deposits. They further introduce a 14-day period, starting from the date of the Emergency Arbitrator’s appointment, in which the Emergency Arbitrator must make his interim order (Rule 30 & Schedule 1 of the 2016 Rules).

S$25,000 fixed fee for Emergency Arbitration. This can be contrasted with the previous rules which merely provided for a range of fees depending on the amount in dispute (Rule 30 & Schedule of Fees of the 2016 Rules).

Other changes

Default seat removed. Singapore is no longer the default seat of arbitration. Instead, the Tribunal has the power to determine the seat of the arbitration, unless it has already been agreed by the parties (Rule 21 of the 2016 Rules).

Remedy against a non-paying party. The Tribunal has the power to issue an order or award for the reimbursement of unpaid deposits towards the costs of the arbitration (Rule 27(g) of the 2016 Rules).
Reasoned decisions on arbitrator challenges and S$8,000 fixed administrative fee for challenges. The Court of Arbitration of SIAC will issue reasoned decisions on all challenges to arbitrators and the administrative fees payable for such challenges are now fixed at S$8,000 (Rule 16.4 & Schedule of Fees of the 2016 Rules).

English version prevails. The Rules now expressly provide that the English version of the Rules shall prevail in the event of any discrepancy or inconsistency between the English version and any other languages in which the Rules are published (Rule 41.3 of the 2016 Rules).

New SIAC Investment Arbitration Rules 2017

On 1 January 2017, the SIAC launched its Investment Arbitration Rules (the "IA Rules") 2017, potentially marking a new chapter in the institutional administration of investor-State arbitration proceedings. The IA Rules were developed, following public consultation, to address some of the compelling criticisms of existing investor-State arbitration mechanisms. In particular, they attempt to deal with spiraling costs, frivolous claims, impartiality and public interest interventions, by drawing on best practice from bodies such as the Permanent Court of Arbitration, the International Centre for Settlement of Investment Disputes and the United Nations Commission on International Trade Law.

Singapore Allows Third Party Funding for International Arbitration

On 10 January 2017, the Singapore Parliament passed a number of amendments to Singapore legislation which paved the way for third party funding for international arbitrations. Third party funders would have to satisfy certain qualifying criteria and conditions and lawyers will have an obligation to disclose the existence of the third party funding contract and the third party funder's identity to the arbitral tribunal, the Singapore Courts and other parties in the proceedings. Codes of Conduct will likely be promulgated to supplement the legislative framework as well.

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Brief Profile:  
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19. **TAIWAN**

**BY: MR. NATHAN KAISER**  
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19.1 **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”). 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 Fees 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.

19.2 **Is the Taiwanese Arbitration Law based on the UNCITRAL Model Law?**

The Arbitration Law was drafted with reference to the UNCITRAL Model Law on International Commercial Arbitration, as well as a view to legislation in the U.S., UK, Germany and Japan. Unlike most national arbitration laws, however, Taiwan’s Arbitration Law contains detailed

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arbitrator qualification requirements and requires training of arbitrators, which is not entirely consistent with international norms.

19.3 **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 (Question 19).

19.4 **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.

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 is no restriction for domestic parties regarding the choice of jurisdictions, 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 arbitration, as explained in Question 6 below.

19.6 **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. 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.

- The place of arbitration, unless agreed by the parties, shall be determined by the arbitral tribunal.

- 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.

- 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.

- If expressly authorized by the parties, the arbitral tribunal may apply the rules of equity.

- The arbitrator shall be independent, impartial and uphold the principle of confidentiality in conducting the arbitration.

In addition, for an arbitration proceeding to be legally valid, it needs to be based on an arbitral agreement between the parties. Article 1 of the
Arbitration Act defines "arbitral agreement" as 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. Article 1 therefore limits the scope of arbitrable disputes (i.e. arbitrability) to those which may be settled in accordance with the law. For example, parties may not enter into an agreement to arbitrate criminal matters, domestic violence issues or some family disputes.

19.7 **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.

19.8 **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 Arbitration Association of the Republic of China** ("中華民國仲裁協會" also known as the "Chinese Arbitration Association, Taipei" or the "CAA") is the leading arbitral institution in Taiwan. It is based in Taipei and has two branch offices in Taiwan as well as two liaison offices in China. In addition to arbitration, it provides a wide range of dispute settlement administration services, including

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214 Article 4 of the Arbitration Law
mediation, dispute review boards and other alternative dispute resolution proceedings.

(2) The Taiwan Construction Arbitration Association ("台灣營建仲裁協會", TCAA), established in 2001, specializes in construction disputes.

(3) The Chinese Construction Industry Arbitration Association ("中華工程仲裁協會", CCIAA) also specializes in construction disputes.


19.9 **Addresses of major arbitration institutions in Taiwan**

The addresses of the above-mentioned arbitration institutions are:

(1) **Arbitration Association of the ROC** (aka Chinese Arbitration Association, CAA)

- **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

- **Dongguan Liaison Office:**
  4F, Dong-Shun Building, Dong Cheng Boulevard, Dong Cheng District, Dongguan, Guandong Province, PRC

- **Xiamen Liaison Office:**
  12F, Taipei Investors Building, 860 Xian Yue Road, Xiamen, Fujian Province, PRC

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215 [http://www.arbitration.org.tw/english/contact%20us.htm](http://www.arbitration.org.tw/english/contact%20us.htm)
(2) **Taiwan Construction Arbitration Association**\(^{216}\)
4F, Nos. 141 and 143, Keelung Road, Sec. 2, Taipei 110, Taiwan

(3) **Chinese Construction Industry Arbitration Association**\(^{217}\)
8F, No. 25, Nanjing East Road, Sec. 4, Songshan District, Taipei 105, Taiwan

(4) **Association of Labor Dispute Arbitration of the ROC**
11-1F, No. 7, Dunhua S. Rd, Sec. 1 Songshan District, Taipei 105, Taiwan

19.10 **Arbitration rules of major arbitration institutions?**

Both the CAA and CCIAA have published arbitration rules online. The CCIAA arbitration rules are only available in Chinese.\(^{218}\) The CAA arbitration rules, which are more widely used in Taiwan, are available in Chinese and English.\(^{219}\)

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

The CAA has published its model clause online:\(^{220}\)

“*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 place of arbitration shall be in Taipei, Taiwan. The language of arbitration shall be _________ (e.g. English). The arbitral award shall be final and binding upon both parties.*”

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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 Arbitration Law provides that in the absence of an appointment of an arbitrator or an agreed method of appointment in an arbitral agreement, three arbitrators shall be appointed. Each party shall appoint one arbitrator and the appointed arbitrators shall then jointly designate a third arbitrator to be the chair of the arbitral tribunal.

Article 5 of the Arbitration Law requires that only a natural person can be appointed as an arbitrator. The Article further provides that “if the parties agreed to appoint a corporate entity or any other organization other than an arbitration institution as an arbitrator, the selection is null and void and it shall be deemed that no arbitrator was appointed.” In practice, if the parties appoint an arbitral institution as an arbitrator, it is also deemed that no arbitrator was appointed.

In arbitrations administered by a Taiwanese arbitral institution, unless the parties otherwise agree, a similar method of appointment of arbitrators to that laid out in Article 9 of the Arbitration Law applies, the only difference being that if a party fails to nominate an arbitrator or if the two arbitrators fail to nominate the chair arbitrator, the parties shall then ask the arbitration institution to make the appointment on their behalf. The institution shall notify the parties and the appointed arbitrators of all arbitrator appointments in writing. The process of appointing arbitrators and constituting the arbitral tribunal will usually resemble the following:

1. The claimant submitting the dispute to arbitration chooses an arbitrator and notifies in writing the respondent as well as the appointed arbitrator.

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221 Art 9, Para 4 and Art 10, Para 1 of Arbitration Law

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 in writing both parties of the final appointment.

19.13 **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. 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 Procedure;\(^\text{224}\);

ii) The existence or history of an employment or agency relationship between the arbitrator and a party;

iv) 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 arbitrator.\(^\text{225}\)

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223 See YANG, CHONG-SEN (楊崇森) ET AL., supra note 1, pp. 167.

224 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.

225 Article 15 of the Arbitration Law
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 Chinese Arbitration Association of Taipei, 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 refraining 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.

19.14 **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 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.

19.15 **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 in Question 18.

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, the procedure for which will be discussed below.

19.16 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.\textsuperscript{226}

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 \textit{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.

19.17 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

\textsuperscript{226} Article 39 of the Arbitration Law; Article 529 of the Code of Civil Procedure
ten days thereafter, issue an arbitral award addressing the claims and issues raised by the parties. An arbitral award shall contain the following items:227

- Name and residence or domicile of the individual parties. For a party that is a corporate entity or another type of organization or institution, its name(s), administrative office(s), principal office(s) or business office(s) address;

- If any, names and domiciles or residences of the statutory agents or representatives of the parties;

- If any, names, nationalities and residences or domiciles of the interpreters;

- The main text of the decision, which shall include the arbitral decision on disputes submitted by parties, and the allocation of the arbitration fee;228

- 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

227 Article 33 of the Arbitration Law
228 Article 34, Paragraph 1 of the Rules on Arbitration Institution, Mediation Procedures and Fees
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.229

• **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 an additional three months if required.230 After declaring the conclusion of a hearing procedure, the arbitral tribunal shall deliver its arbitral award within ten days.231

• **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 obtained.

In the event that a majority consensus of the arbitrators cannot be reached, the arbitral proceedings shall be deemed terminated, 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.

19.18 **On what conditions can arbitral awards be appealed or rescinded in Taiwan?**

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229 Articles 34 and 35 of the Arbitration Law
230 Article 21 of the Arbitration Law
231 Article 33 of the Arbitration Law
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.\textsuperscript{232}

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:\textsuperscript{233}

i). In case of the existence of any circumstances stated in Article 38 of the Arbitration Law.\textsuperscript{234}

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.\textsuperscript{235}

v) 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

\textsuperscript{232} Article 29 of the Arbitration Law
\textsuperscript{233} Article 40 of the Arbitration Law
\textsuperscript{234} 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.
\textsuperscript{235} UNCITRAL Model Law, Article 34 (2) (a) (i).
participate, provided that the request for withdrawal has not been dismissed by the court.\textsuperscript{236}

vi). If an arbitrator violates any duty in the entrusted arbitration and such violation carries criminal liability.

vii). If a party or any representative has committed a criminal offense in relation to the arbitration.

viii). If any evidence or content of any translation upon which the arbitral award relies has been forged or fraudulently altered or contains any other misrepresentations.

ix). If a judgment of a criminal or civil matter, or an administrative ruling upon which the arbitral award relies, has been reversed or materially altered by a subsequent judgment or administrative ruling.

Items (vi) to (viii) above are limited to instances where a final conviction has been rendered, or the criminal proceedings may not have been commenced, or are 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 adopted the wording "may" instead of "shall," which leaves parties some autonomy to choose other competent courts regulated by the Code of Civil Procedure.\textsuperscript{237} An application to revoke an arbitral award shall be submitted

\textsuperscript{236} 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.

\textsuperscript{237} See YANG, CHONG-SEN (楊崇森) ET AL., supra note 204, pp. 321.
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.\(^\text{238}\)

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.\(^\text{239}\) 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.\(^\text{240}\)

19.19 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:\(^\text{241}\)

  1. 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.

\(^{238}\) Article 41 of the Arbitration Law
\(^{239}\) Article 42 of the Arbitration Law
\(^{240}\) Article 43 of the Arbitration Law
\(^{241}\) Article 37 of the Arbitration Law
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 to convert the award into a judgment or court order does not involve a factual investigation. 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:

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:

i). The arbitral award concerns a dispute not contemplated by the terms of the arbitral agreement, or exceeds the scope of the arbitral agreement, unless the offending portion of the award may be severed and the severance will not affect the remainder of the award;

ii). The reasons for the arbitral award were not stated, when and as required, unless the omission was corrected by the arbitral tribunal. It is noteworthy that the omission of the required reasons for the arbitral award is the only factor governing the rejection of an enforcement order application among other items which are required in the arbitral award; and

iii). The arbitral award directs a party to act contrary to the law.

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242 See also Taiwan Supreme Court 87 Tai-Kang-Tzu No. 266.
243 Article 37 of the Arbitration Law
244 Article 38 of the Arbitration 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 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. 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.

245 Article 47 of the Arbitration Law
246 Article 48 of the Arbitration Law
When an application is submitted by a party seeking recognition of a foreign arbitral decision, the court must issue a dismissal if such award contains one of the following elements:

i). Where the content of the arbitral award is contrary to public order or good morals of Taiwan.

ii). Under Taiwan law, the matter in dispute cannot be arbitrated or settled through arbitration.

In addition, the court may also issue a dismissal order with respect to an 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.\(^{247}\)

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:\(^{248}\)

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

\(^{247}\) Article 49 of the Arbitration Law

\(^{248}\) Article 50 of the Arbitration Law
arbitral agreement, unless the offending portion can be severed from and shall not affect the remainder of the arbitral award.

v). The composition of the arbitral tribunal or the arbitral procedure contravenes the arbitral agreement or, in the absence of an arbitral agreement, the law of the place of the arbitration.

vi) The arbitral award is not yet binding upon the parties or has been suspended or revoked by a competent court.

• 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 and 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.249

**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.250 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

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250 Article 74, Paragraph 1 of the Act Governing Relations Between Peoples of the Taiwan Area and Mainland Area.
able to request the court to dismiss the application on the grounds listed in Article 50 of the Arbitration Law.\textsuperscript{251}

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.\textsuperscript{252} After the announcement on 16 May 1998 that the PRC Supreme People’s Court had passed the "Regulation of the Supreme People’s Court Regarding the People’s Court Recognition of the Civil Judgments of Taiwan Courts," Taiwan restored its recognition of China’s arbitral and judgment decisions. In other words, since 1998, both judicial bodies have recognized each other’s judicial judgments and arbitral decisions. To date, five Chinese awards have applied for recognition and enforcement in Taiwan. The Taiwanese court recognized four Chinese awards,\textsuperscript{253} but denied one on the ground of failure to give proper notice.\textsuperscript{254}

Nevertheless, although Article 19 of the "Regulation of the PRC Supreme People’s Court Regarding the People’s Court Recognition of the Civil Judgments of Taiwan Courts" extends the applicability of the regulation to arbitral awards rendered in Taiwan, any application for the enforcement of a recognized Taiwan arbitral award must still be submitted to a competent intermediate court in accordance with the provisions of the Civil Procedure Law of China. At the same time, Article 4 of the "Regulation of the PRC Supreme People’s Court Regarding the People’s Court Recognition of the Civil Judgments of Taiwan Courts" requires that 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.\textsuperscript{255}

\textsuperscript{251} See Leyda, José Alejandro Carballo, supra note 240, Paragraph 57.
\textsuperscript{252} Article 74, Paragraph 3 of the Act Governing Relations Between Peoples of the Taiwan Area and Mainland Area.
\textsuperscript{253} Taipei District Court 92 Zhong-sheng No. 30; Taichung High Court 93 Zai-Sheng No. 5; Banchaio District Court 98 Sheng-Zi No. 124; and Shihlin District Court 100 Sheng No. 276.
\textsuperscript{254} Taipei District Court 93 Zhong-sheng No. 15
\textsuperscript{255} See Leyda, José Alejandro Carballo, supra note 34, Paragraphs 59 and 60.
Later development has seen a stabilization of cross-strait recognition. 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. 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.**

According to the "Act Governing Relations with Hong Kong and Macau," Articles 30 to 34 of the old Commercial Arbitration Act, instead of 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. 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. Therefore, although the 1998 "Regulation of the PRC Supreme People’s Court Regarding the People’s Court Recognition of Civil Judgments of Taiwan Courts" is not applicable for Hong Kong, Taiwan awards may still be enforced under the “universal” enforcement provision.

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256 Shihlin District Court 100 Sheng No. 276
257 Article 42, Paragraph 2 of the Act Governing Relations with Hong Kong and Macau.
contained in the modified Section 2GG (2) of the Arbitration Ordinance of Hong Kong.\textsuperscript{259}

To date, twelve Hong Kong awards have applied for recognition and enforcement in Taiwan. Eight were recognized, three were denied, and one was recognized in part. The court denied the three Hong Kong awards on procedural grounds, including failure to give proper notice.\textsuperscript{260}

\textbf{19.20 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.

\textbf{19.21 Are there any statistics available on arbitration proceedings in Taiwan?}

The CAA publishes statistics irregularly. According to the CAA website, it handled 185 cases in 2010; among all cases handled between 2000 and 2011, more than 70% of the cases were construction disputes, whereas about 15% were for maritime disputes and 10% were trade disputes.\textsuperscript{261}

\textbf{19.22 Are there any recent noteworthy developments regarding arbitration in Taiwan? (new laws, new arbitration institutions, significant court judgments affecting arbitration etc)?}

An amendment to Article 47 of the Arbitration Law was proposed by the CAA in May 2015 and passed by the Legislative Yuan in November 2015.

\textsuperscript{259} See Leyda, José Alejandro Carballo, supra note 34, Paragraph 62.
\textsuperscript{260} Kaohsiung District Court 80 Zhong-Sheng-Keng No.1, Taiwan High Court 83 Keng No. 2331, and Kaohsiung District Court 90 Zai No.13 decisions.
\textsuperscript{261} http://www.arbitration.org.tw/english/arbitration_case_statistics.htm
This amendment clarifies and strengthens the effect and binding force of foreign arbitral awards in Taiwan.

Before the amendment of Article 47, there was a gap in terms of the binding force for foreign arbitral awards. The old text of Article 47, Paragraph 2 states that a foreign arbitral award, after recognition of the domestic court, shall be enforced. However the old text, when compared with the text of Article 37 for domestic arbitral awards, did not specify that a recognized foreign arbitral award has the same legal binding force as a final judgement of the court. This gap provides room for the counterparty to bring up a new lawsuit before the domestic court and challenge the substance of a foreign arbitral award. This sort of potential different treatment between domestic and foreign arbitral awards was very problematic and hence an amendment was needed for legal certainty.

It is extremely important for a healthy arbitration system to ensure that parties to the dispute all agree to be bound by the arbitral award. The 2015 amendment of the Arbitration Law, albeit relatively minor, has a profound meaning for the Law to create a friendly environment for both domestic and international arbitration in Taiwan.

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6. UNCITRAL Model Law on International Commercial Arbitration
7. UNCITRAL Notes on Organizing Arbitral Proceedings, 1996

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20. THAILAND

BY: DR. ANDREAS RESPONDEK
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20.1 Which laws apply to arbitration in Thailand?

In Thailand, the arbitration law is the Arbitration Act B.E. 2545 (2002), which came into force on 30 April 2002 (“Arbitration Act”).

20.2 Is the Thai Arbitration Act based on the UNCITRAL Model Law?

The Arbitration Act is substantially based on the UNCITRAL Model Law with a few differences, such as:

- The arbitrators are not allowed to take any interim measures. The Arbitration Act requires a party to file an application for any provisional measures for the protection of the interests of the party before or during the arbitration proceedings with the competent Thai courts.

- The arbitrators are exempted from liability in performing their duties, except where they act intentionally or with gross negligence causing damages to any party. There are also criminal provisions where an arbitrator can be fined for up to one hundred thousand Baht and/or imprisoned for up to ten years for demanding or accepting bribes (Sec. 23 Arbitration Act).

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

The Arbitration Act applies to both national and international arbitrations, as long as the parties agree on the application of the Thai arbitration law in the arbitration clause or in an arbitration agreement in writing.
There is one noteworthy special feature: Even though Sec. 15 of the Arbitration Act permits a contract between a government entity and a private enterprise to include an arbitration clause to resolve any disputes, in January 2004 the Cabinet passed a resolution that any contract between the government and a private entity should not include the provision that any dispute arising from the contract should be referred to an arbitration tribunal for settlement. Where there is any problem (or a requirement by another party to include such provision in the contract), the contract should be referred to the Cabinet for approval on a case-by-case basis. The validity of this resolution was extended by another resolution passed by the Thai Cabinet in July 2009 to include all types of contracts made between the government and a private entity, whether or not they are administrative contracts. In other words, unless exempted by the Cabinet, no contracts made between the government and a private entity should provide for arbitration as the method of dispute resolution. Foreign investors are opposed to this Cabinet resolution (www.amchamthailand.com/asp/view_doc.asp?DocCID=2518). In this respect Thai Supreme Court Case no. 7277/2549 is also of interest.

20.4 Has Thailand acceded to the New York Convention?


263 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.
20.5 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.

20.6 Does the Thai arbitration law contain substantive requirements for the arbitration procedures to be followed?

The Arbitration Act generally allows the parties to agree on the specific rules to govern the arbitration, and provides the substitute provisions in case that the parties are unable to agree. However, additionally to those requirements referred to in 14.15, there are some mandatory provisions that must be followed:

- The arbitration agreement must clearly state the parties’ intent to submit all or certain of their present or future disputes to arbitration. It must be in writing and signed by the parties (including the electronic signature, such as email).

- The arbitral tribunal must be composed of an uneven number of arbitrators.

- The arbitrators must be impartial and independent, and possess the qualifications prescribed by the arbitration agreement or the institution administering the arbitration.

The Arbitration Act generally allows the parties to agree on the specific rules to govern the arbitration, and provides the substitute provisions in case that the parties are unable to agree. However, there are some mandatory provisions that must be followed:

- The arbitration agreement must be in writing and signed by the parties (including the electronic signature, such as email).
The arbitral tribunal must be composed of an uneven number of arbitrators.

The arbitrators must be impartial and independent, and possess the qualifications prescribed by the arbitration agreement or the institution administering the arbitration.

The arbitral award must be in writing and signed by all or a majority members of the arbitral tribunal.

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

20.7.1 Conflicts of jurisdiction between the courts and the arbitral tribunal: Proceedings started in Thailand

If litigation proceedings are started in court in Thailand in breach of an arbitration agreement, the opposing party may request that the court strike out the case so that the parties can proceed with arbitration. The request must be made no later than the date for filing the statement of defense. If the court considers that there are no grounds for rendering the arbitration agreement void and unenforceable, the court will issue the order to strike out the case.

However it should be noted that if one of the parties to a dispute files an action in the courts, and if the court determines that it has jurisdiction, then the court will not stay the proceedings merely because an arbitral tribunal has determined that it has jurisdiction over the same dispute. If one of the parties to a court case submits a petition objecting to the court’s jurisdiction, and if the court agrees that the dispute should be decided by arbitration, then the court will dismiss the case.

Furthermore, concerning the jurisdiction of the arbitral tribunal, it should be noted that according to the Arbitration Act, the arbitral tribunal can rule on its own jurisdiction, including:
• The existence or validity of the arbitration agreement.
• The validity of the appointment of the arbitral tribunal.
• The issues of dispute falling within the scope of its authority.

For this purpose an arbitration clause is considered to be a separate contract, so if the main contract is void, the arbitration clause can nevertheless survive.

The arbitral tribunal can rule on its jurisdiction as a preliminary question or in the award on the merits. However, if the arbitral tribunal rules as a preliminary question that it does have jurisdiction, and one party in the arbitration denies that the arbitral tribunal has jurisdiction to determine the dispute(s), this party may apply to the court to decide the matter within 30 days of receiving the ruling on the preliminary issue.

20.7.2 Proceedings started abroad

If the proceeding started overseas in breach of an arbitration agreement, the Thai court will not grant an injunction to restrain the proceedings started abroad.

The objecting party must apply to the overseas court to strike out the proceedings on the basis that they are in breach of the arbitration agreement. This is due to the fact that Thailand is not a party to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971, and foreign courts are unlikely to recognize and enforce the Thai court’s order granting the injunction.

20.7.3 During Arbitration Proceedings

Regarding the arbitration proceedings, the local courts are not likely to actively intervene in arbitration proceedings. However, a majority of the arbitral tribunal (or a party with the consent of a
majority) can request a court to issue a subpoena or an order for submission of any document or materials. If the court believes that this subpoena or court order could have been issued if the action was being conducted in the courts, then it will proceed with the application, applying all relevant provisions of the Civil Procedure Code.

In addition, any party to an arbitration agreement can file an application requesting that the court impose provisional measures to protect its interests either before or during the arbitral proceedings (Sec. 16 Arbitration Act). If the court believes that this provisional relief would have been available if the action was being conducted in the courts, then it will proceed as above. If the court orders provisional relief before the arbitral proceeding have started, then the application must begin the arbitration within 30 days of the date of the order (or such other period that is specified by the court), failing which the court order automatically expires.

20.8 What are the main arbitration institutions in Thailand?

The main arbitration institutions in Thailand are the “Thai Arbitration Institute of the Alternative Dispute Resolution Office” (TAI) and the “Office of the Arbitration Tribunal of the Board of Trade Thailand” (OAT). The third institution is the “Thailand Arbitration Center” (THAC).

In addition to these two bodies, other organizations such as the Securities and Exchange Commission and the Department of Intellectual Property also operate industry-specific arbitration schemes. The Insurance Department of the Thai Ministry of Commerce has also its own arbitration rules and established an arbitration body. The ICC maintains an office in Bangkok.

20.9 Addresses of major arbitration institutions in Thailand?

- Thai Arbitration Institute of the Alternative Dispute Resolution Office, Office of the Judiciary (TAI)
20.10 **Arbitration Rules of major arbitration institutions?**

Currently the arbitration Rules of neither the TAI, OAT nor THAC are available online.

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

For the parties who wish to select The Thai Arbitration Institute (TAI) to be their arbitration institution, Rule 5 sets out the TAI’s recommended arbitration clause as follows:

> “Any dispute controversy or claim arising out of or relating to this contract or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Arbitration Rules of the Thai Arbitration Institute, Office of the Judiciary applicable at the time of submission of the dispute to arbitration and the conduct of
20.12 **How many arbitrators are usually appointed?**

If the arbitration agreement is silent as to the required number of arbitrators, only one arbitrator shall be appointed.

According to Sec. 18 of the Arbitration Act, unless otherwise agreed by the parties, the procedure for appointing the tribunal (and the procedure for appointing a chairman if the parties have agreed to an even number of arbitrators) is as follows:

- Where the tribunal consists of a sole arbitrator, and the parties are unable to agree on that arbitrator, then either party can apply to the court requesting it to appoint the arbitrator.

- Where the tribunal consists of multiple arbitrators, then each party must appoint an equal number of arbitrators, and those arbitrators jointly appoint an additional arbitrator (the chairman). If either party fails to appoint its arbitrator(s) within 30 days after notification from the other party, or if the party-appointed arbitrators are unable to agree on a chairman within 30 days from the date of their own appointment, then either party can apply to the court requesting it to appoint the arbitrator(s) or the chairman, as the case may be.

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

The arbitrators can be challenged if there are circumstances that give rise to “justifiable doubts” as to the arbitrator’s impartiality and independence, or the lack of qualifications agreed by the parties. (Sec. 19 Arbitration Act)

The challenge of the appointment of an arbitrator shall, within 15 days after becoming aware of the appointment of the arbitrator or after becoming aware of circumstances that rise to justifiable doubts as to arbitrator’s impartiality, independence or lack of agreed-on qualifications. (Sec. 20 Arbitration Act).
20.14  Are there any restrictions as to the parties’ representation in arbitration proceedings” (Royal Decree No. 3 BE 2543)?

Whereas foreign nationals may act as arbitrators (subject to compliance with immigration and work permit laws), foreign lawyers may only represent parties to an arbitration:

(i)  Where the dispute is not governed by Thai law; or

(ii) Irrespective of the governing law, where there is no need to apply for enforcement of the arbitral award in Thailand.

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

The arbitrators, or any party with the approval of the majority of the tribunal, may make an application for the court intervention, when they are of the opinion that a specific procedure can only be carried out by a court (such as summoning a witness or ordering production of a document). So long as the request is within its jurisdiction, the court shall accept the application.

In addition, any party to an arbitration agreement can file an application requesting that the court impose provisional measures to protect its interest either before or during the arbitral proceedings.

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

No, however the parties may file with a competent court an application for provisional measures for the protection of the interests of the party before or during arbitration proceedings. The court may grant such relief if the court believes that this provisional relief would have been available if the action was being conducted in the courts.
20.17 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.

- **Other formal requirements for arbitral awards**

  Apart from the aforementioned there are no other formal requirements for arbitral awards.

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

An arbitral award is usually not allowed to be appealed. For one of the ultimate purposes for which the arbitration system was designed is to regulate and solve the disputes fast and final. However, the Arbitration Act allows the court to set aside the arbitral awards for certain specific procedural issues.

A party can apply to the court within 90 days of receipt of the award (or after a correction, interpretation or the making of an additional award, as stated in Sec. 39 Arbitration Act) to set aside the award (Sec. 40, Arbitration
Act). The grounds for the arbitral awards to be set aside are essentially identical to Art.34 of the Model Law.

The Court will set aside the arbitral award if:

(i) a party who makes the application is able to prove that:

(a) a party to the arbitration agreement lacks legal capacity under the law applicable to the party;

(b) the arbitration agreement is not legally binding under the law to which the parties have agreed upon or, in case where there is no such agreement, the law of the Kingdom of Thailand;

(c) a party who makes the application was not delivered advance notice of the appointment of the arbitral tribunal or the hearing of the arbitral tribunal, or was otherwise unable to present his or her case;

(d) the award deals with a dispute not falling within the scope of the arbitration agreement or contains decisions on matters beyond the scope of the submission to arbitration. If the decisions on matters submitted to arbitration could be separated from those not so submitted, only the part of the award which contains decisions on matters not submitted to arbitration may be set aside by the Court; or

(e) the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or, in the case where there is no such agreement, was in accordance with Arbitration Act;

(ii) if it appears to the Court that:

(a) the award deals with the dispute which shall not be settled by arbitration by the law; or
20.19 **What procedures exist for enforcement of foreign and domestic awards?**

Domestic arbitration awards are expressly recognized as binding on the parties, and enforceable in the domestic courts on application by one of the parties. Regarding foreign arbitral awards, according to Sec. 41 of the Arbitration Act, foreign arbitral awards will be recognized and enforced if they are made in accordance with a treaty or international agreement where Thailand is a member and to the extent Thailand agrees to be bound.

While Thailand is a party to both the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention, no reservations were entered on accession) and the Geneva Protocol on Arbitration Clauses 1923 (Geneva Protocol), foreign arbitration awards given in countries that are signatories to the New York Convention or the Geneva Protocol are recognized and enforceable in Thailand. The procedure for enforcing a foreign award is the same as the procedure for enforcing a domestic award (Sec. 41 Arbitration Act). The grounds for denying enforcement for both domestic and foreign awards are also the same and are essentially like those set out in Art. V of the New York Convention.

The party seeking enforcement, according to Sec. 42 Arbitration Act, must file a petition within three years from the date the award first became enforceable. The party must submit the following documents:

- An original or certified copy of the arbitral award;
- An original or certified copy of the arbitration agreement;
- A certified Thai translation of the award and the arbitration agreement. (The translations of the arbitral award and the arbitration agreement in Thai language made by a translator who has sworn under oath before the Court or official or the person having power to accept the oath, or who has made an oath to, or represented by, the official authorized to certify the translation or by a diplomatic...
delegate or the Thai consul in the country in which the award or the arbitration agreement was made (Sec. 42 (3) Arbitration Act).

The court can refuse the enforcement of an arbitral award according to Sec. 43, Arbitration Act, if the party against which the enforcement is sought can prove any of the following:

- Any of the grounds for the award to be set aside (see the grounds for appeal);
- That the arbitral award has not yet become binding;
- That the arbitral has been set aside or suspended by a competent court, or under the law of the country where it was issued.

An order or judgment of a Court under the Arbitration Act concerning the recognition and enforcement shall not be appealed, except where:

1. The recognition or judgment of the award is contrary to public order or good morals;
2. The order or judgment is contrary to the provisions of law relating to public order or morals;
3. The order or judgment is not in accordance with the arbitral award;
4. The judge who has tried the case gave a dissenting opinion in the judgment; or
5. It is an order on provisional measure under Sec. 16 Arbitration Act.

An appeal against an order or judgment under the Arbitration Act shall be made to the Supreme Court or the Supreme Administrative Court, as the case may be. (Sec. 45 Arbitration Act)

20.20 **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.
20.21 Are there any statistics available on arbitration proceedings in the country?

No.

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

An amendment to the Thai Penal Code is currently under consideration that would extend the reach of the Thai Penal Code also to arbitrators with regard to the accepting of briberies, carrying the death penalty.

Another noteworthy feature is the recently increased use of Thai Immigration Laws as a “weapon” against foreign arbitrators and foreign counsel. Proper care should be taken by all non-Thai parties engaging in any arbitration work in Thailand to secure proper work permits in advance.

The Thai Cabinet has decided to ease the restrictions placed upon the use of arbitration clauses in government contracts on 14 July 2015. Only three types of contracts will henceforth continue to require Cabinet approval, i.e.

(i) public-private-partnership agreements, (ii) concession agreements and (iii) contracts requiring Cabinet approval under Royal Decree 2005.

While the restrictions on arbitration clauses have not been fully lifted, the relaxation of the restriction in the 2015 Resolution is a welcome step to improve the investment climate in Thailand.

On 30 December 2016, the Thai Arbitration Institute published new arbitration rules (“TAI Rules 2017”). These rules came into force on 31 January 2017 and, unless otherwise agreed by the parties, will apply to all TAI arbitrations commenced after that date. The TAI's arbitration rules are not updated frequently and this is the first update since 2003.
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| MS. WERINORN MANPHAN |
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| Brief Profile: | RESPONDEK & FAN is “breathing” dispute resolution. The firm's founder and Managing Partner started his career by challenging the LSBA in 1983 in the Louisiana Supreme Court 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 and other rules and is also involved in ad hoc arbitrations. Dr. Respondek is regularly appointed as Chairman, Sole Arbitrator, Co-Arbitrator and Counsel and has helped international clients win or resolve a wide variety of disputes before arbitral tribunals around the world. |
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21. VIETNAM

BY: MR. DINH QUANG THUAN

21.1 Which laws apply to arbitration in Vietnam?

Arbitration has been officially recognized and applied in Vietnam since 1960. Arbitration was governed in many official documents of the Government such as Decree No. 116/ND-CP dated 05 September 1994 on the “Organization and Management of Economic Arbitration”, Decision No. 204/QD-TTg dated 28 April 1993 of the Prime Minister on the “Organization of the Vietnam International Arbitration Center”, Decision No. 114/QD-TTg dated 16 February 1996 of the Prime Minister on “Extending the jurisdiction of dispute resolution of the Vietnam International Arbitration Center”; the “Law on Foreign Investment” in Vietnam 1987, the “Vietnam Maritime Code 1990” and the “Law on Commerce 1997”.

In order to create a sustainable and comprehensive legal regulatory framework for the activities of arbitration for commercial dispute resolution, on 25 March 2003, the Standing Committee of Vietnam’s National Assembly passed the Commercial Arbitration Ordinance. However, due to the fast development of Vietnam’s economy, especially after Vietnam joined the World Trade Organization since 07 November 2006, the Commercial Arbitration Ordinance has shown its weakness in governing new arising matters. Therefore, on 17 June 2010, the Vietnamese National Assembly passed the Law on Commercial Arbitration (“Law on Commercial Arbitration”) which has come into effect since 01 January 2011 and replaced the Commercial Arbitration Ordinance respectively.

The Law on Commercial Arbitration contains the current legal framework regarding commercial arbitration competence, arbitration forms, arbitration institutions and arbitrators, orders and procedures for arbitration, rights, obligations and responsibilities of parties to arbitration proceedings, the competence of courts over arbitration activities, organization and operation of foreign arbitration in Vietnam and enforcement of arbitral awards.
In addition, there is other legislation, notably the Civil Procedure Code 2004 as amended in March 2011 ("Civil Procedure Code"), the Law on Enforcement of Civil Judgments 2008 ("Law on Enforcement of Civil Judgments"), the Law on Protection of Consumers’ Right 2010 and the Law on Investment 2005 etc. which also govern issues relevant to arbitration.

21.2 **Is the Vietnamese arbitration law based on the UNCITRAL Model Law?**

The Law on Commercial Arbitration was drafted with the reference to the UNCITRAL Model Law on International Commercial Arbitration as well as the legislation of developed countries like the United States of America, United Kingdom, Singapore, Germany, France, Japan, China and Thailand.

21.3 **Are there different laws applicable for domestic and international arbitration?**

Both domestic and international arbitration are generally covered under the Law on Commercial Arbitration. While the Law on Commercial Arbitration governs certain important aspects with regard to domestic arbitration such as arbitration procedures, the procedures for cancelation of arbitral awards and the procedures for enforcement of arbitral awards, it is silent on the same areas with regard to international arbitration. This is because the recognition and enforcement of foreign arbitral awards in Vietnam is governed by the Civil Procedure Code and the applicable arbitration procedures are implied to be that of the relevant foreign arbitration center.

21.4 **Has Vietnam acceded to the New York Convention?**

Yes. On 28 July 1995, the President of Vietnam signed a Decision in relation to Vietnam’s accession to the New York Convention 1958 (Convention on Recognition and Enforcement of Foreign Arbitral Awards, “the Convention”. Nevertheless, Vietnam reserves its right under the Convention with regard to the following details:
• Vietnam considers the Convention to be applicable to the recognition and enforcement of foreign arbitral awards made only in the territory of another Contracting State. With respect to arbitral awards made in the territories of non-contracting States, it will apply the Convention on the basis of reciprocity.

• The Convention will be applied only to differences arising out of legal relationships which are considered as “commercial” under the laws of Vietnam.

• Interpretation of the Convention before the Vietnamese Courts or competent authorities should be made in accordance with the Constitution and the laws of Vietnam.

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?**

Generally, the parties can agree on foreign arbitration institutions without having to consider if any of the parties is domiciled in the country or a foreign party. However, there are certain exceptions. For instance, the Maritime Code of Vietnam provides that selection of foreign arbitration institutions is allowed only if there is at least one foreign party involved in the maritime transaction.

21.6 **Does the Vietnamese arbitration law contain substantive requirements for the arbitration procedures to be followed?**

Yes, it does. The current Law on Commercial Arbitration requests that arbitration centres have its obligation and right to build up its arbitration rules in accordance with the provisions of the Law on Commercial Arbitration.
According to the Law on Commercial Arbitration, if a dispute is agreed to be resolved at an arbitration centre, the arbitration procedures issued by such centre will be applied. If a dispute is agreed to be resolved by “ad hoc” arbitration, the arbitration procedures shall be agreed by the parties.

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

With reference to Article 6 of the Law on Commercial Arbitration, when a party to a valid arbitration agreement brings a lawsuit against the other party before the state court in Vietnam, the court shall refuse to accept jurisdiction, unless the arbitration agreement is void or incapable of being performed.

21.8 What are the main arbitration institutions in Vietnam?

There are fourteen (14) arbitration institutions in Vietnam. Among them, the three main arbitration institutions are the Vietnam International Arbitration Center (VIAC), the Asian International Commercial Arbitration Center (ACIAC) and the Pacific International Arbitration Center (PIAC).

21.9 Addresses of major arbitration institutions in Vietnam?

**Vietnam International Arbitration Center (VIAC)**
*Headquarter:*
9 Dao Duy Anh Street, Dong Da District, Hanoi, Vietnam
Tel: +84 4 3574 4001
Fax: +84 4 3574 3001
Email: info@viac.org.vn
Website: [http://eng.viac.vn](http://eng.viac.vn)

*Branch:*
171 Vo Thi Sau Street, District 3, Ho Chi Minh City, Vietnam
Tel: +84 8 3932 1632
Fax: +84 8 3932 0119

**Asian International Commercial Arbitration Center (ACIAC)**
*Headquarter:*
3th Floor, 37 Le Hong Phong Street, Ba Dinh District, Hanoi, Vietnam
21.10 Arbitration Rules of major arbitration institutions?

The VIAC’s Arbitration Rules which have come into effect since 01 January 2012 are published on its website as follows:
http://eng.viac.vn/quy-tac-to-tung-trong-tai-c122.html

The ACIAC’s Arbitration Rules are given in details as follows:
http://aciac.com/?page=quy-tac-to-tung

The PIAC’s Arbitration Rules which have come into effect since 1 June 2014 are published as follows:

21.11 What is/are the Model Clause/s of the arbitration institutions?
VIAC recommends that parties include the following arbitration clause in their contract:

“All disputes arising out of or in relation with this contract shall be finally resolved by the Vietnam International Arbitration Centre (“VIAC”) in accordance with its Rules of Arbitration”.

ACIAC recommends that parties include the following arbitration clause in their contract:

“All disputes arising out of or in relation shall be finally settled by the Asian International Commercial Arbitration Center (ACIAC)”.

PIAC recommends that parties include the following arbitration clause in their contract:

“All disputes 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”

21.12 How many arbitrators are usually appointed?

Pursuant to Article 39 of the Law on Commercial Arbitration, an arbitration tribunal may consist of one or more arbitrators subject to the agreement of the disputing parties. In the absence of which, the arbitration tribunal shall consist of three arbitrators. In practice, the number of arbitrators appointed to form an arbitration tribunal to resolve a dispute is usually three.

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

Yes, there is. According to Article 42.1 of the Law on Commercial Arbitration, an arbitrator must refuse to resolve a dispute, and the parties shall have the right to request a replacement of an arbitrator to resolve the dispute in the following circumstances:

- The arbitrator is a relative or the representative of a party;
21.14 **Are there any restrictions as to parties’ representation in arbitration proceedings?**

The Law on Commercial Arbitration is silent on any restriction with regard to the parties’ representation in arbitration proceedings, but provides that the parties can authorize another person to act as their representative during the arbitration proceedings. However, as a matter of practice, in arbitration proceedings as well as in the courts, disputing parties can only authorize natural persons, not legal persons (i.e. legal entities) to act as their representatives.

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

It is the general understanding that the courts will have no jurisdiction over a dispute if the parties to such dispute have agreed to choose arbitration for resolving any disputes between them.

However, there are certain circumstances where the courts may intervene in arbitration proceedings pursuant to Articles 41, 42, 43, 44, 46, 48, 62 and 69 of the Law on Commercial Arbitration as follows:

a. **Appointing “ad hoc” arbitrators for the respondent**

   If the respondent fails to appoint its arbitrator within 30 days as of its receipt of the claimant’s petition and if the parties do not agree otherwise to appoint the arbitrator, the claimant shall file to request the competent court to appoint an arbitrator for the respondent.
In case of more than one respondent, if the respondents fail to reach an agreement on the appointment of their arbitrator within 30 days as of its receipt of the claimant’s petition and if the parties do not agree otherwise to appoint the arbitrator, either party or the parties can file to request the competent court to appoint the arbitrator for the respondents.

b. **Appointing an “ad hoc” presiding arbitrator**

If the arbitrators nominated by the parties fail to appoint the “ad hoc” presiding arbitrator within 15 days as of their appointment and if the parties do not agree otherwise to appoint the presiding arbitrator, then the parties shall file a request to the competent court to appoint the presiding arbitrator.

c. **Appointing an “ad hoc” sole arbitrator**

If the parties fail to appoint the ad hoc sole arbitrator within 30 days as of the respondent’s receipt of the petition, and if the parties do not agree to request an arbitration centre to appoint the ad hoc sole arbitrator, either party shall file to request the competent court to appoint the ad hoc sole arbitrator.

d. **Substituting an “ad hoc” arbitrator**

If the substitution of an arbitrator is not agreed upon by the remaining arbitrators, or if an arbitrator or the sole arbitrator refuses to handle the settlement of the dispute, the Chief Judge of the competent court shall, within 15 days as of its receipt of the request filed by one of the arbitrators, by one or the disputing parties, assign a judge to decide the substitution of such arbitrator.

In case where an arbitrator cannot continue participating in the arbitration proceedings due to a force majeure event or objective obstacles or is substituted, the selection and appointment of the
substituted arbitrator shall be conducted along similar procedures.

e. Review of arbitration tribunal’s decision on arbitration agreement

Before considering the substance of a dispute, the arbitration tribunal must consider the validity and effect of the relevant arbitration agreement. Any party taking issue with the arbitration tribunal’s decision on the validity and effect of the relevant arbitration agreement shall have the right, within 5 working days as of its receipt of the arbitration tribunal’s decision, to file a complaint with the competent court to request the court’s review of such decision of the arbitration tribunal.

f. Collection of evidence

If the arbitration tribunal or the parties cannot collect evidence by themselves after exhausting all means, they can file an application with the competent court to request the court’s assistance in collecting the evidence for them.

g. Subpoenaing witness

If a witness who has been properly subpoenaed by the arbitration tribunal fails to show up at the arbitration hearing without good cause, the arbitration tribunal has the right to request the competent court to issue a decision to subpoena the witness to the hearing. The court shall summon witnesses in case where the witnesses have been legitimately summoned by the arbitral tribunal but then fail to attend the meeting without justifiable reasons, and their absence obstructs the dispute settlement. The subpoenaed witness has the duty to comply with such court decision.

h. Granting interim or conservatory relief
Disputing parties have the right to request the court to grant interim or conservatory relief during the arbitration proceedings as summarized in more detail under item 21.16 below, irrespective of whether or not the arbitral tribunal has been established or the dispute has been settled by the tribunal. Disputing parties also have the right to request the court to change or discharge the interim or conservatory relief.

i. **Registration of ad hoc arbitral award**

Either party has the right to apply to the competent court for the registration of an ad hoc arbitral award within one year from the issuance of such arbitral award. It should be noted however that an ad hoc arbitral award can only be enforced after it has been properly registered with the competent court.

j. **Cancellation of arbitral award**

Last but not least, the competent court can set aside the arbitral award upon either party’s application under one of the circumstances as indicated at item 21.18 below.

### 21.16 Do arbitrators have powers to grant interim or conservatory relief?

According to Article 49 of the Law on Commercial Arbitration, the arbitration tribunal has the powers to grant the following interim or conservatory relief measures:

- Prohibition of any change in the status quo of the assets in dispute;
- Prohibition of acts by, or ordering specific acts to be taken by a disputing party, aimed at preventing conduct adverse to the process of the arbitration proceedings;
- Attachment of the assets in dispute;
• Requirement of preservation, storage, sale or disposal of any of the assets of one or all disputing parties;

• Requirement of interim payment of money as between the parties; and

• Prohibition of transfer of the rights to the assets in dispute.

If during the course of the dispute, one of the parties has already petitioned a court to order one or more of the forms of interim relief summarized above and then applies to the arbitration tribunal to order interim relief, the arbitration tribunal must refuse such application.

If the arbitration tribunal orders a different form of interim relief, or one that exceeds the scope of that applied for by the applicant, and causes loss to either of the parties or to a third party, the party who has suffered loss has the right to institute court proceedings for adequate compensation.

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

• Formal requirements for arbitral awards

Pursuant to Article 61 of the Law on Commercial Arbitration, an arbitral award must be made in writing and contain the following main particulars:

• Date and location of issuance of the award;

• Names and addresses of the claimant and of the respondent;

• Full names and addresses of the arbitrator(s);

• Summary of the statement of claim and matters in dispute;

• Reasons for issuance of the award, unless the parties agree it is unnecessary to specify reasons for the award;

• Result of the dispute resolution;
- Time-limit for enforcement of the award;
- Allocation of arbitration fees and other relevant fees; and
- Signatures of the arbitrator(s).

If an arbitrator does not sign an arbitral award, the chairman of the arbitration tribunal must record such fact in the arbitral award and specify the reasons for it. Under such case, the arbitral award shall still be effective.

- **Deadlines for issuing arbitral awards**

The arbitral award shall immediately be issued in the session or no later than 30 days from the end of the final session. An arbitral award shall be final and in full force and effect as from the date of its issuance.

- **Other formal requirements for arbitral awards**

In addition, the Law on Commercial Arbitration provides stipulations relating to the right of requesting the arbitration tribunal to correct the form of arbitral awards. In detail, pursuant to Article 63 of the Law on Commercial Arbitration, a party may, within 30 days from the date of receipt of an arbitral award - unless the parties have some other agreement about this time-limit -, request the arbitral tribunal to rectify obvious errors in spelling or figures caused by a mistake or incorrect computation in the arbitral award, and must immediately notify the other party of such request. If the arbitral tribunal considers the request legitimate, it shall make the rectification within 30 days from the date of receipt of the request.

Otherwise, within 30 days from the date of issuance of the arbitral award, the arbitration tribunal may, on its own initiative, rectify any of the errors in spelling or figures caused by a mistake or incorrect computation in the arbitral award and immediately notify the parties.
21.18 **On what conditions can arbitral awards be (i) appealed or (ii) rescinded?**

As mentioned above, a domestic arbitral award shall be final and in full force and effect as from the date of its issuance as stipulated in the Law on Commercial Arbitration. A domestic arbitral award cannot be appealed. However, pursuant to Article 68 and Article 69 of the Law on Commercial Arbitration, a domestic arbitral award can be rescinded by the court if so requested by either party within 30 days of the receipt of such arbitral award and only in one of the following cases:

- There was no arbitration agreement or the arbitration agreement is void.

- The composition of the arbitration tribunal was or the arbitration proceedings were, inconsistent with the agreement of the parties or contrary to the provisions of the Law on Commercial Arbitration.

- The dispute was not within the jurisdiction of the arbitration tribunal; where an award contains an item which falls outside the jurisdiction of the arbitration tribunal, such item shall be set aside.

- The evidence supplied by the parties on which the arbitration tribunal relied to issue the award was forged; or an arbitrator received money, assets or material benefits from one of the parties in dispute which affected the objectivity and impartiality or the arbitral award.

- The arbitral award is contrary to the fundamental principles of the laws of Vietnam.

21.19 **What procedures exist for enforcement of foreign and domestic awards?**

21.19.1 **Recognition and Enforcement of foreign arbitral awards in Vietnam**
The recognition and enforcement of foreign arbitral awards in Vietnam is governed by the Civil Procedures Code and in case where an international treaty to which the Socialist Republic of Vietnam is a member (i.e the New York Convention and mutual legal assistance treaties between Vietnam and other countries) contains different provisions, that treaty, and the Law on Enforcement of Civil Judgments.

The procedural steps for the recognition and enforcement of foreign arbitral awards in Vietnam are as follow:

(i) The arbitral award creditor files petitions for recognition and enforcement of foreign arbitral awards in Vietnam with the competent court of Vietnam or the Ministry of Justice of Vietnam if it is so provided in the relevant mutual legal assistance treaties between Vietnam and other countries;

(ii) If the petition is filed with the Ministry of Justice of Vietnam, within 05 working days of the receipt of the petition dossiers, the Ministry of Justice of Vietnam forwards the petition dossiers to the competent court;

(iii) Within 05 working days of the receipt of the petition dossiers from the Ministry of Justice of Vietnam or the arbitral award creditor, the court accepts the case and issues notice of acceptance to the relevant Procuracy, the award creditor and the award debtor;

(iv) Within 02 months from the acceptance of the case, the court makes one of the following decisions:

   a. Temporarily suspending the consideration of the petition;

   b. Suspending the consideration of the petition;

   c. Organizing a court meeting for consideration of the petition.

(v) Within 20 days of the decision to organize a court meeting for consideration of the petition, the court summons the involved parties for the meeting where a panel of 3 judges will decide if the
award is recognized for enforcement in Vietnam;

Parties have 15 days as of the judgment date (if they are present at the hearing) or as of their receipt of the court judgment (if they are absent from the hearing) to appeal to the higher court;

(vi) Within 1 month as of its receipt of the appeal the higher court will summon the involved parties for a meeting where a panel of 3 judges will decide if the appealed judgment is upheld, partially amended or wholly amended;

(vii) If an award which has been recognized for enforcement in Vietnam is being considered for cancellation by a foreign competent body, the relevant enforcement agency in Vietnam shall issue a decision to temporarily suspend the enforcement of the award. If an award which has been recognized for enforcement in Vietnam is cancelled by a foreign competent body, the court who granted the recognition for enforcement in Vietnam for the award shall issue a decision to cancel such recognition and send its decision to the relevant enforcement agency and the concerned parties.

21.19.2 Enforcement of domestic awards

The enforcement of domestic arbitral awards is governed by the Law on Commercial Arbitration, the Civil Procedure Code and the Law on Enforcement of Civil Judgments. The procedural steps for the enforcement of domestic arbitral awards in Vietnam are as follow:

If the award debtor neither voluntarily implements the award within the voluntary enforcement term set out in the award nor files with the court to request cancellation of the award within 30 days as of receipt of the award, the award creditor shall have the right to file with the competent enforcement agency to request the enforcement of the award in accordance with the Law on Civil Enforcement;

The award creditor of a domestic ad hoc arbitral award is required to register the award with the competent court before it can file with the
competent enforcement agency to request the enforcement of the award.

21.20 **Can a successful party in the arbitration recover its costs?**

As stipulated in Article 34 of the Law on Commercial Arbitration, the party which loses the case must pay the arbitration fees, unless otherwise agreed by the disputing parties or stipulated by the procedural rules of the arbitration centre, or allocated by the arbitration tribunal.

“Arbitration fees” is defined by the same Article to be fees collected “for the provision of services for dispute resolution by arbitration”. This includes:

(i) Remuneration and travelling and other expenses of arbitrators,

(ii) Fees for expert consultancy and other assistance requested by the arbitration tribunal,

(iii) Administrative fees,

(iv) Fees for the arbitration centre’s appointment of an arbitrator for an ad hoc arbitrator at the request of the parties in dispute and

(v) Fees for use of other necessary services provided by the arbitration centre.

21.21 **Are there any statistics available on arbitration proceedings in the Vietnam?**

The Ministry of Justice receives annual reports on the operation of arbitration centers from the Department of Justice of the provinces where the arbitration centers register their operation. Therefore, it is assumed that the Ministry of Justice has statistics on arbitration proceedings in Vietnam. However, the Ministry of Justice does not make the statistics on arbitration available for public access.

VIAC provides statistics on its arbitration proceedings in Vietnam on its
Are there any recent noteworthy developments regarding arbitration in Vietnam (new laws, new arbitration institutions, significant court judgments affecting arbitration etc.)?

On 20 March 2014, the Judge Council of the Supreme People's Court issued Resolution No. 01/2014/NQ-HDTP guiding the implementation of several provisions of the Law on Arbitration. This Resolution provides guidelines for the implementation of the Law on Commercial Arbitration in connection with inter alia, the following issues:

- Determination of an invalid arbitration agreement;
- Determination of an unworkable arbitration agreement;
- Determination of competent court for arbitration;
- The court’s competence to settle a dispute in case there is an arbitration agreement;
- Revocation of arbitral award;
- Filing complaint and settlement of complaint against the Tribunal’s decisions regarding the existence, the invalidity and the unworkableness of an arbitration agreement;
- Gathering evidence and summoning witness by the court;
- Court procedures in connection with the application, alteration and termination of interim or conservatory relief

The Resolution became effective on 2 July 2014.

In addition, on 25 November 2015, the National Assembly of Vietnam passed the Civil Procedures Code 2015 which took effect on and from 1 July 2016 bringing several major changes to the procedures for recognition of foreign arbitral awards in Vietnam as follows:

- The statute of limitations for filing a request for recognition of foreign arbitral award is increased from 01 year (in the previous
The petition for the recognition and enforcement in Vietnam of a foreign arbitral award can be submitted to the competent court in Vietnam or, in case where it is provided in an international treaty to which Vietnam is a signatory, to the Ministry of Justice of Vietnam for first review before being forwarded to competent court;

- The award debtor shall bear the burden of proof if they object to the recognition and enforcement in Vietnam of the foreign arbitral award (Article 459.1 of the new Civil Procedures Code); and

- The decision of the People’s High Court has immediate effect and can be protested in accordance with the procedure for judicial review or for a new trial.

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<td>Name of Law Firm:</td>
<td>Phuoc &amp; Partners Law Firm</td>
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<tr>
<td>Brief Profile:</td>
<td>Mr. Thuan has more than 13 years of experience working for the People’s Court of Ho Chi Minh City, of which he spent more than 8 years working as the assistant to the Chief Judge of the Civil Division. In March 2003, Mr. Thuan decided to leave the Court and started his career as a lawyer. He joined the then leading firm Vilaf – Hong Duc and played the role as a key litigator of the firm for more than 5 years before joining P&amp;P in October 2008 and being promoted the fifth partner of P&amp;P in April 2009. Mr. Thuan is highly regarded for his versatility as a civil, commercial, maritime, insurance and construction trial and appellate lawyer. In his commercial litigation practice, Mr. Thuan has handled a variety of well-known cases including legal actions against a tax agency to decline a tax obligation equal to 7 million USD, defending a world famous soft drink manufacturer in labour class actions by employees, handling</td>
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dispute among members of a 5-star hotel joint venture, handling various maritime cases which include the work of applying for arrest and release of sea-going vessels, representing the top US non-life insurer in subrogation cases, representing international top cotton and feeds traders in enforcing foreign arbitral awards in Vietnam to recover several of millions of USD and defending a local aqua-products manufacturer in an arbitration case worth of several of millions of USD. Mr. Thuan is consistently recommended by reputable legal journals such as Legal 500 as one of the leading lawyers for dispute resolution and litigation.

Mr. Thuan has annually given lectures at several seminars on labour both in Vietnam and Singapore from 2009 and on debt collection in Vietnam in 2012. He also has had several contributions to Saigon Economic Times Magazine and other local newspapers on various commercial issues.

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