

Arbitration

Contributing editors

Gerhard Wegen and Stephan Wilske



2017

GETTING THE
DEAL THROUGH 

GETTING THE
DEAL THROUGH 

Arbitration 2017

Contributing editors

Gerhard Wegen and Stephan Wilske

Gleiss Lutz

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2017
No photocopying without a CLA licence.
First published 2006
Twelfth edition
ISSN 1750-9947

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between November 2016 and January 2017. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Introduction	7	Colombia	88
Gerhard Wegen and Stephan Wilske Gleiss Lutz		Alberto Zuleta-Londoño, Juan Camilo Fandiño-Bravo, Juan Camilo Jiménez-Valencia and Natalia Zuleta-Garay Dentons Cardenas & Cardenas	
CEA	17	Croatia	95
José María Fernández de la Mela and Fernando Cabello de los Cobos Spanish Court of Arbitration		Zoran Vukić, Iva Sunko and Ana Pehar Vukić & Partners Ltd	
CEAC	20	Dominican Republic	103
Eckart Brödermann and Christine Heeg Chinese European Arbitration Centre Thomas Weimann Chinese European Legal Association		Fabiola Medina Garnes Medina Garrigó Attorneys at Law	
DIS	25	Ecuador	111
Renate Dendorfer-Ditges DITGES PartGmbH		Rodrigo Jijón Letort, Juan Manuel Marchán, Juan Francisco González and Javier Jaramillo Pérez Bustamante & Ponce	
European Court of Arbitration's Appellate Arbitral Proceedings	29	Egypt	118
Mauro Rubino-Sammartano European Centre for Arbitration and Mediation		Ismail Selim Al Tamimi and Company	
HKIAC	32	England & Wales	125
Paulo Fohlin Magnusson		Adrian Jones, Gordon McAllister, Edward Norman and John Laird Crowell & Moring LLP	
ICSID	35	Equatorial Guinea	138
Harold Frey and Hanno Wehland Lenz & Staehelin		Agostinho Pereira de Miranda and Sofia Martins Miranda & Associados	
LCIA	38	France	144
Claire Stockford, Jane Wessel and Tom Stables Shepherd and Wedderburn LLP		Thomas Bevilacqua and Ivan Urzhumov Foley Hoag LLP	
Angola	42	Germany	155
Agostinho Pereira de Miranda, Sofia Martins and Jayr Fernandes Miranda & Associados		Stephan Wilske and Claudia Krapfl Gleiss Lutz	
Austria	48	Ghana	162
Klaus Oblin Oblin Melichar		Kimathi Kuenyehia, Sarpong Odame and Paa Kwame Larbi Asare Kimathi & Partners, Corporate Attorneys	
Belgium	54	Greece	170
Johan Billiet Billiet & Co		Antonios D Tsavdaridis Rokas Law Firm	
Brazil	65	Hong Kong	178
Hermes Marcelo Huck, Rogério Carmona Bianco and Fábio Peixinho Gomes Corrêa Lilla, Huck, Otranto, Camargo Advogados		Simon Powell and Desmond Gan Latham & Watkins	
Chile	72	Hungary	187
Paulo Román, Marta Arias and Rodrigo Donoso Aninat Schwencke & Cía		Chrysta Bán Bán, S Szabó & Partners	
China	79	India	195
Shengchang Wang, Ning Fei and Fang Zhao Hui Zhong Law Firm		Shreyas Jayasimha, Mysore Prasanna, Mihir Naniwadekar, Rajashree Rastogi and Pinaz Mehta Aarna Law	

Indonesia	208	Singapore	307
Pheo M Hutabarat, Asido M Panjaitan and Yeremia L T Paat Hutabarat, Halim & Rekan		Edmund Jerome Kronenburg and Tan Kok Peng Braddell Brothers LLP	
Italy	217	Slovakia	317
Cecilia Carrara Legance – Avvocati Associati		Roman Prekop, Monika Simorova, Peter Petho and Juraj Kunak Barger Prekop sro	
Japan	224	Spain	325
Shinji Kusakabe Anderson Mōri & Tomotsune		Alfredo Guerrero, Marlen Estévez and Roberto Muñoz King & Wood Mallesons	
Kenya	232	Sweden	332
John Miles and Leah Njoroge-Kibe JMiles & Co		Simon Arvmyren and Johan Kjellner Advokatfirman Delphi	
Korea	239	Switzerland	339
BC Yoon, Liz (Kyo-Hwa) Chung and Joel Richardson Kim & Chang		Xavier Favre-Bulle, Harold Frey and Daniel Durante Lenz & Staehelin	
Mexico	249	Taiwan	346
Adrián Magallanes Pérez and Rodrigo Barradas Muñoz Von Wobeser y Sierra, SC		Helena H C Chen Pinsent Masons LLP	
Morocco	256	Thailand	353
Azzedine Kettani Kettani Law Firm		Kornkieat Chunhakasikarn and John Frangos Tilleke & Gibbins	
Mozambique	263	Turkey	361
Sofia Martins, Filipa Russo de Sá and Ricardo Saraiva Miranda & Associados		Ismail G Esin, Ali Selim Demirel, Dogan Gultutan and Yigitcan Bozoglu Esin Attorney Partnership	
Myanmar	269	Ukraine	369
Kelvin Poon, Min Thein and Daryl Larry Sim Rajah & Tann Singapore LLP		Serhii Uvarov, Anna Vlasenko and Ilhar Hakhramanov Avellum	
Nigeria	275	United Arab Emirates	376
Babajide O Ogundipe and Lateef O Akangbe Sofunde, Osakwe, Ogundipe & Belgore		Robert Stephen and Joseph Bentley Herbert Smith Freehills LLP	
Portugal	282	United States	385
Agostinho Pereira de Miranda, Sofia Martins and Pedro Sousa Uva Miranda & Associados		Timothy G Nelson and Jennifer L Permesly Skadden, Arps, Slate, Meagher & Flom LLP	
Qatar	290	Venezuela	392
Sean Whitham and Janine Mallis Herbert Smith Freehills LLP		Fernando Peláez-Pier and José Gregorio Torrealba Hoet Pelaez Castillo & Duque	
Romania	299		
Cristiana-Irinel Stoica, Andreea Micu and Daniel Aragea STOICA & Asociatii			

Preface

Arbitration 2017

Twelfth edition

Getting the Deal Through is delighted to publish the Twelfth edition of *Arbitration*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Indonesia, Kenya, Mexico, and a new article on the ICSID.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Gerhard Wegen and Stephan Wilske of Gleiss Lutz, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
January 2017

Introduction

Gerhard Wegen and Stephan Wilske

Gleiss Lutz

It is once more our great pleasure to present and celebrate what is now the 12th edition of *Getting the Deal Through – Arbitration*. This 12th edition covers an additional three jurisdictions, bringing the total number to 52 chapters on jurisdictions and arbitral institutions from around the globe. We hope that the next year will see a further increase of contributions and that this specialist edition will continue to expand and diversify. As is the case every year, we truly appreciate the positive feedback we have received regarding past editions and hope to continue in this manner.

Developing trends in international arbitration and overview

While arbitration continues to have an image problem extending from investment arbitration to commercial arbitration, it nevertheless continues to be one of the most favoured means of dispute resolution throughout most jurisdictions in 2016. From case numbers provided to us by the most important international arbitral institutions by November 2016, we can conclude that most institutions were able to maintain or even increase their caseload during last year. This statement holds true for institutions such as the German Institution for Arbitration (the DIS), the London Court of International Arbitration (the LCIA), the American Arbitration Association's International Centre for Dispute Resolution (the AAA-ICDR), the China International Economic and Trade Arbitration Commission (the CIETAC), the Vienna International Arbitration Centre (the VIAC), the Singapore International Arbitration Centre (the SIAC), the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC) and the Cairo Regional Centre for International Commercial Arbitration (the CRCICA), which even broke its institutional record for cases registered at the centre already a month before the end of 2016.

In 2016, several jurisdictions revised their laws relating to international arbitration, all with the proclaimed aim to further implement arbitration as a preferable means of dispute resolution. Further, while new arbitral institutions continued to mushroom, some prominent arbitral institutions revised their arbitration rules in the past year, with the SIAC and the SCC leading the way. The changes in arbitration laws and institutional rules in 2016 mostly focused on the trends from previous years and include the introduction of emergency arbitrator proceedings, improvement of cost and time-efficiency of arbitral proceedings, enhancement of recognition and enforcement of arbitral awards, facilitation of multiparty proceedings and transparency of proceedings. What is new this year is that several jurisdictions and arbitral institutions also addressed the issue of third-party funding of arbitral proceedings – an issue that has remained a hot topic also in 2016. This is unlikely to change in 2017, given that the Third-Party Funding Taskforce initiated in 2014 by the International Council for Commercial Arbitration (the ICCA) and the Queen Mary University of London is expected to present its work at the 14th Annual ITA-ASIL Conference in Washington, DC, in April 2017.

As in previous years, there have been a number of key decisions relating to international arbitration in 2016, with the English Commercial Court ruling on third-party funding, the case of *Philip Morris v Uruguay* being defeated following the example of the somewhat parallel case of *Philip Morris v Australia* decided in December 2015 and the *Yukos* case having still not disappeared out of the headlines.

The number of countries having ratified the ICSID Convention rose to 153 in 2016 with the Convention becoming effective in the

pacific island nation of Nauru in May 2016. Also, the number of signatory states to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) rose to 157 in 2016 with the Convention entering into force for Angola.

2016 further saw the adoption of revised *Notes on Organizing Arbitral Proceedings* by UNCITRAL, which mark the first update in 20 years. The notes have been revised to reflect the present arbitral practices and the diversity of procedural styles and practices more accurately and are intended as a complement to the revised UNCITRAL arbitration rules as revised in 2010. UNCITRAL further launched a guide to the New York Convention, which contains chapters on the application of each provision of the Convention, including case law from 45 contracting states spanning several decades, and will surely provide a useful tool in ensuring consistent interpretation and application of the Convention. The Chartered Institute of Arbitrators (the CIArb) was also busy and, at the time of writing, had already published nine new guidelines in 2015/2016. These guidelines are intended for international commercial arbitrations and are not based on any particular arbitration laws or rules, but instead suggest basic ground rules on topics such as interviews with prospective arbitrators, judicial challenges, application of interim measures, applications for security of costs, document-only arbitrations, party non-participation as well as drafting of arbitral awards. As usual, not all of these guidelines will find equal favour with users.

Another interesting development that deserves mention in this context is the launch of the Equal Representation in Arbitration Pledge in May 2016. The pledge calls upon the international arbitration community to commit itself to increase, on an equal opportunity basis, the number of women appointed as arbitrators. Data suggest that only 10 per cent of arbitrators are women. Hopefully, this is about to change.

A development that surprised many and is likely to impact international arbitration was the British people's vote in June 2016 for the UK to leave the European Union (Brexit). London arbitration practitioners were quick to claim that Brexit would have no negative effect on London as a hub for international arbitration, but rather, if anything, would strengthen it. However, this is questionable at best. While it is true that Brexit will not have immediate legal effects that are likely to adversely affect London as a place for international arbitration, given that arbitration is exempt from EU law, it has to be kept in mind that the perceptions of prospective users are essential to the success of any disputes hub. With rising xenophobia and the return to exclusively national traditions that helped pave the way towards Brexit, there might be a perceived uncertainty whether, in the future, witnesses, lawyers and arbitrators from abroad will be able to enter the country at short notice, as required in many international arbitrations.

Finally, a topic that received increasing attention in 2016 is the 'due process paranoia', which is defined by the 2015 International Arbitration Survey issued by Queen Mary University of London and White & Case as a perceived reluctance of arbitrators to act decisively in certain situations for fear of the award being challenged on the basis of a party's right to be heard having been violated. The issue was, *inter alia*, addressed by Singapore's High Court, which observed in November 2016 that parties increasingly claim to have been denied a fair hearing with reference to procedural decisions rendered against them by arbitral tribunals, thereby attempting to expand the boundaries of natural justice as a ground for setting aside an award. Similarly, the Working

Group on Counsel Ethics of the Swiss Arbitration Association (the ASA), which published its findings in October 2016, likewise identified 'due process paranoia' as a problem. According to the working group, the problem is the reluctance of some arbitrators to exercise their powers to ensure orderly proceedings and the appropriate admission of evidence. Overly cautious procedural decisions rendered by arbitral tribunals may in particular include granting repeated extensions of time at the request of one party, accepting multiple amendments to a party's written submissions and agreeing to the belated introduction of a party's new defences or claims, or of fresh evidence presented late in the proceedings. Indeed, it seems as if some arbitrators already understand the simple mention of 'due process' as a threat – which it may well be in some countries, such as the UAE, where arbitrators – due to a recent legislative amendment – face the threat of imprisonment if bias can be proven. In most countries, however, the risk of an award being set aside or denied enforcement is considerably lower than some arbitrators appear to believe. By granting each and every unreasonable request by a party, these arbitrators indeed violate the procedural rights of the other party, which is entitled to a cost and time-efficient resolution of its dispute and an avoidance of unnecessary costs and delays. Hopefully, the current debate about 'due process paranoia' will create an increased awareness of the problem, thereby helping to limit the use of 'guerrilla tactics' in international arbitration.

Groundbreaking cases in 2016

As in previous years, 2016 saw the issuance of a number of landmark decisions all over the globe, the most intriguing of which shall briefly be summarised below.

England

A decision that has the potential to become a game-changer regarding the recoverability of third party funding costs was issued by the English Commercial Court in September 2016 in *Essar Oilfields Services Limited v Norscot Rig Management Pvt Limited*. The case concerned a partial arbitral award rendered by a sole arbitrator in an ICC arbitration seated in London. In his partial award, which was the fifth partial award and related to interests and costs, the sole arbitrator found that the claimant Norscot was entitled to a reimbursement of the costs of the third party funding it had obtained so as to be able to initiate arbitration. According to the sole arbitrator, these costs, which amounted to £1.94 million, were recoverable as 'other costs' within the meaning of section 59(1)(c) of the Arbitration Act 1996. The respondent, Essar, subsequently initiated set-aside proceedings on the ground of serious irregularity. In what is thought to be the first decision of a UK court on the issue, the English Commercial Court confirmed that third-party funding costs indeed do qualify as 'other costs' and are as such reimbursable in arbitrations seated in England. The decision has caused quite some controversy, and has even been referred to as a 'shock decision', mainly because it stands in stark contrast to the costs regime applicable in litigation in England and Wales, but also because it is expected to encourage an increasing number of claimants to seek recovery of their funding costs. However, the court explicitly left it up to the discretion of arbitral tribunals whether to award funding costs or not, which will make it possible to take into account the specific circumstance of each case – which sometimes indeed call for a reimbursement of costs incurred so as to make the arbitration possible in the first place.

Austria

In April 2016, the Austrian Supreme Court rendered a decision concerning the proper conduct of arbitrators, and, for the first time since the entry into force of the new regime making the Supreme Court the first and last-instance court for proceedings regarding the challenge of arbitrators, upheld a challenge. The decision deals with the question of whether it gives rise to doubts concerning a sole arbitrator's impartiality and independence if the sole arbitrator had lunch with a party's counsel while the arbitration proceedings were still ongoing, albeit only to discuss a forthcoming event unrelated to the arbitration. This was already the second challenge brought forth by the respondent in the underlying arbitration, with the first – based on an incomplete disclosure of the sole arbitrator's relationship to the claimants – having been dismissed by the Supreme Court in August 2014. In 2016, the Court argued that the lunch, while it did not concern the arbitration, revealed a lack of sensitivity on the part of the sole arbitrator. Given the previous

challenge, the sole arbitrator should have proceeded carefully, taking into account the loss of trust that the challenged signified. The Court further found that the lunch meeting, rather than correspondence by email or telephone, which would have sufficed to discuss the upcoming event, indicated a certain personal connection that was sufficient to justify at least the appearance of partiality – which is enough to warrant a challenge. The decision is interesting also because the Court explicitly referred to the IBA Guidelines on Conflicts of Interest in International Arbitration, which underlines the fact that these are well-established and widely accepted in practice.

Switzerland

A decision that has been referred to as historic has been rendered by the Swiss Supreme Court in March 2016, when the Court annulled an award on jurisdiction because of the failure of an Algerian claimant to first comply with the mandatory pre-arbitration procedure provided for in the contract on which the arbitration was based. The other party to the contract was a company registered in the British Virgin Islands, and the contract not only contained an arbitration clause providing for ICC arbitration in Geneva, but also the mandatory requirement that before initiating arbitration, conciliation pursuant to the ICC ADR rules was to be attempted. When a dispute arose between the parties, the Algerian party initiated conciliation proceedings, but then effectively withdrew from these proceedings and commenced arbitration instead. The respondent objected to the arbitral tribunal's jurisdiction invoking the missing completion of the pre-arbitration procedure, an objection which was rejected with an award on jurisdiction rendered in 2015. This award was then made the subject of set-aside proceedings by the respondent, and was now indeed annulled by the Swiss Court. The decision somewhat came as a surprise, since in three previous cases since 2007, the Swiss Supreme Court declined setting aside an award for failure to comply with mandatory pre-arbitration procedures. The Court did, however, not penalise the Algerian claimant by finding that the claim is inadmissible and terminating the proceedings. Rather, it ordered that the proceedings should be stayed pending recourse to conciliation, and that the arbitral tribunal should set a time limit within which this process was to be completed. In doing so, the Court found a balance between holding the parties to what they agreed to in their dispute resolution clause and avoiding an unnecessary termination of already initiated arbitral proceedings.

Germany

A German court decision to be mentioned here is considered a landmark ruling for sports arbitration. The decision rendered by the German Federal Court of Justice in June 2016 concerns the ongoing legal battle between the International Skating Union (the ISU) and German speed skater Claudia Pechstein reported on also in last year's publication. In 2015, the Higher Regional Court of Munich had found an arbitration agreement between the parties to be invalid owing to a breach of mandatory antitrust law, arguing that the ISU had a monopoly in the market of international ice speed skating competitions and, pursuant to the German Law against Restraints on Competition, was thus prohibited from requiring athletes to sign arbitration agreements. This decision was reversed by the Federal Court of Justice, which found that the speed skater's claim is inadmissible. While the Court agreed that the ISU has a dominant market position, it disagreed with the lower court on the abuse of the ISU's monopoly position by requiring athletes to enter into an arbitration agreement, arguing that the conferral of exclusive jurisdiction on the Court of Arbitration for Sports (the CAS) to hear disputes is based on the 'mutual interests' of ensuring that sport is clean. While the decision was perceived by some as marking a 'black day' for athletes all across Europe, it was celebrated by others as confirming the legitimacy of sports arbitration. Indeed, sports arbitration and in particular the CAS would have looked at an uncertain future if the decision rendered by the Higher Regional Court of Munich in 2015 had been upheld. Given that consistent decisions are key to successfully combating doping, the decision is to be welcomed – but should not distract from the fact that certain aspects of sports arbitration indeed require improvement. Pechstein almost instantly appealed to Germany's Federal Constitutional Court, which means that the last word has likely not been spoken yet.

France

In a decision handed down in November 2016, the French Supreme Administrative Court, the Conseil d'État, for the first time ruled on its power to review international arbitration awards arising from public contracts. The Court decided that an ICC tribunal having its seat in Paris violated a mandatory rule of French public law when it dismissed part of a claim in the case of *Fosmax v STS*. While award challenges are ordinarily heard in French civil courts, the French *Tribunal des Conflits* (jurisdictional court) had ruled that since the dispute at hand stemmed from a public works contract, the Conseil d'État had jurisdiction to hear the case. The Court found that the ICC tribunal had wrongly applied private law to the dispute, but refused to annul the entirety of the award. However, the Court merely set aside the portion of the award where the arbitral tribunal dismissed a claim by Fosmax for costs incurred by hiring a third party to complete certain work, which the Conseil d'État considered a violation of mandatory French public law. It remains to be seen whether concerns of a developing dualism on the French law regime of review of arbitral awards expressed by some practitioners are justified, or whether the decision of the Conseil d'État will remain an exception.

United States

Three interesting decisions dealing with international arbitration were issued by US courts in 2016. The first two decisions concern attempts to enforce arbitral awards previously annulled, and the exercise of the discretion granted by the New York Convention as to whether such awards should nevertheless be enforced. The first decision was rendered by the US District Court for the District of Columbia in the dispute between French company Getma International and the Guinean state. Getma had commenced arbitration against Guinea based on the termination of a concession contract in 2011, and in 2014 had obtained an award in its favour, granting it over €38 million in damages plus interest. While Getma commenced enforcement proceedings in the US, Guinea initiated set-aside proceedings before the Cour Commune de Justice et d'Arbitrage (the CCJA) of the Organisation pour l'harmonisation en Afrique du droit des affaires (the OHADA), an institution with currently 17 West and Central African member states, including Guinea. Guinea invoked a violation of CCJA's rules by the arbitrators, who had entered into a private fee agreement with the parties. The US enforcement proceedings were stayed pending the decision of the CCJA, which was handed down in November 2015 and set aside the award – a decision heavily criticized by the arbitrators that had rendered the decision. In June 2016, the US court recognised the CCJA annulment and thus refused to confirm and enforce the award. The court explained that the Federal Arbitration Act, which incorporates the New York Convention, provides for refusal of enforcement of an award where such award has been set aside or suspended by a competent authority of the country in which, or under the laws of which, that award was made. The court pointed out that while a court still has discretion as to whether an annulled award should be enforced, such discretion is narrowly confined, and should only be exercised where basic notions of justice or morality have been violated, which the court did not find to be the case regarding the Getma award.

The second US enforcement decision – which somewhat runs counter to the decision of the US District Court for the District of Columbia – was rendered by the US Court of Appeals for the Second Circuit in August 2016 in the case of US construction company KBR against Mexico's national oil company Pemex. In a decision that is likely to increase tendencies of forum shopping, the Court affirmed and enforced a US\$300 million ICC award in favour of the US company handed down in an arbitration seated in Mexico City in 2009 – even though the award had been set aside at the Mexican seat in the aftermath of the arbitration. In its decision, the court relied on the Panama Convention, a regional version of the New York Convention incorporated into the US Federal Arbitration Act, and argued that it was only possible for the court to refuse enforcement of the award if one of the limited reasons provided for in the Convention were at hand. While the court acknowledged that, in principle, it also had to keep in mind the comity owed to a foreign court's ruling, it found that in the case at hand, fundamental notions of what is fair and just required it not to give effect to the Mexican annulment decision. The decisive reason was that the annulment had been granted on the basis of a law passed only when the arbitration was already under way.

The third US court decision to be reported on here was rendered by the US Court of Appeals for the Ninth Circuit in San Francisco in the case of *Move, Inc v Citigroup Global Markets, Inc* in November 2016. The court set aside a Financial Industry Regulation Authority (FINRA) award obtained by New York investment banking company Citigroup Global Markets against a Californian provider of online real estate services in 2009. The curious reason for setting aside the award was that the chair of the arbitral tribunal had made fraudulent misrepresentations about his legal qualifications, alleging that he was qualified to practise law in California, New York and Florida – thereby impersonating a retired California lawyer with the same name who has never acted as an arbitrator. The San Francisco Court ruled that the chairman had thereby prejudiced the parties' right to a fair hearing, which would have included having their case heard by a panel of three qualified arbitrators, rather than an imposter. Even though Move had only initiated the set-aside proceedings five years after the award had been issued, the court found that the application was filed in time, given that Move had only learned of the fraudulent misrepresentations in 2014. It remains to be seen whether other parties to arbitrations conducted by the same chairman will likewise seek to have their awards annulled. Hopefully, this decision will not be considered by parties who have lost an arbitration in the past, to now meticulously review the CVs of their arbitrators and compare them to reality.

Hong Kong

A reassuring decision was issued by the Hong Kong Court of First Instance in the case of *Sun Tiang Ling v Hong Kong & China Gas* in September 2016. The set-aside proceedings were initiated by Sun Tiang Ling, a Chinese individual and the former owner of a company bought by a subsidiary of Hong Kong & China Gas. While the former was imprisoned in a remote province of north-east China and denied contact with the outside world, the latter initiated arbitration proceedings at the Hong Kong International Arbitration Centre (the HKIAC), and in 2007 obtained an award granting it damages and confirming its right to withhold payment of the purchase price. The charges against Sun Tiang Ling were dropped in 2012, following which he relocated to the US. The court has now overturned the award on natural justice grounds, finding that Sun Tiang Ling, who was not represented in the arbitration and claimed to not even have been aware of the dispute until last year, was deprived of a fair opportunity to defend himself by presenting his case in the arbitration, resulting in a lack of due process. With its decision, the court sent a strong message that the Hong Kong courts will uphold the fundamental principles of natural justice, and that awards rendered in disregard of a party's right to present its case will not be enforced.

India

For the fifth year in a row, there are several Indian court decisions that deserve mention in this Introduction. Unlike last year, these Indian court decisions suggest that while the Indian judiciary may have gone astray for a while, it may now be back on track towards a more arbitration-friendly jurisdiction with predictable courts. The first decision was rendered by the Supreme Court of India in May 2016 in *Eitzen Bulk A/S v Ashapura Minechem Limited*, and marks the continuation of the course set by the Supreme Court's *Balco* decision reported on in the 2013 edition of this publication. With the *Balco* decision, the Supreme Court had ruled that Indian courts have no authority to annul awards or remove and appoint arbitrators in arbitrations seated outside India. This decision was perceived by many as a much needed course correction after the Supreme Court had previously found in its 2002 decision in *Bhatia International v Bulk Trading SA* that the Indian judiciary was permitted to exercise supervisory jurisdiction over arbitrations both inside and outside of India – a door opener for unsuccessful parties to arbitrations seated abroad trying to have their awards vacated in Indian courts. However, the *Balco* decision applied only to arbitration agreements executed after early September 2012, while arbitration agreements executed before that date remained subject to the principles established in *Bhatia*, regardless of when the dispute arose. In 2015, this prompted the Supreme Court to apply the *Bhatia* principles to an arbitration clause, even though the contract containing the clause had been amended after issuance of the *Balco* decision. As reported in the 2016 edition, this decision was perceived by many as further adding to the confusion and uncertainty regarding the usurpation of jurisdiction by Indian courts in international arbitration. The decision in *Eitzen*

Bulk A/S v Ashapura Minechem Limited is now the latest in this line of decisions. The Supreme Court ruled that Part I of India's Arbitration and Conciliation Act of 1996 does not apply in cases involving arbitral tribunals outside of India, and that the principle established in *Balco* applies regardless of when the arbitration agreement was signed, provided only that it expressly stipulates a seat outside India. Accordingly, Indian courts no longer have the authority to set aside arbitral awards issued by foreign seated arbitral tribunals. The decision was welcomed by the arbitral community as reversing a development that was completely out of step with international practice, and should mark the end of an unfortunate chapter in the history of the Indian judiciary.

The other decision that shall be mentioned in this context can likewise be seen as a correction of the previous year's decisions. In May 2016, the New Delhi High Court lifted two interim anti-arbitration injunctions issued within two weeks of each other in July and August 2015, and reported on in the 2016 edition of this publication. The two decisions concerned two separate arbitrations seated outside of India, which arose from the same contract. In the decision rendered in July 2015 in *Union of India v Videocon Industries Ltd*, the New Delhi High Court agreed with India in finding that the arbitral tribunal did not have jurisdiction to fix a hearing venue at a place that was neither foreseen in the contract nor related to the contract or the parties. In August 2015, the same Court in *Union of India v Cairn India Ltd* and others then dealt with the question of whether an arbitral tribunal seated outside of India has jurisdiction to assess costs related to a concluded arbitration in subsequent proceedings, and again agreed with India, this time by finding that except for corrections and supplementary rulings that require no further taking of evidence, tribunals lose their function upon rendering a final award, which should already include a quantification of costs. Both injunctions have now been lifted by the New Delhi High Court, which reaffirmed that Indian courts have no jurisdiction to issue anti-arbitration injunctions or to grant other means of interim relief in relation to arbitration proceedings seated outside of India. The New Delhi High Court's decision of May 2016 should come as a relief to international investors. However, the fact remains that this has not been the first time that Indian courts have issued anti-arbitration injunctions concerning arbitrations seated outside of India, merely because the contracts on which the arbitrations were based were governed by Indian law. It remains to be seen whether the Indian judiciary will learn its lesson this time – or whether 2017 will see new troubling anti-arbitration injunctions.

United Arab Emirates

In May 2016, in a controversial decision that has in the meantime been overturned, the Dubai Court of Appeal had refused the application of US-based company Fluor Transworld Services to enforce an ICC award against the UAE energy company Petrixo Oil & Gas in an arbitration seated in London. The surprising reason for refusing enforcement of the award was that the principle of reciprocity in the UAE's civil procedure law made it impossible to enforce the award in the UAE – because there was no evidence that the United Kingdom was a signatory to the New York Convention. This decision was troubling for a number of reasons. To begin with, there is no doubt that the UK validly acceded to the New York Convention in 1975, as can be discerned from readily available sources. Further, the New York Convention does not require a party seeking enforcement of an award to furnish proof that the country where the award was rendered is a member state. Finally, when the UAE acceded to the New York Convention in 2006, it chose not to sign a reciprocity reservation that would have permitted it to limit application to awards issued in other contracting states. In June 2016, the Dubai Court of Cassation overturned the decision of the lower court and stressed that the UAE Civil Procedure Code binds the courts to international treaties to which the UAE is a party, including the New York Convention. Additionally, it confirmed that the UK has been party to the New York Convention since the 1970s.

Netherlands

A decision not issued by a court, but an arbitral tribunal, nevertheless deserves mention in this context for the profound effect on international law it is expected to have. In July 2016, a tribunal at the Permanent Court of Arbitration in The Hague handed down the final award in the case of *Philippines v People's Republic of China*. The case concerns maritime rights in the South China Sea to which China claims

it is entitled by virtue of historic rights. With one of the most politically sensitive decisions of this time, the arbitral tribunal chaired now rejected China's claims and decided in favour of the Philippines, which had initiated the proceedings in early 2013. The tribunal's reasoning is based on the finding that longstanding Chinese claims to 90 per cent of the South China Sea within an asserted 'nine-dash line' are without lawful effect. According to the tribunal, any historic rights China may have had were superseded with China's ratification of the United Nations Convention on the Law of the Sea (UNCLOS) in 1996, to the extent that they are incompatible with the Convention. China did not participate in the proceedings, arguing that it concerned territorial sovereignty, to which the Convention does not apply. The case nevertheless saw two hearings, one on jurisdiction and one on the merits, during which the tribunal extensively questioned the Philippines, and was observed by the representatives of various governments interested in the outcome. After issuance of the award, China was quick to issue a statement declaring the award to be null and void with no binding force and underlining that it will not accept or recognise the decision. Nevertheless, it is expected that the award will affect multiple pending disputes concerning the delimitation of maritime boundaries. Whether China will indeed refuse to comply with the award or seek a political solution with the Philippines (which seems currently more likely) – and what the consequences of such refusal might be – remains to be seen.

Revision of laws relating to international arbitration

In 2016, once more, countries around the globe decided to revise their existing arbitration laws, or to issue entirely new legislation.

Russia

To begin with, the Russian Federation replaced its domestic arbitration law and amended the international commercial arbitration provisions. While President Vladimir Putin had signed the new federal law already in December 2015, it entered into force only in September 2016. The purpose of the law reforms is to make arbitration in Russia more attractive and more accessible to parties. Key changes include the mandatory licencing of arbitration institutions to avoid 'pocket arbitration courts' (ie, courts created by organisations and dealing with cases involving these organisations or their subsidiaries, which have in the past repeatedly been criticised as lacking impartiality by the Russian Supreme Commercial Court). Pursuant to the new regime, all existing arbitration institutions, except for the International Commercial Arbitration Court and the Maritime Arbitration Commission, will have to be licensed by the Russian government and have their rules deposited with the Ministry of Justice starting November 2017. Another key change is the introduction of a list of disputes that cannot be resolved through arbitration, which is hoped to do away with the previous uncertainty surrounding the topic. The list includes non-business disputes, such as family or labour issues, public law disputes, certain class actions, bankruptcy proceedings and certain IP disputes, such as the annulment of patents. Further, the new regime provides for requirements that arbitrators have to fulfil, which apply not only to domestic, but also to international commercial arbitrations. These requirements include being at least 25 years of age, having the legal capacity to enter into contracts and not having a criminal or disciplinary record. Government officials are excluded from the office as arbitrators. Chairpersons or sole arbitrators are additionally required to have a Russian law degree or an equivalent law degree officially recognised by Russia. This makes it significantly more difficult for any non-Russian to be appointed as chairperson or sole arbitrator in an arbitration seated in Russia. There are also a few changes concerning Russia as the seat of arbitrations, including rules providing for courts to assist in appointing arbitrators or obtaining evidence.

Somalia

Somalia is not a country commonly known for its commitment to arbitration. In 2016, however, the federal government of Somalia underlined its interest in signing up to the New York Convention by setting up an arbitration and ADR division under the auspices of the Office of the Prime Minister, as well as a New York Convention taskforce consisting of leading international arbitration practitioners. The task of the arbitration and ADR division is to promote the use of ADR and to oversee the commercial and investment arbitration-related matters of all 26 ministries of the central cabinet. The arbitration and ADR division

further aims to reform Somalia's arbitration regime, which will include the drafting of the first Somali Arbitration Bill expected to be based on the UNCITRAL Model Law. The drafting will be supported by the New York Convention Taskforce, which – as the name indicates – is further charged with promoting the countries accession to the New York Convention. Since 2012, Somalia is slowly rebuilding itself and found more stability after years of complete lawlessness and anarchy. With its initiative to promote arbitration, Somalia hopes to attract more foreign investment. We join Somalia in this hope.

Myanmar

Myanmar passed a long awaited new arbitration law in January 2016, which replaces legislation from 1944. The new law is based on the UNCITRAL Model Law, with some slight differences. Myanmar's new arbitration law applies to domestic and international arbitrations alike. It provides that in domestic arbitrations, the arbitrators have to be citizens of Myanmar, unless otherwise agreed by the parties. In international arbitrations, the arbitrators have to have different nationalities than the parties involved in the dispute. In sum, Myanmar has made enormous strides in updating its arbitration laws and removing serious uncertainties for parties wanting to initiate arbitration in Myanmar. Following Myanmar's ratification of the New York Convention in 2013, the next step for the country would be to sign and ratify the ICSID Convention. It remains to be seen whether the country is willing to take that step, and what will become of the Myanmar Arbitration Centre, for which plans are already under way.

Singapore and Hong Kong

Singapore and Hong Kong have both been working on law reforms concerning third-party funding. In June 2016, Singapore started circulating the proposed Civil Law (Amendment) Bill 2016 and the Civil Law (Third Party Funding) Regulations 2016 to invite feedback on the proposed changes. The bill provides for the abolition of common law champerty and maintenance, two doctrines aiming to preclude frivolous litigation, and legalises third-party funding for international arbitrations. The regulations set out criteria that have to be met by third-party funders, failure to comply with which will make it impossible for the funders to enforce their rights under the funding contracts. Attorneys will be able to recommend funders, but will be prohibited from obtaining any direct benefits therefrom. Furthermore, attorneys will have to disclose the identity of the funder and the funding arrangement to the tribunal. Singapore's consultation follows the example of Hong Kong's Law Reform Commission, which last year recommended changes to the legislation in order to permit third-party funding and to implement appropriate ethical and financial standards that have to be met by the potential funders. In October 2016, the Commission issued its second report. In November 2016, Singapore's draft Civil Law (Amendment) Bill was introduced to the Singaporean parliament, and the Bill became law on 10 January 2017. These changes will bring the laws of Hong Kong and Singapore in line with Australia, certain European countries and the United States, where third-party funding has been permitted for some time.

New Zealand

New Zealand is a rather remote jurisdiction, geographically speaking. However, New Zealand has constantly been working on the promotion of the location as a seat for international arbitration, and, indeed, has seen an increase of both domestic and international arbitrations in the past years. Recently, the government updated the New Zealand Arbitration Act of 1996. The New Zealand Arbitration Amendment Act 2016 received Royal Assent in October 2016, and will enter into force in March 2017. The new rules provide for the Minister of Justice to appoint a qualified body to resolve all issues originating from the appointment of arbitrators, which used to be the task of the High Court. Now, the High Court can still make these appointments, provided that the body to be appointed by the Minister of Justice failed or was unable to appoint an arbitrator within 30 days of receiving the request to do so. The new rules also modify the definition of what constitutes an 'arbitral tribunal'. While previously the definition only included sole arbitrators and panels of arbitrators, the definition now encompasses arbitral institutions and emergency arbitrators as well. Accordingly, awards rendered by emergency arbitrators are now enforceable in New Zealand's courts.

Growth and change in arbitral institutions and arbitration rule frameworks

2016 saw a continuing growth of the numbers of arbitral institutions, while a series of existing arbitral institutions revised their rules.

New Arbitral Institutions

AAA/ICDR

In October 2016, the International Centre for Dispute Resolution (the ICDR) and the American Arbitration Association (the AAA) announced the creation of the Aerospace, Aviation and National Security Panel. The Panel will be designed for the settlement of technically complex, high-value aerospace, aviation, defence, cyber and security-related disputes.

WESA

In November 2016, the World eSports Association (WESA) announced the installation of the WESA Arbitration Court. The court, which will operate independently of WESA, is open to everyone involved in e-sports, from players, teams, organisers and publishers and is designed for the resolution of a wide array of issues such as contract disputes, prize money pay out and distribution, financial misconduct and player representation.

ISTAC

As reported in last year's publication, the Istanbul Arbitration Center (ISTAC) was established by law in January 2015. In October 2016, its rules finally entered into force. In November 2016, the Turkish Prime Minister then made a somewhat surprising attempt to jumpstart the centre's business by issuing a circular which directs private and public institutions to incorporate arbitration clauses providing for ISTAC arbitration as a means to resolve commercial disputes in their national and international contracts. It not entirely clear what impact such circulars have under Turkish law, but while they are considered as a mere encouragement to private parties, they are generally regarded as executive orders binding on public agencies and institutions. The probably well-meant interference of the Turkish government in the matters of ISTAC just weeks after its rules entered into force calls into question the impartiality and independence of the institution. Given that, as reported last year, ISTAC's success will largely depend on whether ISTAC manages to build a reputation as a truly independent institution; this kind of governmental support might not necessarily be considered as helpful from an international perspective.

EMAC

The Vice-President and Prime Minister of the UAE and Emir of Dubai in April 2016 issued a decree providing for the establishment of the Emirates Maritime Arbitration Centre (EMAC), an arbitral institution that will specialise in maritime disputes. The arbitration institution will be housed by the Dubai International Financial Centre (the DIFC), and is said to have the potential to fill a gap in the international arbitration market and meet the needs of parties operating in the maritime industry. The new commitment of the UAE to arbitration is viewed as a favourable development.

Emirates Centre of Arbitration for Sports

In May 2016, the UAE Federal National Council passed a federal draft law that aims to establish the Emirates Centre of Arbitration for Sports, which will find its home in Abu Dhabi and will be run by a six-member council. Specific arbitration rules have not been issued yet, but the draft law provides that the centre for sports arbitration will enjoy a judicial personality, full legal capacity to fulfil its objectives and financial and administrative independence.

SCCA

These are not the only new arbitration institutions in the Middle East. In October 2016, Saudi Arabia launched the Saudi Center for Commercial Arbitration (the SCCA), which had already been established by cabinet decree two years ago. The centre aims to become the preferred alternative dispute resolution choice in the Gulf by 2030. SCCA will be overseen by a board of directors of 10 directors all coming from the private sector. The centre's rules are based on the UNCITRAL rules and have been developed with the help of the American Arbitration Association's International Centre for Dispute Resolution (the AAA-ICDR). The rules, which were issued already in July 2016, include features from the

ICC and ICDR rules and reflect the local legal framework. The SCCA was unable to buck the trend. Thus, its rules include provisions on emergency arbitrators, and further authorise arbitral tribunals to grant interim relief. Further, the rules provide for the joinder of third parties. The SCCA rules are surprisingly liberal, and permit parties to appoint any person to represent them, with party representatives not being required to have a local law licence. Further, the language of arbitration does not necessarily have to be Arabic, which makes SCCA an option also for the international arbitration community. Additionally, the place of arbitration does not have to be within Saudi Arabia. Awards have to be published no later than 60 days from the date of the closing of the hearing, unless otherwise agreed by the parties. Arbitrators will have to be appointed from a list of candidates provided to the parties, which are supposed to agree on the members of the tribunal. If no agreement is reached, the centre will select the tribunal from the candidates the parties approve. There are no legal restrictions on the appointment of female arbitrators. Given that in May 2016, the Saudi Administrative Court of Appeal in Dammam confirmed the appointment of the first female arbitrator for a commercial dispute, there is thus hope that the Middle East will see an increase in arbitrator diversity. However, since the SCCA's list of arbitrators is not publicly available, it remains unclear whether the SCCA indeed supports and promotes gender diversity in arbitration.

BIAC

In November 2016, the American Chamber of Commerce in Romania launched the Bucharest International Arbitration Court (the BIAC), which focuses on business and commercial disputes in the Romanian and English languages, and in particular disputes involving foreign investors and multinationals active in Romania. The institution has its own rules, which are based on various existing arbitration rules such as the UNCITRAL rules and the rules of the LCIA, the ICC and the AAA-ICDR, and by reference include the IBA Guidelines on Conflicts of Interest in International Commercial Arbitration and the IBA Rules on the Taking of Evidence in International Commercial Arbitration. The institution has a closed list of 60 local and foreign arbitrators. The BIAC is the first Romanian arbitral institution and one of only a small number of Eastern and Central European institutions that has adopted the Equal Representation in Arbitration Pledge aimed at improving the profile and representation of women in arbitration. Given that its closed list of arbitrators is not publicly available, it remains to be seen whether BIAC's pledge to promote gender diversity is more than a mere lip service. The BIAC's launch comes two years after the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania got entangled in a bribery scandal with its former president having been caught accepting a bribe from a party. It remains to be seen whether the BIAC will be able to overcome this disastrous impression of Romanian institutional arbitration.

MICAM

While many Caribbean states, including Jamaica, the British Virgin Islands, Barbados, the Bahamas and Trinidad and Tobago, are currently in the process of revising their arbitration laws, two of them also launched new arbitration centres in 2016. Jamaica was the first, and, with the support of the Kuala Lumpur Regional Centre for Commercial Arbitration (the KLRCA), in early November 2016 launched the Mona International Centre for Arbitration and Mediation (MICAM). The launch comes at a time when Jamaica is in the process of drafting a new law to replace its 1900 Arbitration Act, which is based on the 1889 English Arbitration Act long since replaced in the UK. The proposed law is closely modelled after the UNCITRAL Model Law. The launch of MICAM was accompanied by the Chartered Institute of Arbitrators, which organised trainings preceding the launch. Just days later, another new arbitration centre then opened its doors in the British Virgin Islands. The British Virgin Islands International Arbitration Centre (the BVIIAC) is set to have a roster of more than 200 arbitration practitioners drawn from both common and civil law jurisdictions. BVIIAC will administer arbitration proceedings under its own rules as well as ad hoc arbitrations. The hope is that the centre becomes the most popular arbitration centre in the Caribbean, where arbitration is said to have significant potential given that Caribbean state courts have an overwhelming case load, hindering speedy and efficient dispute resolution.

LACIAC

Nigeria launched a new arbitration centre in Lagos in November 2016, the Lagos Chamber of Commerce International Arbitration Centre. The centre was incorporated already in 2002, but had existed only on paper since. The new centre's rules were drawn up in 2015 and are said to be in line with international best practice. The rules incorporate the IBA Guidelines on Party Representation as well as the IBA Guidelines on Conflicts of Interest, and provide for an emergency arbitration procedure, fast track arbitration as well as measures of interim relief and online dispute resolution. Additionally, the centre provides parties with the freedom of choice of counsel, regardless of the counsel's nationality. Arbitration is used with increasing frequency in Nigeria, whose courts so far appear supportive of the arbitral process. In the wake of the launch of Nigeria's new arbitration centre, some practitioners have thus voiced the hope that Nigeria will be able to follow the example of many Asian states, and will be able to establish itself as a popular seat for international arbitrations.

DJIAC

Lastly, Djibouti deserves mention here, given that the country is soon to host the Djibouti International Arbitration Centre (the DJIAC). The centre was still in the making at the time of writing, but set to open its doors in late 2016 or early 2017. The centre is supported by the Intergovernmental Authority on Development (IGAD), which comprises eight African states, namely Djibouti, Eritrea, Ethiopia, Kenya, Somalia, Sudan, South Sudan and Uganda. While African arbitral centres in the past often mimicked foreign institutions without paying regard to local interests and particularities, this is supposed to change with the DJIAC. The new centre specifically aims at servicing the community in which it is based, particularly East African companies, which want to be able to arbitrate locally and want to avoid foreign institutions, long travel and foreign counsel.

Amended rules of existing arbitral institutions

In addition to new arbitration institutions shooting out of the ground like mushrooms, a number of existing arbitral institutions revised their rules in 2016.

ICC

The first to be mentioned in this context is the ICC, which has announced revisions aiming at making ICC arbitration more efficient and transparent. The amendments were approved by the ICC Executive Board in Bangkok in October 2016 and will enter into force in March 2017. A controversial provision that has been the subject of much debate is the expedited procedure, which will automatically apply to all arbitrations with an amount in dispute below US\$2 million, as well as to all other arbitration where the parties have previously agreed so. According to the new set of rules, in these cases a sole arbitrator will be appointed by the ICC, even if an arbitration agreement provides otherwise. The sole arbitrator will have the discretion to decide the dispute on a documents-only basis, and the award itself must in principle be issued within six months of the case management conference, with extensions only in limited and justified circumstances. The hope is that this will make proceedings significantly faster and more cost-efficient. For some, however, this new concept, and in particular the ICC's power to appoint a sole arbitrator even when the parties agreed to arbitrate their dispute in front of a three-member tribunal, runs counter to party autonomy, the cornerstone of arbitration.

DIS

The Deutsche Institution für Schiedsgerichtsbarkeit (the DIS), the German Arbitration Institution, has initiated a complete revision of its 1998 rules, which are among the oldest rules of the major arbitration institutions, leaving aside the rules on expedited proceedings incorporated by the DIS in 2008. At the moment, the revised rules are still work-in-progress, and are not expected to enter into force before the second half of 2017.

ICSID

Similarly, the International Centre for Settlement of Investment Disputes (ICSID) in November 2016 announced that it has commenced the process of revising its rules and regulations. The aim of the revision process is to simplify procedures to increase cost and time-efficiency.

The process is expected to entail a public consultation process with surveys and background papers to be issued in 2017.

SCC

In time for its 100th anniversary, the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC) likewise revised its rules. The rules, which were approved by the SCC Board, will enter into force in January 2017. As of the new year, the SCC will have new provisions on multi-party and multi-contract arbitration. Furthermore, the SCC Rules 2017 contain updated rules on arbitrator challenges, administrative secretaries and security of cost. Another novelty are the provisions on summary procedure, which aim at making procedures more efficient by giving tribunals more flexibility in their case management. The new rules also include a pledge for equal representation of arbitrators in arbitration proceedings.

SIAC

Important changes to its rules have been made by the Singapore International Arbitration Centre (the SIAC). Those changes entered into effect in August 2016, and the revised rules apply to arbitration agreements entered into thereafter as well as those not providing for a specific edition of the rules to apply. It is the sixth set of rules released by the SIAC since its launch 25 years ago. The changes include revisions of the provisions dealing with consolidation of proceedings, while rules on joinder and intervention of parties introduced already in 2010 were made clearer and easier to apply. Additionally, a party can now apply for early dismissal of unmeritorious claims or defences. Further, the new rules update the expedited procedure and the emergency arbitration proceedings. A more controversial update to the rules is that the SIAC Rules 2016 no longer provide for Singapore as the default seat of arbitration. Rather, if no seat has been agreed upon by the parties, the tribunal may now decide upon the seat of the arbitration.

SCIA

The Shenzhen Court of International Arbitration (the SCIA) has also revised its rules. The revised rules entered into effect in December 2016. In contrast to other institutions' revised rules, the new SCIA Rules provide for the SCIA, as the first institution in China, to hear investor-state arbitrations and to administer those cases under the UNCITRAL rules. Additionally, all parties involved as well as the arbitrators and counsel have to follow procedural guidelines, which, for example, include a provision stating that if no seat of arbitration was agreed upon and the tribunal does not take a different decision, the seat shall be Hong Kong. Furthermore, the institution introduced a provision on 'bona fide cooperation' of parties, which means that legal counsel must act in good faith and cooperate with each other so as to ensure fair and efficient proceedings. If counsel breaches that provision by causing delays or other procedural misconduct, the tribunal has the authority to sanction such misconduct. However, the rules do not specify what these sanctions may be, instead authorising tribunals to determine adequate measures.

CIETAC HKIAC

The SCIA's neighbour, the China International Economic and Trade Commission Hong Kong Arbitration Centre (the CIETAC HKAC), was also busy in 2016, and released guidelines for third-party funding of arbitrations. While third-party funding of arbitrations has so far been prohibited in Hong Kong, the Hong Kong Law Reform Commission is endorsing a change and CIETAC HKAC has made it its task to identify and address potential risks of funding. The new guidelines contain principles of (allegedly) best practice and conduct, which the parties are encouraged to comply with. In particular, parties which are being funded are requested to disclose any possible issues of conflicts of interest under the applicable laws. The guidelines further provide for arbitral tribunals to take the third-party funding into account when deciding upon an application for security for costs. The guidelines have not yet entered into force, but are still under review and will likely see further revisions.

KCAB

Since June 2016, the new International Arbitration Rules of the Korean Commercial Arbitration Board (the KCAB) apply to newly commenced arbitration proceedings. The revised rules include provisions that

allow for more efficient case management, including in particular the consolidation of related arbitrations and joinder of additional parties. Following the trend of the past years, the revised rules also introduce emergency arbitrator proceedings. Additionally, the KCAB added provisions addressing conservatory and interim measures. The revised rules have been published in five different languages, and the institution offers a multilingual service to the parties, all in the hope that this will help KCAB to grow and promote Seoul as an Asian arbitration hub.

DIFC-LCIA

The DIFC-LCIA Arbitration Centre in Dubai, which aims at combining the strength of the LCIA with the proximity of the Dubai International Financial Centre to the cultural mentality and legal background of the Gulf States, and is the largest arbitral institution in the Middle East, updated its rules with effect as of October 2016. The first update since the initial launch of the DIFC-LCIA Arbitration Centre eight years ago introduces provisions on emergency arbitrators, multiparty disputes as well as sanctions against counsel for poor conduct. To make arbitration proceedings more cost-efficient and less time-consuming, arbitrators confirm, with acceptance of their appointment, their availability and commitment to the arbitral proceedings. Appointments can be revoked should the arbitrator not conduct the proceedings with reasonable diligence and efficiency. The revised rules come nearly one year after the centre's relaunch in November 2015, and in the hope that these changes will help to make Dubai the most popular regional hub for international commercial arbitration.

ADGM

Abu Dhabi Global Market (the ADGM), an international financial centre in the centre of Abu Dhabi, issued new arbitration regulations adapting the UNCITRAL Model Law in December 2015, which entered into force in January 2016. ADGM is located on Al Maryah Island, a financial free zone in central Abu Dhabi, follows English common law and hopes to become a regional arbitral seat. The new ADGM Arbitration Regulations include provisions such as the right of parties to waive their right to appeal, permit joinders and consolidations by agreement, and further contain confidentiality provisions regarding the proceedings and the awards rendered. However, parties are allowed to make reasonable disclosures to protect their legal rights. ADGM does not require a link between the disputes that are to be arbitrated and the financial free zone. With the new regulations, ADGM aims to fulfil a perceived need for regional users of arbitration to have a seat in the Middle East that follows well established international principles.

BCDR-AAA

The Bahrain Chamber for Dispute Resolution (the BCDR-AAA) is currently in the process of revising its rules. It is expected that the revised rules will enter into force in early 2017. These rules, which will replace the chamber's original rules from 2010, will include provisions on the independence and impartiality of arbitrators, as well as changes to the notification process of arbitrator challenge, of which – in deviation from the previous regime – the whole tribunal and all parties will have to be informed. Additionally, a challenged arbitrator will now automatically have the right to comment on the challenge. The rules on the request for arbitration and its response have been revised as well. In summary, the new BRDC-AAA rules will be more aligned with the rules of other institutions such as the SCC, SIAC or the ICC.

MCIA

Yet another institution that revised its rules in 2016 is the Mumbai Centre for International Arbitration (the MCIA). The revised rules mirror other institutional rules, but are adjusted to the Indian market and reflect the amendments made to the Indian Arbitration and Conciliation Act, which passed last year. The new provisions include a shortening of proceedings for simple or low-value disputes, guidelines on multi-party or multi-contract disputes, dispute consolidation mechanisms, the use of emergency arbitrators and time-limits for arbitral tribunals to issue draft or final awards. Similar to ICC awards, awards issued in MCIA arbitrations will be subject to the inspection of the registrar, who is entitled to suggest changes of draft awards to tribunals, which, however, remain at liberty to make or refuse such changes. Additionally, the new 17-member council of the MCIA will

have exclusive mandatory competence to appoint sole arbitrators and tribunal presidents, and will confirm party-appointed arbitrators.

ACICA

The Australian Centre for International Commercial Arbitration (the ACICA) is another institution that revised its rules in the past year. The new rules came into effect in January 2016 and replaced the 11-year-old original rules. The new rules address the topic of counsel conduct and contain provisions on joinder and consolidation of proceedings. A noteworthy addition to the ACICA is the 21-member advisory council, whose job it is to advise on the implementation of the rules and the institute's initiatives, and to promote the use of the ACICA for international arbitration.

Investment arbitration

Free-Trade Agreements

While the Transatlantic Trade and Investment Partnership (TTIP) Agreement has been a recurring topic in this Introduction for years, this can reasonably be expected to change in 2017. The past year saw a continuation of public protest and heated debates in many of the major EU economies. Efforts were made to appease passionate critics by abolishing the originally intended investor-state dispute resolution mechanism and providing for a standing investment court with tenured judges and an appeals mechanism instead – which has since likewise been the subject of much debate. However, all efforts invested into finding a compromise beneficial to all involved will likely have been for nothing. US President Donald Trump has hardly made a secret of his rejectionist attitude towards free trade agreements, and while he remains highly unpredictable and there is still hope that no more than a fraction of his electoral promises will be fulfilled, TTIP is likely to face a premature death. While this will be noted with satisfaction by critics of TTIP, and in particular investor-state arbitration, this is in reality a missed chance for the economies of the EU and the US. Perhaps even more regrettable is the US president-elect's announcement that, among other steps to be effected on his first day in the White House, the US will issue notification of intent to withdraw from the Trans-Pacific Partnership (TPP) Agreement. This trade deal, which the US had signed with 10 other countries around the Asia-Pacific in October 2015, created a free trade area accounting for nearly 40 per cent of global GDP and a third of global trade. The likely consequence of the withdrawal of the US is that China will step in and that the Regional Comprehensive Economic Partnership (the RCEP), a proposed free trade agreement between the 10 member states of the Association of Southeast Asian Nations (ASEAN) as well as Australia, China, India, Japan, South Korea and New Zealand, will suddenly be an attractive alternative. This will strengthen China's economic power and its position in the world – the opposite of what the US President-elect presumably desires to achieve. While the past years have already seen a shift in the geography of international investment law, this development is now sure to continue. Europe and North America have shaped international investment law for the better part of its history, but are now at risk of losing their position as predominant global rule-maker to Asian powerhouses increasingly active in the field of international investment law.

Another free trade agreement that the EU has spent years negotiating is likely to suffer a similar fate as TTIP and TPP. The Comprehensive Economic and Trade Agreement (CETA) was finally adopted by the Council and signed at the EU-Canada Summit in October 2016. It will take quite some time for effects on investment arbitration to begin materialising – if at all. Already the path to signing of CETA was rocky and, in addition to increasing political pressure and public protest that has long extended from TTIP to CETA, it seemed for a while as if first Germany and then Belgium would end up being the (unwitting) grave-diggers of CETA. In October 2016, the German Federal Constitutional Court had to rule on several applications for interim injunctions forbidding the German representative in the Council to consent to CETA. In its eagerly awaited decision, the highest German court rejected the applications and ruled that, in principle, the German representative can consent to CETA and that CETA's provisional application is compatible with German law. However, the judges set out several conditions, ordering the German government to ensure, inter alia, that the Council only agrees to CETA to the extent it covers matters undisputedly falling into the exclusive competence of the EU, and that a unilateral German termination of the preliminary applicability remains possible

should the Federal Constitutional Court's ruling in the main proceedings require such termination. Additionally, the court prohibited the German government from consenting to provisions pertaining to investment protection and the controversial proposal for disputes to be settled by an investment court, which had made it into the text of CETA in February 2016. After Germany's highest court had given its (limited) approval, new problems did not take long to materialise. The Belgian province of Wallonia, and with it the Belgian government, blocked the signing of CETA for several days and eventually only agreed to it after concessions had been made and laid down in an addendum barring the investment court and other CETA provisions – for the time being. Accordingly, provisional application of CETA will only concern some of the deal's provisions, but notably not the ones dealing with investment protection and dispute settlement. These will only apply once CETA is ratified and has entered into force. Accordingly, no effects on the dispute resolution landscape can be expected in the near future. It remains to be seen whether CETA's novel investment court will ever be tested in practice – or whether it will remain a topic for academics and conferences.

After CETA had been signed and TTIP had been put on ice, it did not take long for critics to identify a new bogeyman – the Trade in Services Agreement (TiSA) currently negotiated by around 50 states, including the 28 member states of the EU, Australia and the US, which together account for 70 per cent of services traded worldwide. The agreement is designed to be the successor of the General Agreement on Trade in Services (GATS) of the WTO, and aims at a liberalisation of the trade in services. Given that the critics of free trade and globalisation have now become aware of TiSA, it is more than just questionable whether the agreement will be concluded in the foreseeable future.

While TTIP and CETA – at least in the initially envisaged form – are unlikely to ever come to pass, the fate of the EU-Singapore Free Trade Agreement (EUSFTA) is yet to be determined. Negotiations were launched in 2009, and agreement was reached on all major points, including the investment chapter. However, ratification of the EUSFTA was delayed by the European Commission's (EC) decision to request an opinion of the ECJ regarding the EU's competence to conclude the agreement on its own. A hearing was held in September 2016, but, given the vast amount of general as well as policy-specific legal issues that will need to be addressed by the ECJ, a decision is not expected any time soon. There is hope, however, that the ECJ will clarify and redefine the involvement of the member states in the EU's external economic relations, and will in particular answer for the EU the pressing question of whether – and to what extent – the EU has the competence to conclude free trade agreements on its own, without ratification through all 28 – or, in the future, 27 – national parliaments.

The last development to be mentioned in the context of free trade and investment agreements is India's decision to recast its BIT regime. Since early 2016, India has notified 57 countries of its intention to replace recently expired or soon-to-expire BITs with new agreements providing for less expansive protections. India has further announced that it will initiate negotiations with the remaining 25 countries with which the state has BITs, in an attempt to agree on joint statements clarifying perceived ambiguities. India's move, which comes in the wake of a series of investment arbitrations initiated against the country, caused concern among practitioners, in particular since the EU-India Free Trade Agreement under negotiation since 2007 is far from being concluded. However, given that at least India's 2003 model BIT provides for a 'sunset-clause' entitling at least existing investors to rely on the protections of the BIT for a period of 15 years after the BIT's termination, there is no reason to panic just yet.

Case development

A new trend observed in ICSID arbitration, which is clearly aimed at increasing transparency, is to broadcast hearings either online or in CCTV in ICSID headquarters. 2016 saw three of such hearings, with the hearings in *Bear Creek Mining Corporation v Peru* and in *Gabriel Resources v Romania* being broadcast in September 2016. That same month, ICSID announced that the parties to the infamous investment arbitration of *Vattenfall AB and others v Germany* had likewise agreed to make the hearing on jurisdiction, merits and quantum held in October 2016 open to the public by streaming a video of the hearing with a four-hour delay. Such broadcasts of ICSID hearings provide an excellent opportunity to gain practical insights for anyone interested

in investment arbitration. Whether many critics of investment arbitration took the trouble to actually watch what they pretend to have such vital interest in is, however, questionable. What those critics of investment arbitration might be more interested in is an investigative report by Pulitzer Prize-winning journalist Chris Hamby published by BuzzFeed in August 2016. According to the report, the investment arbitration system is a 'shield for the criminal and the corrupt', who hope to obtain not only multimillion-dollar awards, but also the closure of criminal investigations against them. According to Hamby, more than 10 per cent of investment arbitrations filed in the past five years were initiated by companies or executives accused of criminal activity. While this sounds like a high number, what has to be kept in mind is that, as Hamby admits, many states involved in investment arbitrations seek to invent criminal charges against investors so as to escape liability and distract from their own wrongdoings.

What is not yet a trend, but can realistically be expected to develop into one is investment arbitration initiated by (Silicon Valley-based) internet companies such as Uber, airbnb and Twitter. While Uber faces increasing opposition from local taxi lobbies, airbnb has been heavily criticised for increasing the shortage of residential space, and both have had to deal with court decisions and a tightening of legal regulations. Similarly, Twitter is having a hard time in regimes with reduced press freedom. It is likely no more than a matter of time before these companies will discover the possibility of initiating investment arbitration – which promises to entail some interesting cases.

2016 also saw the issuance of a number of awards and court decisions concerning investment arbitrations that deserve mention in this context.

The first to be mentioned is the (second) award rendered in the longest-running ICSID investor-state arbitration of all time, *Victor Pey Casado and Foundation 'Presidente Allende' v Chile*. Nearly two decades after the arbitration began, a second ICSID tribunal in September 2016 issued an award refusing to award compensation to 101 year-old Spanish publisher Pey Casado and the foundation named after the former Chilean President Salvador Allende, finding that the claimants had failed to establish any loss for which they could have been awarded compensation. While the arbitral tribunal in its award had expressed the hope that the case had now reached its 'final end', the claimants filed an application for interpretation of the award with the secretary-general in October 2016, which marks the sixth chapter in the *Pey Casado* saga. Once the application has been ruled upon, the case will have gone through an arbitration, a revision, an annulment, a supplementary decision proceeding, a resubmitted arbitration and interpretation proceedings. It all began when Pey Casado filed for arbitration against Chile 1997, requesting to be awarded compensation for the expropriation he claimed to have suffered when the newspaper he ran in Chile was seized during the 1973 Pinochet coup against President Allende. In 2008, the tribunal, which repeatedly had to be recomposed, rejected Pey Casado's claim on judicial grounds, since the seizure of his assets took place before the BIT between Chile and Spain entered into force in 1991. Additionally, however, the tribunal found that by delaying restitution claims filed by Pey Casado in Chilean courts after the BIT had entered into force, Chile had breached the fair and equitable treatment standard provided for in the BIT and had denied Pey Casado justice. On the basis of these later breaches, the tribunal awarded Pey Casado US\$10 million in damages, a decision which was then challenged by Chile in subsequent annulment proceedings. In 2012, the annulment committee annulled the award insofar as damages were awarded, but left intact the finding that Chile had breached the BIT. Barely more than half a year later, Pey Casado initiated a second arbitration, and requested to be awarded US\$330 million in compensation, plus moral damages. The second tribunal, however, found that the claimants had failed to prove a link between Chile's breach of the BIT and any loss they had suffered. To the second tribunal it seemed as if the claimants had suffered no material damage at all that was admissible under the BIT. While this tribunal stressed the fact that the first tribunal's finding of a denial of justice constitutes in itself a satisfaction under international law, this will be cold comfort for Pey Casado.

Another ICSID case that has come to an end in 2016 is the case of *Abaclat and others v Argentina*, which had been brought by 195,000 Italian holders of defaulted Argentine government bonds in 2007. The case, which has been called the first mass claim at ICSID and a test for sovereign debt disputes under investment treaties, was settled by

Argentina's new government in early 2016. Already in January 2016, Task Force Argentina (TFA), the umbrella group established by eight Italian banks to represent holders of defaulted Argentine government bonds, and Argentina had reached an agreement in principle that was subsequently approved by the National Congress of Argentina. In April 2016, TFA and the Ministry of Economy and Public Finance of the Argentine Republic then entered into a final settlement agreement. Argentina agreed to make a cash payment equal to 150 per cent of the principal value of the affected bonds to the remaining approximately 50,000 claimants, in exchange for 'dismissal with prejudice' of the US\$2.5 billion claim. Supposedly, the payment agreed to by Argentina equals around US\$1.35 billion. In 2011, in what was later named the most influential arbitration decision of the decade, the majority of the arbitral tribunal ruled that the high number of claimants did not preclude the tribunal from accepting jurisdiction over the dispute. The arbitrator appointed by Argentina, issued a dissenting opinion warning of potentially disruptive effects on the international financial system, before resigning from the case. While some may regret that the most influential arbitration decision will now not be followed by another landmark decision on the merits, there is hope that the settlement marks a breakthrough ending a 15-year deadlock over the Argentine default, and will help to normalise the country's relationship with the international capital markets. Continuing its efforts to settle investor disputes, Argentina in May 2016 then announced that it would pay US\$217 million to satisfy an UNCITRAL award obtained by UK's BG Group and an ICSID award rendered in proceedings against the US company El Paso Corporation.

Finally, a case incessantly referred to by opponents of investor-state arbitration, in particular in the context of protests against TTIP and, at a later stage, CETA, has come to an end in July 2016, when the ICSID tribunal handed down its long-awaited decision in the case of *Philip Morris v Uruguay*. The tribunal rejected Philip Morris' claim based on the BIT between Uruguay and Switzerland, and upheld Uruguay's right to regulate the packaging of cigarettes for grounds of public health. According to the tribunal's reasoning, adopting single presentation requirements precluding tobacco manufacturers from marketing more than one variant of cigarette per brand family and demanding the display of noticeable health warnings on the packaging cannot be considered an investment treaty breach, but rather constitute a legitimate exercise of the state's police power. Further, the tribunal rejected Philip Morris' claim that it had been denied justice because the Uruguayan Supreme Court and the Tribunal de lo Contencioso Administrativo had issued contradictory rulings on whether Uruguay's Ministry of Public Health had the authority to require health warnings on cigarette packages to cover more than 50 per cent of the packaging. While reputable arbitrator Jan Paulsson had provided expert evidence and attested an 'Orwellian display of arbitrariness', the tribunal assigned to the case found no more than 'a quirk of the judicial system', which did not justify a finding of a denial of justice. The arbitrator appointed by Philip Morris could not resist the urge to issue a concurring and dissenting opinion. While agreeing with almost all of the conclusions in the award, he voiced his 'fundamental disagreement' with the tribunal's conclusions regarding Uruguay's failure to provide Philip Morris any means of judicial recourse following the contradictory decisions of its courts, as well as the tribunal's finding that Uruguay's 'single presentation requirement' for tobacco products did not constitute a denial of fair and equitable treatment. This is the second defeat for Philip Morris. In December 2015, claims raised by Philip Morris against Australia in an UNCITRAL arbitration administered by the Permanent Court of Arbitration were rejected. Unlike in the present case, the tribunal declined its jurisdiction over the claim brought by Philip Morris under the BIT between Hong Kong and Australia, and thus refrained from entering into an examination of Australia's right to regulate. It is not clear yet whether this concludes Philip Morris' fight against plain packaging laws. In any case, the two cases most frequently invoked as textbook examples of why investor-state arbitration allegedly poses a 'threat to democracy' can no longer serve as ammunition in the fight against investor-state arbitration. Needless to say, it remains to be seen whether this will affect the debate, or whether the outrage of opponents of investor-state arbitration will just retreat further into the 'post-factual' or 'post-truth'.

As in the previous year, the *Yukos* case has not disappeared out of the headlines in 2016. Instead, the story took a new turn – or, rather,

several new turns. Undoubtedly, the most spectacular development was the decision of the Hague District Court handed down in April 2016, which set aside the US\$50 billion award obtained by the former majority shareholders in the Yukos Oil Company on the basis of the Energy Charter Treaty (the ECT). In what has been described as a spectacular reversal of fortune for Russia, the Court agreed with Russia's reading of article 45 of the ECT on provisional application and found that Russia as a state having never ratified the ECT was only bound by those provisions reconcilable with Russian law, including its Constitution. On this basis, the court proceeded to find that article 26 of the ECT and the unconditional offer to arbitrate any disputes concerning alleged breaches of the ECT was not binding for Russia, and the shareholders' notice of arbitration on Russia thus did not constitute a valid arbitration agreement. The court concluded that, accordingly, the arbitral tribunal had not been competent to hear the case. Other reasons for setting aside the award brought forth by Russia were not considered by the Dutch court. The shareholders' initially continued the enforcement battle they had commenced in 2015 in France, Belgium, Germany, England and the US. In July 2016, the shareholders appealed the decision of the Hague District Court setting aside their award against Russia, and at the same time temporarily suspended the recognition and enforcement proceedings initiated in various jurisdictions. While the shareholders had applied for a bifurcation of the proceedings so that arguments relating to the provisional application of the ECT could be considered separately from others, this request was denied by the Court of Appeal in The Hague in September 2016. At the time of writing, it was thus expected that the shareholders would file a statement including all their grounds of appeal for collective consideration by the Court by late December 2016. This will have to include a response to Russia's claims that the tribunal's assistant spent more time on the award than any of the arbitrators, raising the question of whether he performed substantive decision-making obligations effectively, which would make him a fourth arbitrator. At the same time, another investment arbitration in the *Yukos* orbit is in the offing. In October 2016, Russia's former space agency, Roscosmos, and its partners addressed a formal letter to the French prime minister, threatening to bring an investment treaty claim against France over the seizure of €300 million in funds in the wake of enforcement proceedings of the former Yukos shareholders. According to Roscosmos, the French courts' refusal to release the assets has deprived it of fair and equitable treatment guaranteed by the BIT between France and Russia. In sum, there is thus every reason to believe that the *Yukos* saga will be a topic of next year's publication as well.

Finally, a potential landmark decision of the ECJ that is expected to have a tremendous effect on investment treaty arbitration within the European Union was still outstanding at the time of writing. In May 2016, Germany's Federal Court of Justice stayed proceedings in which Slovakia is challenging a €22 million award obtained by Dutch insurer Achmea in a dispute concerning Slovakia's decision to reverse the liberalisation of its health insurance market. On the basis of the BIT between Slovakia and the Netherlands, Achmea initiated investor-state arbitration in Germany in 2008. Throughout the proceedings, Slovakia objected to the arbitral tribunal's jurisdiction, arguing that the arbitration clause in the BIT was in conflict with EU law and thus invalid, and challenged both the award on jurisdiction as well as the final award, ordering Slovakia to pay damages to Achmea. The Federal Court of Justice called to rule upon Slovakia's challenge of the final award now requested guidance from the ECJ on the compatibility of BITs between member states of the European Union (intra-EU BITs), and in particular their arbitration clauses, with EU law. In its reference for a preliminary ruling, the German Federal Court of Justice made it very clear that it does not see a conflict between arbitration clauses in intra-EU BITs and articles 344, 267 or 18 of the Treaty on the Functioning of the European Union (TFEU). In particular, it argued that while the principle of equal treatment may be affected given that the option to initiate investor-state arbitration is merely granted to investors of the other contracting party, such violation would not lead to the invalidity of the arbitration clause, but rather to its extension to all investors from member states. It will be very interesting to see how the ECJ will position itself, in particular because the German Federal Court of Justice's reasoning stands in stark contrast to the EC's stance, which in the past years has made no secret of the fact that it is strongly in favour

of cancelling all intra-EU BITs it considers to be in breach of EU law and redundant within the EU's single market. Indeed, the reference for a preliminary ruling was made almost a year after the EC initiated infringement proceedings against Slovakia, the Netherlands, Austria, Romania and Sweden for not terminating their intra-EU BITs, and preceded the reasoned opinion issued by the EC in September 2016, requesting the five member states to terminate their intra-EU BITs. Similarly, the EC increasingly interferes in investment arbitrations and even went as far as prohibiting Romania from complying with an award the EC considered to breach EU state aid law. This is a dangerous precedent that might backfire. Should international organisations and states be allowed to disregard international arbitral awards because they allegedly do not comply with their internal rules? The answer of international law is clearly 'no'. At least, the ECJ's decision will end the internal legal uncertainty created by the EC. Hopefully, the ECJ will agree with the view expressed by the German Federal Court of Justice. If the ECJ should agree with the EC instead, this may have severe consequences for pending arbitration proceedings initiated on the basis of intra-EU BITs – and for future arbitrations to be initiated on their basis. Perhaps it will then become necessary to revert to a joint proposal of France, Germany, the Netherlands, Austria and Finland made in April 2016, when the governments of those states proposed the coordinated termination of all intra-EU BITs, and their replacement by an intra-EU multilateral investment agreement setting out all protections traditionally found in BITs – as well as scattered across several legal instruments of EU law – in one single document. Given the present public opposition to investment protection and arbitration, this proposal is, however, unlikely to find favour with EU voters and all EU member states.

The relationship between EU law and international investment law was also addressed by an ICSID tribunal in June 2016. In the case of *RREEF v Spain*, an ICSID tribunal rejected the notion that there is an inconsistency between the ECT's arbitration provisions and EU law, and further held that, even if such conflict would exist, the ECT would trump EU law, thus dismissing the jurisdictional objections raised by Spain on the basis of these arguments. From the point of view of the arbitral tribunal, there is no indication that the signatories of the ECT intended to exclude intra-EU investments from the scope of the treaty, which imposed an 'unqualified obligation' on the arbitral tribunal to apply its provisions. The case ties in with a number of other decisions rendered by arbitral tribunals rejecting the argument that intra-EU BITs have been replaced by EU law, as well as the decision in *Charanne v Spain* rendered in January 2016 and the decision in the *Electrabel v Hungary* case rendered in 2012, both of which rejected the same intra-EU objection with regard to the ECT. Interestingly, the tribunal in *RREEF v Spain* twice refused an application by the EC to intervene as *amicus curiae*. It remains to be seen whether the EC will allow Spain to comply with a final award, if *RREEF* should succeed also on the merits.

We hope we have continued to share our interest in international arbitration and that we can promote the acceptance of this dispute resolution process as an efficient and effective means of settling disputes. Certainly, the recent developments in this ever-changing field continue to show that international arbitration is striving to preserve and enhance its qualities. For this specialist edition, we used a separate arbitration-related questionnaire as the basis for the country contributions and hope that this guide will be a useful tool for the practitioner reviewing whether a certain jurisdiction or domestic arbitral institution is suitable for the given circumstances. For the 12th edition, we have slightly modified the questionnaire. In particular, in light of the increasing involvement of third-party funders in (international) arbitration proceedings, we now address regulatory restrictions for third-party funding of arbitral claims pursuant to domestic arbitration law, domestic jurisprudence and rules of domestic arbitral institutions (question 51).

Our thanks are extended to everyone who has contributed to this edition, in particular Laura Bräuninger, and we look forward to working with all of you on the 13th edition.

Any suggestions or comments are welcome and should be addressed either to us (stephan.wilske@gleisslutz.com and gerhard.wegen@gleisslutz.com) or to the publisher, Gideon Robertson (gideon.robertson@lbresearch.com).

CEA

José María Fernández de la Mela and Fernando Cabello de los Cobos*

Spanish Court of Arbitration

History and structure

Founded in 1981, the Spanish Court of Arbitration (CEA) is the oldest Spanish arbitration institution.

Managing the arbitration cases entrusted to it is CEA's main purpose. Additionally, CEA is actively engaged in promoting arbitration best practices and enhancing the understanding of arbitration among practising lawyers. It supports all kinds of arbitration-related initiatives and events across Spain, as well as the Spanish Arbitration Club.

The CEA's organic institutional structure is made up of a presidency, two vice presidencies, a permanent committee that manages the Court's consultancy activity and the secretary general. There is also an arbitrator appointment committee and specific commissions of a scientific nature.

CEA Rules

Modelled upon the best arbitration standards, the Spanish Court of Arbitration Rules (the Rules) came into force on 15 May 2010. They were updated in 2011 in view of Law 11/2011, which amends the 60/2003 Spanish Arbitration Act.

Pursuant to article 1.2 of the Rules, the arbitrations entrusted to the Court shall be administered according to the Rules in force at the date the arbitration begins, unless the parties have expressly agreed otherwise.

Cutting-edge procedure for appointing arbitrators

Arbitrators are appointed using an open system, with the candidates being appointed or proposed by the CEA, or those appointed by the parties being confirmed by the Court. If the Court appoints the arbitrators, the committee enabled for this purpose shall prepare a list with several names (at least three) for each arbitrator to be nominated, so that the parties may be heard on their preferences regarding the proposed candidates, thus ensuring the maximum transparency in their appointment.

Emergency arbitrator

When a party requests an urgent measure prior to the constitution of the tribunal, the Court may appoint an emergency arbitrator to decide on the application for urgent measures pursuant to article 15 of the Rules.

Proportional awarding of costs

Unless otherwise agreed by the parties, the general principle applicable is that arbitrators may justify the awarding of costs based on the principle that their decision must proportionally reflect the success or failure of the litigation, thus using the 'costs follow the event' approach.

Provisions for summary and fast-track proceedings

Appropriate measures are implemented for matters involving minor sums or those that need a resolution as fast as possible.

Arbitration proceedings

The Spanish Court of Arbitration performs its functions under the principles of transparency, efficiency and confidentiality.

The parties may freely determine the place of arbitration. In the absence of an agreement, this place will be Madrid. The language of arbitration shall be the one used to draft the arbitration agreement, unless otherwise agreed by the parties (articles 5 and 6 of the Rules).

The CEA has extensive experience in arbitration proceedings in Spanish, English and French.

Initiation of proceedings

The arbitration procedure begins by filing a request for arbitration (article 17.1 of the Rules). As the use of electronic communication is preferred (article 7.3 of the Rules), the request (including all enclosed documents) may be submitted to arbitraje@camara.es, or, if the request cannot be submitted by email, to the CEA Registrar (C/Ribera del Loira 12, 28042, Madrid, Spain).

Pursuant to article 17 of the CEA Procedural Rules, the request must contain:

- complete identity or corporate name, address, telephone, fax, email and other relevant data, of the claimant or claimants filing the request for arbitration, as well as of the defendant or defendants, and their representatives and advisers, to allow the Court to identify, contact and communicate with them;
- a brief description of the dispute and the claims that are subject to arbitration and their amounts;
- identification of the action, contractual documents or documents or legal transactions from which the dispute submitted to arbitration derives, as well as the arbitration agreement or specific agreement that binds the parties and from which submission to the Court is deduced or derived – providing, as the case may be, a copy thereof unless said submission is sought in the request for arbitration itself as a result of its acceptance by the defendant or defendants; and
- other relevant procedural details such as place of arbitration, number of arbitrators and language, among others.

Initial review

If the defendant or defendants fail to appear before the Court within the period conferred or if any party raises an objection concerning the existence, validity or scope of the arbitration agreement, the Court shall decide *prima facie* based on an initial review (article 18.1 of the Rules). Notwithstanding that, if the Court decides to continue with the proceedings, in accordance with the competence-competence doctrine, the final decision regarding the existence, validity and scope of the arbitration agreement and competence of the Court shall be the responsibility of the arbitrators. They shall decide on their own jurisdiction, including objections relating to the existence, validity or effectiveness of the arbitration agreement, or any others whose consideration prevents them from addressing the substance of the dispute under arbitration (articles 14 and 18.2 of the Rules).

Joinder and intervention of third parties

At the request of a party, the Court may agree on the joinder of arbitration in cases where, if heard separately, the awards could be issued with contradictory, incompatible or mutually exclusive decisions or grounds (article 19.1 of the Rules).

After hearing the parties, arbitrators may decide on the request of intervention of a third party that was not originally a claimant or defendant and that has a direct and legitimate interest in the result. The admission would be subject to the payment of arbitrators' and the Court's fees and shall not entail the suspension or backtracking of the proceedings, except for arguments necessary for the third party's

defence when proceedings had already been carried out (article 19.2 of the Rules).

The arbitral tribunal

The CEA maintains an open list of arbitrators, including more than 350 national and international experienced lawyers, specialised in all areas, so it can also appoint or confirm arbitrators not on its list.

The Court lays down an open system for appointment of arbitrators in article 12 of the Rules, as arbitrators proposed by the Court are appointed by the parties, and those appointed by the parties are confirmed by the Court. In the absence of agreement on the number and identity of all of the arbitrators, the Court shall appoint a sole arbitrator, therefore encouraging time and cost-efficiency.

If the Court appoints the arbitrators, the committee for the appointment of arbitrators shall prepare a list with several names that shall be sent to the parties, who may cross out the names to which they object, while they must number the rest of the names on the list in order of preference. The Court shall choose the candidate who, not having been crossed out, was preferred by the parties. When the nature, complexity, and other circumstances of the dispute submitted to arbitration require the appointment of an arbitral tribunal, it shall comprise three members. The Court, ex officio or at the joint request of all of the parties, may allow, in the absence of agreement, each of the parties to appoint an arbitrator. Both shall appoint a chairman through mutual agreement. If co-arbitrators fail to reach an agreement on the president of the arbitral tribunal, one shall be appointed by means of the aforementioned list system.

The arbitral tribunal is entitled to decide *ex aequo et bono* when expressly agreed by the parties (article 4.2 of the Rules).

In cases of international arbitration, the advisability of appointing a sole arbitrator or president of a different nationality (including that of shareholders or of majority stakeholders) than either of the parties shall be borne in mind (article 13.1 of the Rules).

The standard declaration of independence and impartiality drafted by the CEA whereby arbitrators state their personal and professional details contains an express adherence to IBA Guidelines on Conflicts of Interest in International Arbitration.

Challenges to arbitrators

Arbitrators must disclose any circumstance that may be relevant to their appointment or that may arise thereafter and throughout the arbitration proceedings, or that directly or indirectly may raise any justified doubts on their impartiality, independence or suitability as an arbitrator. The parties may challenge the arbitrators once their appointment has been confirmed, when such circumstances arise, by means of a request addressed to the arbitrators in which they must specify and justify the facts on which they base the challenge, and they must provide *prima facie* evidence. The Court must hear the arbitrator and the parties involved and decide on the challenge. If the challenge is upheld or the challenged arbitrator accepts the challenge, the next arbitrator in the parties' order of preference will be appointed (articles 13.3 and 13.4 of the Rules).

An arbitrator may also be declared unable to perform his or her duty and be replaced when the arbitrator is, *de facto* or *de iure*, prevented from performing his or her duties, the parties agree to such removal, or if the arbitrator behaves in a manner that is incompatible with the integrity required to perform the arbitration duties, or for any other reason fails to carry out his or her duties within a reasonable term (article 13.5 of the Rules).

Conduct of proceedings

The arbitration procedure shall be subject to the principle of due process (article 16 of the Rules).

The terms of reference shall determine, among others, the procedural timetable (article 20 of the Rules). Accordingly, the filing of new claims shall require authorisation from the arbitrators, considering the nature of such claims, the status of the process and other relevant circumstances (article 22.3 of the Rules).

The management of the hearings is under the sole responsibility of the arbitral tribunal, which may hold a hearing even if one of the parties fails to appear without providing just cause, after having been summoned with sufficient notice (article 24 of the Rules).

Any procedure that requires the attendance of the parties can only be held outside of the place or seat of arbitration with express consent of the parties or by means of prior ruling of the arbitral tribunal in this regard (article 5 of the Rules).

Once post-hearing briefs have been filed, the arbitrators shall declare the proceedings closed and further submissions are only permitted with the Arbitration Tribunal's authorisation (article 27 of the Rules).

The arbitrators must decide on the dispute submitted to arbitration in a single award or in as many partial awards as they deem necessary. They must do so within the five months following the date on which the reply to the claim or the counterclaim was filed or upon the expiration of the term. The term of five months may be extended under special circumstances for an additional period not exceeding one month. Only the Court can decide on an extension (article 28.1 of the Rules). The term to issue the award shall be three months in a summary procedure in which the total cost of proceedings is less than €300,000 (article 35 of the Rules).

Prior review of the award is laid down in article 30 of the Rules, but the Court may only suggest strictly formal amendments.

Statutory arbitration

The Rules provide for statutory arbitration in article 40 of the Rules.

This article stipulates joinder of proceedings when a party files a request for arbitration related to a company conflict on which the Court has a case pending before it. The Court may, after consulting with all of the parties, allow third parties to join the arbitration as co-claimants or co-defendants. Once the arbitrators are appointed, they shall have the authority to include third parties if so requested. The article also allows for holding the appointment of arbitrators in those cases where a single conflict may lead to successive arbitration claims.

Corte
Española de
Arbitraje

José María Fernández de la Mela
Fernando Cabello de los Cobos

josemaria.mela@camara.es
fernando.cabello@camara.es

Official Chamber of Commerce of Spain
C/Ribera del Loira 12
28042 Madrid
Spain

Tel: +34 91 590 69 00
Fax: +34 91 590 69 08
www.corteespanolaarbitraje.es

CEA standard clause

Any dispute arising out of the present contract shall be resolved definitively by means of arbitration administered by the Spanish Court of Arbitration, in accordance with its Rules and By-laws. The Court is entrusted with the administration of arbitration and the arbitrator or arbitrators' appointment.

Contact details

Spanish Court of Arbitration
C/ Ribera del Loira 12
28042 Madrid

Spain

Tel: +34 91 590 69 16

Fax: +34 91 590 69 08

arbitraje@camara.es

www.corteesspanolaarbitraje.es

* *The authors have worked on this revised version from the original article, with the acknowledgement that Mr Pablo Poza and Ms Ana Blanco wrote it.*

CEAC

Eckart Brödermann and Christine Heeg Chinese European Arbitration Centre

Thomas Weimann Chinese European Legal Association

Introduction

What is the importance of arbitration in China-related trade and investments?

International commercial arbitration plays an important role in China-related trade and investments. As China increases its import and export trade rapidly, there is an increasing number of Chinese, European and other companies worldwide involved in contracts for China-related trade and investments. This leads to a need for dispute resolution mechanisms to support such contracts.

International arbitration provides the backbone, securing access to justice for market participants in China-related transactions. Chinese state court judgments are not recognised and enforceable in many countries, in particular in Europe, because of a lack of reciprocity, and foreign judgments are often impossible to enforce in China. There is no functioning system of international treaties securing the enforcement of national state judgments in China and vice versa. In contrast, China is a party to the 1958 New York Convention on Recognition and Enforcement of International Arbitral Awards, which is in force in 160 states worldwide, including all EU countries and the US. Therefore, international arbitral awards can be enforced in China (whereby, from a Chinese perspective, the 'nationality' of an arbitration award made under the rules of an institutional organisation is determined in light of the seat of the administration of the arbitration institution). Under these circumstances, recourse to arbitration is an important alternative to dispute resolution by ordinary courts. Arbitration gives the parties the best chance of getting a final judgment that is enforceable.

In addition, arbitration is preferable to proceedings before ordinary state courts because it can be faster than court proceedings and, in most cases, cheaper (this is true, at least, when comparing arbitration to fully fledged litigation in more than one instance). For example, there is no need for the translation of documents if the parties agree on English or any other language as a common language and present their documents and submissions in the chosen language to arbitrators who speak such a language.

Arbitration, further, is an important tool for dispute resolution in contracts related to China, if the parties wish to agree on strict confidentiality.

What is the importance of institutional arbitration in China-related trade and investments?

Chinese national law provides for institutional arbitration. Presently, there is a debate in China about the admissibility of ad hoc arbitration under Chinese law. For international disputes, ad hoc arbitration is not legally prohibited in China. However, article 16, paragraph 3 of the PRC Arbitration Law requires the mentioning of 'the arbitration commission chosen'. Further, recourse to institutional arbitration provides the advantage that, in the case of recognition and enforcement proceedings in China, this kind of arbitration is known to the competent Chinese judges. As a result, it is wise to provide for institutional arbitration in China-related contracts to avoid hurdles during the enforcement process.

What is the Chinese European Arbitration Centre (CEAC)?

Overview

The CEAC is an international dispute resolution institution focusing on China-related disputes worldwide. The first cases from seven

jurisdictions among four continents show that CEAC is accepted worldwide. It was established in September 2008. Based on an intensive international dialogue including listening to Chinese and foreign China experts, the CEAC Rules provide a tailor-made solution for international disputes in China-related matters. This applies, most importantly, to international contracts with Chinese parties, to joint venture agreements with Chinese or Chinese-controlled companies or to contracts with subsidiaries of Chinese companies in other countries (eg, Europe, North and South America and Africa).

The CEAC Arbitration Rules are based on and are loosely identical to the UNCITRAL Arbitration Rules. They have been duly adapted to the 2010 UNCITRAL Arbitration Rules and in 2012 have been amended again to meet the practical needs of China-related arbitration derived from practice in the first CEAC cases pending since the beginning of 2012. A key feature of the CEAC Rules is the special focus on neutrality, in particular with respect to the composition of the appointing authority (that appoints the arbitrator if the parties do not agree on a sole arbitrator or the chairman of an arbitration panel if the two party-appointed arbitrators cannot agree on a chairman). The CEAC focuses on neutrality and the equal treatment of China, Europe and the world (outside China and Europe) is also evidenced by it being based on the neutral and universally accepted UNCITRAL Arbitration Rules and by the integration of neutral rules of law in the CEAC choice of law clause (article 35 CEAC Rules, which was the subject of the 2012/13 worldwide Willem C Vis Moot Court competition).

The CEAC Rules are available in a 'short version' as the CEAC Core Rules, showing all supplements and amendments to the underlying UNCITRAL Arbitration Rules 2010 and in a 'consolidated version', integrating the applicable text of the UNCITRAL Arbitration Rules and highlighting any deviations in bold print.

The CEAC is seated in Hamburg, Germany, at the Hamburg Chamber of Commerce, which also operates the Beijing-Hamburg Conciliation Centre.

Have there been cases yet?

The CEAC saw its first cases in spring 2012 (which was, prior to the expectations of its founding association, the non-profit organisation Chinese European Legal Association (CELA)). From the first 11 cases filed since, it can be deduced that increasingly companies have integrated a CEAC arbitration clause into their standard terms of contract. One case has been coping with more than 100 contracts. In one case, the CEAC arbitration clause was part of a settlement agreement between a European and a Chinese party. Ten of the cases have been terminated (by awards, by a settlement on agreed terms and by withdrawal of the claim for different reasons: payment by the respondent, insolvency of the respondent and refusal of the insurer to finance the arbitration), and one case is pending.

The total amount in dispute amounts to an aggregate amount of about €60 million. Arbitrator fees in total incurred in these proceedings have so far amounted to approximately €500,000. Parties have come from Canada, China (Mainland and Hong Kong), Germany, Israel, Italy and Spain.

Cornerstones of the CEAC Arbitration Rules

What is the origin of the global spirit of the CEAC?

After several years of preparation and preliminary discussions in China, Europe and around the globe, the CEAC emerged in 2008 as a result of an international dialogue with, in the end, 470 supporters of the project from 47 nations. The dialogue was initiated by the Hamburg Bar Organisation during a formal visit of a delegation to the World Leading Cities Bar Conference, which was hosted by the Shanghai Bar Organisation in 2004 (Hamburg and Shanghai being twin cities). Following a number of background discussions including discussions with members of the Hamburg parliament, the concept of the CEAC Rules was then first discussed with a small international group of lawyers in April 2007 on the occasion of the annual meeting of the Inter-Pacific Bar Association (IPBA) in Beijing, which has been supporting a number of joint events (in Tokyo and in Washington, DC) in recent years.

The concept was first presented to the international arbitration community during a fringe event at the 2007 annual meeting of the International Bar Association (IBA) in Singapore hosted by the Hamburg Bar Organisation at the Singapore Cricket Club. At that time, lawyers from several nations started to discuss the concept and decided to further pursue the CEAC project on a worldwide basis. The process of elaboration of the CEAC Arbitration Rules was initiated and draft versions were sent around by email and were subject to international discussion before the 2008 IPBA annual conference in Los Angeles. Some law firms submitted detailed observations. Lawyers involved in arbitration proceedings in China gave detailed advice on the specifics of Chinese law and experts from UNCITRAL and UNIDROIT gave their input on the choice of law clause (see below). After numerous discussions and email exchanges about the first drafts, a number of final workshops took place in Hamburg to discuss the new rules, which were finally approved by the General Assembly of the CELA when the CEAC was founded in September 2008. This dialogue continued in 2009 and 2010 with arbitration experts from China, Europe and all over the world when the reform of the 2010 UNCITRAL Arbitration Rules was already under way. Once this reform was completed and the UNCITRAL Arbitration Rules 2010 became available, the CEAC Arbitration Rules were adapted to this new international and well-balanced standard integrating almost all amendments of the UNCITRAL Arbitration Rules 2010 and thus substituting some provisions of the prior version of the CEAC Rules (eg, on multiparty arbitration). Meanwhile, the tradition of such international discourse is continued at the traditional CEAC breakfast receptions at the IBA annual meetings and at various other events around the globe (eg, jointly with our friends from Chinese organisations). Such discourse and the results reflected in the rules and practice of the young institution are well accepted in the business and arbitration community. Proof of this are the cases that were filed with CEAC within its first years of operative arbitral business.

How is the CEAC adapted to the needs of China-related business?

The CEAC Arbitration Rules reflect the particular needs of China-related trade.

Most importantly, the CEAC Arbitration Rules ensure that judgments based on an arbitration clause referring to the CEAC Hamburg Arbitration Rules, the CEAC Arbitration Rules, the CEAC Rules or the Rules of the Chinese European Arbitration Centre or if the parties agreed on CEAC are recognisable and enforceable in China. In this respect, the Rules clarify that, irrespective of the drafting in the contract of the parties, there can be no doubt that the dispute is referred to an arbitration institution rather than to ad hoc arbitration and that the dispute shall be administered by CEAC. This correlates to the importance of institutional arbitration from a Chinese perspective. In this respect, article 1 paragraph 1a of the Rules (2012) and the CEAC arbitration clause (which is contained in an annex to the CEAC Arbitration Rules) differ from various standard clauses used by other arbitration institutions.

Further, the Rules put a special emphasis on ensuring equal treatment of the parties in China-related transactions. In view of the focus of the CEAC on China, this applies in particular to the active integration of Chinese arbitration experts into the CEAC boards and the appointing authority. Cross-cultural dialogue thereby takes place at an early stage. This ensures neutrality and recognition of the CEAC as an arbitration institution in China. For example, in 2010, the official

publication of the China International Economic and Trade Arbitration Commission (the CIETAC), Arbitration and Law, published a long article about the CEAC in Chinese (volume 116 (2010), pages 104 to 130). Further, both CIETAC and the Beijing Arbitration Commission (BAC) participated in joint events in China in 2009 and 2010. In 2011, the CEAC and the CIETAC jointly hosted the China Arbitration Day in Hamburg, which focused on China-related arbitration with speakers from China and Europe as well. In 2012, CIETAC, BAC, HKIAC and CEAC jointly co-hosted the China Arbitration Day in Munich with more than 130 participants from all over the world. Ever since, the dialogue has been continued at many occasions, for example, in Shanghai or Cologne.

The focused search for a form of neutrality (which is also acceptable as truly neutral by Chinese organisations and experts) is also reflected in the reference and incorporation of international rules accepted worldwide and, in particular, in China. This includes the UNCITRAL Arbitration Rules, the 1980 UNCITRAL Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts (see below). In addition, the German arbitration law (applicable at the Hamburg seat of the arbitration) is based on the UNCITRAL Model Law. Given that this is not the case for the Chinese arbitration law, the foundation of the German arbitration law on the UNCITRAL Model Law ensures an internationally acceptable level of neutrality for Chinese parties also.

What is the freedom provided for by the model arbitration clause?

The model arbitration clause proposed by the CEAC is available in various languages and will assist the parties to a China-related contract as early as the stage of contract drafting. At present, the model arbitration clause is available in English, German and Mandarin. It 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 CEAC in Hamburg (Germany) in accordance with the CEAC (Hamburg) Arbitration Rules.

In addition, the model arbitration clause provides options dealing with the number of arbitrators, the place for hearings, languages to be used in the arbitral proceedings, confidentiality and the applicability of the Rules as in force at the moment of commencement of arbitration proceedings or at the time of conclusion of the contract in dispute.

By providing future parties to a CEAC dispute with these options, the CEAC aims to offer a service to the parties on the one hand facilitating contract drafting and on the other hand reminding parties of a number of important issues to be dealt with in international commercial arbitration. The CEAC management is aware of several contracts in which the CEAC arbitration clause was integrated, including contracts not only involving Chinese and European parties but also African and South American parties. A special need of small and medium-sized companies in China and Europe for finding a dispute resolution mechanism for their joint business projects becomes obvious in various phone calls from such parties, about which the CEAC management has reported repeatedly. Such tendencies and application of the CEAC clause in all kinds of cases are confirmed by the first cases pending.

Is it sensible to combine the CEAC arbitration clause in China-related contracts with a mediation or conciliation clause?

Mediation and conciliation have a long history in China, as Chinese parties often want face-saving solutions with their business partners. European and other foreign companies are also keen to avoid bad press about their business activities in Asia. Therefore, it is sometimes wise to combine a CEAC arbitration clause with a mediation or conciliation clause. For example, the parties might like to provide for conciliation under the Beijing-Hamburg Conciliation Rules (which have been in force since 1987) or other ADR rules. Article 1 of the CEAC Arbitration Rules expressly provides for the possibility of initiating any such mediation or conciliation within 21 days after receipt of the notice of arbitration by the respondent, which, upon consent by the other party, will suspend the arbitral proceedings including all deadlines for up to three months or until the termination of the conciliation or mediation, whichever is earlier.

If the mediation is not finished within the three-month period, a further suspension of the arbitral proceedings requires the mutual written consent of all parties, which may be contained in separate documents.

Why does the model choice of law clause refer to CISG and the UNIDROIT Principles of International Commercial Contracts on an optional basis?

As a result of the international discussion, it became obvious that the majority of experts favoured a pragmatic approach. Therefore, the CEAC Arbitration Rules integrate a CEAC choice of law clause, as stated in article 35. It was based on input from both UNCITRAL and UNIDROIT experts.

The model clause provides for a number of possible and non-mandatory options. It thereby reminds future parties to a dispute of the fact that a choice of the law applicable to the substance of the dispute is of vital importance. Often parties from different jurisdictions wish to agree on a neutral law or set of rules. The model clause therefore offers the choices of simply choosing the law of a certain jurisdiction, referring to the CISG, which will often be common ground for both the Chinese and the non-Chinese party, or opting for the application of the UNIDROIT Principles of International Commercial Contracts, which are globally known and increasingly used in China, Europe and many other jurisdictions. China is a signatory state to the CISG. The UNIDROIT Principles of International Commercial Contracts influenced the Chinese legislature when drafting the new Chinese contract law in 1999 and as a result there are many similarities between the Chinese contract law and the UNIDROIT Principles. The model choice of law clause reads:

The arbitral 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:

This 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.

A quite specific, notable adaptation to China-related contracts is contained in the reference to the CISG 'without regard to any national reservation'. The clause thereby seeks to avoid the application of the national reservations to the CISG such as the one made by the PRC in accordance with articles 11 and 96 CISG at the time of the ratification (which, however, was later withdrawn with effect from 1 July 2013). This reservation was outdated. It concerned the requirement of written form whereas the Chinese contract law of 1999 does not require written form. Depending on the circumstances, some national reservations may still apply if they are not excluded. This is why the exclusion of national reservations in the CEAC choice-of-law clause is still helpful and avoids further research. The exclusion ensured that the CISG would be applied in this respect in accordance with standards that have also been recognised by the Chinese legislature for many years. This CEAC rule was based on the experience of a confusion between the 'Chinese' and the 'international' CISG in a German-Chinese arbitration in which the Chinese party tried to avoid the application of the outdated Chinese reservation.

Guiding principles: neutrality, division of power and party autonomy

How does the CEAC ensure neutrality by division of power?

A major principle of the CEAC is the tripartite division of power, which guarantees 360-degree neutrality for parties from any country. The CEAC pursues a truly global approach to achieve a balance of power,

by integrating arbitration experts from China, Europe and other parts of the world on an equal basis, for example in the appointing authority and the advisory board of the CEAC.

How does the CEAC apply the principle of division of power in the Appointing Authority?

Most importantly, the work of the appointing authority of the CEAC is based upon the principle of neutrality and balance of power. The appointing authority is competent for the appointment of arbitrators if the parties cannot agree on a sole arbitrator or if the party-appointed arbitrators of a three-person tribunal cannot agree on the chairman. It also decides on arbitrator challenges and on certain issues related to costs of the proceedings (eg, special fees in cases of extreme workload for the arbitrators involved). In view of the importance of the decisions of the appointing authority, the CEAC ensures neutrality by a balance of power in the competent chamber of the appointing authority.

The appointing authority is separated into chambers comprising three members, one member from China, one from Europe and one from the rest of the world. According to this principle of division of power, the CEAC ensures that there is always one expert from a neutral region who can particularly assist the panel of the affected chamber in the selection of a neutral arbitrator who takes the interests of both parties into account. The members of the first chamber of the appointing authority are Lu Song (China), Angelo Anglani (Italy) and Karen Mills (US/Indonesia). The second chamber, which was established in autumn 2009, consists of Li Yong (China), Bart Kasteleijn (Europe) and Nayla Comair-Obeid (Lebanon).

The competences of the chambers in the appointing authority are determined according to the first letter of the name of the respondent named first in the notice for arbitration. At present, the first chamber is competent for the letters A to M and the second chamber for the letters N to Z. In the first 10 cases, the parties succeeded in agreeing on a sole arbitrator or the co-arbitrators succeeded in agreeing on a presiding arbitrator without recourse to the appointing authority.

How does the CEAC apply the principle of division of power in the management of the CEAC?

According to section 6 of the CEAC's articles of association, the management consists of one or more managing directors. At present, one Chinese law professor and two German lawyers are active in the management of the CEAC responsible for the administration of arbitration proceedings and the ordinary course of business of the arbitration institution, as well as for the marketing of the institution in China and Europe, which is the secretary general's task within the CEAC management. It is expected to include a representative from another part of the world outside China and Europe.

Who controls the CEAC Arbitration Rules?

The Advisory Board of the CEAC is responsible for amendments to the CEAC Rules. It also advises the CEAC management on matters concerning the administration of arbitration proceedings and other issues of importance. In view of this important function of the advisory board, the principle of tripartite division of powers between representatives of China, Europe and the other regions of the world applies to the advisory board of the CEAC, which at the moment includes experts from mainland China, Hong Kong, Germany, Italy, Switzerland and the United Kingdom. The members include experts with experience in large arbitration institutions, for example, a former president of the Chartered Institute of Arbitrators, Hew R Dundas, who is the chairman of the Advisory Board, and the former secretary general of the Hong Kong International Arbitration Centre, Christopher To. They also generally assist the CEAC's management with considerable international arbitration know-how.

Why is party autonomy so important for the CEAC?

Party autonomy enables the parties to make the arbitration proceedings suitable, as far as possible, to the case in question.

The CEAC Rules allow the parties to choose freely among arbitrators from around the world and to decide on the appointment of such arbitrators by themselves without approval of the CEAC. The appointing authority steps in only if the parties do not reach an agreement by themselves. Further, the parties are free to decide on the languages to be used in the arbitral proceedings and the places for oral

hearings or meetings of the arbitrators. The CEAC does not intervene in the arbitration procedure itself, which is left to the parties and the appointed arbitrators.

This strict adherence to the principle of party autonomy guarantees the highest level of influence of both parties in the arbitral proceedings.

Miscellaneous

In what respect do the CEAC (Hamburg) Arbitration Rules deviate from the UNCITRAL Arbitration Rules?

Since the amendment of both the UNCITRAL Rules and, therefore, the CEAC (Hamburg) Arbitration Rules in 2010 and 2012, there remain very few differences. Many issues that are state of the art for a modern international arbitration centre (eg, multiparty arbitration) are now covered directly in the UNCITRAL Rules. In such cases in 2010, the CEAC Advisory Board deleted initial special provisions in the CEAC Rules on these issues and replaced them with the UNCITRAL Rules in order to ensure a maximum of correlation between the CEAC Rules and the UNCITRAL Rules. Special CEAC rules concern only a few topics:

- the scope of application including the combination of arbitration and conciliation or mediation (article 1, paragraph 4);
- introduction of institutional arbitration (article 3) and a respective model arbitration clause;
- the exclusion of liability of the CEAC and its officers (article 16);
- Hamburg as the default standard seat of arbitration with the express possibility of deviating to other venues for the hearings (article 18);
- a time limit for the award (article 31a);
- the choice of law clause (article 35); and
- costs and fees (articles 40, 41, 43).

What are the costs of arbitral proceedings under the CEAC Rules?

Costs for CEAC arbitral proceedings are determined in accordance with the CEAC fee schedule and its annex, which contains a table of fees related to the amount in dispute. Fees for arbitrators and administrative fees for the CEAC are generally based on the amount in dispute. However, this rule is supplemented by a special rule for cases with heavy workload for the arbitrators. Costs for CEAC arbitration proceedings are reasonable and comparable to the schedules of costs of other renowned international arbitration institutions.

How long will the arbitral proceedings take?

Another provision aiming to boost the efficiency of CEAC arbitration proceedings is article 31a of the CEAC Rules, which provides that the arbitral tribunal shall render a final award within nine months after constitution of the arbitral tribunal, unless agreed otherwise by the parties. Five of the first 10 cases have been concluded within six months.

Young CEAC

The CEAC division for young practitioners (with fewer than eight years of practice) is Young CEAC. Founded in 2008, it has organised its first events in Germany, often attracting participants from several European countries. In June 2010, Young CEAC Beijing was founded in the presence of the president of the Beijing Bar Association.

In November and December 2010, Young CEAC hosted arbitration events both in China (Beijing and Shanghai) and in Germany (together with the division of young practitioners of the German Institution of Arbitration DIS in Frankfurt). In 2011, Young CEAC, jointly with Young Austrian Arbitration Practitioners, hosted a coffeehouse debate about cultural specifics of arbitration in China and Europe at the occasion of the 2011 Vis Moot in Vienna. Young CEAC Taipei was founded in March 2012 and the Young CEAC community grows continuously. 2016 has seen the kick off for the relaunch by the second generation of Young CEAC experts. In November 2016, Young CEAC organised an event on 'Arbitration in China' jointly with the German DIS arbitration organisation.

The non-profit organisation behind the CEAC: what is the Chinese European Legal Association?

The CELA is a German non-profit organisation with about 250 members from more than 30 nations. The founding members of the CELA include the Hamburg Bar Organisation and the Hamburg Chamber of Commerce.

The management of the CELA is presently Austrian, Chinese and German. The chairman of the international Advisory Board is Gao Zongze, a former president of the All China Lawyers' Association and a former president of the Inter-Pacific Bar Association.

The CELA has its seat at the offices of the Hamburg Bar Organisation. It was established in July 2008 to provide a neutral buffer between the law firm members of the CELA and the independent arbitration institution, the CEAC (under the CEAC ethical rules, members of the CEAC boards and members of CELA boards are ineligible for appointment as arbitrators by the CEAC). Law firms supporting CELA cannot have any influence on CEAC arbitration procedures. Although the CEAC has received official support from the state of Hamburg, it is, through the CELA, a product of the self-regulation of and innovation by lawyers. The official support by the state of Hamburg is limited to patronage of the CEAC project by the Hamburg Senator of Justice and a remarkable change of Hamburg court rules to permit parties to CEAC arbitrations to use the official letter box of the Hamburg Court of First Instance to submit documents to the CEAC's administration. This is helpful when a party wishes to meet a deadline after office hours or on a weekend or a holiday.

The CELA is an association that promotes legal and legal cultural exchange between Europe and China. It focuses in particular on the education of lawyers in the field of alternative dispute resolution. The CELA's purpose is 'to support the interaction and exchange between China and Europe and the world regarding issues of economics, law and legal culture' and 'to make a contribution to the avoidance, settlement and resolution of disputes related to international trade from and to China'.

Given this purpose, the CELA has always supported the Vis Moot Court in Vienna (2009-2017) and Hong Kong and the Düsseldorf Arbitration School. In 2012-2013, the problem of the 20th Vis Moot Court competition in Vienna and the 10th in Hong Kong was based on the CEAC Rules. CELA and CEAC have jointly organised a pre-moot in Düsseldorf with about 300 participants from many jurisdictions. CEAC's chairman of the advisory board and a CEAC managing director have chaired the finals in Hong Kong and Vienna. An 'award' of that competition has been published in Australia. In 2010, CELA has also become an official supporter of the China-EU School of Law. It also supports conferences and events organised by the CEAC and Young CEAC.

The CELA is open to all experts active in the field of international commercial arbitration and interested in or engaged in China. It offers two types of membership: law firm membership or individual membership at differing rates, depending on the size of the law firm and the country where the individual member comes from.

The CEAC is still a young arbitration institution tailor-made for international commercial disputes related to China. It has a particular emphasis on service orientation for future parties to arbitration.

It is tailored to the specifics of Chinese law and culture and at the same time ensures neutrality for parties from all over the world.

The CEAC is open for disputes even if there is only a remote or even no connection to China, if the parties wish to refer their case to CEAC arbitration. In this case, the composition of the appointing authority (including Chinese, European and other members) will ensure neutrality. CEAC is aware of at least one large international company using CEAC clauses for all its Asian related contracts. It will be a few years before the CEAC has a fully active caseload. Yet, the first 10 cases since spring 2012 have shown that CEAC has been accepted by the international business community. The high level of recognised international experts involved in the project and, in particular, in the appointing authority ensures that the quality of the arbitrations corresponds to international standards. In recent years, a number of companies have started to integrate CEAC clauses into their contracts. CEAC started to administer proceedings in early 2012.

The future of the CEAC will be shaped by the continuation of the international dialogue that strives for dispute prevention and dispute resolution in a time and cost-efficient manner. The CEAC Rules have been discussed at events organised, for example, in Beijing, Boston, Brussels, Buenos Aires, Dubai, Dublin, Düsseldorf, Frankfurt, Hamburg, Hong Kong, Jinan, London, Madeira, Madrid, New York, São Paulo, Shanghai, Taipei, Tokyo, Tsingdao, Vancouver, Washington, DC and Zurich. Also, the CEAC has concluded formal cooperation

agreements with the Hong Kong International Arbitration Centre and the Kuala Lumpur Regional Arbitration Centre.

Professor Dr Eckart Brödermann LL.M. FCI Arb (Hamburg University; Brödermann Jahn, Hamburg) is the present managing director of CEAC. Dr Christine Heeg LL.M. (KPMG, Düsseldorf) serves as CEAC's secretary general. Thomas Weimann (Herbert Smith Freehills, Düsseldorf) is president of the institution's founding non-profit association CELA. All three are practising attorneys specialising in international arbitration acting as counsel and as arbitrators in their professional practices.

The contact details for the CEAC, Young CEAC and the CELA are as follows and further information can be found on their websites:

Chinese European Arbitration Centre (CEAC)
c/o Handelskammer Hamburg
Adolphsplatz 1
20457 Hamburg
Germany
www.ceac-arbitration.com

Chinese European Legal Association (CELA)
c/o Hanseatische Rechtsanwaltskammer
Valentinskamp 88
20355 Hamburg
Germany
www.cela-hamburg.com



Eckart Brödermann
eckart.broedermann@german-law.com /
broedermann@ceac-arbitration.com
Christine Heeg
cheeg@kpmg-law.com / heeg@ceac-arbitration.com

Thomas Weimann
thomas.weimann@hsf.com /
weimann@cela-hamburg.com

Adolphsplatz 1
20457 Hamburg
Germany
Tel: +49 40 66 86 40 85
Fax: +49 40 66 86 40 699
www.ceac-arbitration.com

c/o Hamburg Bar Organisation
Valentinskamp 88
20355 Hamburg
Germany
Tel: +49 40 66 86 40 85
www.cela-hamburg.com

DIS

Renate Dendorfer-Ditges*

DITGES PartGmbH

History and structure of the DIS

The German Institution for Arbitration (DIS) is the most important organisation for arbitration in Germany. It was established on 1 January 1992 as a result of the merger of the German Arbitration Committee and the German Arbitration Institute. The DIS is closely linked to the German Association of Chambers of Industry and Commerce and the German Chambers of Industry and Commerce, which are members of the DIS and refer to the DIS Arbitration Rules as the basis for their arbitration proceedings in general.

The primary goal of the DIS is to promote arbitration and, in a wider sense, alternative dispute resolution (ADR) as well as to support all arbitration-related matters across Germany. Therefore, the DIS offers arbitration as well as mediation and conciliation rules and rules for conflict management, adjudication and expert opinion, administers and facilitates arbitration as well as mediation and conciliation proceedings, offers arbitration-related services, organises conferences, seminars and other events related to arbitration (eg, the Petersberger Schiedstage or the Karl-Heinz Böckstiegel lectures) annually, and supports the publication of literature, court decisions and articles referring to arbitration or ADR, or both.

The DIS is a registered association with its seat in Berlin. Its main secretariat is located in Cologne. The management of the association, in particular the administration of arbitral proceedings, is conducted by the executive committee, headed by its secretary general, Dr Francesca Mazza.

The DIS is also governed by a board of directors, consisting of 19 members. An advisory board, consisting of 21 members assists the board of directors.

The DIS has approximately 1,100 members from Germany and abroad. A frequently updated list of all members is available online (see www.dis-arb.de). The membership-related benefits include free and unrestricted access to the full text version of the online database on arbitration-related German court decisions, an online directory of all members with an opportunity for the members to include their curriculum vitae and subscription of the *German Arbitration Journal*.

In 2015, 134 new arbitration cases were administered by the DIS. In previous years, on average, 130 cases per year were filed under the DIS Arbitration Rules and processed as well as managed by the DIS. The amount in dispute ranged from €30 to €2 billion. According to statistics, about 15 per cent of the cases end before the arbitral tribunal has been appointed, about 55 to 60 per cent of the remaining cases result in a settlement and 40 to 45 per cent end with a final award. In 2015, 28.8 per cent of the arbitration cases included foreign parties from, for example, China, Europe, India, Israel, Russia, Ukraine and the United States.

The DIS Arbitration Rules and Supplementary Rules

The DIS Arbitration Rules in effect were adopted on 1 July 1998. The appendix to section 40.5 DIS Arbitration Rules (Schedule of Costs) was revised with effect to 1 January 2005. The DIS Arbitration Rules are available on the DIS website (www.dis-arb.de) in English, German, French, Russian, Spanish, Turkish, Arabic and Chinese.

Referring to its section 1.1, the DIS Arbitration Rules apply to all disputes that, pursuant to an agreement concluded between the parties, are to be decided by an arbitral tribunal 'in accordance with the Arbitration Rules of the German Institution of Arbitration (DIS)'.

The DIS Arbitration Rules do not provide for a compulsory prima facie review of the validity of the arbitration agreement that must be submitted when filing a statement of claim according to section 6.2 DIS Arbitration Rules. Therefore, even if the reference to the applicability of the DIS Arbitration Rules is ambiguous or non-existent, the DIS will not refuse to administer the proceedings. It will, however, draw the claimant's attention to possible problems in respect of the validity or scope of the arbitration agreement. If the respondent objects to the competence of the arbitral tribunal, the decision on the validity of the arbitration clause remains with the arbitral tribunal.

In addition, the DIS provides supplementary rules for expedited proceedings (DIS-SREP), which were adopted in April 2008 and are available in German, English, French and Russian. The DIS Arbitration Rules remain applicable to proceedings conducted under the DIS-SREP to the extent that these rules do not contain more specific provisions. The duration of DIS-SREP proceedings should be no longer than six months (in the case of a sole arbitrator) or nine months (in the case of a three-member tribunal) after the filing of the statement of claim.

Further, the DIS Rules for Sports-related Arbitration were adopted on 1 January 2008 (see: www.dis-sportschiedsgericht.de). Similarly, the DIS founded together with the German National Anti Doping Agency the German Court of Arbitration for Sport according to the requirements of the UNESCO Anti Doping Convention. In all doping-related disputes, appeal to the International Court of Arbitration for Sport (CAS) is possible. Sport-related arbitration proceedings administered by the DIS are increasing: there were seven proceedings in 2014 and 16 proceedings in 2015.

In 2009, the DIS transferred the strict guidelines as decided by the German Federal Court of Justice for shareholder resolution disputes into practice by the adoption of the DIS Supplementary Rules for Corporate Law Disputes (DIS-SRCoLD), available in German and English. The Federal Court of Justice decided on 29 March 1996 (case No. II ZR 124/95) and 6 April 2009 (case No. II ZR 255/08) that shareholder resolutions passed by the shareholders' meeting may also be submitted to arbitration. However, strict requirements apply: basically it must be ensured that the arbitral proceeding offers the same legal protection as a state court proceeding. The DIS-SRCoLD, which also supplements the DIS Arbitration Rules, entered into force on 15 September 2009.

The DIS-SRCoLD are especially suitable for limited liability companies under German law. They are, generally, also applicable for partnerships. However, arbitration agreements included in the statutes of a stock corporation listed on the stock exchange are considered inadmissible because of the mandatory requirements applicable to the statutes of a stock corporation. Whether this also applies for a 'small' stock corporation with a limited number of shareholders, and which is not listed on the stock exchange, has not yet been decided.

General characteristics of DIS arbitration proceedings

The arbitration procedure offered by the DIS Arbitration Rules is very flexible, combining a high degree of party autonomy with full independence of the arbitral tribunal in the conduct of the proceedings.

Commencement of proceedings

The statement of claim must be filed with a DIS secretariat. Apart from the main DIS secretariat in Cologne, DIS also has secretariats in Berlin

and Munich. Proceedings commence when the statement of claim is received by the DIS (section 6.1 DIS Arbitration Rules). According to section 6.2 DIS Arbitration Rules, the statement of claim must contain an identification of the parties, a specification of the relief sought, particulars regarding the facts and circumstances that give rise to the claims, a reproduction of the arbitration agreement and a nomination of the arbitrator (unless the parties have agreed on a decision by a sole arbitrator). It is, however, under the DIS Arbitration Rules, generally not expected that the statement of claim already contains all details regarding the facts and circumstances that are relevant to the claims, including the offer for evidence. The facultative content of a statement of claim is listed in section 6.3 DIS Arbitration Rules, and includes:

- the amount in dispute;
- the proposal for the nomination of an arbitrator (where the parties have agreed on a decision by a sole arbitrator);
- details regarding the place of arbitration;
- the language of the arbitral proceeding; and
- the rules applicable to the substance of the dispute.

Upon filing the statement of claim, the claimant has to pay the DIS administrative fee as well as a provisional advance on the costs of the arbitrators (section 7.1 DIS Arbitration Rules). The statement of claim is delivered to the respondent by DIS (section 8 DIS Arbitration Rules).

Arbitral tribunal

Unless otherwise agreed by the parties, the arbitral tribunal consists of three arbitrators (section 3 DIS Arbitration Rules). Its wording is similar to section 1034(1) of the German Code of Civil Procedure. Considering the advantages and disadvantages of choosing an arbitral tribunal with three arbitrators (eg, expertise in different areas, higher quality of arbitration, but also higher costs) on the one hand, and choosing a sole arbitrator on the other hand, the DIS decided reasonably and like the UNCITRAL Model Law that, as a general rule and in the absence of a respective agreement between the parties, an arbitral tribunal according to the DIS Arbitration Rules consists of three arbitrators.

In the case of a three-member panel, each party nominates one arbitrator and these two arbitrators jointly nominate the chairman of the arbitral tribunal (section 12.2 DIS Arbitration Rules). If the parties have agreed that the tribunal shall consist of one arbitrator, the parties jointly nominate the sole arbitrator (section 14 DIS Arbitration Rules). The time limit for the nomination of a sole arbitrator, for the nomination of the respondent's arbitrator and for the nomination of the chairman is likewise 30 days and may be extended upon application.

If the nominating procedure fails, nomination of a substitute arbitrator by the Appointing Committee of the DIS can be requested by a party. The Appointing Committee of the DIS consists of three members and three alternate members who are appointed by the DIS board of directors for a period of two years. Decisions are taken by the three regular members of the Appointing Committee. The Appointing Committee nominates arbitrators upon proposal of the Executive Committee. If the Appointing Committee adopts the proposal of the Executive Committee by at least a majority of the votes, the proposed person is confirmed as arbitrator pursuant to section 17.2 DIS Arbitration Rules. The DIS Appointing Committee is rarely called upon to nominate an arbitrator (only in about 10 per cent of all cases). Most often the DIS Appointing Committee has to nominate a sole arbitrator or a chairman of the arbitral tribunal.

The persons are selected on the basis of the circumstances of each individual case, having regard to its legal and factual specifics and the requirements for the arbitrator resulting therefrom. For the selection of arbitrators, the DIS maintains a strictly confidential database of information on the professional know-how as well as previous experience as arbitrator or counsel in arbitration of persons interested to act as arbitrators in DIS proceedings. The database is not limited to DIS members.

Arbitrators, upon being nominated, are required to submit a written declaration (section 16.1 DIS Arbitration Rules) regarding their acceptance and their impartiality and independence as well as regarding the compliance with any agreed qualifications. According to section 15 DIS Arbitration Rules, the concepts of 'impartiality' and 'independence' are formulated broadly in order to cover all possible circumstances, which might justify challenge from a party of the arbitration. An arbitrator may only be confirmed in office after having submitted such declaration. If the declaration does not reveal grounds, which may give rise

to doubts as to an arbitrator's impartiality or independence, the DIS Secretariat confirms the arbitrator in office upon receipt of the declaration (section 17.1 DIS Arbitration Rules). As soon as all three arbitrators or the sole arbitrator are confirmed in office, the arbitral tribunal has been constituted.

Challenge of arbitrators

An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess qualifications agreed to by the parties (section 18.1 DIS Arbitration Rules). A party may challenge an arbitrator nominated by him or her, or in whose nomination he or she has participated, only for reasons of which he or she becomes aware after the nomination has been made. The challenge shall be notified and substantiated to the DIS Secretariat within two weeks of being advised of the constitution of the arbitral tribunal or of the time at which the party learns of the reason for challenge (section 18.2 DIS Arbitration Rules). The limitation of grounds to challenge an arbitrator according to the DIS Arbitration Rules reflects the high degree of autonomy that parties have in selecting their arbitrators. Once a nomination of an arbitrator is made, he or she cannot be withdrawn at will. Only grounds of which the party was not aware at the time of nominating the arbitrator can be raised in challenge proceedings by that party.

Conduct of proceedings

After its constitution, the arbitral tribunal sets a time limit for the respondent to file the statement of defence (section 9 DIS Arbitration Rules). This implies that the DIS Arbitration Rules do not provide for a fixed time limit for the filing of the statement of defence and instead give the arbitral tribunal the discretion to determine an appropriate period. The arbitral tribunal has to take into account the date on which the respondent received the statement of claim. In addition, the arbitral tribunal has to consider the complexity of the case and the volume of the file at the time when the decision is made.

Two core principles of arbitration are fixed in section 26.1 DIS Arbitration Rules: equal treatment of the parties and the right to be heard. Both principles are mandatory statutory law under the German Arbitration Law. DIS arbitral tribunals are aware of these principles and generally very sensitive if the 'right to be heard' principle could become relevant. They will try to avoid even the slightest risk that the award may later be challenged on that ground.

Additionally, the arbitral tribunal shall establish the facts underlying the dispute (section 27.1 DIS Arbitration Rules). It has the discretion to give directions and to hear witnesses or experts as well as to order the production of documents. The DIS Arbitration Rules are guided by the notion of an arbitrator as an active and investigative case manager and not the one of a passive judge who only listens to the parties.

Costs of proceedings

The DIS administrative fee and the fees of arbitrators are calculated by reference to the amount in dispute for greater transparency and predictability (Schedule of Costs, Appendix to section 40.5 DIS Arbitration Rules). With effect of January 2005, the DIS has also issued guidelines for the reimbursement of the expenses of arbitrators. Further, the DIS website provides the possibility to calculate the prospective costs of filing a claim with the DIS as well as the costs of the entire proceeding. This service should support parties and arbitrators without constituting a binding calculation of the costs.

Interim measures of protection

Through section 20 DIS Arbitration Rules it is confirmed that arbitral tribunals have – unless otherwise agreed by the parties – the authority to order any interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure. The measures to be ordered by the arbitral tribunal include, in particular, interim injunctions and arrests in rem. Regarding the proceeding, the arbitral tribunal has to comply with section 24.1 DIS Arbitration Rules (ie, it must apply the mandatory laws at the place of arbitration, the DIS Arbitration Rules and the additional rules agreed between the parties).

Place and language of arbitration, applicable law

Provided that the parties did not agree on the place of arbitration, it shall be determined by the arbitral tribunal according to section 21.1 DIS Arbitration Rules. According to section 21.2 DIS Arbitration Rules, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for an oral hearing, for hearing witnesses, experts or the parties, for consultation among its members or for inspection of property or documents. The DIS model clause contains a provision inviting the parties to determine the place of arbitration. Only in rare cases when no agreement is reached by the parties does the arbitral tribunal decide.

According to section 22.1 DIS Arbitration Rules, it is clarified that the parties' freedom to choose the language in which the arbitration will be conducted is a generally accepted principle for the DIS. An official mandatory court language does not exist in DIS arbitrations. Instead, the parties can choose the ruling language on the arbitration, and only in absence of such agreement does the tribunal decide. The DIS Secretariat is able to administer arbitration proceedings conducted in German, English or French. In the case of the parties using another language, the Secretariat is entitled to order a translation and to charge the costs to the parties (No. 19 of Appendix to section 40.5 - Schedule of Costs).

The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties and as applicable to the substance of the dispute (section 23.1 DIS Arbitration Rules). If the tribunal does not respect the parties' decision, the award could later be set aside under section 1059 German Code of Civil Procedure. Further, section 23.1 DIS Arbitration Rules determines that any choice of law clause must be interpreted as a choice of the respective substantive law, excluding any conflict of laws rules. Section 23.2 DIS Arbitration Rules imposes the duty on the arbitral tribunal to determine the applicable law if the parties have not reached a respective agreement. In addition, the arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so (section 23.3 DIS Arbitration Rules).

Settlement

At every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of an individual issue in dispute (section 32.1 DIS Arbitration Rules). If the parties settle the dispute, the arbitral tribunal shall terminate the proceedings. If requested by the parties, the arbitral tribunal shall record the settlement in the form of an arbitral award on agreed terms, unless the contents of the settlement are in violation of public policy (section 32.2 DIS Arbitration Rules). Although the wording of section 32.1 DIS Arbitration Rules must not be misunderstood to mean that the main task of the arbitral tribunal is to cause a settlement of the dispute, the arbitral tribunal should consider that a settlement might be in the best interests of both parties and should address this possibility if it has the impression that it is appropriate. The content of section 32 DIS Arbitration Rules is similar to section 278 of the German Code of Civil Procedure.

Closing and termination of proceedings

The arbitral tribunal may set a time limit if it is convinced that the parties have had sufficient opportunity to present their case (section 31 DIS Arbitration Rules). The proceedings are terminated by the final award rendered by the arbitral tribunal, or by a termination order of the arbitral tribunal or of the DIS, if the claim is withdrawn or if the proceedings end otherwise before the rendering of a final award (section 39 DIS Arbitration Rules).

Further arbitration-related services offered by the DIS

The DIS performs the functions of a national committee of the International Chamber of Commerce (ICC) with respect to ICC arbitrations. The DIS proposes arbitrators at the request of the ICC Court of Arbitration and participates in the ICC Commission on Arbitration and its sub-committees.

The DIS also acts as Appointing Authority under the UNCITRAL Arbitration Rules where the parties have so agreed or at the request of the Permanent Court of Arbitration (PCA). In addition, the DIS also nominates arbitrators in *ad hoc* proceedings (domestic or international) if the parties have so agreed.

The DIS and the Frankfurt Chamber of Industry and Commerce have jointly founded the Frankfurt International Arbitration Center (FIAC) in 2005. It is located on the site of the Frankfurt Chamber of Industry and Commerce. Frankfurt is a suitable and easily assessable location for investment arbitration proceedings, being Germany's leading banking and finance centre. FIAC provides hearing and meeting room facilities particularly equipped for arbitrations as well as services in connection with the conduct of hearings at its venue. FIAC also organises conferences and other events related to arbitration. Further information is available at www.fiac-arbitration.de.

The International Center for Settlement of Investment Disputes (ICSID) and the DIS signed a cooperation agreement regarding the conduct of arbitrations under the ICSID Arbitration Rules. ICSID, an affiliate of the World Bank, offers member states and private investors the opportunity to settle disputes arising from international investment projects by way of mediation or arbitration. Pursuant to section 63 of the ICSID Convention, in principle proceedings take place at the seat of ICSID. If the proceedings are to be conducted at any other place, approval of ICSID is required. The cooperation agreement makes it possible to conduct the proceedings at the FIAC premises, without requiring specific approval. The DIS website publishes a broad collection of bilateral investment protection treaties (BITs) that include Germany as one contracting state.

In May 2005, the DIS founded the Arbitration Documentation and Information Center eV (ADIC). The main goal of ADIC is the documentation of arbitral awards, the library for literature referring to arbitration and other forms of ADR, the education of arbitrators and mediators (eg, preparation for international moot court competitions or conducting summer courses in international commercial law with relevance to arbitration), research in the area of arbitration as well as online services. Further details on ADIC can be found at www.adic-germany.de.

The DIS also provides advisory and organisational support to arbitral tribunals and parties, mainly but not restricted to DIS arbitrations. In addition, the DIS provides its online database on arbitration law. This database contains the cases of German courts related to arbitration. The decisions are indexed by case numbers, the date of the decision, a bibliographical reference and by a list of keywords (in German) to facilitate the search. English summaries of the key decisions are provided. The database is generally accessible. DIS members and participants in DIS arbitral proceedings (arbitrators and counsel) receive a user ID and can undertake a full text search.

DIS activities in other ADR proceedings

The parties often have an interest in pursuing an amicable resolution of the dispute by means of separate proceedings conducted before an independent and impartial third party who is not authorised to decide the dispute finally. Because the increasing demand for ADR, the DIS dedicated the year 2010 to the implementation of several ADR rules and published a booklet including the rules and standards as relevant for DIS-administered ADR proceedings. The number of ADR cases administered by the DIS has fluctuated. In 2013, 11 ADR cases were administered by the DIS and by the end of December 2014, a total of 14 cases had been filed according to the DIS ADR rules. However, in 2015, only 6 ADR cases were filed.

The basic regime refers to a conflict management proceeding and is called *Konfliktmanagementordnung* (DIS-KOM). The focus of DIS-KOM is the support of the parties to decide on the best available proceeding for the concrete dispute. The goal is to find the most effective proceeding for each dispute in order to meet the parties' economic, legal and further interests. The parties are supported by a conflict manager who has no decision-making power but provides proposals regarding the best choice for a proceeding.

Further, the DIS also administers mediation and conciliation proceedings. Effective from 1 May 2010, the DIS provides separate mediation rules, *Mediationsordnung* (DIS-MedO), which consider all relevant factors of mediation proceedings. The mediator is described as an independent and impartial person who shall be allowed to provide proposals to the parties if the parties agree mutually (section 3.4 DIS-MedO). The mediation rules can be used for domestic as well as in international disputes. Persons of any nationality can be appointed as mediators by the parties. If the parties cannot agree, they can ask the DIS to appoint

a mediator and to administer the mediation proceeding (section 4.5 DIS-MedO).

With respect to conciliation, the *Schlichtungsordnung* (DIS-SchlO) came into force. The DIS-SchlO is the transformation of the already existing DIS Mediation/Conciliation Rules, effective on 1 January 2002, now focusing only on conciliation. The DIS-SchlO provides also the possibility for an appointment of the conciliator by the DIS (section 8, DIS-SchlO). The DIS-SchlO leaves it up to the parties and the conciliator to frame the proceeding. The conciliator is allowed to submit a non-binding decision if the parties ask for one.

The ADR rule set also includes rules for a binding or non-binding expert opinion, namely the *Schiedsgutachtensordnung* (DIS-SchG) for binding expert opinions and the *Gutachtensordnung* (DIS-GO) for non-binding expert recommendations on the case. Both regimes were adopted on 1 May 2010. Finally, the DIS adjudication rules (DIS-AVO) guide the parties who want to establish a dispute board at the beginning of projects, responsible for all disputes during the project development. The DIS-AVO is effective from 1 July 2010.

DIS services for young arbitrators

In summer 2002, the DIS initiated DIS40, the German Initiative of Young Arbitrators. Membership of DIS40 is possible for any person under the age of 40 interested in arbitration. The aim of DIS40 is to enhance the experience of young arbitrators and to discuss questions that are of interest especially for young arbitrators. The meetings are more informal and several events have been organised.

In addition, the DIS powers an initiative, which is called the Co-Chairs' Circle (CCC). The goal of CCC is the exchange of co-chairs of sister organisations and to found networking groups as opportunity to meet and exchange ideas. Further information can be found at www.dis-arb.de/ccc/index.html.

Further, the DIS supports young academics in the area of alternative dispute resolution with an award for outstanding academic work, which is awarded every two years.

DIS model clause

The DIS provides a model clause for parties interested in using DIS arbitration. This model clause is a comprehensive arbitration clause, including all disputes arising 'in connection with' a contract. This model clause also contains an explicit exclusion of the competence of state courts as it is required by some national jurisdictions. It also serves as a reminder to less experienced parties that arbitration is a fully fledged alternative to the jurisdiction of state courts and not a preliminary procedure.

The model clause contains some recommended additions, such as the place of arbitration and the language of the proceedings, the substantive law applicable to the dispute or the number of arbitrators. The required form for the arbitration agreement is determined by the statutory regimes applicable to the arbitration agreement (eg, in section 1031 German Code of Civil Procedure). Pursuant to widespread statutory rules and international custom, the arbitration agreement may be contained in a contractual clause or in a separate agreement.

Contact details for the DIS:

German Institution of Arbitration (DIS)
Beethovenstrasse 5-13
50674 Cologne
Germany
Tel: +49 221 285520
Fax: +49 221 28552222
dis@dis-arb.de
www.dis-arb.de

* *The content of this chapter is accurate as at January 2016.*

DITGES
RECHTSANWÄLTE
WIRTSCHAFTSPRÜFER
STEUERBERATER

Renate Dendorfer-Ditges

rdd@ditges.de

Kaiserplatz 7-9
53113 Bonn
Germany

Tel: +49 22 860460 0
Fax: +49 22 860460 40

European Court of Arbitration's Appellate Arbitral Proceedings

Mauro Rubino-Sammartano

European Centre for Arbitration and Mediation

Background

The European Court of Arbitration (or CEA) is a body of the European Centre of Arbitration and Mediation, formed in 1959 in Strasbourg under the patronage of the Council of Europe, the Strasbourg Stock Exchange and the Chamber of Commerce of Strasbourg and many other public bodies, including various professional associations. Its registered office is in Strasbourg.

In 1997, the Arbitration Rules of the European Court (the Rules) were amended, upon the initiative of this author, to provide for intra-arbitration appellate proceedings. The Rules fit into the rest of the structure of CEA arbitration, which provides for a sole arbitrator in the first instance, a duration of nine months (extendable in special cases by twice each time for a maximum of six months) and rules of evidence much in line with those for English arbitration.

The relevant provisions of the Rules currently in force, the 2015 Rules, are contained in article 28 and are available here: <http://cour-europe-arbitrage.org/archivos/documentos/192.pdf>.

The position of various jurisdictions on intra-arbitration appeals

The intra-arbitration appeal – a full de novo rehearing – is provided for by the Rules except in arbitrations in which mandatory procedural rules do not allow for it. This is the case for Italian proceedings where the general opinion is that challenges against an award may only be made before the court of appeal. This author disagrees with this view on the ground that Italy's parliament has solely provided for remedies against final arbitral awards, without considering whether this consists just of one award or whether there are appellate proceedings. Consequently it could be argued that Italian law does not forbid rehearings.

Intra-arbitration appellate proceedings are not prohibited, based on information received, in various jurisdictions such as England and Wales, France, Spain, the US, Germany and Switzerland.

Challenging a first-instance CEA award

If a challenge of the first award has been made, the Rules provide at article 28(1) that an application to stay the challenge may be filed.

If those appellate proceedings are instituted under the Rules, the victorious party at first instance undertakes under article 28.2 not to enforce the first-instance award (except for what is necessary to avoid falling foul of the limitation period) and agrees that the award made at the rehearing will replace the first award.

Conditions for leave to appeal

The Rules provide under article 26.3 that the appeal is admissible (except in exceptional cases by a reasoned order of the CEA) only if it is accompanied by a deposit, paid into the CEA's competent registrar, of the principal amount, interest and of the costs awarded to it by the first award or, in the event of it not being possible to establish such specific amount, of the amount which will be determined by the CEA 'for the purpose of ensuring appropriate enforcement of the contemplated appellate award'.

Such deposit may be replaced by an unconditional bond by a 'primary bank', with operating offices in the seat of the CEA's competent registrar, the contents of which must be previously approved by the court.

Deadline for the appeal

The appeal is to be filed in conformity also with the procedural requirements of the country of origin of the defendant within 40 days of service of the first-instance award (article 28.2).

Ambit of the appeal: a full de novo review

The appeal allows 'a full review of the dispute by way of rehearing, including dealing in particular with admissibility, the facts and the merits'.

Number and appointment of the arbitrators

The appeal is heard by three arbitrators, who are all appointed by the CEA.

Appellate arbitration rules

In addition to the specific rules for appeals, the appellate proceedings are governed, under article 28(6), by the rules that governed the first-instance arbitration.

Term for the appellate award

The appellate award is to be filed, under article 28(7), within six months of receipt by the arbitrators of the case file, and nine months if evidence is to heard.

In special circumstances (to be stated in a fully reasoned and justified application) this time limit may be extended once or twice up to a total of six months.

Prompt dealing with the deposit under the award

At the same time the appellate award is filed, the arbitral tribunal (or in its absence the competent registrar of the court) will, under article 28(9):

give instructions to the Competent International Registrar, and where appropriate to the guaranteeing bank, to return the funds deposited or to cancel the guarantee to it, or to cause the funds or guarantees to be returned, or to pay them immediately in part or in full to the party entitled to them under the appellate award, and shall deliver the appellate award to the guaranteeing bank.

The bank will then act in accordance with such instructions.

Subsequent dispatch of the award to the parties

According to article 28.11 'The appellate award will then be sent by the Competent International Registrar to the parties'.

The arguments raised against intra-arbitration appeals

Among the arguments used against intra-arbitration appellate proceedings, one may mention:

- the wish of many parties to have a 'one shot' proceeding;
- its longer duration;
- higher costs; and
- lack of certainty that the appellate tribunal will be better than the first one.

Some comments in response to such arguments

One shot

All parties seek a quickly resolved decision made in their favour. While the award is fine for the victorious party, who will obviously oppose its review on the merits, the loser invariably wants it to be reviewed.

In the great majority of jurisdictions, a review of the first-instance judgment is a right of the loser in state court proceedings. The parties generally go to arbitration because they look for a mechanism that is not only different from state courts proceedings, but better.

Not making an appellate facility available in arbitration does not look like an improvement on court proceedings, since arbitrators are equally as fallible as judges.

Duration

Since under the CEA's Arbitration Rules the first proceedings must (and in general do) last nine months (which only in very special circumstances may be extended for six months once or twice), if one adds to that the six months available for intra-arbitral appeal, its total is one year and three months, which is shorter than the duration of many other arbitral proceedings, which are frequently over two years, and on occasion, even reaching 10 years.

As to investment arbitration, the duration of the various steps in *Klockner Industrie Anlagen GmbH et al v United Republic of Cameroon et al* (Ad Hoc Committee Division, 3 May 1985, 2, ICSID Rep 95, 122 [1994]) was nine years, and in *Amco Asia Corp v Republic of Indonesia* (ICSID Tribunal, 9 December 1983, 24, International Legal Materials 365 [1985]) it was over 10 years.

Costs

Under the Rules the costs involve a sole arbitrator in the first instance and three in the second hearing.

This, compared to the three arbitrators generally appointed under other rules, makes it only a four to three difference.

Adding to this the reasonable rates provided for the arbitrators' fees and the administrative dues under the CEA's schedule, the costs of the two CEA arbitration proceedings are not necessarily higher than the costs of average commercial arbitration proceedings for disputes of the same value.

Quality of the appellate tribunal

The question whether in appellate proceedings arbitrators have a higher standard than in first instance is answered by there being three arbitrators in the appellate proceedings (all appointed by the CEA) as opposed to a sole arbitrator in the first instance. A review by three arbitrators should normally ensure the quality of the decision.

Rehearings under other arbitration rules

UNCITRAL Arbitration Rules

The UNCITRAL Arbitration Rules provide only (article 39(1), 2010 edition) for an additional award 'as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal'.

Commodity arbitration

A full de novo review of the first award is generally provided by the rules of commodity institutions.

AAA and CPR

In the US, the CPR (the International Institute for Conflict Prevention and Resolution) recently revised its Arbitration Appeal Procedure for CPR arbitrations.

Similarly the American Arbitration Association has provided for Optional Appellate Arbitration Rules (1 November 2013).

The Arbitration Chamber of Paris

The Rules of the Arbitration Chamber of Paris provide that three arbitrators, all appointed by it, hear appellate arbitral proceedings.

Sports arbitration

The Court of Arbitration for Sport has introduced an internal appellate facility, which provides for a full review of the merits by its Appellate Division.

Investment arbitration

The Washington Convention provides for a second instance before an ad hoc committee. However this has the limited scope to decide whether the first award must be set aside on a few specific grounds, errors of law and errors of fact being excluded from it.

In such event, the case must be started again before a new arbitral tribunal, the decision of which may be set aside, which gives rise again to new arbitral proceedings.

Such four steps have been registered as to *Klockner* and as to *Amco Asia* and have lasted respectively nine and over ten years.

WTO

The World Trade Organization has, under article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, an appellate body that was established in 1995 consisting of seven persons and that hears appeals from reports submitted by a WTO panel. It may uphold, set aside or modify such report. Its own report, if adopted by the dispute settlement body, becomes binding for the parties unless they notify the intention to appeal it.



Mauro Rubino-Sammartano

president@cour-europe-arbitrage.org

3, rue du Général Frère
67000 Strasbourg
France
Tel: +33 3 6878 1453

3 Viale Cassiodoro
20145 Milan
Italy
Tel: +39 02 4989361
Fax: +39 02 48008277

info@cour-europe-arbitrage.org
www.cour-europe-arbitrage.org

PCA

The Rules of the Permanent Court of Arbitration provide, under article 6, that 'awards are final and binding and there is no right of appeal'.

The European Union's recent position

The traditional hostility in many arbitration circles to intra-arbitral appellate proceedings is likely to face a challenge because of the very neat position recently taken by the European Commission.

With the support of several of its member states, the Commission has objected to the present structure of investment arbitration in

various respects, among which is the lack of a review of the merits of the first instance proceedings, and has firmly requested that there be an appellate stage.

It is suggested that the very determined position of the European Union as to investment arbitration shows that the lack of a full de novo review is no longer accepted in the European Union.

Commercial arbitration may then be expected to follow this new trend and accept a full review, which has been advocated by the author since 1989 (Rubino-Sammartano, *L'arbitrato internazionale* (International Arbitration), CEDAM 1989).

HKIAC

Paulo Fohlin

Magnusson

The Hong Kong International Arbitration Centre (HKIAC) is an independent and financially self-sufficient non-profit company limited by guarantee. Established in 1985, it provides services and facilities for arbitration, mediation, adjudication and domain name dispute resolution at its office in Central, Hong Kong. The HKIAC opened its first office outside Hong Kong in 2013 at the then newly launched Seoul International Arbitration Centre. In 2015, the HKIAC also opened an office in mainland China as the first international non-mainland Chinese arbitration institute to do so. The office is located in the China (Shanghai) Pilot Free Trade Zone.

Notably, the HKIAC is entrusted by the Hong Kong legislature with acting as the statutory default appointing authority under the Arbitration Ordinance, according to which the HKIAC may appoint arbitrators in ad hoc arbitrations and determine whether a tribunal of one or three arbitrators should decide a dispute.

In 2015, the HKIAC handled 520 new dispute resolution matters, including 271 arbitrations, 227 domain name disputes and 22 mediations. Of the arbitrations, 116 were administered by the HKIAC under its Administered Arbitration Rules or Procedures for the Administration of Arbitration under the UNCITRAL Arbitration Rules. Seventy-nine per cent of the arbitrations involved at least one non-Hong Kong party. As a hallmark of a truly international arbitration institute, a considerable number of the arbitrations (43 per cent) had no connection with Hong Kong. There were also arbitrations without any Asian connection at all (6 per cent). Seventy-nine per cent of the arbitrations were conducted in English.

In 2015, the HKIAC won the Global Arbitration Review (GAR) Award for innovation, which recognised the HKIAC's introduction of a tribunal secretary service allowing a tribunal to benefit from appointing a member of the HKIAC secretariat as secretary. The proper role of such secretaries is dealt with in separate HKIAC guidelines.

Further, in 2015, the HKIAC launched a system of forms allowing users to evaluate the conduct of their arbitrations and the performance of their arbitrators. Arbitrators are also able to rate the services of the HKIAC and give feedback on the performance of fellow arbitrators.

The Queen Mary University of London and White & Case International Arbitration Survey of 2015 placed the HKIAC as the most preferred arbitration institute outside Europe and the third best arbitration institute worldwide.

The HKIAC has issued a few Practice Notes supplementing its arbitration rules. New Practice Notes entered into force in June 2016 on Costs of Arbitration, and in January 2016 on Consolidation of Arbitration. The new Practice Notes on costs expressly provide that, if a party pays deposits on behalf of another party, the tribunal may make a separate award for reimbursement of the payment.

In March 2016, the HKIAC launched a new Panel of Arbitrators for Intellectual Property Disputes, which is separate from its regular Panel or List of Arbitrators. The launch coincided with the Hong Kong government's proposal of amendments to the Hong Kong Arbitration Ordinance in respect of intellectual property disputes.

The 2013 HKIAC Administered Arbitration Rules

Focusing on amendments to the 2008 HKIAC Administered Arbitration Rules (the 2008 Rules), this paper will also describe a few basic elements of the Administered Arbitration Rules of 2013 (the 2013 Rules).

The seat of HKIAC arbitrations

The relevant HKIAC model arbitration clause prompts parties to consider designating the seat of arbitration. The default seat is no longer necessarily Hong Kong, as article 14.1 of the 2013 Rules provides that, where there is no agreement as to the seat, the seat shall be Hong Kong 'unless the arbitral tribunal determines, having regard to the circumstances of the case, that another seat is more appropriate'. However, in emergency arbitrator procedures the default seat is always Hong Kong (Schedule 4, paragraph 10). The first mentioned provision increases the likelihood of HKIAC arbitrations seated outside Hong Kong, which should work well in most, if not all, jurisdictions where international arbitrations are likely to be seated. In some HKIAC arbitrations brought in 2015 the seat was Macau, Oregon or England and Wales.

Ex parte communications with arbitrator candidates and arbitrators

The 2013 Rules introduced a provision on a party's ex parte communications with an arbitrator candidate or arbitrator (article 11.5). This is helpful considering the different backgrounds of the users. Under the provision, no party shall have any such communication relating to the arbitration with any arbitrator or arbitrator candidate, subject to certain clearly defined exceptions.

The request for arbitration

Under articles 4.1 to 4.3 of the 2013 Rules, as under other institutional rules, a claimant initiating recourse to arbitration shall submit a notice to the institution (ie, the HKIAC), containing a demand that the dispute be referred to arbitration, whereupon the arbitration is deemed to commence. The notice of arbitration must contain, inter alia, a confirmation that copies of the notice have been or are being served on the respondent. The notice may also include the full statement of claim (article 4.6). As, under articles 16.3 and 17.4, the parties must generally annex to the statements of claim and defence all documents on which they rely, the claimant can thus front-load the arbitration in respect of, inter alia, documentary evidence and thereby speed up the proceedings.

Initiating a single arbitration under multiple contracts

The 2013 Rules added an express provision allowing a single arbitration under multiple contracts. According to article 29.1, provided that the arbitration agreements are compatible, claims arising in connection with more than one contract may be made in a single arbitration, if all parties are bound by each arbitration agreement, a common question of law or fact arises under each arbitration agreement and the rights to relief claimed are in respect of 'the same transaction or series of transactions'. In 2015, seven multiple-contract HKIAC arbitrations were commenced.

Emergency relief from an emergency arbitrator

Under article 23.1 and Schedule 4, paragraph 1 of the 2013 Rules, a party may apply for emergency relief from an emergency arbitrator concurrently with or following the filing of a notice of arbitration and prior to the constitution of the tribunal. The application must include, inter alia, the reasons the applicant needs the emergency relief on an urgent basis that cannot await the constitution of a tribunal and a confirmation that copies of the application have been or are being served on all

other parties to the arbitration (paragraph 2). Thus, the 2013 Rules do not permit any *ex parte* emergency relief. A party who fears that prior disclosure of an application to the other party would risk frustrating the purpose of the application will have to consider applying for *ex parte* interim measures in the relevant courts. Likewise, an emergency arbitrator can of course not grant relief against a third party.

If the HKIAC accepts the application, it seeks to appoint an emergency arbitrator within two days after receipt of the application and the deposit (Schedule 4, paragraphs 5 and 6). Ensuring that each party has a reasonable opportunity to be heard, the emergency arbitrator has to decide on the application within 15 days from the receipt of the file, unless this period is extended by the parties or the HKIAC (paragraphs 11 and 12).

There is no definition of emergency relief, other than a general provision in article 23.1 to the effect that it is an 'urgent interim or conservatory relief'. Likewise, the test for granting emergency relief is not spelled out. However, parties and emergency arbitrators are well advised to seek guidance in the definition of interim measures ordered by arbitral tribunals found in article 23.3, and the test applicable when a tribunal decides a request for an interim measure found in article 23.4.

Whether an emergency decision is subject to court enforcement depends on the laws where enforcement is sought. Together with Singapore, Hong Kong was at the forefront in this respect as enforcement of emergency relief granted by an emergency arbitrator was provided for in the Arbitration Ordinance in July 2013.

In 2015, the HKIAC received two emergency arbitrator applications, bringing the total to six.

The answer to the request for arbitration

Pursuant to article 5.1 of the 2013 Rules, within 30 days from receipt of the notice of arbitration, the respondent shall submit an answer to the HKIAC, including *inter alia* any plea that a tribunal constituted under the 2013 Rules lacks jurisdiction and a confirmation that copies of the answer have been, or are being, served on all other parties. If the notice of arbitration contained the statement of claim, the answer may also include the full statement of defence (article 5.3).

Early jurisdictional issues before the HKIAC

As a welcome clarification, the 2013 Rules added a provision on the competence of the HKIAC and the jurisdictional test to be applied by the HKIAC where the respondent does not submit any answer or answers that the jurisdiction of the HKIAC or an HKIAC tribunal to be constituted is contested. Article 19.4 namely provides that, if a question arises as to the existence, validity or scope of the arbitration agreement, or to the competence of the HKIAC to administer an arbitration, before the constitution of the tribunal, the HKIAC may decide whether and to what extent the arbitration shall proceed and that the arbitration shall proceed if, and to the extent that, the HKIAC is satisfied, *prima facie*, that an arbitration agreement under the 2013 Rules may exist.

There is also, under article 27.8, a similar *prima facie* jurisdictional test to be made by the HKIAC if it receives a request for joinder of a party to an arbitration in which the tribunal is not yet confirmed.

The constitution of the tribunal and terms of appointment

In the 2013 Rules, parties' and co-arbitrators' choices of arbitrators are called 'designations'. Under article 9.1, all designations made by parties and co-arbitrators are subject to confirmation by the HKIAC, upon which the 'appointments' become effective.

The HKIAC confirms the designation of an arbitrator on the terms found in either Schedule 2 or Schedule 3 to the 2013 Rules, subject to any variations agreed by the parties and any changes the HKIAC considers appropriate (article 9.2). This standardisation of terms may serve, *inter alia*, to avoid delay. Schedule 2 provides for arbitrator fees based on hourly rates and always applies to emergency arbitrators. Schedule 2 is supplemented by the Practice Note on Arbitral Tribunal's Fees, Expenses, Terms and Conditions Based on Schedule 2 and Hourly Rates in force on the date the notice of arbitration is submitted. An arbitrator's agreed hourly rate may not exceed a rate set by the HKIAC as stated on its website on the said date, unless expressly agreed in writing by all parties or if the HKIAC so determines. At the time of writing, the maximum agreed hourly rate is HK\$6,500. Schedule 2 (like Schedule 3) also contains provisions on, *inter alia*, reimbursement for travelling time and cancellation fees. Schedule 3 provides for fees based

on the sum in dispute. The amounts are stated in HK\$ and not US\$ (as in the 2008 Rules). Schedule 3 is supplemented by the Practice Note on Arbitral Tribunal's Fees, Expenses, Terms and Conditions Based on Schedule 3 and the Sum in Dispute.

The parties can, by agreement between them, choose between the two methods of remunerating the arbitrator(s). If the parties fail to agree, the fees will be based on hourly rates in accordance with Schedule 2 (article 10.1). Designated arbitrators are asked to confirm that they accept an appointment on the basis of either method.

Replacement arbitrator

The 2013 Rules introduced a new provision on the appointment of substitute arbitrators. The main rule remains that the party who designated an arbitrator also has the right to designate a substitute arbitrator (cf. article 12.1). However, in exceptional circumstances, the HKIAC may, at the request of a party, appoint the substitute arbitrator directly and thereby deprive a party of its right to designate the substitute arbitrator (article 12.2). Furthermore, if the proceedings are declared closed, the HKIAC may authorise the other arbitrators to proceed and make an award without a substitute arbitrator. These powers may be useful to handle certain rare guerrilla tactics.

Interim measures from the tribunal

Unlike the 2008 Rules, the 2013 Rules contain a definition of interim measures, closely but not completely mirroring the 2006 amendments to the UNCITRAL Model Law adopted in the Arbitration Ordinance. The non-exhaustive definition reflects the UNCITRAL Rules of 2010. According to article 23.3 of the 2013 Rules, an interim measure, whether in the form of an order or award or in another form, is any temporary measure ordered by the tribunal at any time prior to the issuance of the award by which the dispute is finally decided, that a party 'for example, and without limitation' must:

- maintain or restore the status quo pending determination of the dispute;
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award may be satisfied; or
- preserve evidence that may be relevant and material to the resolution of the dispute.

Furthermore, the applicable test when deciding a request is now spelt out, in a similar non-exhaustive fashion. The tribunal shall take into account the circumstances of the case, and relevant factors 'may include, but are not limited to': harm, not adequately reparable by an award of damages, is likely to be the result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to be inflicted on the party against whom the measure is directed if the measure is granted; and there is a reasonable possibility that the requesting party will succeed on the merits (article 23.4).

The 2013 Rules also expressly provide that the tribunal may order security for costs, which may be useful to avoid debates as to whether such orders qualify as interim measures or not (article 24).

Provisional timetable, written submissions and oral hearings

Like other institutional rules, the 2013 Rules require the tribunal to prepare a provisional timetable for the arbitration in consultation with the parties (article 13.2). The timetable will usually fix deadlines for the statements of claim and defence (cf. articles 16.1 and 17.1). The parties are generally obliged to annex to the said statements all documents on which they rely (articles 16.3, 16.4, 17.4 and 17.5). Often, the timetable fixes deadlines for further written statements as well (article 20). It may also, among other things, fix or reserve dates for oral hearings or potential oral hearings. The fundamental requirement that oral hearings be held if requested by a party is retained, unless the expedited procedure applies (articles 22.4 and 42.1(e)).

Joinder of parties

Broadening the possibilities for joinder, articles 27.3, 27.4 and 27.6 of the 2013 Rules provide that a party wishing to join an additional party – or a third party wishing to be joined – shall submit a request to the HKIAC. The parties and the additional party, where applicable, shall

then submit their comments (articles 27.5 and 27.7). The tribunal has the power to allow an additional party to be joined, provided that, prima facie, that party is bound by an arbitration agreement under the 2013 Rules giving rise to the arbitration. The decision is without prejudice to the tribunal's power to subsequently decide any question as to its jurisdiction arising from the decision (articles 27.1 and 27.2). HKIAC received two requests for joinder in 2015.

Consolidation of arbitrations

Under article 28.1 of the 2013 Rules, at the request of a party and after consulting with the parties and any confirmed arbitrators, the HKIAC has the power to consolidate two or more arbitrations. It is thus the HKIAC and not any arbitral tribunal that makes the decision. This power exists provided that the parties agree or all claims are made under the same arbitration agreement or, notably, the claims are made under two or more compatible arbitration agreements, a common question of law or fact arises in both or all of the arbitrations and the rights to relief claimed are in respect of 'the same transaction or series of transactions'. This may save time and costs in disputes where the parties (and not necessarily the same parties) have made a deal covering, for example, several individual contracts. It also reduces the risk of conflicting awards.

Where the HKIAC decides to consolidate arbitrations (or an additional party is joined after the prima facie test made by the HKIAC), all parties are deemed to have waived their right to designate an arbitrator and the HKIAC may revoke the appointments of any designated or confirmed arbitrators (articles 27.11 and 28.6). The HKIAC will then appoint the tribunal.

In 2015, HKIAC received two requests for consolidation.

The laws applicable to the contract and the arbitration agreement

The provision on the law applicable to the merits (article 35.1 of the 2013 Rules) contains a few adjustments. It now expressly provides that:

- the tribunal shall decide the 'substance of the dispute' in accordance with the rules of law agreed upon by the parties;
- any designation of the law or legal system of a given jurisdiction shall be construed, unless otherwise expressed, as directly referring to the substantive law of that jurisdiction and not to its conflict of laws rules; and
- failing such designation by the parties, the tribunal shall apply the rules of law that 'it determines to be appropriate'.

Thus, it is still the case that in the absence of a choice of law by the parties, the tribunal is not required first to determine any national conflict of laws rule to apply. However, the direct method for determining the applicable law is now differently worded. Under the 2008 Rules, the tribunal was authorised to directly choose the law that the dispute had 'the closest connection to', whereas the tribunal is now authorised to directly choose the law that it determines to be 'appropriate'. A direct method is in line with the modern trend, although it deviates from the indirect method provided for in the Model Law. It also reduces the risk of delay and additional costs due to disputes that could otherwise arise as to which national conflict of laws rule that should apply. The parties may take conflicting positions also under a direct method, but under a direct method they will apply the same test when arguing.

Like other institutional rules, the 2013 Rules are silent on the law applicable to the arbitration agreement. However, breaking new ground, in August 2014, the HKIAC introduced a model clause that prompts parties to consider designating the law to govern the arbitration clause as distinguished from the law governing the substantive contract.

Expedited procedure

Under the 2013 Rules, a party may apply to the HKIAC for the arbitration to be conducted in accordance with the expedited procedure if the amount in dispute does not exceed HK\$25 million or in cases of exceptional urgency (article 41.1). However, the expedited procedure will generally not apply to a single arbitration under multiple contracts or consolidated proceedings. In 2015, nine applications for the expedited procedures were submitted.

The HKIAC Procedures for the Administration of Arbitration under the UNCITRAL Arbitration Rules

The Procedures, effective from 1 January 2015, generally apply to arbitrations under an arbitration agreement or investment treaty, which provides for the Procedures to apply, or for arbitration administered by HKIAC under the UNCITRAL Arbitration Rules, or words to similar effect. Superseding HKIAC's previous procedures for the administration of UNCITRAL arbitrations, the Procedures are in conformity with both the 1976 and 2010 versions of the UNCITRAL Rules, with or without paragraph 4 of article 1 on transparency in investment treaty arbitration as introduced in 2013.



MAGNUSSON

Paulo Fohlin

paulo.fohlin@magnussonlaw.com

Hang Lung House
Suite B, 5/F
184-192 Queen's Road Central
Hong Kong

Tel: +852 3487 4690 (office) / +852 6278 86 22 (mobile)
Fax: +852 3487 4691
www.magnussonlaw.com

ICSID

Harold Frey and Hanno Wehland

Lenz & Staehelin

Introduction to ICSID arbitration

The present contribution deals with arbitration under the rules of the International Centre for Settlement of Investment Disputes (ICSID), subsequently referred to as ICSID arbitration. ICSID was established in 1966 through the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) and is one of the five international organisations that are part of the World Bank Group. Its main purpose is to provide institutional support for conciliation and arbitration proceedings in relation to international investment disputes. In terms of structure, ICSID consists of an administrative council composed of representatives of its current 153 member states and a secretariat headed by its secretary-general.

The unique character of ICSID arbitration derives from the fact that, unlike standard commercial arbitrations, ICSID proceedings are largely detached from national legal orders and, in particular, are not subject to supervision by the courts at the seat of the arbitration. This 'self-contained' nature of the ICSID process is particularly relevant when it comes to the setting-aside of ICSID awards and – to a lesser extent – also with regard to the enforcement of awards. ICSID arbitration must be distinguished from arbitration under the rules of ICSID's additional facility, which is not governed by the ICSID Convention and will not be addressed in this chapter.

ICSID arbitration and treaty-based arbitration

The notion of ICSID arbitration is closely associated with treaty-based proceedings, and most ICSID arbitrations today arise under international investment agreements (IIAs). These treaties usually confer both substantive and procedural rights to investors with the nationality of one signatory making an investment in the territory of another signatory. In particular, most IIAs contain a dispute resolution clause through which the signatories give their generic advance consent to international arbitration with investors of any other signatory, provided that these investors meet certain requirements.

In terms of substantive protection standards, while IIAs show a fair degree of variation in this regard, a number of standards can be found in most of them. These include the protection of investors in the event of expropriation, the guarantee of fair and equitable treatment, full protection and security, national treatment, most-favoured-nation treatment, the prohibition of unreasonable or discriminatory measures and, to a lesser extent, 'umbrella' clauses. The content of each of these standards needs to be determined in accordance with the relevant principles of treaty interpretation, and tribunals typically refer to a growing body of arbitral precedent when interpreting the substantive provisions of an IIA.

Observing the standards contained in a treaty is an international obligation of the signatories, and conduct attributable to a state that is not in conformity with an investment protection standard will usually constitute an international wrong, entailing the consequences set out in articles 28 et seq of the 2001 ILC Draft Articles on State Responsibility. In particular, a state breaching its obligations under an IIA has the duty to cease the act constituting the breach (if it is still continuing), and the obligation to repair any injury caused by the breach. In practice, the large majority of treaty-based arbitrations relate to claims for compensatory damages.

While the majority of ICSID arbitrations today arise under IIAs, ICSID proceedings can in principle also be based on a contract or a

domestic investment law. Conversely, while the majority of treaty-based arbitrations take place under the regime established by the ICSID Convention, a significant number of treaty-based proceedings are conducted outside the ICSID framework, in particular under the UNCITRAL Arbitration Rules. ICSID arbitrations and treaty-based arbitrations are therefore best seen as two partially intersecting circles, and the two notions (ICSID arbitrations on the one hand, treaty-based arbitrations on the other) need to be carefully distinguished.

Jurisdiction of ICSID

Article 25(1) of the ICSID Convention establishes certain requirements for the 'jurisdiction of the Centre', often referred to as *ratione materiae*, *ratione personae*, and *ratione voluntatis*. According to article 41 of the ICSID Convention, each of these requirements must be fulfilled for a dispute to fall within the competence of a tribunal established under the ICSID Convention.

Jurisdiction ratione materiae

Article 25(1) ICSID provides that the jurisdiction of the Centre is limited to 'legal dispute[s] arising directly out of an investment'. While the ICSID Convention does not define the notion of 'investment', it has long been argued on the basis of the Convention's negotiating history that the term must be given an autonomous meaning. ICSID tribunals therefore frequently assess the existence of certain criteria thought to be inherent to the notion of 'investment' when examining their competence. These criteria, which are often referred to as the '*Salini* test' (based on one of the early decisions discussing them), are typically described as follows:

- a commitment of resources to the host state's economy;
- a certain duration of this commitment;
- the assumption of risk and the expectation of profit; and
- a contribution to the host state's economic development.

Recent decisions have supported the idea that the *Salini* criteria should be applied with some flexibility and suggested that not all of them necessarily need to be fulfilled for there to be an investment.

Jurisdiction ratione personae

In addition, article 25(1) of the ICSID Convention requires that the dispute be 'between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by the State) and a national of another Contracting State'. Article 25(2) ICSID defines the term of 'national of another Contracting State' as encompassing both natural and juridical persons. With regard to natural persons, article 25(2)(a) specifically excludes dual nationals with the nationality of the respondent State. In terms of juridical persons, article 25(2)(b) extends the Centre's jurisdiction to foreign-controlled juridical persons with the nationality of the state that is a party to the dispute, provided that there is a specific agreement in this regard.

Jurisdiction ratione voluntatis

In addition to the *ratione materiae* and *ratione personae* jurisdiction requirements, article 25 of the ICSID Convention requires the consent of the parties to submit their dispute to the Centre. In contract-based arbitrations, this consent typically results from an arbitration clause in the contract.

By contrast, in treaty-based arbitrations, the arbitration agreement is formed when the investor accepts the host state's offer to arbitrate contained in the dispute resolution clause of the relevant International Investment Agreement, usually by filing a notice of arbitration. Given that the host state's offer to arbitrate is made only to protected investors, protection under the treaty effectively becomes another jurisdictional requirement. In addition, tribunals in treaty-based arbitrations have frequently found their jurisdiction to be limited to situations where the investors could show the existence of a *prima facie* case regarding a breach of the relevant treaty.

ICSID arbitration procedure

The procedure in ICSID arbitrations is primarily governed by the relevant provisions in the ICSID Convention, the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules) and the Rules of Procedure for Arbitration Proceedings (Arbitration Rules). In general the procedure is fairly similar to the procedure applied in proceedings before other arbitral institutions.

Constitution of ICSID tribunals

By default, ICSID tribunals consist of three arbitrators, one (who must not have the nationality of either party) to be appointed by each party, with the chair to be appointed by agreement of the parties. If a tribunal has not been fully constituted within 90 days of registration of a case, either party may request the president of the World Bank to appoint the remaining arbitrators. The necessary appointments are then made from ICSID's panel of arbitrators, which is a list of individuals nominated primarily by the member states. Here again, the arbitrators to be appointed must not have the nationality of either party to the dispute.

With regard to arbitrator challenges, where a single member of a three-member tribunal is being challenged, the challenge is decided by the other tribunal members. By contrast, where a challenge relates to more than a single member of a three-member tribunal, it is decided by the president of the World Bank. The same is true if, in the event of a challenge against a single tribunal member, the other two arbitrators cannot agree on whether to uphold or reject the challenge. The challenging party bears a heavy burden of proof, having to show a 'manifest lack' of the capacity to exercise independent judgment on behalf of the challenged arbitrator. Historically, only a handful of arbitrator challenges in ICSID proceedings have been successful.

The conduct of ICSID proceedings

Subject to any mandatory provisions in the ICSID Convention, the proceedings before an ICSID tribunal can in principle be determined by the parties. Article 44 of the ICSID Convention provides that a tribunal is the master of the proceedings before it to the extent where procedural questions are not determined by the Convention, an agreement of the parties, or the Arbitration Rules.

With regard to interim relief, parties can request an ICSID tribunal to 'recommend' provisional measures for the preservation of their rights, but there is no mechanism for enforcing a tribunal's recommendations. In the absence of a specific agreement to the contrary, parties are prevented from seeking interim relief from any other judicial authority.

A respondent can raise preliminary objections with regard to the claims brought against it. There are two different procedures in this regard. The normal procedure under rule 41(1) of the Arbitration Rules requires a respondent to raise preliminary objections 'as early as possible'. The tribunal can then decide to suspend the proceedings on the merits and seek submissions of the parties with regard to the objections, which frequently leads to a bifurcation of the proceedings and a first phase ending with a decision on jurisdiction and admissibility. Where a tribunal dismisses a respondent's preliminary objections without deciding on the merits of the case, that decision can only be challenged once a final award has been rendered.

In addition, rule 41(5) of the Arbitration Rules provides for an expedited preliminary objections procedure allowing the quick dismissal of claims that are 'manifestly without legal merit'. Under this procedure, objections must be raised within 30 days of the constitution of the tribunal and, in any event, before the tribunal's first session. The provision has been held to apply not only to jurisdictional objections, but to all sorts of defences, including those relating to the merits of a case.

Otherwise ICSID proceedings typically follow a sequence similar to that under other arbitration rules, with a written phase consisting of two submissions by each party, followed by an oral hearing including the examination of factual and expert witnesses.

With regard to document production, article 43(a) ICSID and rule 34(2)(a) of the Arbitration Rules explicitly provide that a tribunal has the power to request the production of documents from a party.

It also bears noting that rule 37(2) of the Arbitration Rules allows ICSID tribunals to admit written *amicus curiae* submissions after consulting the parties, even where the parties do not agree in this regard.

ICSID awards

Regarding the content of ICSID awards, the Arbitration Rules specify that they must state the reasons on which they are based and include a decision on the allocation of costs between the parties. Awards can be rendered by a majority of votes, and arbitrators have the possibility to issue individual opinions.

Post-award proceedings

Article 53(1) of the ICSID Convention provides that ICSID awards are not subject to any remedies other than those specified in the Convention itself. Recourse against ICSID awards is thus limited to four types of post-award proceedings under the Convention, namely:

- correction and supplementation;
- interpretation;
- revision; and
- annulment.

Correction and supplementation

Awards can be corrected or supplemented at the request of a party in accordance with article 49(2) of the ICSID Convention within 45 days from the day the award is rendered. This procedure is limited to two narrowly defined types of situations, namely:

- a tribunal's inadvertent failure to decide an issue which it had been requested to decide; and
- the rectification of clerical or arithmetical errors.

Interpretation

A party can request the interpretation of an award in accordance with article 50(1) of the ICSID Convention if there is a dispute as to the 'meaning or scope' of the award between the parties. The secretary-general of ICSID will submit the request to the original tribunal if possible – otherwise a new tribunal needs to be constituted.

Revision

A party may request the revision of an ICSID award in accordance with article 51(1) of the ICSID Convention in case of 'discovery of some fact of such a nature as decisively to affect the award'. The fact must have been unknown to both the applicant and the tribunal, the applicant's ignorance must not have been negligent and the circumstances must be such that the tribunal's knowledge of the fact would have led to a different decision. A request must be made within 90 days of discovery of the fact and, in any event, within three years of the date of the award. Here again, the secretary-general of ICSID will submit the application to the original tribunal, if possible.

Annulment

By far the most relevant post-award procedure in practice is the one under article 52 of the ICSID Convention relating to the annulment of ICSID awards. The grounds for annulment are conclusively listed in article 52(1) as follows:

- the tribunal was not properly constituted;
- the tribunal manifestly exceeded its powers;
- there was corruption on the part of a member of the tribunal;
- there has been a serious departure from a fundamental rule of procedure; or
- the tribunal failed to state the reasons on which it based its decision in the award.

A request for annulment must generally be submitted within 120 days of the date of the award, except where it is based on allegations of corruption, in which case it must be made within 120 days of the discovery of the corruption and, in any event, within three years of the date of

the award. An annulment request is decided by a three-member ad hoc committee appointed by the president of the World Bank from ICSID's panel of arbitrators. The committee members must not be nationals or have been designated by either the state party to the proceedings or the investor's home state.

While review of an award is limited to the five grounds for annulment listed in article 52(1) ICSID, ad hoc committees have sometimes interpreted their mandate rather liberally, taking a generous approach in particular with regard to the grounds of 'manifest excess of powers', 'serious departure from a fundamental rule of procedure' and 'failure to state reasons'. This may help to explain the popularity of the annulment process with unsuccessful parties: requests for annulment have been filed against approximately 40 per cent of all final awards rendered in ICSID proceedings so far.

If an ad hoc committee decides to annul all or part of the award, either party has the possibility to resubmit the dispute to a new tribunal. In case of only partial annulment of an award, the part that has not been annulled remains *res judicata* between the parties, and the competence of any new tribunal will be restricted accordingly.

Enforcement of ICSID awards

While recourse against ICSID awards takes place exclusively within the regime established by the ICSID Convention, the self-contained nature of the ICSID system does not fully extend to the enforcement of awards. On the one hand, article 54(1) of the ICSID Convention

severely limits the grounds for refusing enforcement by providing that signatory states must enforce pecuniary obligations imposed by an award 'as if it were a final judgment' of one of their own courts. On the other hand, article 55 of the ICSID Convention specifies that signatories are not prevented from applying national laws with regard to the immunity of states from execution.

When it comes to state immunity regarding execution, most legal orders make a distinction between property designated for sovereign or official functions (for which immunity tends to be granted) and property intended for commercial use (for which immunity usually cannot be claimed). At the same time, the details regarding the application of national laws in this area vary considerably. In sum, therefore, while ICSID proceedings and recourse against ICSID awards follow a single system of rules that is completely detached from any national legal order, the same is not true with regard to the enforcement and execution of ICSID awards.

In practice, it appears that most ICSID awards are paid voluntarily by respondent states. ICSID's association with the World Bank and the associated leverage with borrowing signatories as well as the rule contained in article 54(1) of the ICSID Convention are both likely to play a role in the effective implementation of ICSID awards. From an investor's perspective, when it comes to the enforcement of arbitral awards, the ICSID system presents a clear advantage over other enforcement regimes, in particular that under the New York Convention.

LENZ & STAEHELIN

Harold Frey
Hanno Wehland

harold.frey@lenzstaehelin.com
hanno.wehland@lenzstaehelin.com

Bleicherweg 58
8027 Zurich
Switzerland

Tel: +41 58 450 80 00
Fax: +41 58 450 80 01
www.lenzstaehelin.com

LCIA

Claire Stockford, Jane Wessel and Tom Stables Shepherd and Wedderburn LLP

The London Court of International Arbitration (LCIA) is the leading English institution that deals with international arbitration and one that can date its roots back to 1883. A not-for-profit company limited by guarantee and headquartered in London, it provides services and facilities for arbitration and mediation throughout the world.

As its name suggests, the LCIA primarily deals with an international caseload; in fact only around 15 per cent of the parties using the LCIA are English. In addition to its London headquarters, the LCIA has established arbitration centres in Mauritius (LCIA-MIAC) and the Dubai International Financial Centre (DIFC-LCIA). The DIFC-LCIA put in place new arbitration rules on 1 October 2016, rendering the content of its rules very close to that of the updated rules introduced by the LCIA in 2014. The LCIA also had a centre in India from 2009 until it was closed in 2016, with the LCIA noting that it had become apparent that 'Indian parties are equally content to continue using the LCIA Rules and there are insufficient adopters of LCIA India clauses to justify [their continuation] as a separate offering'.

Structure

The LCIA is organised in a three-tier structure, comprising the company, the arbitration court and the secretariat. The director-general fulfils the role of CEO of the company responsible for the day-to-day conduct of the LCIA and acts as the principal point of contact between the board and court. The LCIA court is composed of up to 35 members, of whom no more than seven may be of the same nationality (and no more than two associated with the same law firm). The LCIA Court appoints arbitrators, controls non-party costs and determines challenges to arbitrators. It also provides the final word on the application of the LCIA Rules. The secretariat is headed by the registrar who is responsible for the day-to-day administration of all the disputes referred to the LCIA.

Fees

Distinct from the majority of other arbitration centres around the world, the LCIA administrative charges and tribunal fees are based on hourly rates rather than being related to the sums in issue. The arbitrators charge for their time at an hourly rate, which is currently capped at £450.

The LCIA rules

The latest edition of the rules governing LCIA arbitrations came into effect on 1 October 2014 (the 2014 Rules). This followed a five year consultation by the drafting committee aimed at improving and bringing the rules up to date with current practice and procedure while preserving the previously successful aspects of the earlier rules. The 2014 Rules apply to all arbitrations filed on or after 1 October 2014, even if the relevant agreements were entered into before that date, unless the parties have explicitly agreed otherwise. There is one important exception to this principle: where an arbitration agreement has been concluded before 1 October 2014, article 9B – the emergency arbitrator provision – only applies where the parties have specifically agreed to opt in to it. For agreements concluded after 1 October 2014, the emergency arbitrator provisions apply unless the parties choose to opt out of it.

The 2014 Rules have been supplemented with three guidance notes (the Notes) – one for parties, one for arbitrators and a third relating to emergency proceedings – all of which are designed to facilitate the diligent and timely conduct of arbitration.

Who uses LCIA arbitration and for what kinds of disputes?

According to the most recent data published by the LCIA, in 2015, 332 requests for dispute resolution were made to the LCIA, 326 of these for arbitration (the remainder for some other form of ADR), representing a 10 per cent increase on 2014's statistics. The nature of the contracts, and the industry sectors, out of which referrals arose in 2015 was diverse, including agreements relating to mining, offshore oil and gas, healthcare and pharmaceuticals, the sale and purchase of business assets and shares, joint ventures and partnerships, construction and engineering, shipbuilding, telecommunications, retail and consumer products, loan and other financial agreements, insurance, culture, media and sports, commodities and professional services.

Parties to LCIA arbitrations come from a broad spectrum of jurisdictions around the world, from places as far afield as the United States, Russia and Hong Kong. Only 15.6 per cent of parties in 2015 were from the UK. LCIA arbitrators also come from all around the world. In addition to UK nationals, in 2015 arbitrators were appointed to LCIA tribunals from countries as diverse as Brazil, China, Iran and South Africa.

The default position under the 2014 Rules is for the LCIA Court to select candidates for appointment as arbitrators, and for there to be a sole arbitrator (articles 5.6 and 5.8). However, many parties prefer to nominate arbitrators themselves to retain control over the selection, which is an often-cited advantage of arbitration over litigation. Nonetheless, in a substantial minority of cases (approximately 40 per cent), the LCIA Court selects the arbitrator. This can be quicker than other nomination methods. Where the LCIA does select arbitrators, it is actively using this power to promote diversity in the arbitrator ranks. For example, 28.2 per cent of LCIA appointees in 2015 were women; against only 6.9 per cent of party appointees. The LCIA reports that in 2015 the parties chose to deviate from the default position of one arbitrator in favour of a three-member tribunal in only 48 per cent of arbitrations, which represents a reversal of the position in 2014 when 62 per cent of appointments were three-member tribunals.

Cost and duration

Data relating to the cost and duration of LCIA proceedings were published in November 2015. These indicate that the median length of an LCIA arbitration is 16 months and the median costs are US\$99,000. By way of comparison, similar data were published by the Stockholm Chamber of Commerce (SCC) in February 2016 and by the Singapore International Arbitration Centre (SIAC) in October 2016. The SCC's data indicate a median duration of 13.5 months, while costs are not disclosed. SIAC's data indicates a median duration of 11.7 months and median costs of approximately US\$30,000. It is not possible to discern whether these data are truly comparable, or whether these differences merely result from variations in the complexity or value of the arbitrations concerned.

Conducting an LCIA arbitration

The following are the key elements of an LCIA arbitration, from the arbitration agreement, to the tribunal's award and costs.

LCIA model arbitration clause

The LCIA recommends the following arbitration clauses for parties who wish to refer future disputes to arbitration under the 2014 Rules:

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

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

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

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

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

Commencing proceedings

An LCIA arbitration is commenced by submission to the registrar of the LCIA Court, either electronically or in hard copy form, of a written request for arbitration, including the following elements:

- full contact details for the claimant and its legal representatives, and all other parties to the arbitration;
- the full terms of the arbitration agreement and a copy of the contract or other document in which the arbitration agreement is recorded;
- a brief summary of the nature and circumstances of the dispute, its estimated value, the transactions at issue, and the claim advanced in the arbitration;
- a statement on procedural matters such as the seat and language of the arbitration, and the number of arbitrators and their qualifications;
- full contact details for any arbitrator nominated by the claimant;
- confirmation of payment of the registration fee (currently £1,750); and
- confirmation that the request for arbitration has been or is being delivered to the other parties, and the means of delivery, supported as soon as possible thereafter with written proof of delivery.

The commencement date of the arbitration is deemed to be the later of the date the request is received by the registrar or the date when the registration fee is received by the LCIA.

Article 2 requires the respondent to submit a response to the LCIA registrar within 28 days of the commencement date.

Constituting the tribunal

The parties to an LCIA arbitration are free to agree a process for nomination of the arbitrators, but as stated in article 5.7 of the 2014 Rules, all arbitrators are formally appointed by the LCIA Court. Article 5.6 provides that the LCIA Court shall appoint the tribunal promptly after receipt of the response to the request for arbitration, or if no response is received, within 35 days of the commencement date.

Article 5.3 provides that arbitrators must be impartial and independent of the parties. Under articles 5.4 and 5.5, potential arbitrators are required to provide a statement of their qualifications and professional positions, to agree fee rates conforming to the LCIA's Schedule of Costs, and to sign a written declaration confirming their impartiality, independence and availability.

Under article 5.8, if the parties have failed to agree the number of arbitrators, the LCIA will appoint a sole arbitrator unless the LCIA Court determines that in the circumstances a tribunal consisting of three arbitrators (or, exceptionally, more than three) would be appropriate. Article 5.9 provides that the LCIA Court will take account of any agreement between the parties as to the constitution of the tribunal. If the parties to the arbitration are of different nationalities, article 6 provides that a sole arbitrator or the presiding arbitrator of a three-member

tribunal cannot share the nationality either of the parties or their controlling shareholders.

Under article 9A of the 2014 Rules, a party may apply to the LCIA Court for the appointment of the tribunal to be expedited, setting out the specific ground for the exceptional urgency justifying the need for expedited appointment.

In cases of extreme urgency, a party that has either opted in (for arbitration agreements made prior to 1 October 2014) or not opted out (in the case of agreements made from that date) may apply to the LCIA Court for the appointment of a sole emergency arbitrator to determine a claim for emergency relief under article 9B. The appointment must be made within three days, and the emergency arbitrator must decide upon the claim for emergency relief within 14 days of his or her appointment. An additional fee of £8,000 is payable for the appointment of an emergency arbitrator, and the emergency arbitrator's fee is set at £20,000.

Seat and language of the arbitration

The 2014 Rules include default provisions to deal with the situation where the parties have not agreed on the seat or language of the arbitration.

Article 16.1 provides that the parties may agree on the seat of the arbitration at any time before the formation of the tribunal, or after formation with the consent of the tribunal. In the absence of any such agreement, article 16.2 provides that the seat of the arbitration shall be London, England, unless the tribunal determines otherwise following submissions by the parties.

The 2014 Rules include detailed default provisions dealing with the language of the arbitration at article 17. The initial assumption is that the language of the arbitration will be the language in which the arbitration agreement is written. If the arbitration agreement is written in more than one language of equal standing, the LCIA Court may determine which of those languages should be used for the arbitration.

Applicable law

Article 16.4 of the 2014 Rules provides that the law applicable to the arbitration agreement and to the arbitration shall be the law of the seat unless the parties have otherwise agreed.

Party representation

Article 18.3 requires the parties to obtain the approval of the tribunal for changes or additions to their legal representatives. Under article 18.4, approval may be withheld if the change could compromise the composition of the tribunal or finality of an award. This is intended to prevent proceedings being derailed by circumstances such as those that arose in *Hrvatska Elektroprivreda v The Republic of Slovenia* (ICSID Case No. ARB/05/24) in which, at a late stage in the proceedings, one of the parties instructed a barrister from the same set of English barristers' chambers as the tribunal chairman. This led to a successful challenge by the other party against the instruction of that barrister in the proceedings.

Counsel conduct

Articles 18.5 and 18.6 and the Annex to the 2014 Rules require a party to an LCIA arbitration to ensure that its legal representatives have agreed to comply with the conduct guidelines set out in the Annex to the 2014 Rules. A tribunal has the power to sanction counsel by way of a written reprimand or caution, or 'any other measure necessary to fulfil within the arbitration the general duties required of the Arbitral Tribunal' (article 18.6).

The award

Article 26 of the 2014 Rules deals with the award. The tribunal may make separate awards on different issues at different times. The award must be in writing and state its reasons unless the parties have agreed otherwise, and be signed by each of the arbitrators who assent to it. A majority award is permissible. The award of the tribunal is final and binding on the parties. Under article 26.9, the tribunal may issue an award recording a settlement agreed by the parties, and such a consent award need not contain reasons.

Costs

As mentioned above, under the 2014 Rules, unlike many other institutional arbitration rules, the arbitrators' fees are charged on an hourly basis (rather than *ad valorem*), currently capped at £450 per hour. In addition, the LCIA charges administrative fees based on the time spent by the staff of the LCIA secretariat on the administration of the case. There is no charge for the time of the members of the LCIA Court.

Article 28 provides that the award must specify the amount of arbitration costs determined by the LCIA and the proportions in which those costs are to be borne by the parties. The tribunal is also empowered to determine the reasonable amount of the parties' legal costs and make any award of costs based on the general principle that costs should reflect the parties' relative success in the proceedings. Article 28.4 permits a tribunal to take party conduct into account when awarding costs.

LCIA-related developments in the courts

There have been a number of interesting recent developments relating to LCIA arbitration in courts in England.

The English courts have continued to act in a manner that indicates firm support for the arbitration process. This is illustrated by two recent cases in particular. In *Pearl Petroleum Company Ltd and others v The Kurdistan Regional Government of Iraq* [2015] EWHC 3361 (Comm), the Commercial Court granted enforcement of a peremptory order made by an LCIA tribunal requiring the payment of money to maintain the status quo between the parties. Section 39 of the English Arbitration Act 1996 (the Act) allows parties to give tribunals the power to order provisional relief. Such an agreement is contained in article 25 of the 2014 Rules. In this case, the respondent's arguments that the tribunal's order fell outside its jurisdiction and represented an attempt to assert state immunity did not convince the court. The judgment clarifies that the court will not revisit arguments made to the tribunal when exercising its discretion to grant enforcement (except, possibly, where circumstances have changed). The second case worthy of mention is *C v D* [2016] EWHC 1893 (Comm). In this case, a tribunal hearing an arbitration under the 1998 LCIA Rules issued a partial award. The claimants challenged this in the court, on the basis of jurisdiction (section 67 of the Act) and serious irregularity (section 68 of the Act). The section 67 challenge concerned the tribunal's jurisdiction to hear disputes under a guarantee and sale and purchase agreement in a single arbitration proceeding, where the agreements themselves did not explicitly provide for this, or for consolidation of arbitration proceedings. The section 68 challenge was based on criticisms of the tribunal, including that it failed to act fairly and impartially between the parties. The court found no merit in either challenge. The case illustrates the high burden facing any party attempting to overturn an LCIA award in the English court.

Another recent case provides useful insight into when the English courts may extend time to remove ambiguity in an LCIA award. In *Xstrata Coal Queensland Pty Ltd v Benxi Iron and Steel (Group) International & Economic Trading Co Ltd* [2016] EWHC 2022 (Comm), the Commercial Court indicated that article 27.1 of the 1998 LCIA Rules

was more than a mere 'slip rule' and could be used to allow clarification of ambiguities in an award. The case concerned an award issued in 2010 by an LCIA tribunal requiring the payment of US\$27.8 million by the respondent party. When the successful party sought enforcement of the award in China, the Chinese court had refused the application because it found that one of the claimant parties (ICRA OC Pty Ltd) was not a party to the underlying contract, considering this a 'critical flaw' in the award. The award was silent on why ICRA OC Pty Ltd was a party to the arbitration, but ICRA NCA Pty Limited was a party to the underlying contract and the arbitration agreement contained within it. In 2014, the claimants applied to the tribunal under article 27 of the LCIA Rules 1998. Article 27 allows parties to make a written request within 30 days of receipt of the award for the tribunal to 'correct in the award any errors in computation, clerical or typographical errors or any errors of a similar nature', or to make an additional award in relation to claims presented within the arbitration. The tribunal refused the request as being made outside the 30-day period. Section 79 of the Act allows the court to extend any time limit unless the parties have agreed otherwise. The parties applied to the English Court for an extension of time under section 79. The court found that the conditions for extending time under section 79 had been satisfied. The time limit had expired and substantial injustice would be done if time were not extended. There was an ambiguity in the award which impeded the arbitral process. The wording of article 27 of the 1998 LCIA Rules ('any errors of a similar nature') was found to be broad enough to include removing ambiguity. This decision allowed the tribunal to reform some six years after the date of the original award.

There has been much commentary about *Gerald Metals SA v The Trustees of the Timis Trust & others* [2016] EWHC 2327, which addressed the relative powers of the LCIA and the court in relation to interim relief. The Act gives the court the power to grant interim relief in support of arbitration, providing that 'the court shall act only if or to the extent that the arbitral tribunal and any arbitral or other institution or person vested by the parties with power in that regards, has no power or is unable for the time being to act effectively' (section 44(5)). As mentioned above, article 9B of the 2014 Rules includes a procedure for the appointment of an emergency arbitrator prior to the formation of the tribunal. The provision is explicitly stated to not prejudice 'any party's right to apply to a state court or other legal authority for any interim or conservatory measures before the formation of the Arbitration Tribunal' (article 9.12). In *Gerald Metals*, the claimant applied to the LCIA for the appointment of an emergency arbitrator to consider an application for emergency relief including an order to prevent the respondent dissipating its assets. The LCIA rejected the request to appoint an emergency arbitrator on the basis of an undertaking provided by the respondent. The claimant then applied to the court, seeking a freezing injunction and an order requiring the provision of information regarding the respondent's assets. The court refused the application, holding that it would have no power to make an order in these circumstances except where either there was insufficient time to form an expedited tribunal or appoint an emergency arbitrator; or where an expedited tribunal or emergency arbitrator was unable to exercise the necessary powers. It



SHEPHERD+ WEDDERBURN

Claire Stockford
Jane Wessel
Tom Stables

claire.stockford@shepwedd.com
jane.wessel@shepwedd.com
tom.stables@shepwedd.com

Condor House
10 St Paul's Churchyard
London
EC4M 8AL

Tel: +44 20 7429 4900
Fax: +44 20 7329 5939
www.shepwedd.com

therefore appears that in cases where the LCIA emergency arbitrator provisions apply, the court's powers under section 44 of the Act may be limited to cases that are too urgent to allow the appointment of an emergency arbitrator, or where his or her powers would be insufficient to make the necessary order.

Final remarks

2016 marked the successful launch of the Arbitration Pledge, a diversity initiative focused on improving the profile and representation of women in arbitration. The LCIA was one of the first signatories. At the time of writing, more than 1,500 other organisations and individuals have joined it in signing the Pledge.

In the midst of uncertainty following the United Kingdom's vote in the referendum on 23 June 2016 to leave the European Union, the LCIA offered some words of comfort for LCIA users. In a message on the LCIA website, its president and chairman of the board wrote 'The outcome of the referendum does not affect the workings of the LCIA or the conduct of cases subject to its Rules. The LCIA continues to administer and monitor arbitrations and mediations, whether seated in the UK or elsewhere, and all financial and logistical arrangements including travel in relation to arbitrations seated in the UK continue as before.' Enforcement of arbitration awards under the New York Convention, which has no relationship with the EU, will be wholly unaffected by the Brexit result.

Angola

Agostinho Pereira de Miranda, Sofia Martins and Jayr Fernandes

Miranda & Associados

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

The Angolan National Assembly has approved the accession of the country to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards by means of resolution No. 38/2016. The resolution was approved on 16 June 2016 and published in the official gazette on 12 August 2016. The Convention has also already been ratified by the president of the Republic of Angola through a letter of accession dated 5 December 2016, published in the Official Gazette on 19 December 2016. Such instrument must now be deposited with the secretary general of the United Nations. The Convention will come into force 90 days following the deposit of the ratification instrument with the secretary general of the United Nations.

Under the principle of reciprocity set forth in article I.(3) of the New York Convention, the Republic of Angola made a reservation pursuant to which the Convention will only apply to the recognition and enforcement of awards issued in the territory of another contracting state.

Angola is not a party to the 1965 Washington Convention on Settlement of Investment Disputes between States and Nationals of other States (ICSID).

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Angola is a party to bilateral investment treaties (BITs) with Cape Verde, Germany, Italy, Portugal, Russia, South Africa, France, Spain, the United Kingdom and Brazil but only four of these BITs are in force (Cape Verde, Germany, Italy and Russia).

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary domestic source of law relating to arbitration in Angola is the Voluntary Arbitration Law (VAL), Law No. 16/03, dated 25 July 2003. The VAL governs both domestic and international arbitration. According to the VAL, arbitration will be of an international nature when international trade interests are at stake, in particular when the parties to the arbitration agreement have business domiciles in different countries at the time of the agreement's execution, or the place of performance of a substantial part of the obligations resulting from the legal relationship from which the dispute arises is situated outside the countries where companies have their business domiciles or when the parties have expressly agreed that the scope of the arbitration agreement is connected with more than one state.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The VAL is not based on the 1985 UNCITRAL Model Law. In contrast to the Model Law, the VAL:

- does not address the issue of preliminary orders;
- does not expressly distinguish between different types of awards; and
- allows for appeals on the merits to be lodged against domestic arbitral awards unless otherwise agreed between the parties.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Arbitral procedures must comply with the following principles of due process, which are mandatory for any arbitration (domestic or international) taking place in Angola:

- parties must be treated equally; and
- the proceedings must have an adversarial nature.

Also, it is mandatory that both parties be given the opportunity to present their case, orally or in writing, before the final award is rendered.

An arbitral award may be set aside on account of breach of the principles listed above in cases where such a breach has played a decisive role in the dispute's outcome.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Pursuant to the VAL, parties in domestic and in international arbitration are free to designate the substantive law or rules of law applicable to the merits of the case. In both domestic and international arbitration, parties may also authorise the tribunal to decide *ex aequo et bono*, provided they do so expressly.

If, however, parties in domestic arbitration fail to agree on the substantive applicable law, the arbitral tribunal shall decide in accordance with Angolan substantive law. As to international arbitration, failing party agreement, the tribunal shall apply the law resulting from the rules on conflict of laws.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

Decree No. 4/06, of 27 February 2006, is aimed at promoting institutional arbitration in Angola and deals with licensing procedures for the incorporation of arbitration centres. According to said Decree, the Minister of Justice is the entity empowered to authorise the incorporation of arbitration centres in Angola.

- Currently the following arbitration centres have been authorised:
- Iuris SA;

- Harmonia – Integrated Centre for the Study and Resolution of Conflicts;
- CEFA Arbitration Centre;
- Angolan Centre for the Arbitration of Disputes (CAAL);
- Angolan Centre for Mediation and Arbitration (CMA);
- Centre for the Extrajudicial Resolution of Disputes (CREL); and
- Arbitration Centre of the Centre for Strategic Studies of Angola (CEEA).

Harmonia and CREL currently administer arbitrations.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The general rule under the VAL is that parties are free to submit their disputes to arbitration, with exceptions made to disputes that fall under the state courts' exclusive jurisdiction and disputes that relate to inalienable or non-negotiable rights. As such, disputes relating to the following issues may, inter alia, be submitted to arbitration: IP rights, commercial and corporate law, securities transactions and intracompany disputes.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The arbitration agreement may consist of either an arbitration clause or a 'submission agreement'. The arbitration clause concerns potential future disputes arising from a given contractual or extra-contractual relationship, whereas the submission agreement arises from existing disputes, whether or not they have already been submitted to a state court. The VAL treats both types of arbitration agreements on an equal footing.

Subject to any special law requiring a more formal form, the arbitration agreements must be made in writing. An arbitration agreement is considered to be in writing if documented either in a written instrument signed by the parties or in correspondence exchanged between them.

The VAL allows arbitration agreements to be incorporated in a contractual document that is not signed by both parties simply by reference to general terms and conditions on another contract. Under Angolan Law, the validity of such an arbitration clause is governed by general principles of contract law and specifically by the Standard Contractual Clauses Law (Law No. 4/03 of 18 February 2003 (the SCCL)). As per the SCCL, only clauses expressly accepted by the adhering party and whose contents have actually been communicated and explained to such a party will be considered as enforceable.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The VAL expressly adopts the doctrine of separability by stating that the arbitration clause is autonomous in relation to the other clauses of the contract in question. Consequently, a decision rendered by the arbitral tribunal on the contract's nullity does not entail the invalidity of the arbitration clause ipso iure unless it is shown that such a contract would not have been entered into without said agreement.

Pursuant to the VAL an arbitration agreement shall be declared null and void when entered into in breach of formal requirements or provisions on legitimacy, scope and arbitration exclusion.

Parties are entitled to mutually revoke the arbitration agreement before the award is rendered by the arbitral tribunal, provided such revocation is made in writing.

Additionally, the arbitration agreement will expire in the following situations:

- when an arbitrator dies, excuses him or herself or is unable to exercise his or her duties and he or she is not duly replaced;
- when a majority of votes is not obtained in those cases where the tribunal is composed of more than one arbitrator; or
- when the award is not rendered within the time limit set for such a purpose.

Unless otherwise stipulated by the parties, the arbitration agreement shall not lapse upon the death (or extinction, in the case of corporate persons) of any of the parties.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

The VAL does not contain a provision on the extension of an arbitration agreement over third parties. Unless a third party subsequently adheres to the arbitration agreement, claims against such a third party lodged with an arbitral tribunal will not be admissible nor will it be admissible to invoke an arbitration clause against a third party that has lodged a claim before a state court.

Pursuant to Angolan law, rights or obligations under a main contract can be transferred to third parties. When applied to arbitration clauses, this rule results in an automatic transfer to the transferee of the transferor's rights and obligations under the arbitration agreement. This is the case, for instance, in the assignment of an entire contract or specific rights or interests. Exceptions to the automatic transfer occur when parties have excluded the assignment of the arbitration agreement or entered into the arbitration agreement on an *intuitus personae* basis.

Automatic transfers of arbitration agreements may further occur in cases of statutory or contractual subrogation whereby a third party replaces a contracting party (eg, by paying a debt of the said party pursuant to a guarantee). In those cases the third party is bound by the arbitration agreement and is allowed to invoke it before the counterpart.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The VAL does not contain a provision on third-party participation.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

There is no information available in this respect.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The VAL does not expressly provide for multiparty arbitration agreements.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Any person enjoying full legal capacity may act as an arbitrator. Further to this, no special qualifications are required to act as an arbitrator. In particular, the arbitrator does not have to be admitted to the Angolan Bar or even possess a legal background. Arbitrators are not restricted by their nationality or their previous experience or responsibilities.

There is no available information as to whether any contractually stipulated requirement for arbitrators based on nationality, religion or gender would be recognised by Angolan courts.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

In all cases in which the parties are unable to agree on the appointment of an arbitrator, this appointment shall be made by the president of the provincial court of the seat of arbitration. When no such seat has been agreed on, the choice shall be made by the president of the court with jurisdiction over the applicant's domicile or, should the applicant be a foreign entity or citizen, by the president of the Provincial Court of Luanda.

Should the counterpart refuse or fail to appoint its arbitrators, the applicant may request for default appointment proceedings to be initiated within 30 days from the date of the notice of arbitration.

The decision rendered by the state courts under such terms is not subject to appeal.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Arbitrators may be challenged in the event of justified doubts as to their impartiality or independence or whenever the qualifications agreed to by the parties are not met by the arbitrator.

A party may only challenge an arbitrator based on reasons the party only became aware of after the appointment was made.

Parties are free to agree on the procedures for the challenge of arbitrators. Failing agreement, the party intending to challenge an arbitrator shall submit a written statement to the arbitral tribunal within eight days from the date on which it became aware of the reasons for challenge. The arbitral tribunal shall decide on the challenge unless the challenged arbitrator withdraws or the counterpart agrees with the challenge.

Similarly to the Model Law, the VAL allows the unsuccessful party in a challenge to proceed with such a challenge before the state court, whose decision shall be final and binding. While such a request is pending the arbitral tribunal may proceed with the arbitral proceedings but it may not in the meanwhile render the final award.

Arbitrators are replaced when unable to perform their duties *de jure* or *de facto*, notably, in the event of death, voluntary withdrawal or a successful challenge. The arbitrator shall be replaced in accordance with the rules applicable to the appointment or designation, adapted as necessary.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

The relationship between parties and arbitrators is both of a contractual and jurisdictional nature. Arbitrators must meet the requirements of independence and impartiality and are bound to disclose all facts that may have potential implications on their impartiality and independence. Further to this, arbitrators must have the qualifications agreed upon by the parties.

As to remuneration, unless the arbitration is governed by institutional rules, arbitrators fees are agreed between the parties and the arbitrators as a whole, with the exclusion of any one party fee arrangement with one or more arbitrators.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators are generally immune, much as state judges, but they may be held liable on account of unjustified or illegitimate withdrawal from office. In addition to this, an arbitrator who unjustifiably delays the issuance of the award may also be held liable on account of the delay.

Liability on account of breach of the arbitrator's general duties of impartiality, independence and good faith is also admissible.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

An agreement to arbitrate implies the waiver by the parties to initiate state court action on the matters or disputes submitted to arbitration. As a result, once the parties have agreed to use arbitration, the intervention of the judicial court is limited to those instances set forth in the VAL.

Should proceedings be filed with a state court, the arbitration agreement may be relied upon by the respondent with a view to request that the proceedings be dismissed. The court will not address this matter *ex officio*. Unless the party invoking such an exception is only made aware of the relevant facts at a later stage, it must be claimed in the statement of defence.

Actions concerning the validity of an arbitration agreement filed with a state court once the arbitral tribunal has been constituted shall not be admitted. Pursuant to the Angolan Code on Civil Procedure (the CCP), judicial courts are prevented from hearing a case in which the breach of an arbitration agreement is invoked. Unless the arbitration agreement is patently null and void, the state court must dismiss the proceedings and refer the matter to arbitration.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Under the VAL, the arbitral tribunal is entitled to decide on its own jurisdiction (competence-competence) and for this purpose may rule on the existence, validity and effectiveness of the arbitration agreement.

Parties may claim that the arbitral tribunal lacks jurisdiction until the time limit set for submission of the statement of defence, or jointly therewith. If relevant facts evidencing the arbitral tribunal's lack of jurisdiction should supervene, parties may still raise the issue.

A tribunal's decision confirming its own jurisdiction may only be challenged by means of setting-aside proceedings.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Failing agreement of the parties, the choice on the place of arbitration shall fall to the arbitrators. The choice of the seat does not preclude the arbitral tribunal from meeting at other places for purposes of consultation among its members.

As to language, the rules governing international arbitration provide that the parties are free to agree on the language or languages to be used in the proceedings. Failing agreement, the choice of language falls to the tribunal. The chosen language shall apply to all written declarations submitted by the parties, hearings and awards, rulings or notices of the arbitral tribunal, unless otherwise specified.

23 Commencement of arbitration

How are arbitral proceedings initiated?

There being no prior agreement as to the form for instituting arbitration, the party intending to bring a dispute before an arbitral tribunal shall notify the opposing party of this fact. The notice shall identify the parties, indicate the arbitration agreement and specify the subject matter of the dispute (unless it has already been done in the arbitration agreement) and the name of the arbitrator the party wishes to appoint. Notice of arbitration may be made by any means available, provided that it is possible to prove its receipt by the addressee.

The VAL does not address the matters of signature and number of copies necessary to institute an arbitration.

24 Hearing

Is a hearing required and what rules apply?

The VAL does not address this matter. Subject to party agreement, the tribunal shall decide on the existence of hearings for purposes of production of evidence or oral arguments.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Although the general rule on the burden of proof is that each party must prove the facts that it claims, state courts may order that evidence be provided for this purpose *ex officio*.

There is no particular standard of proof under the VAL. Parties are thus free to agree on the matter, and failing agreement the arbitral tribunal shall decide.

All means of evidence allowed for under the CCP are admissible in arbitration proceedings (eg, documentary, witness and expert evidence).

Parties may present the tribunal with documents voluntarily, notably with their submissions. Further, the arbitral tribunal may order parties or third entities to submit documents held by these. Failing voluntary compliance with such an order, the tribunal may request judicial court assistance.

Although witness evidence is admissible, the VAL is silent on the admissibility of written statements. This matter is thus subject to party autonomy.

Expert witnesses are also admissible in arbitration proceedings. However, the appointment and presentation of experts (by the parties or by the tribunal) is not addressed in the VAL, the matter thus being subject to party autonomy.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

According to the VAL, Angolan courts may be called upon to assist the arbitral tribunal during arbitration proceedings for the following purposes:

- to grant interim measures, which may be ordered before commencement of arbitral proceedings;
- to enforce interim measures ordered by arbitral tribunals;
- to appoint arbitrators where the parties fail to do so;
- to appoint the chairperson when the tribunal is made up of more than one arbitrator and such an appointment has not been carried out; and
- to assist the tribunal in the taking of evidence.

Once arbitration proceedings are completed the award shall be deposited with the competent state court except when the parties have agreed otherwise. State courts may also intervene in appeals and in setting-aside or enforcement proceedings.

27 Confidentiality

Is confidentiality ensured?

The VAL contains no rules in respect of confidentiality of the proceedings or the award. However, confidentiality clauses to that effect may be included in arbitration agreements.

Awards may easily become part of the public domain for, as a rule, they are deposited with a state court. In addition, legal proceedings for purposes of award annulment or enforcement are typically not held in private.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

If made by a party to a judicial court, a request for interim measures before or during arbitral proceedings does not seem incompatible with an arbitration agreement.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The VAL does not provide for an emergency arbitrator prior to the constitution of the arbitral tribunal.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The VAL expressly provides that the arbitral tribunal has the power to grant interim measures. This provision is, however, silent on the kind of interim measures that the tribunal may order.

The VAL does not address the issue of security for costs.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The VAL is silent in this regard.

Arbitrators have no authority to apply compulsory measures. However, they may report any gross violations committed by counsel to the Bar for purposes of disciplinary action.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Whenever the tribunal is made up of more than one arbitrator, all decisions must be made by a majority of its members unless the parties agree otherwise. Issues of procedure may be decided by the presiding arbitrator if so authorised by the parties or by all members of the arbitral tribunal.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

The VAL provides that dissenting opinions must be included in the award and the dissenting arbitrator must be identified.

34 Form and content requirements

What form and content requirements exist for an award?

The award shall be made in writing and include the following contents:

- identification of the parties;
- reference to the arbitration agreement;
- the subject matter of the dispute;
- identification of the arbitrators;
- the seat of the arbitration;
- the location and date on which the award was made; and
- the arbitrators' signatures.

Update and trends

As mentioned in question 1, the Angolan National Assembly has approved the accession of the country to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards by means of resolution No. 38/2016. The resolution was approved on 16 June 2016 and published in the official gazette on 12 August 2016. The Convention will only come into force after being ratified by the president of the Republic of Angola and after 90 days following the deposit of the ratification instrument with the secretary general of the United Nations. The Convention has already been ratified by the president of the Republic of Angola through a letter of accession dated 5 December 2016, published in the Official Gazette on 19 December 2016. Such instrument must now be deposited with the secretary general of the United Nations.

In addition, and unless otherwise agreed by the parties, the award must be reasoned, an exception being made for consent awards.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

According to the VAL, unless otherwise provided for by the parties in writing, the arbitral tribunal shall render the award within six months of the date of acceptance by the last arbitrator. Parties are free to extend this time limit, provided it is done in writing.

Although domestic arbitration institutions have been created in Angola (as mentioned in question 7), there is no information available to the public yet as to the rules of the said institutions.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The relevant date for the commencement of the time limits applicable to challenge proceedings and requests for award correction is that of the receipt of the award by the applicant.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The VAL does not expressly distinguish between different types of awards. It is silent on partial awards as it is on default awards but does allow for final, interim and consent awards to be rendered.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Other than the grounds for termination of proceedings mentioned in question 10, an arbitration may be terminated by settlement between the parties.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The remuneration of arbitrators (and that of others participating in the proceedings), as well as other charges related to the proceedings and their sharing among the parties have to be set in the arbitration agreement (or in a subsequent document signed by the parties), or otherwise they result from the arbitration regulations chosen by the parties.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Interest may be awarded to the parties only if initially claimed and will be attributed according to the statutory rate applicable to each case.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Parties may request the tribunal to correct computational or typographical errors within 10 days from the date of the award's receipt. The VAL does not expressly empower the tribunal to perform corrections to the award on its own initiative. Parties may also request the tribunal to interpret the award in the event of ambiguity or vagueness of its terms.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

A party wishing to set aside the award may do so based on the following grounds:

- the subject matter of the dispute is not arbitrable under Angolan law;
- a lack of jurisdiction of the arbitral tribunal to rule on the dispute (as long as a claim in this respect was made by the applicant during proceedings);
- the award was rendered after the arbitration agreement had already lapsed;
- a breach of the rules on arbitrator appointment and tribunal constitution (as long as a claim in this respect was made by the applicant during proceedings);
- a breach of the arbitrators' duty to reason the award;
- a breach of mandatory principles of due process;
- when the award deals with a dispute not referred to in the arbitration agreement or fails to consider matters that it should have considered; or
- the arbitral tribunal decides *ex aequo et bono* or according to usages and customs and fails to observe Angolan public policy principles.

According to the VAL, setting-aside proceedings may only be resorted to when the parties are not allowed or choose not to present an appeal on the merits. When the parties opt to present an appeal on the merits, grounds for setting aside the award must be claimed therein.

Some authors take the view that, in addition to the grounds for setting aside an award explicitly provided for in the VAL, there are other grounds that are implicitly included in the said provision or otherwise arise from general principles of law. Such additional grounds include cases in which there is breach of the arbitration agreement with a decisive influence on the award (eg, when the arbitrators decide *ex aequo et bono* without the parties' agreement or apply a law to the substance of the dispute different from that chosen by the parties) or in which international public policy rules have been breached.

Setting-aside proceedings are decided by the Angolan Supreme Court and should be initiated by the applicant 20 days after it has been given notice of the award. Setting-aside proceedings follow the rules provided for ordinary appeals in the Angolan CCP.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

The VAL contains distinct provisions for domestic and international arbitration on this matter.

An appeal on the merits is admissible in domestic arbitration provided that the parties have not waived this right. In contrast, for international arbitration, the rule is that awards are final and binding and will not be subject to appeal on the merits unless the parties have agreed otherwise.

It is not possible to estimate how long it will take for an appeal on the merits to be decided by the state court, but according to experience it could take six months or a few years.

Court costs depend mainly on the case's economic value.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

According to the VAL, domestic arbitral awards have the same effects as judicial awards. As such, if the losing party does not comply with the award, the winning party may seek the direct enforcement thereof in a state court through judicial enforcement proceedings. No previous exequatur is required.

Further to the grounds generally admissible in the CCP, the enforcement of an arbitral award may be refused on the same grounds as those provided for setting-aside proceedings.

Moreover, courts may ex officio refuse the enforcement if the dispute at stake:

- is not arbitrable;
- falls under the exclusive jurisdiction of state courts; or
- is subject to statutory (as opposed to contractual) arbitration.

No particular enforcement procedure is set forth in the VAL. An arbitral award shall be enforceable pursuant to domestic civil procedure rules. Parties are granted a 30-day period to comply with the award's terms voluntarily. Failure to do so will legitimate the winning party to initiate enforcement proceedings, which will follow the terms of summary enforcement proceedings provided for in the CCP.

Enforcement proceedings take place before the provincial court of the seat of arbitration. After an application has been presented to the state court in this respect, the counterpart will be summoned to pay the sum it has been ordered to pay within a five-day period from the date of the summons. The respondent may also file an opposition to the enforcement proceedings within the same period of time. Such opposition shall not stay enforcement proceedings.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

There is no relevant information available in this respect.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The VAL does not address either the issue of emergency arbitrators or the enforcement of orders issued by emergency arbitrators.

47 Cost of enforcement

What costs are incurred in enforcing awards?

A party seeking to enforce an arbitral award will be subject to payment of regular court fees, depending mainly on the case's economic value.

Other**48 Judicial system influence**

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Angola is a civil law jurisdiction. The VAL makes clear reference to the CCP in regard to the means and rules of evidence available to arbitral tribunals.

The CCP presents a mixed approach between the inquisitorial and adversarial systems. Thus, although the general rule is that each party must prove the facts that it claims, courts also have the duty to seek the truth, and in view of such a duty are allowed to order that evidence be provided for said purpose ex officio.

There is no tendency towards US-style discovery. The VAL is silent on written statements and party officer testimonials. Such matters are subject to party autonomy.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

The VAL contains no reference to ethical rules applicable to counsel acting in international arbitration. Also we are not aware of any soft law or guidelines regarding party representation in Angola.

The information available on the matter is not enough to allow for a conclusion on whether the best practice in Angola reflects or contradicts the IBA Guidelines in International Arbitration.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

There is no regulation on third-party funding of arbitration in Angola.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Foreign practitioners may act as arbitrators in Angola with no limitation on nationality (as mentioned in question 15), but not as counsel.

No VAT is applicable to independent service providers under Angolan law.

Non-Angolan citizens are required to hold a visa when entering the country, although an exception is made for nationals of Cape Verde, Namibia, and São Tomé and Príncipe.

MIRANDA
Miranda & Associados Sociedade de Advogados RL

Agostinho Pereira de Miranda
Sofia Martins
Jayr Fernandes

agostinho.miranda@mirandalawfirm.com
sofia.martins@mirandalawfirm.com
jayr.fernandes@fatimafreitas.com

Av. Eng. Duarte Pacheco 7
1070-100 Lisbon
Portugal

Tel: +351 217 814 800
Fax: +351 217 814 802
www.mirandalawfirm.com

Austria

Klaus Oblin

Oblin Melichar

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Austria has ratified the following multilateral conventions relating to arbitration: the New York Convention, 31 July 1961 (Austria has made a notification under article I, section 3, stating that it would only recognise and enforce awards rendered in other contracting states of this convention); the Protocol on Arbitration Clauses, Geneva, 13 March 1928; the Convention on the Execution of Foreign Arbitral Awards, Geneva, 18 October 1930; the European Convention on International Commercial Arbitration (and the agreement relating to its application), 4 June 1964; and the Convention on the Settlement of Investment Disputes, 24 June 1971.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Austria has signed 65 bilateral investment treaties, of which 60 have been ratified, namely with Albania, Algeria, Argentina, Armenia, Azerbaijan, Bangladesh, Belarus, Belize, Bolivia, Bosnia, Bulgaria, Cape Verde, Chile, China, Croatia, Cuba, the Czech Republic, Egypt, Estonia, Ethiopia, Georgia, Hong Kong, Hungary, India, Iran, Jordan, Kuwait, Latvia, Lebanon, Libya, Lithuania, Macedonia, Malaysia, Malta, Mexico, Moldova, Mongolia, Morocco, Oman, Paraguay, Philippines, Poland, Romania, the Russian Federation, Saudi Arabia, Serbia, Slovakia, Slovenia, South Africa, South Korea, Tajikistan, Tunisia, Turkey, Ukraine, the United Arab Emirates, Uzbekistan, Vietnam and Yemen.

Austria is also a party to a number of further bilateral treaties that are not investment treaties, mainly with neighbouring countries.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Austrian arbitration law is contained in articles 577 to 618 of the Austrian Code of Civil Procedure (CCP). These provisions regulate both domestic and international arbitration proceedings.

Recognition of foreign awards is regulated in the aforementioned multilateral and bilateral treaties (see questions 1 and 2). The enforcement proceedings are regulated in the Austrian Enforcement Act.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

As in most countries, the law does not mirror every single aspect of the UNCITRAL Model Law. However, the main features have been introduced.

Unlike the UNCITRAL Model Law, the Austrian law does not distinguish between domestic and international arbitrations or between commercial and non-commercial arbitrations. Therefore, specific rules apply to employment and consumer-related matters (see question 44).

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The parties are free to agree on the rules of procedure (eg, by reference to specific arbitration rules) within the limits of the mandatory provisions of the CCP. Where the parties have not agreed on any set of rules, or set out rules of their own, the arbitral tribunal must, subject to the mandatory provisions of the CCP, conduct the arbitration in such a manner as it considers appropriate. Mandatory rules of Austrian arbitration procedure include that the arbitrators must be, and remain, impartial and independent. They must disclose any circumstances likely to give rise to doubts about their impartiality or independence. The parties have the right to be treated in a fair and equal manner and to present their case. Further mandatory rules concern the arbitral award, which must be in writing, and the grounds on which an award can be challenged (see question 42).

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

An arbitral tribunal has to apply the substantive law chosen by the parties, failing which, it has to apply the law that it considers appropriate. A decision on grounds of equity is only permitted if the parties have expressly agreed to a decision in equity (article 603 CCP).

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The Vienna International Arbitral Centre (VIAC) (viac.eu) administers international arbitration proceedings under its Rules of Arbitration and Conciliation (2013), better known as the Vienna Rules. The fees for the arbitrators are calculated on the basis of the amount in dispute. There are no restrictions as to the place and language of the arbitration.

The Vienna Commodity Exchange at the Vienna Stock Exchange has its own court of arbitration and its own recommended arbitration clause.

Certain professional bodies and chambers provide for their own rules or administer arbitration proceedings, or both.

The International Chamber of Commerce maintains a direct presence through its Austrian National Committee.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

In principle, any proprietary claim is arbitrable. Non-proprietary claims are still arbitrable if the law allows the dispute to be settled by the parties.

There are some exceptions in family law or cooperative apartment ownership.

Consumer and employment-related matters are only arbitrable if the parties enter into an arbitration agreement once the dispute has arisen.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

An arbitration agreement must:

- sufficiently specify the parties (they must at least be determinable);
- sufficiently specify the subject matter of the dispute in relation to a defined legal relationship (this must at least be determinable and it can be limited to certain disputes, or include all disputes);
- sufficiently specify the parties' intent to have the dispute decided by arbitration, thereby excluding the state courts' competence; and
- be contained either in a written document signed by the parties, or in telefaxes, emails or other communications exchanged between the parties, which preserve evidence of a contract.

A clear reference to general terms and conditions containing an arbitration clause is sufficient.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

Arbitration agreements and clauses can be challenged under the general principles of Austrian contract law, in particular on the grounds of error, deceit or duress, or legal incapacity. There is controversy over whether such a challenge should be brought before the arbitral tribunal or before a court of law. If the parties to a contract containing an arbitration clause rescind their contract, the arbitration clause is deemed to be no longer enforceable, unless the parties have expressly agreed on the continuation of the arbitration clause. In the event of insolvency or death, the receiver or legal successor is, in general, bound by the arbitration agreement. An arbitral agreement is no longer enforceable if an arbitral tribunal has rendered an award on the merits of the case or if a court of law has rendered a final judgment on the merits and the decision covers all matters for which arbitration has been agreed on.

11 Third parties - bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

As a general principle, only the parties to the arbitration agreement are bound by it. Austrian courts are reluctant to bind third parties to the arbitration agreement. Thus, concepts such as piercing the corporate veil, groups of company and so on typically do not apply.

However, a legal successor is bound by the arbitration agreement in which his or her predecessor has entered into. This also applies to the insolvency administrator and to the heir of a deceased person.

12 Third parties - participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

Normally, joinder of a third party to an arbitration requires the corresponding consent of the parties, which can either be express or implied (eg, by reference to arbitration rules that provide for joinder). The consent can be given either at the time the request for joinder is made or at an earlier stage in the contract itself. Under Austrian law, the issue

is largely discussed in the context of the intervention of a third party that has an interest in the arbitration. Here, it is argued that such a third-party intervener must be a party to the arbitration agreement or otherwise submit to the jurisdiction of the tribunal, and that all parties, including the intervener, must agree to the intervention.

The Austrian Supreme Court has held that the joining of a third party in arbitral proceedings against its will, or the extension of the binding effect of an arbitration award on a third party, would infringe article 6 of the European Convention on Human Rights if the third party was not granted the same rights as the parties (eg, the right to be heard).

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The group of companies doctrine is not recognised in Austrian law (see question 11).

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

Multiparty arbitration agreements can be entered into under the same formal requirements as arbitration agreements (see question 9).

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Only physical persons can be appointed as arbitrators. The statute does not provide for any specific qualifications, but the parties may agree on such requirements. Active judges are not allowed to act as arbitrators under the statute regulating their profession.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

The courts are competent to make the necessary default appointments, if the parties do not agree on another procedure, and if:

- one party fails to appoint an arbitrator;
- the parties cannot agree on a sole arbitrator; or
- the arbitrators fail to appoint their chairman.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Challenge of arbitrators

An arbitrator can only be challenged if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess qualifications agreed to by the parties. The party that appointed an arbitrator cannot rely, in its challenge, on circumstances it knew at the time of the appointment (article 588 CCP).

Removal of arbitrators

An arbitrator can be removed if he or she is incapable of discharging his or her tasks, or if he or she does not discharge them within an appropriate time (article 590 CCP).

Arbitrators can be removed, either by way of challenge, or with the termination of their mandate. In both cases, it is ultimately the court

that decides upon the request of one party. If early termination of the arbitrator's mandate occurs, the substitute arbitrator must be appointed in the same manner in which the replaced arbitrator was appointed.

In a recent case, the Supreme Court dealt with the grounds for challenges analysing the conflicting views of scholars as to whether, and to what extent, challenges should be permitted after a final award. In its analysis the court also cited and relied on the IBA guidelines.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

In ad hoc arbitration, an arbitrators' agreement should be concluded, regulating the rights and duties of the arbitrators. This contract should include a fee arrangement (eg, by reference to an official tariff of legal fees, hourly rates or in some other way) and the arbitrators' right to have their out-of-pocket expenses reimbursed. Their duties include the conduct of the proceeding, as well as the drafting and signing of the award.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

If an arbitrator has accepted his or her appointment, but then refused to discharge his or her tasks in due time, or at all, he or she can be held liable for the damage because of the delay (article 594 CCP). If an award has been set aside in subsequent court proceedings and an arbitrator has caused, in an unlawful and negligent manner, any damage to the parties, he or she can be held liable. Arbitrators' agreements and rules of arbitration of arbitral institutions often contain exclusions of liability.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Austrian law does not contain any express rules on the remedies available in the event that court proceedings are commenced in breach of an arbitration agreement or if arbitration is commenced in breach of a jurisdiction clause (other than an adverse cost decision in proceedings that should not have been commenced in the first place).

If a party brings a legal action before a court of law, despite the matter being subject to an arbitration agreement, the defendant has to raise an objection to the court's jurisdiction before commenting on the subject matter itself, namely, at the first hearing or in its statement of defence. The court must generally reject such claims, if the defendant objected to the court's jurisdiction in time. The court must not reject the claim if it establishes that the arbitration agreement is non-existent, not valid or impracticable.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

An arbitral tribunal can rule on its own jurisdiction either in a separate award or in the final award on the merits. A party who wishes to challenge the jurisdiction of the arbitral tribunal must raise that objection no later than in the first pleading in the matter. The appointment of an arbitrator, or the party's participation in the appointment procedure, does not preclude a party from raising the jurisdictional objection. A late plea must not be considered, unless the tribunal considers the delay justified and admits the plea. Both courts and arbitral tribunals can determine jurisdictional issues.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

If the parties have not agreed on a place of arbitration and on the language of the arbitral proceedings, it is at the arbitral tribunal's discretion to determine an appropriate place and language.

23 Commencement of arbitration

How are arbitral proceedings initiated?

Under Austrian statutory law, the claimant has to submit a statement of claim that must set forth the facts on which the claimant intends to rely and his or her requests for relief. The statement of claim must be filed within the time period agreed between the parties or set by the arbitral tribunal. The claimant may submit relevant evidence at that point. The respondent shall then submit his or her statement of defence.

Under the Vienna Rules, the claimant has to submit a statement of claim to the secretariat of the VIAC. The statement must contain the following information:

- the full names, addresses, and other contact details of the parties;
- a statement of the facts and a specific request for relief;
- if the relief requested is not exclusively for a specific sum of money, the monetary value of each individual claim at the time of submission of the statement of claim;
- particulars regarding the number of arbitrators;
- the nomination of an arbitrator if a panel of three arbitrators was agreed or requested, or a request that the arbitrator be appointed; and
- particulars regarding the arbitration agreement and its content.

24 Hearing

Is a hearing required and what rules apply?

Oral hearings shall take place at the request of one party, or if the arbitral tribunal considers it necessary (article 598 CCP and article 30 of the Vienna Rules).

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Austrian statutory law does not contain specific rules on the taking of evidence in arbitral proceedings. Arbitral tribunals are bound by rules on evidence, which the parties may have agreed on. In the absence of such rules, the arbitral tribunal is free to take and evaluate evidence as it deems appropriate (article 599 CCP). Arbitral tribunals have the power to appoint experts (and to require the parties to give the experts any relevant information or to produce or provide access to any relevant documents, goods or other property for inspection), hear witnesses, parties or party officers. However, arbitral tribunals have no power to compel the attendance of parties or witnesses.

As a matter of practice, parties often authorise arbitral tribunals to refer to the IBA Rules on the Taking of Evidence for guidance. If rules such as the IBA Rules are referred to, or agreed, the scope of disclosure is often wider than disclosure in litigation (which is quite limited under Austrian law). The arbitral tribunal has to give the parties the opportunity to take note of and comment on the evidence submitted and the result of the evidentiary proceedings (see article 599 CCP).

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

An arbitral tribunal may request assistance from a court in order to:

- enforce an interim or protective measure issued by the arbitral tribunal (article 593 CCP); or
- conduct judicial acts where the arbitral tribunal is not authorised to do so (compelling witnesses to attend, hearing witnesses under oath and ordering the disclosure of documents), including

requesting foreign courts and authorities to conduct such acts (article 602 CCP).

A court can only intervene in arbitrations if this is expressly provided for in the CCP. In particular the court can (or must):

- grant interim or protective measures (article 585 CCP);
- appoint arbitrators (article 587 CCP); and
- decide on the challenge of an arbitrator if:
 - the challenge procedure agreed upon, or the challenge before the arbitral tribunal, is not successful;
 - the challenged arbitrator does not withdraw from his or her office; or
 - the other party does not agree to the challenge.

27 Confidentiality

Is confidentiality ensured?

The CCP does not explicitly provide for the confidentiality of arbitration, but confidentiality can be agreed upon between the parties. Further, in court proceedings for setting aside an arbitral award and in actions for a declaration of the existence, or non-existence, of an arbitral award, or on matters governed by article 586 to 591 CCP (eg, challenge to arbitrators), a party can ask the court to exclude the public from the hearing, if the party can show a justifiable interest for the exclusion of the public.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Both the competent Austrian court and an Austrian arbitral tribunal have jurisdiction to grant interim measures in support of arbitration proceedings. The parties can exclude the arbitral tribunal's competence for interim measures, but they cannot exclude the court's jurisdiction on interim measures. The enforcement of interim measures is in the exclusive jurisdiction of the courts.

In support of money claims, the court can grant interim remedies if there is reason to believe that the debtor would prevent or impede the enforcement of a subsequent award by damaging, destroying, hiding or carrying away his or her assets (including prejudicial contractual stipulations).

The following remedies are available:

- to place money or moveable property into the court's custody;
- a prohibition to alienate or pledge moveable property;
- a garnishment order in respect of the debtor's claims (including bank accounts);
- the administration of immovable property; and
- a restraint on the alienation or pledge of immovable property, which is to be registered in the land register.

In support of non-pecuniary claims, the court can grant interim remedies similar to those mentioned above in relation to money claims. Search orders are not available in civil cases.

Injunctions given by a foreign arbitral tribunal (article 593 CCP) or by a foreign court can be enforced in Austria under certain circumstances. The enforcement measures, however, must be compatible with Austrian law.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Austrian state law does not provide for an emergency arbitrator.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

An arbitral tribunal has wide powers to order interim measures on the application of one party, if it deems it necessary to secure the enforcement of a claim, or to prevent irretrievable harm. Differing from interim

remedies available in court proceedings, an arbitral tribunal is not limited to a set of enumerated remedies. However, the remedies should be compatible with Austrian enforcement law, in order to avoid difficulties at the stage of the enforcement. Austrian statutory law does not provide for a security for costs in arbitration proceedings.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitration institutions?

Arbitral tribunals have wide discretion to order interim measures as a way of dealing with guerrilla tactics. They may suspend the proceedings in extreme cases, or even dismiss an arbitration with prejudice as a sanction for the wilful misconduct of a party or of its counsel.

Arbitral tribunals may also order security for costs.

Further, it is a widely accepted possibility that arbitrators may draw negative inferences from a party's failure to comply with the tribunal's requests. For example, if a party refuses to produce documents, the tribunal can assume that the documents contain information that would compromise the party's position.

Another quite effective measure for regulating a party's misconduct is the award of costs in the final award.

Austrian lawyers are bound by professional ethical rules when acting as counsel in arbitrations (independent of whether they are held in Austria or abroad). Foreign lawyers in arbitrations held in Austria are not bound by Austrian professional ethical rules.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Unless otherwise agreed by the parties, it is sufficient for the arbitral award to be valid if it has been rendered and signed by a majority of arbitrators. The majority has to be calculated on the basis of all appointed arbitrators and not just those present. If the arbitral tribunal intends to decide on the arbitral award without all of its members being present, it must inform the parties in advance of its intention (article 604 CCP).

An arbitral award signed by a majority of arbitrators has the same legal value as a unanimous award.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Austrian statutory law is silent on dissenting opinions. There is a controversy on whether they are admissible in arbitral proceedings.

In a recent case concerning the enforcement of a foreign arbitral award, the Austrian Supreme Court stated that the requirement to attach the dissenting opinion to the arbitral tribunal's award (which requirement was contained in the applicable rules of arbitration), is not a stringent requirement under Austrian enforcement law.

34 Form and content requirements

What form and content requirements exist for an award?

An arbitral award is to be delivered in writing and has to be signed by the arbitrator or arbitrators. Unless otherwise agreed by the parties, the signatures of a majority of arbitrators is sufficient. In that event, the reason for the absence of some of the arbitrators' signatures should be explained.

Unless otherwise agreed by the parties, the award should also state the legal reasoning on which it is based. It should also indicate the day and place on and in which it is made.

Upon request of any party of the arbitration, the award has to contain the confirmation of its enforceability.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

Austrian state law does not provide for a specific time period within which an arbitral award has to be delivered.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Under Austrian state law, the date of delivery of the award is relevant for both an application to the arbitral tribunal for correction or interpretation of the award, or both, or to make an additional award (see question 41) and any challenge of the award before the courts of law (see question 42). If the arbitral tribunal corrects the award on its own, the time limit of four weeks for such a correction starts from the date of the award (article 610, paragraph 4 CCP).

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The following types of awards are usual under Austrian arbitration law: award on jurisdiction; interim award; partial award; final award; award on costs; and amendment award.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Arbitral proceedings can be terminated if the claimant withdraws its claim, if the claimant fails to submit its statement of claim within the period of time determined by the tribunal (articles 597 and 600 CCP), by mutual consent of the parties, by settlement (article 605 CCP) and if the continuation of the proceedings has become impracticable (article 608(2) 4 CCP). There are no formal requirements for such a termination.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

With respect to costs, arbitral tribunals have wider discretion and are in general more liberal than the Austrian courts. The arbitral tribunal is granted discretion in the allocation of costs, but must take into account the circumstances of the case, in particular the outcome of the proceedings. As a rule of thumb, costs follow the event and are borne by the unsuccessful party, but the tribunal can also arrive at different conclusions if this is appropriate to the circumstances of the case.

Where costs are not set off against each other, and as far as it is possible, the arbitral tribunal must, at the same time as it decides on the liability for costs, also determine the amount of costs to be reimbursed.

In general, attorneys' fees calculated on the basis of hourly rates are also recoverable.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

An Austrian arbitral tribunal would, in most cases, award interest for the principal claimed, if permitted under the substantive law applicable. Under Austrian law, the statutory interest of civil law claims is 4 per cent. If both parties are entrepreneurs and the default is reproachable, then a variable interest rate, published every six months by the Austrian National Bank, would apply. At present it is 9.2 per cent. Bills of exchange are subject to an interest rate of 6 per cent.

The allocation and recovery of costs in Austrian arbitration proceedings is regulated in article 609 CCP. However, there is no provision as to whether interest may be awarded for costs, and it is therefore at the arbitral tribunal's discretion.

Proceedings subsequent to issuance of award**41 Interpretation and correction of awards**

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The parties can apply to the arbitral tribunal requesting a correction (of calculation, typing or clerical errors), clarification or to make an additional award (if the arbitral tribunal has not dealt with all claims presented to it in the arbitral proceedings). The time period for such application is four weeks, unless otherwise agreed by the parties. The arbitral tribunal is also entitled to correct the award on its own within four weeks (an additional award within eight weeks) of the date the award has been rendered.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

Austrian courts are not entitled to review an arbitral award on its merits. There is no appeal against an arbitral award. However, it is possible to bring a legal action to set aside an arbitral award (both awards on jurisdictions and awards on merits) on very specific, narrow grounds, namely:

- the arbitral tribunal accepted or denied jurisdiction although no arbitration agreement or a valid arbitration agreement, exists;
- a party was incapable of concluding an arbitration agreement under the law applicable to that party;
- a party was unable to present its case (eg, it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings);
- the award concerns matters not contemplated by, or not falling within the terms of the arbitration agreement, or concerns matters beyond the relief sought in the arbitration; if such defects concern a separable part of the award, such part must be set aside;
- the composition of the arbitral tribunal was not in accordance with articles 577 to 618 CCP or the parties' agreement;
- the arbitral procedure did not, or the award does not, comply with the fundamental principles of the Austrian legal system (*ordre public*); and
- if the requirements to reopen a case of a domestic court in accordance with article 530(1), Nos. 1 to 5 of the CCP are fulfilled, for example:
 - the judgment is based on a document that was initially, or subsequently, forged;
 - the judgment is based on false testimony (of a witness, an expert or a party under oath);
 - the judgment is obtained by the representative of either party, or by the other party, by way of criminal acts (for example, deceit, embezzlement, fraud, forgery of a document or of specially protected documents, or of signs of official attestations, indirect false certification or authentication or the suppression of documents);
 - the judgment is based on a criminal verdict that was subsequently lifted by another legally binding judgment; or
 - the award concerns matters that are not arbitrable in Austria.

Further, a party can also apply for a declaration for the existence or non-existence of an arbitral award.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Instead of three procedural levels (the court of first instance, the court of appeal and the Supreme Court), article 615 CCP has been changed so that the decision about a claim challenging an arbitration award is made by just one judicial instance.

Article 616, paragraph 1 CCP stipulates that the procedure that follows a claim challenging an arbitration award, or a claim regarding the declaration on the existence or inexistence of an arbitration award, is the same one as performed in front of a court of first instance. This means in fact that the Austrian Supreme Court has to apply the same

procedural rules as a court of first instance (eg, in the context of taking evidence).

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Domestic arbitral awards are enforceable in the same way as domestic judgments.

Foreign awards are enforceable on the basis of bilateral or multilateral treaties that Austria has ratified, the New York Convention being by far the most important legal instrument. Thus, the general principle that mutuality of enforcement has to be guaranteed by treaty or decree remains applicable (as opposed to the respective provisions under the UNCITRAL Model Law).

The enforcement proceedings are essentially the same as for foreign judgments.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Under article 5 of the New York Convention, the recognition and enforcement of a foreign arbitral award may be refused if the award has been set aside or suspended by the competent authority of the country in which, or under the laws of which, that award was made.

Austria is a contracting state to the New York Convention and Austrian courts would therefore, in general, refuse enforcement of such an award. However, if an award has been set aside on the grounds that it is in conflict with public policy at the place of arbitration, then the Austrian courts have to assess whether the award would also violate public policy in Austria. If the award is not in conflict with Austrian public policy, Austrian courts would probably enforce such an award.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Article 45 of the Vienna Rules provides for an expedited procedure. However, there are no specific rules on the enforcement of orders issued in such proceedings, by emergency arbitrators respectively. The same goes for domestic arbitration legislation (including case law).

47 Cost of enforcement

What costs are incurred in enforcing awards?

The prevailing party is entitled to recover the lawyers' fees from the opponent in accordance with Austrian Act on Lawyers' Fees (a schedule of fees based on the amount in dispute).

The court fees are based on the amount in dispute as well. If the principal amount of the enforced claim is, for example, for €1 million, the court fee for the enforcement against moveable property would amount to approximately €2,500; if the enforcement is against immovable property, the court fee would be approximately €23,000.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

In Austrian civil and commercial proceedings, there is no court-ordered discovery, and the possibilities to obtain a court order providing for the production of documents by the other party are rather limited. In Austrian arbitral proceedings, there is no tendency towards US-style discovery, but arbitrators may order a certain amount of document production, depending on the applicable rules of arbitration and the agreement between the parties. Written witness statements are common in arbitral proceedings. The IBA Rules on the Taking of Evidence are becoming popular in arbitral proceedings.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

No.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding has become common in Austria. The funder will cover the procedural costs and receive a share of the recouped amount. The validity of such arrangements has not yet been decided on by the Supreme Court. It is not entirely clear whether and to what extent the prohibition for lawyers to accept fees on a percentage basis could also apply to such funding.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Under Austrian tax law (implementing Regulations (EC) No. 1798/2003 and No. 143/2008), arbitrators who are based in Austria need not charge VAT if the refunding party is a 'taxable person' under the said regulation and has its place of business outside Austria, but in the EU.

OBLIN@MELICHAR

Klaus Oblin

klaus.oblin@oblin.at

Josefstädter Str 11
1080 Vienna
Austria

Tel: +43 1 505 3705
Fax: +43 1 505 3705 10
www.oblin.at

Belgium

Johan Billiet

Billiet & Co

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been in force in Belgium since 16 November 1975. Belgium made a reciprocity reservation under article I(3) and declared that it would apply the Convention only to recognition and enforcement of awards made in the territory of another contracting state. Belgium is also a party to the following conventions and treaties: the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (in force in Belgium since 26 September 1970); the European Convention on International Commercial Arbitration of 1961 (Belgium ratified on 9 October 1975); the Energy Charter Treaty (in force in Belgium since 6 August 1998).

Belgium is also a contracting party in several other bilateral conventions on the recognition and enforcement of foreign judgments:

- the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed on 8 July 1899;
- the Convention between Belgium and the Netherlands on Jurisdiction, Bankruptcy, and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed on 28 March 1925;
- the Convention between the Kingdom of Belgium and the Federal Republic of Germany on the Mutual Recognition and Enforcement of Judgments, Arbitration Awards and Authentic Instruments in Civil and Commercial Matters, signed on 30 June 1958;
- the Convention between the Kingdom of Belgium and the Italian Republic on the Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters, signed on 6 April 1962;
- the Convention between the Kingdom of Belgium and Austria on the Mutual Recognition and Enforcement of Judgements, Arbitral Awards, and Public Certificates in Civil and Commercial Law, signed on 16 June 1959; and
- the Convention between the Kingdom of Belgium and Switzerland on the Recognition and Enforcement of Judicial Decisions and Arbitral Awards, signed on 29 April 1959.

The importance of these conventions should be noted, bearing in mind that the New York Convention only applies to arbitral awards and that the Brussels Convention (recast) has no application, as clarified in recital 12, to any action or judgment concerning annulment, review, appeal, recognition or enforcement of an arbitral award. The practical use of those bilateral treaties has been demonstrated in the *Komstroy* case where the res judicata of the annulment by the Paris court of an arbitral award has been involved according to article 11 of the Convention

between Belgium and France, and the *Yukos* case where the annulment by the court in The Hague has been involved.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

As of December 2015, Belgium has signed 98 bilateral investment treaties (BITs). Of these, 74 are currently in force. The majority of BITs provide either for ICSID or ad hoc arbitration under the UNCITRAL Arbitration Rules.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Chapter Six of the Belgian Judicial Code (BJC) contains the new Law on Arbitration of 24 June 2013 that came into effect on 1 September 2013. It applies to arbitration proceedings, both domestic and international, that commence as from that date if the seat of the arbitration is in Belgium, irrespective of the parties' nationality. The previous Law on Arbitration remains applicable to arbitration proceedings introduced before 1 September 2013. The procedural steps for recognition and enforcement of awards, both Belgian and foreign, are contained in articles 1719 to 1722. The below questions are answered according to the new Law on Arbitration of 24 June 2013.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The new Law on Arbitration of 24 June 2013 is based on the UNCITRAL Model Law (the Model Law). The major differences compared to the Model Law concern the recourse against an arbitral award and interim measures. The legislature kept three additional grounds for annulment: if an award does not state reasons (article 1717.3 (a), (iv)); if an arbitral tribunal has exceeded its powers (article 1717.3 (a), (vi)); and if an award was obtained by fraud (article 1717.3 (b), (iii)). By analogy with the grounds for annulment, the Belgian arbitration law provides two additional grounds for refusal of the recognition and enforcement of an arbitral award: if an award does not state reasons (article 1721.1(a), (iv)); and if the arbitral tribunal has exceeded its powers (article 1721.1(a), (vii)).

As to the interim measures, unlike the Model Law, the BJC does not give powers to the arbitral tribunal to issue preliminary orders (see question 30).

Another noteworthy difference is a Chapter IX 'time bar'. Article 1722 of the BJC stipulates that the enforcement of an arbitral award is barred for 10 years from the date the award has been communicated.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The parties are free to determine the rules of the arbitral proceedings. However, this freedom is not absolute. Article 1699 of the BJC outlines the mandatory obligation of equal treatment and the principle of adversarial proceedings. Also, the requirement of an uneven number of arbitrators is mandatory (article 1684.2 of the BJC). Further, the arbitral award must be in writing, reasoned and signed by the arbitrators (article 1713 of the BJC).

Article 1676.8 of the BJC lists certain provisions that apply irrespective of the place of arbitration and notwithstanding any clause to the contrary: articles 1682, 1683, 1696-1698, 1708 and 1718-1721.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

As a general rule, the parties to an arbitration may freely decide on the law applicable to the merits of the case. If the parties failed to decide this, the arbitral tribunal applies the law determined by the conflict of laws rules that it considers applicable (article 1710.2 of the BJC). The arbitrators have the power to decide on an *ex aequo et bono* basis only if the parties have expressly authorised them to do so (article 1710.3 of the BJC). Additionally, the arbitrators shall always decide in accordance with the terms of the contract if the dispute opposing the parties is contractual in nature and shall take into account the usages of the trade if the dispute is between commercial parties (article 1710.4 of the BJC).

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

Belgian Centre for Arbitration and Mediation (CEPANI)
Rue des Sols, 8
1000 Brussels
Belgium
Tel: +32 2 515 08 35
info@cepina-cepani.be
www.cepina.be

The Belgian Centre for Mediation and Arbitration (CEPANI) adopted new Arbitration Rules and new Mediation Rules that came into force on 1 January 2013. The new Rules have undergone a substantial revision and were inspired by the 2012 ICC Arbitration Rules. The most significant innovations include:

- the inclusion of additional provisions on multiparty and multi-contract arbitration, joinder and consolidation;
- now it is possible to request interim and conservatory measures before the tribunal is constituted via an emergency arbitrator procedure; and
- a limitation of the liability of CEPANI and the arbitrators: liability is excluded for acts or omissions when a tribunal is carrying out their functions of ruling on a dispute with the exception of fraud.

A significant role in the appointment of arbitrators under the CEPANI rules is given to the appointments committee, which is the nomination body attached to the CEPANI, or the President of the CEPANI. Whenever the parties appoint an arbitrator, either a sole arbitrator or a panel of three arbitrators, the chosen arbitrators are subject to the confirmation of the appointments committee or the president. If the appointments committee or the president refuses to confirm the nomination of the arbitrator, the committee or the president shall replace that arbitrator within one month of the notification of this refusal to the parties. If the parties fail to appoint the arbitrators within the set time limit, the appointments committee or the president shall proceed with the appointment.

Arbitration costs include the fees and expenses of the arbitrators, as well as the administrative expenses of the CEPANI. They shall be fixed by the secretariat on the basis of the amount of the principal claim and of any counterclaim, according to the scale of costs for arbitration

in effect on the date of the commencement of the arbitration. The CEPANI arbitration cost calculator may be consulted for determining general administrative costs.

Institute of Arbitration
Central Clerk's Office
68b, Drève Sainte Anne
1020 Brussels, Belgium
Tel: +32 2 790 12 66
info@euro-arbitration.org
www.euro-arbitration.org

The Institute of Arbitration is a neutral and independent, non-governmental organisation that does not depend on professional associations or one country. It has a triple purpose:

- to organise mediation and arbitration in different countries in accordance with the universal Standard Dispute Rules (SDR). This is because of the fact that the diversity of legal systems, even within a single country, increases costs and creates insecurity. It is also a constant obstacle to the free circulation of goods, services and products;
- to centralise all litigation services to be more efficient, without the fragmentation of jurisdictions and matters of different national legal order, which is a prime factor in the increasing costs of treatment; and
- to offer an Online Dispute Resolution platform for everyone that is easy, simple and flexible and to replace the administrative paper obstacles within particular public services, which are the cause of continual delay.

Although the general secretariat of the Institute of Arbitration is based in Brussels, the administrative and diplomatic centre of Europe, it is more than just a Belgian Arbitration Institute. Many arbitration committees sit abroad with follow-up of the procedures from Brussels. A committee sometimes has several chambers of arbitration and mediation.

The Institute of Arbitration as it exists today was founded in 1994. As stated above, it is an independent, non-governmental organisation that is not bound by professional associations or any one government. This allows complete neutrality.

One of the distinguishing features of the Institute is that an arbitral award can be appealed within the Institute before another arbitral tribunal. Under the Institute's SDR effective from 15 April 2013, unless the parties agree otherwise, the clerk's office shall appoint one arbitrator in the first instance and three for the appeal level. If an arbitrator dies or is legally impeded from fulfilling his or her function, the clerk's office is in charge of finding a replacement. The seat of arbitration shall be considered as the place of the award. The arbitral tribunal may sit in any country. Unless agreed otherwise, the clerk's office determines the seat of arbitration and the place of the debates. The parties shall choose the language of the proceedings. The proceedings may take place in several languages. In the absence of an agreement, the languages of the proceedings are those of the countries of the parties or English.

The administrative cost is €100 for each demand not submitted via www.lisdirect.net, and €200 for the appeal level. Parties who submit a request must pay in advance, within 15 working days upon demand from the secretary or clerk, under penalty of the inadmissibility of the case in the first instance or a loss of the possibility to appeal. The cost for arbitration is at least €500 plus a maximum percentage of the amount of the claim, counterclaim and additional claim, each party funds its part. The detailed information on percentages can be found in Part IV of the SDR. The arbitration costs are doubled on appeal or when the Arbitral Court is composed of three arbitrators. Additionally, the new 2013 Rules introduced the requirement for arbitrators to reduce their fees if they declare themselves incompetent or for a default award in the first instance.

The Chamber of Arbitration and Mediation
Rue des Chandeliers 18
1000 Brussels
Belgium
Tel: +32 2 511 39 90
info@arbitrage-mediation.be
www.arbitrage-mediation.be

The Chamber of Arbitration and Mediation mainly deals with cases regarding real estate and rental agreements. The costs of arbitration vary from €100 to €5,000. The claim has to be submitted in French or Dutch. If all parties agree, the hearing can be conducted in another language, provided all parties and an arbitrator know that language.

European Arbitration Chamber
Belgium, Brussels, B-1050, Avenue Louise, 146
Tel/Fax: +32 2 808 77 54
secretary@chea-taic.be
www.chea-taic.be

The European Arbitration Chamber is an international non-profit association one of the main activities of which is the functioning of the International Commercial Arbitration Court, an independent permanent arbitration court, operating under articles 1676–1723 of the Belgian Judicial Code, Statute of the European Arbitration Chamber and its Rules. The European Arbitration Chamber focuses on arbitration between parties in the Commonwealth of Independent States and other parties.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Pursuant to article 1676, any dispute of a pecuniary nature can be subject to arbitration. This is a very broad notion involving all claims that present, at least for one party, an interest that can be assessed in monetary terms. Non-pecuniary matters also may be subject to arbitration proceedings if it is legally permitted to settle the matter by arbitration. Restrictions on arbitrability of certain types of disputes shall be clearly provided by specific legislation.

Pursuant to article 1676.5, arbitration agreements in respect of the disputes belonging to the jurisdiction of the labour courts, without prejudice to the exceptions provided by law, shall be automatically null and void if concluded prior to the moment the dispute arises.

Within the area of intellectual property, the Act on Patents dated 28 March 1984 excludes disputes relating to mandatory licences from arbitration.

Under article 4 of the Belgian Law dated 27 July 1961 on Unilateral Termination of Exclusive Distribution Agreements of Indefinite Duration (the Law of 1961), if an exclusive distributor has suffered damage further to the unilateral termination of a distribution agreement effective on all or part of Belgian territory, he or she may always initiate legal proceedings before the courts of Belgium. In such cases the courts must apply Belgian law exclusively. Article 6 of the Law of 1961 adds that the provisions of the Law will prevail over any contrary stipulations of the parties, agreed upon prior to contract termination.

The situation is not entirely clear with regards to the Law of 13 April 1995 on commercial agency contracts. The decision from the Belgian Supreme Court in *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare* is expected to clarify the issue. It can be questioned whether the new law and this decision will not bring a change in the future with regard to concession agreements.

The case between United Antwerp Maritime Agencies (Unamar) NV (Unamar), a company incorporated in Belgium, and Navigation Maritime Bulgare (NMB), a company incorporated in Bulgaria, concerns the payment of various forms of compensation owed as a consequence of the termination, by NMB, of the commercial agency agreement between the two companies.

The Court of Cassation addressed a request for a preliminary ruling to the CJEU, regarding the interpretation of articles 3 and 7(2) of the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, in conjunction with Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the member states relating to self-employed commercial agents. (See C-184/12, *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare*, 17 October 2013, sections 20–26). In particular, the Court of Cassation referred the following question to the CJEU:

Having regard, not least, to the classification under Belgian law of the provisions at issue in this case (articles 18, 20 and 21 of the

[Law on] commercial agency contracts) as special mandatory rules of law within the terms of article 7(2) of the Rome Convention, must articles 3 and 7(2) of the Rome Convention, read, as appropriate, in conjunction with [Directive 86/653], be interpreted as meaning that special mandatory rules of law of the forum that offer wider protection than the minimum laid down by [Directive 86/653] may be applied to the contract, even if it appears that the law applicable to the contract is the law of another member state of the European Union in which the minimum protection provided by [Directive 86/653] has also been implemented?

In its judgment of 17 October 2013, the ECJ concluded that:

Articles 3 and 7(2) of the Rome Convention must be interpreted as meaning that the law of a member state of the European Union which meets the minimum protection requirements laid down by Directive 86/653 and which has been chosen by the parties to a commercial agency contract may be rejected by the court of another member state before which the case has been brought in favour of the law of the forum, owing to the mandatory nature, in the legal order of that member state, of the rules governing the situation of self-employed commercial agents only if the court before which the case has been brought finds, on the basis of a detailed assessment, that, in the course of that transposition, the legislature of the State of the forum held it to be crucial, in the legal order concerned, to grant the commercial agent protection going beyond that provided for by the directive, taking account in that regard of the nature and of the objective of such mandatory provisions.

On 12 February 2014, the Court of Cassation rendered its decision. It considered – without further explanation – that the Antwerp Court of Appeal did not justify at law its decision that:

- the Law on commercial agency contracts is not part of public policy, nor of Belgian international public policy, within the meaning of article 7 of the Rome Convention, since that the Bulgarian law chosen by the parties also allows Unamar, as the maritime agent of NMB, the protection of Directive 86/653, even if that directive provided for only a minimum level of protection; and that against that background, the principle of the freedom of contract of the parties has to prevail and, therefore, Bulgarian law is applicable; and
- the parties were allowed to subject their dispute to arbitration by an arbitration clause in the agreement.

The Court of Cassation rescinded the decision of the Antwerp Court of Appeal insofar as it found it has no jurisdiction to take cognisance of the claim lodged by the claimant against the defendant in payment of damages and to decide on the legal costs.

The case has been sent back to the Court of Appeal of Brussels (a court of fact).

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Article 1681 of the BJC mirrors article 7 Option II of the UNCITRAL Model Law that defines the arbitration agreement in a manner that omits any formal requirement. Hence, in order to be valid under Belgian law, an arbitration agreement does not have to be concluded in writing. That means that an oral arbitration agreement is valid as long as it can be proven. The *travaux préparatoires* provide that witness testimonies can serve as proof.

As a general rule, public legal entities may only enter into an arbitration agreement if the object thereof is to resolve disputes relating to an agreement. The conditions that apply to entering into an agreement, which constitutes the object of the arbitration, also apply to entering into an arbitration agreement. Moreover, public legal entities may enter into arbitration agreements on all matters defined by law or by royal decree decided by the Council of Ministers. The decree may also set forth the conditions and rules to be respected for entering into such an agreement.

Courts in Belgium generally uphold arbitration clauses contained in general terms and conditions. In particular such clauses were upheld when:

- the clause was contained in general conditions of a seller with whom the buyer had a long-standing commercial relationship;
- the seller sent the buyer a model contract containing an arbitration clause and the parties thereafter agreed to conclude the sale on the conditions of the model contract; and
- the clause was contained in general insurance conditions and the signature of the special insurance conditions implied acceptance of the general conditions.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

Neither voidance of an underlying contract nor the death of a party shall result in the nullity of the arbitration agreement. However, the law explicitly provides for the automatic lapse of the arbitration agreement, unless the parties agree otherwise, in cases when the arbitrator has been named in the arbitration agreement and when that arbitrator dies or becomes unable in fact or in law to continue his or her mission, or refuses it or fails to carry it out, or if the parties agree to terminate it or if the award is not rendered within the set time limit.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Although an arbitration agreement is binding only on the parties to it, in certain cases non-signatories may also be forced to participate in arbitration proceedings. This happens, for example, if the original contract has been assigned or if the original party has undergone a takeover. A receiver in bankruptcy will be bound by an arbitration clause contained in a contract to which the company that went bankrupt was a party. A shareholder can be bound by an agreement of the company he or she is shareholder of.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

According to article 1709.1 of the BJC, any interested third party may apply to the arbitral tribunal to join the proceedings. The request must be put to the arbitrators in writing, and the tribunal shall communicate it to the parties. Also, a party may take the initiative in calling upon a third party to intervene in the proceedings. In any event, the admissibility of such interventions requires an arbitration agreement between the third party and the parties involved in the arbitration. Such joinder is subject to the unanimous consent of the arbitral tribunal.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the ‘group of companies’ doctrine?

Belgian jurisprudence recognises that a non-signatory parent company can, in particular circumstances, be considered liable for the obligations of its subsidiary. In the *Badger* case, the American parent company rejected any responsibility regarding pensions obligations for its insolvent Belgian subsidiary. Belgium persistently pursued the parent company, which ultimately had to admit its obligation and proceed with the necessary financing.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The BJC does not contain any provisions specifically regulating the validity of a multiparty arbitration agreement. At the same time, the possibility of multiparty arbitrations is not excluded. Consequently, if

there is a multiparty arbitration the general provisions on arbitration must be respected.

The institutional rules provide a special regulation for multiparty arbitrations. For example, the new 2013 CEPANI Arbitration Rules introduced provisions regarding multiple parties, multiple contracts, intervention, consolidation and the jurisdiction of arbitral tribunals in such cases. In particular, the Rules contain provisions instructing, if the dispute is referred to three arbitrators, the multiple claimants jointly and the multiple respondents jointly to nominate one arbitrator for approval. In the absence of such a joint nomination and where all parties are unable to agree on a method for the constitution of the arbitral tribunal, the appointments committee or the chairman may appoint each member of the arbitral tribunal and shall designate one of them to act as chairman.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Article 1685.1 of the BJC mirrors article 11.1 of the UNCITRAL Model Law: ‘No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.’ According to article 298 of the BJC, judges may not act as arbitrators for compensation. There are no provisions in Belgian legislation on arbitration requiring arbitrators to be selected from a list of arbitrators.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

If the parties have not determined the number of arbitrators in the arbitration agreement, and cannot agree on such a number, the tribunal shall be composed of three arbitrators. If the parties failed to agree on a procedure for appointing arbitrators, in an arbitration with:

- three arbitrators, each party shall appoint one arbitrator, and these two arbitrators shall appoint the third arbitrator; if a party fails to appoint an arbitrator within 30 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 30 days of the appointment of the second arbitrator, the appointment shall be made by the president of the court of first instance, ruling on the request of the most diligent party;
- a sole arbitrator, if the parties are unable to agree on the selection of the arbitrator, shall be appointed by the president of the court of first instance, ruling on the request of the most diligent party; and
- more than three arbitrators, if the parties are unable to agree on the composition of the arbitral tribunal, it shall be appointed by the president of the court of first instance, ruling on the request of the most diligent party.

The above-mentioned decisions of the president of the court of first instance cannot be appealed (article 1680.5 of the BJC).

Pursuant to article 15 of the CEPANI Arbitration Rules, where the parties have not agreed upon the number of arbitrators, the dispute shall be settled by a sole arbitrator. However, at the request of one of the parties or on its or his own motion, the appointments committee or the president may decide that the case shall be heard by a tribunal of three arbitrators.

If the parties have agreed to settle their dispute through a sole arbitrator but failed to agree within one month of the notification of the Request for Arbitration to the respondent, or within such additional time as may be allowed by the secretariat, the sole arbitrator shall be automatically appointed by the appointments committee or by the president.

If the parties have agreed to have three arbitrators, but a party refrains from nominating its arbitrator or if the latter is not confirmed, the appointments committee or the president shall automatically appoint the arbitrator. The appointments committee or the president also shall appoint a chair of the arbitral tribunal unless the parties have

agreed upon another procedure for such appointment, in which case the appointment shall be subject to confirmation by the appointment.

Should such procedure not result in an appointment within the time limit fixed by the parties or the secretariat, the third arbitrator shall be automatically appointed by the appointments committee or the president.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or if he does not have the qualifications agreed to by the parties. A party may challenge an arbitrator appointed by the said party, or in whose appointment it participated, only for reasons of which it becomes aware after the appointment has been made.

The parties are free to agree on a procedure for challenging an arbitrator. This can be done, for example, by reference to the institutional arbitration rules. The IBA Guidelines on Conflicts of Interest in International Arbitration are often used as a source of guidance. If the parties failed to agree on such procedure, the challenge is to be notified to the arbitrators and to the opposing party. This must be done within 15 days after the challenging party has become aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance that forms a ground for a challenge.

If the challenged arbitrator does not withdraw or the other party agrees to the challenge within 10 days of the challenging statement being sent, the challenging party shall summon the arbitrator and the other parties within 10 days to appear before the president of the court of first instance. In contrast with the previous law, the tribunal may now continue proceedings and render an award while the challenging procedure is pending before the court. The court's decision cannot be appealed.

If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office if the parties agree on the termination of the mandate or with the authorisation of the court of first instance. If an arbitrator fails to withdraw, the most diligent party shall summon the other party and the arbitrator referred to appear before the president of the court of first instance.

In all cases where the arbitrator's mandate is terminated before the final award is made, a substitute arbitrator shall be appointed. This appointment shall be made in accordance with the rules that were applicable to the appointment of the arbitrator being replaced unless otherwise agreed by the parties. Failing such replacement, either party may refer the matter to the president of the court of first instance.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

The parties may agree, in the arbitration agreement, to exclude certain categories of persons from becoming arbitrators. If such an exclusion has been ignored when the arbitral tribunal was appointed, the challenge proceedings can be initiated. The appointment of an arbitrator, once notified, cannot be withdrawn, and an arbitrator cannot withdraw once he or she has accepted his or her mission, unless with the parties' consent or with the authorisation of the court of first instance.

Unless provided otherwise by the parties, the arbitrators themselves determine their remuneration. If an arbitrator who has not yet accepted his or her mission disagrees with the remuneration offered or agreed upon by the parties, he or she may refuse to act as an arbitrator for them. If an arbitrator disagrees with the offered remuneration after accepting the mission, he or she can only withdraw if the court of first instance allows him or her to do so upon his or her request. It

is forbidden for a party to come to a separate financial arrangement with that party-appointed arbitrator as it might affect that arbitrator's neutrality.

Unless parties agree otherwise, they should pay the advance jointly. Where one of the parties refuses to pay its part of the advance, one party might transfer the whole amount of the advance.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Although arbitrators do not enjoy the same immunity as judges, it is generally accepted that they are immune from liability if a committed fault or negligence pertains to the exercise of the strictly jurisdictional function. The arbitrator may be found liable for other types of faults, provided the parties prove that such fault entailed damages, because the common rules of contractual professional liability become applicable.

Article 37 of the new CEPANI Arbitration Rules specifically provides for a limitation of the liability of the arbitrator. Liability is excluded for an act or omission when a tribunal is carrying out its functions of ruling on a dispute (with the exception of fraud). For any other act or omission by the arbitrator or the CEPANI, liability can incur in cases of gross negligence or fraud.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

The court before which a dispute is brought shall declare itself without jurisdiction at the request of a party, unless the arbitration agreement is invalid with regard to this dispute or has ceased to exist. Jurisdictional objections must be raised before any other plea or defence. However, a claim for conservatory or provisional measures brought before a court is not inconsistent with the arbitration agreement, nor shall it imply a waiver thereof.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The arbitral tribunal is empowered to rule on its own jurisdiction and, to this end, examine the validity of the arbitration agreement. A finding that the contract is null and void shall not entail the nullity of the arbitration agreement that it contains. The arbitral tribunal's decision that it has jurisdiction may only be contested together with the award on the main issue and through the same proceedings. The court may, at the request of a party, rule on the merits of the arbitral tribunal's decision that it lacks jurisdiction. The fact that a party has appointed an arbitrator does not prevent it from claiming that the arbitral tribunal lacks jurisdiction.

The asserting party shall raise an objection that the arbitral tribunal does not have jurisdiction not later than its communication of the first written pleadings. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. In either case, the arbitral tribunal may admit a later plea if it considers the delay justified.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

If the parties failed to agree, the arbitrators determine the language of the arbitral proceedings and the place of arbitration. If neither the parties nor the arbitrators determined the place of arbitration, the place where the award is rendered is deemed to be the place of arbitration.

Unless otherwise agreed by the parties, and after consulting with them, the arbitral tribunal may hold its hearings and meetings in any other location that it considers appropriate.

23 Commencement of arbitration

How are arbitral proceedings initiated?

The BJC provides that the arbitral proceedings start on the date on which an arbitration application is received by the respondent, unless otherwise agreed by the parties.

If the new 2013 CEPANI Arbitration Rules apply, the date of commencement of the arbitral proceedings is the date on which the secretariat receives the request for arbitration and the payment of the registration costs. The request shall include information about the parties, their counsel and the contact details; a succinct recital of the nature and circumstances of the dispute giving rise to the claim; a statement of the relief sought, a summary of the grounds for the claim, and, if possible, a financial estimate of the amount of the claim; all relevant information regarding the number of arbitrators and the nomination procedure; any comments as to the place of the arbitration, the language of the arbitration and the applicable rules of law. The claimant shall provide copies of all agreements, in particular the arbitration agreement. The claimant shall attach to the request proof of its dispatch to the respondent. The request and the documents annexed thereto shall be supplied in a number of copies sufficient to provide one copy for each arbitrator and one for the secretariat. Under the BJC or the CEPANI Rules, there is no signature requirement.

24 Hearing

Is a hearing required and what rules apply?

Unless the parties have agreed that no hearings will be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. In any case, the parties shall be treated with equality and each party shall be given a full opportunity to present its case, pleas in law and arguments in conformity with the principle of adversarial proceedings and the principle of fairness of debate. If there is a hearing, the chairman of the arbitral tribunal will set the schedule of the hearings and preside over them. If any party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Under the CEPANI Rules, arbitrators may decide the case solely on the basis of the documents submitted by the parties, unless the parties or one of them requests a hearing.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The arbitral tribunal is free to assess the admissibility and weight of the evidence, unless otherwise agreed by the parties. The arbitral tribunal may hear any person but without administering an oath. It may call witnesses, appoint experts, organise site visits and order the personal appearance of the parties. It may also order a party to disclose documents on pain of a penalty payment. Additionally, under the new Law on Arbitration of 24 June 2013, the arbitrators have the power to rule on applications to verify the authenticity of documents and to rule on allegedly forged documents. For applications relating to authentic instruments, the arbitral tribunal will leave it to the parties to refer the matter to the court of first instance within a given time limit. The parties may challenge experts appointed by an arbitral tribunal in arbitration proceedings. A party may, with the consent of the arbitral tribunal, ask a court to order measures with regard to the taking of evidence.

The IBA Rules on the Taking of Evidence in International Arbitration are often considered as guidelines in the international arbitration proceedings.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

The new Law on Arbitration of 24 June 2013 entrusts five courts of first instance located at the seat of the Courts of Appeal to hear all matters related to arbitration. With the approval of the arbitral tribunal, a party may apply to the court of first instance for assistance in taking of evidence. The president of the court of first instance rules in summary proceedings and his decision cannot be subject to any recourse.

In general, courts cannot intervene in arbitration proceedings. However, if the arbitrators are late in rendering an award, one of the parties can request the president of the court of first instance to set a time limit for an arbitrator to render the award. This decision shall not be subject to any recourse.

27 Confidentiality

Is confidentiality ensured?

The BJC does not impose a duty of confidentiality on the parties involved in arbitration proceedings. Consequently, if the parties wish to ensure confidentiality of the arbitration proceedings they will have to separately agree upon that. However, the confidentiality will not be respected when parties have to resort to state courts for assistance, for example, to appoint an arbitrator, to order interim measures or to apply for the setting aside of an award.

The new CEPANI Rules provide that the arbitration proceedings shall be confidential, unless the parties have agreed otherwise or there is a legal obligation to disclose the arbitration proceedings.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

A party may seek interim measures from courts notwithstanding an arbitration agreement. A claim for conservatory or provisional measures may be brought before a court at any time of the proceedings and even prior to them. Only a state court can issue attachment orders.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Chapter 6 of the BJC does not provide for an emergency arbitrator prior to the constitution of the arbitral tribunal. However, according to article 584 of the BJC, in cases of urgency and prior to the constitution of the arbitral tribunal, a party may request a court of first instance hearing for any interim relief provided that there is an urgency to prevent serious damage or inconvenience and the court-ordered measure does not affect the merits of the case. The matter must be brought before the court by interlocutory order or, where absolutely necessary, by *ex parte* petition.

According to article 26 of the new CEPANI Arbitration Rules, it is now possible to request interim and conservatory measures before the tribunal is constituted. CEPANI will appoint an emergency arbitrator within two days after the request was filed and the arbitrator will render an award within 15 days. The emergency arbitrator cannot be appointed as an arbitrator in the proceedings on the merits and the award on the interim and conservatory measures will not bind the tribunal.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

As a general rule, the arbitral tribunal may order any interim or conservatory measures it deems necessary. However, the arbitral tribunal may not authorise attachment orders. Also, it cannot issue preliminary orders at the unilateral request of a party, before the other party is

informed thereof (*ex parte* measures). Further, at the request of one of the parties, the arbitral tribunal may amend, suspend or terminate an interim or conservatory measure. The arbitral tribunal may require the party requesting an interim or conservatory order to provide appropriate security.

Decisions of the arbitral tribunal with regard to interim measures are recognised as binding and shall be enforced by the court of first instance irrespective of the country where such measures are issued. The conditions under which such a recognition or enforcement may be refused correspond to article 17 I of the UNCITRAL Model Law:

- if such refusal is warranted on the grounds listed in article 1721 (see the answer to question 44);
- if the party has not complied with the arbitral tribunal's decision with respect to the provision of security; or
- if the interim or conservatory measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the state in which the arbitration takes place or under the law of which that interim measure was granted.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Pursuant to article 1700.4 of the BJC, if a party holds a piece of evidence, the arbitral tribunal may enjoin it to disclose the evidence according to such terms as the arbitral tribunal shall decide and, if necessary, on pain of a penalty payment.

Article 23.1 of the new CEPANI Rules provides that in the conduct of the proceedings the arbitral tribunal and the parties shall act in a timely manner and in good faith. In particular, the parties shall abstain from any dilatory acts as well as from any other action having the object or effect of delaying the proceedings.

The IBA Guidelines on Party Representation in International Arbitration will be most probably used as a source of guidance in such cases.

The conduct of counsels in Belgium is regulated by their ethical bar rules. Although there is a common understanding that these rules also apply to counsels during arbitration, this is not specifically addressed in the rules. The consequence is that the rules do not provide for the arbitral tribunal to impose any sanctions or disciplinary measures on counsels (unlike the IBA Guidelines on Party Representation in International Arbitration). Therefore sanctions are imposed by the Disciplinary Courts and the Disciplinary Court of Appeal. These may extend from a simple warning to suspension and disbarment. Foreign lawyers participating in arbitral proceedings sited in Belgium are not bound by the rules.

No ability of CEPANI (Belgian arbitration institution) to sanction counsels came to my attention.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Any decision of the arbitral tribunal shall be made by an absolute majority, unless the parties have agreed upon another type of majority. The parties are also free to decide that the chairman's vote shall be decisive where no majority can be formed. The parties shall be given advance notice of the intention to make an award without the arbitrator refusing to participate in the deliberations or in the vote.

The award is rendered in writing and signed by the arbitrators. Should one or more of the arbitrators be unable to sign, or refuse to do so, the reason shall be stated in the award; however, the award must bear at least as many signatures as are necessary to form a majority of arbitrators.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

The only requirement, under Belgian legislation, if one or more of the arbitrators disagree with the award and refuse to sign it, is that it will have to be mentioned on the award and the parties shall be given advance notice.

34 Form and content requirements

What form and content requirements exist for an award?

The award must be rendered in writing and signed by the majority of 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 contain the decision, the names and domiciles of the arbitrators, the names and domiciles of the parties, the object of the dispute, the date on which the award is rendered, the seat of arbitration and the place where the award is rendered. It is important that the award states the reasons upon which it is based. The lack of reasoning makes the award susceptible to challenge.

The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The parties may determine the time limit within which the arbitral tribunal must render its award, or the terms for setting such time limit until the date on which the first arbitrator accepts his or her mission. If the parties have not set the time limit nor determined the terms for doing so, and if a period of six months has elapsed from the date on which all of the arbitrators have accepted their mission, the president of the court of first instance may, at the request of one of the parties, impose a time limit on the arbitrators. The president's decision is not subject to appeal. The mission of the arbitrators ends if the award is not rendered in a timely manner, unless this time limit is extended by an agreement between the parties.

Under the CEPANI Rules the arbitral tribunal shall render the Award within six months of the date of the terms of reference. However, this time limit may be extended pursuant to a reasoned request from the arbitral tribunal, or upon its own motion, by the secretariat.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The date of the award is decisive in respect of the arbitrators' possibility to correct, interpret or supplement the award at their own initiative (see the answer to question 41 with regard to the time limits for correction and interpretation). Parties may also request such measures but within one month of receipt of the award. This date is also important regarding the question of whether the arbitral tribunal is late in rendering its award. As a general rule, the award shall be rendered within a period of six months starting from the date on which the last arbitrator has been appointed unless the president of the court of first instance, at the request of one of the parties, extends this time limit.

The date of delivery of the award is decisive in respect of the time limits for requesting an additional award and challenging the award. Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within one month of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within two months. The default time limit for an appeal of the award is one month as of the award's notification if the parties have provided for that possibility in the arbitration agreement. The request for setting aside the award for the majority of the causes must be filed within three months of the date on which it was notified to the parties.

Finally, the new Belgian law on arbitration introduced the time bar for enforcement of an award. After a period of 10 years following the date on which the arbitral award is communicated, the condemnation pronounced by an award is time-barred.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The arbitral tribunal shall make a final decision or render interlocutory decisions by way of one or several awards. If, during the arbitral proceedings, the parties come to a settlement, their agreement may be recorded in the form of an award on agreed terms. Such an award has the same status and effect as any other award on the merits of the case.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

- the claimant withdraws his or her claim, unless the respondent objects thereto and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute; and
- the parties agree on the termination of the proceedings.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties. Unless otherwise agreed by the parties, the costs of the arbitration include the fees and expenses of the arbitrators, the fees and expenses of the parties' counsel and representatives, the costs of services rendered by the instances in charge of the administration of the arbitration and all other expenses arising from the arbitral proceedings.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

In principle, arbitrators may award any type of interest provided they do not exceed the actual damages that the party incurred. The only restriction applies to compound interest, which may be awarded if the interest has accrued for at least one year and a formal request in its respect has been filed in writing during the proceedings.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

A party may request the arbitral tribunal to correct any clerical, computational or typographical error, or any other error of a similar nature, provided it notifies its request to the other party within 30 days of the notification of the award, and unless the parties have agreed on another time limit. The arbitral tribunal may, on its own motion, correct any of the above-mentioned errors within 30 days of the date of the award.

A party may also request that the arbitral tribunal interpret a given point or passage of its award, provided the parties have so agreed and provided one party has notified its request to the other. The time limit for filing a request for interpretation is within 30 days of the notification of the award. If the arbitral tribunal considers the request founded, it shall correct or interpret its award within 30 days of the request. The interpretation is part of the award. The arbitral tribunal may, if necessary, extend the time limit in which it is allowed to correct or interpret its award. When the same arbitrators cannot be reunited, the request for interpretation or correction of the award shall be submitted to a court, whose president has jurisdiction to render the award enforceable in accordance with the applicable rules of jurisdiction.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

The BJC provides for an opt-out system allowing the parties to agree to exclude any application for the setting aside of an award if there is no connection with Belgium other than the location of the seat of arbitration.

The time limit for initiating setting aside proceedings is three months since the award's notification to the parties. However, that time limit cannot start before the day on which the award can no longer be contested before the arbitrators. In order to challenge an award, a party shall file a writ of summons to the court of first instance. The grounds on which an arbitral award can be set aside are exhaustively listed in article 1717(3) BJC.

The arbitral award may be set aside only if:

- (a) *the party making the application furnishes proof that:*
 - (i) *a party to the arbitration agreement was under some incapacity or the arbitration agreement is not valid;*
 - (ii) *the party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case and that irregularity had effected the arbitral award;*
 - (iii) *the award deals with a dispute not provided for in, or not falling within, the terms of the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement, provided that, if the provisions of the award on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;*
 - (iv) *the award is not reasoned;*
 - (v) *the composition of the arbitral tribunal or the arbitral proceedings were not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of Part 6 of this Code from which the parties cannot derogate, or, failing such agreement, was not in accordance with Part 6 of this Code; with the exception of an irregularity affecting the composition of the arbitral tribunal, such irregularities may however not give rise to a setting aside of the arbitral award if it is established that they have had no effect on the award; or*
 - (vi) *the arbitral tribunal has exceeded its powers; or*
- (b) *the court of first instance finds:*
 - (i) *that the subject matter of the dispute is not capable of settlement by arbitration;*
 - (ii) *that the award is in conflict with public policy; or*
 - (iii) *that the award was obtained by fraud.*

It is important to know that the court of first instance may remit an award to the arbitral tribunal in order to 'save' an award. Where appropriate and if so requested by a party, the court may suspend the setting-aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take an action which will eliminate the grounds for setting aside.

A specific feature of Belgian law on arbitration is the possibility to appeal an award if the parties have provided for that possibility in the arbitration agreement. An appeal must be filed before another arbitral tribunal and is not admissible before the court.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Pursuant to article 1717.2 of the BJC, annulment proceedings are conducted before the court of first instance, with no possibility to go to the Court of Appeal. However, article 609 of the BJC provides the possibility of filing for 'cassation' with the Supreme Court albeit only on limited grounds.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Generally, courts in Belgium tend to look favourably upon enforcing awards. The court of first instance has jurisdiction over an application relating to the recognition and enforcement of an arbitral award rendered in Belgium or abroad. A party should file an application to the court of first instance of the seat of the Court of Appeal in the jurisdiction of which the person against whom the enforcement is requested has his domicile or, in the absence of a domicile, his usual place of residence or, where applicable, its registered office or, failing this, its place of business or branch office. If that person is neither domiciled in, or is a resident of, Belgium, nor has its registered office, place of business or branch office in Belgium, the application is made to the court of first instance of the seat of the Court of Appeal in the jurisdiction of which the award is to be enforced. The applicant shall enclose with his request the original copy or a certified copy of the arbitral award and of the arbitration agreement.

The award shall no longer be contested before the arbitrators or arbitrators have declared the award to be provisionally enforceable regardless of any potential appeal. Besides adopting all grounds for refusing recognition or enforcement listed by the Model Law, the BJC provides two additional grounds: lack of reasons on which an award is based when such reasons are mandatory pursuant to the law applicable to arbitration proceedings; and the excess of mandate by an arbitral tribunal. Additionally, pursuant to article 1127 of the BJC, the enforcement judge may, at the request of a party, suspend provisionally, in whole or in part, the enforcement of an award.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

The setting aside of an award by the courts at the place of arbitration does not prevent the award's recognition and enforcement in Belgium.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Decisions or awards of emergency arbitrators granting provisional measures are, in principle, amenable to enforcement in Belgium. However, unlike Singapore and Hong Kong, Belgium has not introduced legislation, specifically recognising the enforceability of emergency orders of arbitrators. However, on 1 January 2013 CEPANI introduced its New Rules of Arbitration, which provide for the possibility of an 'emergency arbitrator', entitled to grant provisional orders, before the constitution of the arbitral tribunal (article 26). However, these orders are not binding upon the tribunal after its constitution.

47 Cost of enforcement

What costs are incurred in enforcing awards?

If the enforcement of the award is sought through legal proceedings, a registration tax of 3 per cent of the total amount awarded is levied. After the court holds to enforce an award, there will also be the costs related to the bailiff's participation.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Traditionally, the rules of conduct of Belgian Bar Associations, like in many other civil law countries, have prohibited their members from contacting witnesses. Any preparation of witnesses by attorneys was considered as an influence on a witness obstructing the course of justice. Such strict regulations led to a rare use of witness evidence in court

proceedings. Consequently, some bar associations introduced exemptions to their rules of conduct.

For example, as early as 26 June 1989, the Dutch-speaking Brussels Bar allowed its members to contact witnesses in international arbitration cases. However, only since 11 January 2011 has this exemption become applicable to domestic arbitration as well. The French-speaking Brussels Bar in a decision of 12 October 2010 adopted an exemption to its professional rules and allowed counsel to have prior contact with witnesses for the purposes of written statements and oral hearings in international or domestic arbitration and other alternative dispute resolution proceedings, such as mediation or conciliation.

Besides elevating the rights of Belgian lawyers regarding taking witness evidence to the same level as their colleagues from other jurisdictions, the initiative increases the role of witness evidence in domestic arbitration. By facilitating the collection and presentation of oral evidence, the authorisation of preparatory contacts with witnesses offers a true alternative to Belgian litigation proceedings, which may enhance the use of arbitration in Belgium.

The tribunal may order a party to disclose documents subject to the same rules as used in court proceedings (ie, only if there are serious grounds to believe that the documents held by the party contain evidence regarding a fact that is relevant and material for the outcome of the proceedings). The production of certain types of documents may be restricted due to legal privileges. In arbitration, parties have the freedom to agree on the rules applicable to the production of evidence. The IBA Rules of Evidence may be used as guidelines for the disclosure process.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

In terms of representation and assistance, Belgian law on arbitration welcomes the UNCITRAL rules. As of today, in general, the legal profession is organised by articles 428 to 508 of the Belgian Code on Civil Proceedings. In addition, the Order of the Flemish Bars and of the French-speaking and German-speaking Bars, and the local Bars, have drafted Bar Rules which also regulate the conduct of the legal profession. On the European level, the following rules apply: the Code of Conduct for the European Lawyers of the Council of Bars and Law Societies of Europe (CCBE), the European Council Directive of 22 March 1977, the Directive of 16 February 1998. Although there are only some partial regulations specifically addressing the conduct of attorneys in international arbitration, the common understanding in Belgium is nevertheless that the local ethics rules are applicable to attorneys in international arbitration regardless of the seat of arbitration. As for international arbitration with attorneys from the within the European Union and European Economic area, article 4.5 of the Code of Conduct for European Lawyers provides: 'The rules governing a lawyer's relations with the courts apply also to the lawyer's relations with the arbitrators and any other persons exercising judicial or quasi-judicial functions, even on an occasional basis.' Also, the local Bar Rules of the Dutch-speaking Order at the Brussels Bar contain one specific ethical rule that deals with the conduct of attorneys in international arbitration proceedings in respect of witness contact, as mentioned above (question 48).

No decisions have been found to refer explicitly to the IBA Guidelines on Party Representation in International Arbitration. Nonetheless, no real discrepancies exist between the local ethics rules and the IBA Guidelines; best practice in Belgium reflects rather than contradicts the IBA Guidelines. However, that is not to say that some differences, or variations in the degree of detail between the sources, do not subsist. For example, the contents of Guidelines 5 on conflict of interest in party representation, apply in Belgium to the arbitral tribunal, and not to attorneys (article 1686(1) Belgian Code on Civil Proceedings). Therefore, the conflicted members of the tribunal have to disclose this or withdraw, as the case may be, but not the attorneys. Guidelines 7 and 8 on ex parte communications do not find an exact equivalent in local ethics rules which may be more relaxed (article 4.2 CCBE and 1699 of the Belgian Code on Civil Proceedings). Neither do Guidelines 9-11 on integrity and 12-17 on information exchange and disclosure, which are addressed in less detail in the local ethics rules.

Update and trends

In September 2015, the Vulture Funds Act entered into force. Its aim is to prevent investment funds that qualify as 'vulture funds' from using Belgian courts to obtain illegitimate benefits to the detriment of countries recovering from severe financial difficulties. Vulture funds are investment funds that acquire sovereign debt at a discount price, in particular when states are in a position of financial difficulty, and then take legal action and force them to pay the full value of the debt plus the interest. The Vulture Funds Act intends to protect all debt-facing states; creditors who will be targeted are those who intentionally seek to exploit states by acquiring sovereign debt in order to pursue a benefit considered illegitimate. A creditor is pursuing an illegitimate benefit when two criteria are fulfilled (article 2). First, there has to be a manifest disproportion between the amount claimed by the creditor and the acquisition value of the debt. Second, the manifest disproportion has to be supplemented by one of the criteria set out in article 2 of the Vulture Funds Act. The list of criteria is not exhaustive. When a creditor is deemed to pursue an illegitimate benefit, his or her rights against the state will be limited to the amount that was paid when acquiring the loan or receivable.

In this sense, it can be observed that the situations where investors would be able to pursue these illegitimate benefits became even more restricted in Belgium with the adoption of the new Law of 23 August 2015 regarding the seizures of goods belonging to foreign states or to an international organisation of public law. According to section 1 of article 1412 of the Judicial Code, goods that are the property of a foreign power that are located in the territory of Belgium are not subject to seizure. A person holding a debt claim that possesses a writ of execution may introduce a request asking for the authorisation to seize its goods only upon fulfilment of one of the conditions stated in paragraph 2 of article 1412, such as when the foreign power explicitly and specifically consented to the seizure of such goods. It should be noted that paragraph 3 of that article states that these provisions apply to goods that are not only the property of one of its federated entities, but also a supranational organisation or international organisation of public law that uses the goods or intends to use them for similar purposes of non-commercial public services. It can be observed that such an article takes back provisions of the United Nations Convention on Jurisdictional Immunities of States and Their Property, especially Part III of this Convention that provides for proceedings in which state immunity cannot be invoked, such as commercial transactions (article 10) or the fact that sovereign immunity over goods can be lifted if the state agrees to it (article 7 of the Convention). Therefore, investors will face different barriers imposed by the Vulture Funds Act and the Law of 23 August 2015 when seeking to force states to pay the full value of the debt plus the interest in Belgium. This new regime has been largely criticised and has been challenged before the Constitutional Court of Belgium on the basis of the right to access to justice and discrimination.

It is believed that article 1412-quinquies was added into the Belgian Code of Civil Procedure to avoid diplomatic incidents with Russia, after Belgium was confronted with the enforcement of the *Yukos v Russia* case in June 2015. In brief, the case concerns an oil company's former shareholders and management (Yukos Oil Company) who filed a series of claims in court and arbitration panels in 150 different countries. The *Yukos* case constitutes an application (provisional application) of the Energy Charter Treaty, which the Russian Federation has signed but not ratified. The shareholders sought compensation for the expropriation they allegedly suffered because of Russia's actions. The Permanent Court of Arbitration has 'concluded that the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets' and ordered Russia to pay damages in excess of US\$50 billion to the majority shareholders

of Yukos Oil Company. Consequently, the Yukos shareholders immediately started proceedings against the Russian Federation and several Russia-related entities, seeking the recognition and enforcement of the award. However, in April 2016 the district court of The Hague annulled the arbitral award. The question now arises as to how the courts of the member states of the New York Convention will decide on the recognition and enforcement of the arbitral award that has been annulled. It is rather an understatement to consider that enforcement of the award will be difficult for Yukos's shareholders in the current geopolitical context. Courts in France and Belgium have ordered a freeze on Russian state assets and other non-diplomatic assets, including bank accounts and real estate. Yet in France, the court annulled the exequatur concerning US\$700 million in payments owed to Roscosmos, a Russian space agency, which were seized by French authorities. In Belgium, an opposition is still pending by the Agence de Press Tass and RIA Novosti (both Russian united enterprises) against a seizure of its assets (in question, two apartments) where it is alleged that:

- the title of property belongs to Agence de Press Tass;
- Agence de Press Tass is not a debtor in the arbitral award; and
- even if it is considered that the Agence de Press Tass is an *entreprise unitaire*, the propriety will be transmitted to the Russian Federation only upon the Agence de Press Tass liquidation.

Proceedings are pending before the Belgian constitutional court.

In addition, some old treaties are rediscovered or even used for the first time (see question 1). One should note the bilateral Convention concluded on 28 March, 1925 between Belgium and the Netherlands regarding the recognition and enforcement of foreign judgments. In fact, on 9 December 2016 the court of First Instance of Brussels dismissed the Russian Federation opposition to the exequatur on procedural grounds, based on the applicability of the above-mentioned bilateral Convention. As per article 18 of the Convention, the adequate mechanism of challenge to counter the exequatur is through an appeal before the court of appeal within 14 days, instead of through an opposition before the court of first instance. Moreover, the court held that the Convention remains in force and is fully applicable, without an express withdrawal from Belgium.

In another recent case, Moldova, together with its air traffic security company MoldATSA, successfully opposed the enforcement of an adverse arbitral award (pursuant to UNCITRAL Rules) in Belgium. In this case the Convention between Belgium and the Netherlands was used. In a nutshell, this case is related to the exequatur, suspension and annulment proceedings in Belgium, where Komstroy (formerly Energoalians) sought recognition and enforcement of an arbitral award in the amount of US\$48.7 million against the Republic of Moldova and against several Moldovan-related entities, such as MoldATSA. MoldATSA is responsible for the safety of the Moldovan airspace and has been affected by the seizing of important assets in Belgium. In April 2015, Komstroy locked MoldATSA's accounts in Eurocontrol, but on 22 June, 2016, the Brussels Court of First Instance annulled the exequatur after the annulment of the arbitral award by the Paris Court of Appeal on 12 April 2016. The annulment of the exequatur was based on article 11 of the Convention between Belgium and France. After the decision of the annulment of the exequatur the Court of the seizure ruled that Komstroy could not enforce an award and the seizure was lifted with immediate effect (28 July 2016), and Komstroy was condemned to pay damages.

It is worth noting, that in 2016 very old bilateral Conventions on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instrument were used in two important investment arbitrations.

As we have seen Guidelines 18–25 concerning witness contact are more relaxed than the local rules. Finally, on sanctions or disciplinary measures, the local ethics rules do not provide for the arbitral tribunal to impose them. Disciplinary courts will impose disciplinary measures; other sanctions will be imposed by the state courts.

No decisions have referred to the IBA rules.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

There is no specific regulation of third-party funders in Belgium law. Nonetheless, the IBA Guidelines on Conflicts of Interest in

International Arbitration (2014) are commonly used as a guideline for disclosure:

If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party ['General Standard' 6(b)]

The explanation for this 'General Standard' is:

When a party in international arbitration is a legal entity, other legal and physical persons may have a controlling influence on this

legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.

And:

For these purposes, the terms 'third-party funder' and 'insurer' refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

The restrictions on the appearance of foreign lawyers in Belgian court proceedings are not applicable in arbitration. Each party has the right to be represented by anyone specifically empowered in writing and admitted by the arbitral tribunal. Foreign practitioners will be subject to the usual visa requirements depending on their citizenship. If a foreign practitioner works in Belgium for longer than three months he or she becomes obliged to pay income taxes.



Johan Billiet

johan.billiet@billiet-co.be

146 Avenue Louise
1050 Brussels
Belgium

Tel: +32 2 643 3301
Fax: +32 2 646 2431
www.billiet-co.com

www.arbitration-adr.org/news
administration@arbitration-adr.org

Brazil

Hermes Marcelo Huck, Rogério Carmona Bianco and Fábio Peixinho Gomes Corrêa*

Lilla, Huck, Otranto, Camargo Advogados

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Brazil is a contracting state to the New York Convention, having acceded to it through the issuance of Federal Decree No. 4,311/2002, on 23 July 2002. No declarations or notifications under articles I, X and XI of the Convention were made by the Brazilian government.

Brazil has also agreed to the following multilateral conventions regarding international commercial arbitration:

- Geneva Protocol on Arbitration Clauses (1923);
- Panama Inter-American Convention on International Commercial Arbitration (1975);
- Montevideo Inter-American Convention on the Extraterritorial Enforcement of Foreign Court Decisions and Arbitral Awards (1979);
- Las Leñas Protocol on Judicial Cooperation and Assistance within the Mercosur (1996);
- Mercosur International Commercial Arbitration Agreement (1998); and
- United Nations Convention on Contracts for the International Sales of Goods (2013).

Brazil has not yet acceded to any multilateral conventions regarding international investment arbitration.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Brazil has not yet ratified any bilateral investment treaties with other countries. Nonetheless, it is worth mentioning that Brazil has entered into new bilateral investment treaties with Angola, Colombia, Malawi, Mexico, Mozambique and Chile. There are ongoing negotiations to sign similar agreements with India and Morocco.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary domestic source of law relating to domestic and foreign arbitral proceedings is Federal Law No. 9,307/1996, amended by Federal Law No. 13,129/2015, known as the Brazilian Arbitration Act (the BAA), which governs both domestic and foreign arbitral proceedings. Federal Decree No. 4,311/2002, which introduced the New York Convention into the Brazilian legal order also represents a relevant source of law.

As to the recognition and enforcement of awards, aside from the New York Convention and the BAA, this process is currently ruled also

by Federal Decree No. 4,657/1942 (Rules of the Civil Code), Internal Regulations of the Brazilian Superior Court of Justice and the BAA, specially through articles 34 to 39. The New Brazilian Civil Procedure Code (NBCPC), which came into force in March 2016, further details the procedure of recognition and enforcement of foreign awards in articles 960 through 965.

Awards rendered in Brazil or by an arbitral tribunal seated in Brazil are automatically enforceable in the country, entitling the interested party to enforce such judgment as soon as the decision is definitely rendered by the tribunal. Awards rendered abroad, on the other hand, only acquire enforceability after undergoing a procedure of recognition of judgment before the Superior Court of Justice.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The UNCITRAL Model Law served as an important source of inspiration for the BAA and both are similar in many aspects. Notwithstanding, it is possible to identify some differences between both statutes, even though the BAA is not contrary to the Model Law in any relevant feature.

For instance, while the Model Law applies to international commercial arbitration, the BAA does not raise any distinction on the matter, applying to both domestic and international proceedings.

Another difference between these statutes is with regard to the moment the proceedings commence; under the Model Law, unless otherwise agreed by the parties, a dispute commences on the date on which a request for arbitration is received by the respondent (article 21); under the BAA, on the other hand, the arbitration shall be deemed to be initiated only when the nomination is accepted by the sole arbitrator or by all members of the arbitral tribunal (article 19).

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The parties are free to agree upon the procedure to be followed by the tribunal in conducting the proceedings, which may abide by the rules of an arbitral institution or be entirely decided by the parties (article 21 of the BAA). In conducting the proceedings, however, the arbitral tribunal shall not deviate from the core principles of Brazilian law, such as fair and equal treatment between the parties, equivalent opportunity to be heard and impartiality of the arbitrator.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

As a rule, parties to an arbitration may freely decide on the law applicable to the merits of the case, provided that there is no violation of core principles of Brazilian law or national public order (article 2, paragraphs 1 and 2 of the BAA). If no such agreement exists, the arbitral tribunal may decide on the matter (article 18 of the BAA).

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The most prominent arbitral institutions in Brazil are:

The Brazil-Canada Chamber of Commerce (CCBC)
Rua do Rócio, No. 220, 12º andar, cj. 1212, Vila Olímpia
São Paulo 04552-000
Brazil
www.ccbc.org.br

The Arbitration Center for the American Chamber in São Paulo (AMCHAM)
Rua da Paz, No. 1,431
São Paulo 04713-001
Brazil
www.amcham.com.br

The Mediation and Arbitration Chamber of São Paulo (CIESP)
Av Paulista, No. 1,313, 13º andar, Cerqueira César
São Paulo 01311-926
Brazil
www.camaraearbitragem.org.br

The FGV Chamber of Conciliation and Arbitration (the FGV Chamber)
Praia de Botafogo, No. 190, 12º andar
Rio de Janeiro 22250-900
Brazil
www.fgv.br/camara

The Market Arbitration Chamber (the CAM BOVESPA)
Rua XV de Novembro, No. 275, 5º andar
São Paulo 01013-001
Brazil
www.bmfbovespa.com.br

All institutions mentioned above have rules that provide the parties with considerable freedom in choosing the place and language of arbitration, applicable law to the merits of the case and the members of the arbitral tribunal. While CCBC and CAM BOVESPA require that the chair is nominated from its list, none of the others require that the arbitral tribunal be necessarily selected from their list of arbitrators.

As to the fees, AMCHAM, CIESP and CAM BOVESPA calculate them on the basis of the time spent by the arbitrators to decide the case or according to the amount in dispute. CCBC (as of 2015) and FGV Chamber, on the other hand, charges fees solely based on the amount in dispute. All information regarding this matter is available on the websites indicated above.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

As per article 1 of the BAA, a dispute may only be deemed arbitrable as long as the subject matter relates to freely transferable rights. Therefore, disputes concerning some family issues, civil status, taxes or criminal law, for example, may not be subject to an arbitration agreement. Disputes concerning competition law, antitrust, securities transactions and intracompany disputes, even though involving public interest in some level, are usually deemed arbitrable by Brazilian authorities and case law. There is some controversy on the arbitrability of IP, labour and restructuring proceedings. The BAA, as per its recent amendment, now expressly provides that public entities may resort to arbitration in order to solve its disputes, if such disputes concern freely transferable rights (article 1, paragraphs 1 and 2 of the BAA). In this case, the procedure may not be judged on an equity basis and shall always be public (article 1, paragraph 3 of the BAA).

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Article 4, paragraph 1 of the BAA states that the arbitration clause shall necessarily be in writing. Further, in adhesion contracts, the arbitration clause will only have efficacy either if the adherent initiates the arbitration proceedings or expressly agrees to the insertion of such a clause in the contract (eg, in writing, in a separate attachment, in bold, with a signature or endorsement specifically for this clause).

There is some case law in the Superior Court of Justice granting enforcement to foreign arbitral awards issued on cases in which the parties disputed the execution of the arbitration agreement.

Any aspect relating to the nullity, invalidity or inefficacy of the arbitration agreement must be argued as soon as the arbitration proceedings are initiated. If the interested party fails to do so, the lack of a formal objection may be deemed cured (article 20 of the BAA). If such objection is timely raised but dismissed by the arbitral tribunal, the state courts will have jurisdiction to entertain a challenge to the arbitral award based on this arbitration agreement (article 20, paragraph 2 of the BAA).

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The BAA does not contain any disposition regarding this matter. However, it can be affirmed that the termination of the underlying contract does not affect the enforceability of the arbitration agreement, which is deemed to be autonomous under Brazilian law.

If the parties, however, decide to specifically terminate the arbitration agreement itself, then such agreement will no longer be enforceable. The arbitration agreement will also be unenforceable if the interested party proves that it was forced to sign it and, therefore, that it has not validly waived its right to submit its pleas before state courts.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

The BAA does not rule on this matter; scholars and case law, on the other hand, have not yet reached an agreement regarding this subject. Notwithstanding, Brazilian law has been construed in the sense that a non-signatory party may be bound by an arbitration agreement whenever it has somehow replaced the contracting party that actually entered into the agreement, or when it has had a relevant participation in negotiating such agreement. There is Brazilian case law recognizing the group of contracts doctrine in order to extend the arbitration agreement to non-signatories. This position, however, is not free from opposition.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The BAA does not contain any provisions with respect to third-party participation in arbitral proceedings. While many authorities admit the participation of a third party to the arbitration agreement, others simply forbid such intervention, in a more conservative approach. Altogether, considering that the arbitrators' jurisdiction descends from the parties' express consent to the arbitration agreement, it is safe to conclude that third-party participation of any nature unequivocally depends on the consensus of all parties involved and also on the assent of the arbitral tribunal on the matter.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the ‘group of companies’ doctrine?

The BAA does not rule on the extension of an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company. Nonetheless, some precedents have already expressly applied the group of companies doctrine, therefore admitting the extension of an arbitration agreement to a non-signatory company (see, for example, *Trelleborg v Anel Empreendimentos Participações e Agropecuária Ltda*, Court of Justice of São Paulo, Civil Appeal No. 267.450-4/6, 24 May 2006).

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The BAA does not rule on multiparty arbitration agreements and consequently on the requirements for their validity. Parties should settle the issue on the arbitration agreement or resort to the rules of the chosen arbitration institution.

Constitution of arbitral tribunal**15 Eligibility of arbitrators**

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

A person may not act as an arbitrator if he or she has any relationship with the parties, with the subject matter of the arbitration or an interest of any nature in the resolution of the dispute (article 14 of the BAA). Active judges are also barred from acting as arbitrators, in accordance with Law No. 35/79. Aside from these restrictions, anyone with legal capacity who enjoys the trust of the parties may be appointed as an arbitrator, including retired judges.

Brazilian courts would very likely deem valid requirements based on nationality, especially if such requirements aim at the neutrality of the arbitral tribunal. Requirements based on religion or gender, however, may be subject to further scrutiny given that the Brazilian Federal Constitution has expressly acknowledged gender equality and religious freedom.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

For proceedings with a sole arbitrator, the rules of the arbitration institutions mentioned in question 7 provide that, failing agreement of the parties, the arbitrator will be appointed by the institution itself. In proceedings with three arbitrators, each party may nominate one of the co-arbitrators, who will be responsible for appointing the chair of the arbitral tribunal. If the co-arbitrators fail to appoint the chair, the institution itself will do so. If the arbitration agreement, however, is silent as to the arbitration institution before which the proceeding shall be conducted, the interested party may resort to state courts and request the appointment of the arbitrators that shall form the tribunal (article 7, paragraph 4 of the BAA). The BAA, as recently amended, expressly provides that the parties are free to agree upon the waiver of institutional rules that limit the choice of arbitrators to those that are part of the respective institution’s list, as per article 13, paragraph 4 of the BAA. According to the same provision, if the parties fail to appoint the arbitrators or in case of multiparty arbitration, the matter must be settled in accordance with the rules of the arbitration institution elected to rule the procedure.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Article 14 of the BAA provides that arbitrators may be challenged and replaced should they have a relationship with one of the parties or a connection to the subject matter of the arbitration that would lead to the disqualification of a state judge, such as, for example, personal interest in the matter, a familial or intimate relationship with one of the parties, enmity with one of the parties, and so on. As from March 2016, the matter is disciplined by articles 144 and 145 of the NBCPC, which include intimate relationship and enmity with lawyers). The party interested in challenging the arbitrator shall file the respective plea directly to the arbitrator or the chair of the arbitral tribunal, setting forth its reasoning and pertinent evidence (article 15 of the BAA). Should the challenge be accepted, the disqualified arbitrator shall be removed and replaced by its substitute as set forth in article 16 of the BAA or in the rules of the arbitration institution chosen by the parties.

In the event that an arbitrator should die or become unable to carry out his or her duties, a substitute indicated by the parties or the arbitration institution will also take over (article 16 of the BAA). However, in the event of the death or illness of an arbitrator, if the parties have expressly declared that they would not accept a substitute, the arbitration agreement will be considered terminated (article 12 of the BAA).

The IBA Guidelines on Conflicts of Interest in International Arbitration may be applied, but this does not yet represent a strong trend in Brazil.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Parties and arbitrators are bound by a contractual relationship, and both party-appointed and non-party-appointed arbitrators must, in the performance of their duty, proceed diligently, efficiently, independently, and free from bias of any nature (article 13, paragraph 6 of the BAA). Arbitrators’ remuneration usually falls within the rules of the arbitral institutions and is defined on a case-by-case basis. The terms of reference of the arbitration usually sets forth the procedure for the reimbursement of the expenses of arbitrators.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Pursuant to article 17 of the BAA, when carrying out their duties, arbitrators shall be considered comparable to public officials and judges for the purpose of criminal legislation, which further reinforces the compliance with their duty of impartiality.

Jurisdiction and competence of arbitral tribunal**20 Court proceedings contrary to arbitration agreements**

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If court proceedings are initiated despite an existing arbitration agreement, the interested party must raise this issue, as a preliminary objection, when presenting its answer to the claim submitted to the state court. The time limit for raising such an objection is either 15 days from the defendant’s service of process or from the preliminary hearing in court, should the judge hold it in accordance with article 335 of the NBCPC. Once the arbitration agreement between the parties has been raised, the state judge must dismiss the claim, as per article 337, section X of the NBCPC. If the interested party, however, fails to

bring to the knowledge of the state judge the existence of the arbitration agreement in the 15-day term, the state judge may proceed with the judgment on the merits, for it is presumed that both parties have waived their right to resort to an arbitral tribunal.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

As per article 20 of the BAA, the party interested in raising an objection as to the jurisdiction of the arbitral tribunal must do so at the first opportunity once the proceedings have been initiated. The arbitral tribunal will then rule on its own jurisdiction and if it accepts the challenge, the parties shall be directed to the proper judicial court to settle the dispute. If the challenge is not accepted, however, the arbitral proceedings shall proceed. Nevertheless, in this case, once the arbitration proceedings are over, the interested party may still claim the nullity of the award on the grounds that the arbitral tribunal did not have jurisdiction to settle the matter (article 33 of the BAA).

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Provided that the parties have not chosen a set of institutional rules that settles this matter, the arbitral tribunal may decide upon the place and language of the proceedings (article 21, paragraph 1 of the BAA).

23 Commencement of arbitration

How are arbitral proceedings initiated?

The arbitral proceeding is deemed initiated when the nomination is accepted by the sole arbitrator, in the event that there is only one, or by all members of the arbitral tribunal. Such criteria is expressly stated in article 19 of the BAA and was adopted by the rules of the arbitration institutions listed in question 7. For the purposes of statute of limitations, the BAA provides that the arbitration is deemed as commenced on the date of the filing of the request for arbitration (article 19, paragraph 2 of the BAA).

24 Hearing

Is a hearing required and what rules apply?

A hearing is not mandatory for the validity of the proceedings. The BAA and the rules of the above-mentioned arbitration institutions leave this issue to the discretion of the arbitral tribunal (article 22 of the BAA). If deemed necessary, the tribunal, at the request of the parties or on its own initiative, may take depositions, hear witnesses, carry out expert examinations and determine the production of any other evidence it may deem necessary. The parties and the tribunal may freely determine upon the procedural rules applicable to the hearing, and the sole requirement under the BAA is that the deposition of the parties and witnesses be taken at a time, place and date previously informed, and be reduced to a written transcript, signed by the deponent or at his or her request, and by the arbitrators.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The arbitral tribunal is free to decide on every aspect relating to the taking of evidence, to the extent that it is free to form its opinion (article 21, paragraph 2). Such freedom can be inferred from article 22 of the BAA, which states that the arbitrators, at the request of the parties or on their own motion, may take depositions of the parties, hear witnesses, carry out expert examinations (both of party-appointed experts and tribunal-appointed experts) and determine the production of any other evidence deemed appropriate. While the oral evidence is produced at the hearing, the hard evidence must be presented with the parties'

submissions. The IBA Rules on the Taking of Evidence in International Arbitration are gradually becoming more popular in Brazil, especially in proceedings where there is a party original from a common-law system.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

The BAA provides for two hypotheses in which the arbitral tribunal may request assistance from a state court, as per articles 22 and 22-C (the latter having been introduced in the recent amendment of the Law). The first, stated in article 22, refers to the absence of a witness from the deposition session. In this situation, the arbitral tribunal may request the judicial authority to subpoena the reluctant witness for a new hearing. The second hypothesis refers to the possibility of the arbitral tribunal requesting the assistance and cooperation of the state court that would originally have jurisdiction to trial the case, by means of an arbitral letter, in accordance with article 22-C of the BAA.

27 Confidentiality

Is confidentiality ensured?

Confidentiality is not expressly ensured by the BAA, but such a provision is commonly inserted in the arbitration agreement. Much in the same manner, the rules of the arbitration institutions listed above contain a confidentiality duty that applies to both the parties and the arbitrators. The NBCPC ensures, confidentiality to judicial proceedings for enforcement of an arbitral decision or award, and also for recognition or nullity of the latter, provided that the interested party demonstrates before the state court that the arbitral proceedings are confidential (article 189, section IV). However, as per article 2, paragraph 3, of the recently amended BAA, confidentiality does not apply to arbitral proceedings in which public entities are involved.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Before arbitration proceedings have been initiated, courts may grant any type of interim measures seeking to preserve parties' rights. After the proceedings have been initiated, state courts may intervene in very specific situations, such as on the subpoena of a witness that fails to appear to court (articles 22, section 2, and 22-A of the BAA). As a rule, once the proceedings have commenced, the arbitral tribunal has exclusivity on ruling every aspect of the matter, including to maintain or reconsider decisions previously rendered by state courts (article 22-B of the BAA), but there may be some exceptions when state proceedings commence before the arbitration.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The BAA does not provide for an emergency arbitrator prior to the constitution of the arbitral tribunal. Usually, interim measures are sought by the parties before state courts, as per article 22-A of the BAA. However, it should be noted that the CAM BOVESPA arbitration rules do provide for an emergency arbitrator procedure (article 5.1).

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The BAA does not set limits to the arbitral tribunal's power to issue interim measures within its jurisdiction (article 22-B of the BAA), neither does it establish cases in which security for costs are required. Besides those measures mentioned above, the arbitral tribunal may

issue temporary restraining orders or interim relief sought by the parties. It is not usual for the arbitral tribunals to order security for costs.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

As per article 27 of the BAA, the arbitral award shall decide the parties' responsibilities, as well as any amount (penalty) resulting from bad-faith conduct during the proceedings, such as the use of 'guerilla tactics', as the case may be, following the provisions of the arbitration agreement, if any. Further, the arbitral tribunal is empowered to communicate to the criminal authorities on any conduct that constitutes a crime under Brazilian law, such as harassment of witnesses. The BAA lacks provision regarding penalties applicable to conducts that would amount to contempt of court.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

A unanimous vote is not required and the existence of a dissenting opinion does not affect the validity of the award. Under article 24, paragraph 1 of the BAA, when there are several arbitrators, the award may be rendered by majority vote. Failing majority agreement, the vote of the chair of the arbitral tribunal shall prevail.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

As per article 24, paragraph 2, the arbitrator who dissents from the majority may, if he or she so wishes, state his or her vote separately. However, if the dissenting arbitrator does not state his or her vote separately, this does not have an influence on the validity of the award rendered by majority vote, as long as the majority award clearly states the limits of the dissenting opinion.

34 Form and content requirements

What form and content requirements exist for an award?

As to the form, the award shall be expressed in a written document (article 24 of the BAA). The mandatory requirements for an award are the following, as per article 26 of the BAA:

- a report containing the names of the parties and a summary of the dispute;
- the grounds for the decision where questions of fact and law shall be analysed, with an express mention as to whether the arbitrators are judging the case on an equity basis;
- the opinion wherein the arbitrators shall resolve the specific questions that were submitted to them by the parties and also establish the time frame for compliance with the decision; and
- the date and place where the award was rendered.

Further, the award shall be signed by all members of the tribunal and will also state the responsibility of the parties regarding costs and expenses for the arbitration, as well as fees of any other nature. In exceptional circumstances, the absence of the signature of an arbitrator in the award may be justified.

The NBCPC contains provisions that may enhance the content of an award, including its mandatory reasoning and the possibility of issue preclusion (collateral estoppel).

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The award shall be rendered within the time limit stipulated by the parties. If no agreement has been made in this sense, the time limit for rendering the award shall be six months from the commencement of the proceedings, as per article 23 of the BAA. The parties and the arbitrators, by mutual agreement, may extend the stipulated time period. Usually, arbitration institution rules set a time limit of 60 days for the tribunal to issue the award after the close of the proceedings and such time limit can be extended once, for the same period or for a shorter period of 30 days, by the arbitral tribunal.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The applicable time limits for a challenge or for a request for correction or interpretation of the award commence only from the date of its delivery to the parties (articles 30 and 33, paragraph 1 of the BAA). Also, any party interested in setting aside an arbitral award shall submit its challenge in state court within 90 days of the date of receipt of the arbitral award or from the receipt of the decision on the request for correction or interpretation of the award, if applicable (article 33, paragraph 1 of the BAA).

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

Final awards, partial awards, interim awards and consent awards are valid and possible under the BAA. Up until the recent amendment of the BAA, there was much controversy among Brazilian scholars regarding the validity of partial awards, especially because article 32, section 5 of the BAA used to state that an award will be null and void if it does not settle the entire dispute submitted to arbitration. However, through Federal Law No. 13,129/2015, such provision was revoked and a specific provision expressly authorising arbitrators to issue partial awards was incorporated (article 23, paragraph 1 of the BAA). There are no limitations as to the type of relief an arbitral tribunal may grant and awards may dismiss the arbitration without prejudice or be definitive as to the merits of the dispute.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Proceedings may be terminated by default, in accordance with the rules of the arbitration institutions mentioned above. Proceedings may also be terminated by means of a settlement and, even though legally there are no formal requirements for such termination, parties may request the tribunal to ratify such fact in an award, as per article 28 of the BAA.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

In accordance with article 27 of the BAA, the award shall decide the responsibility of the parties regarding costs and expenses for the arbitration. The tribunal is absolutely free to decide upon this matter, following the provisions of the arbitration agreement, if any, or alternatively the rules of the arbitration institution chosen by the parties. Arbitrators are not by any means bound to the rules or standards for cost allocation established in domestic court proceedings and may rule on this matter as they deem appropriate. The award on costs encompasses not only the attorney's fees, but also the arbitrators' fees, the administrative costs and, if any, the experts' fees.

Update and trends

The Brazilian Arbitration Act was amended by Federal Law No. 13,129/2015. Even though the amendments introduced do not alter the fundamental aspects of the arbitration proceedings under the previous legislation, relevant additions were made. For example, the procedure to be followed regarding emergency interim measures is now more straightforward. The introduction of the arbitration letter will probably make it easier to enforce arbitral decisions rendered during the course of the proceedings that need the executory power of state courts to be complied with. Finally, the express provision that arbitrators are authorised to render partial awards will silence the intense doctrinal debate among national scholars.

On the other hand, the NBCPC also introduces significant modifications to the legal system, some of which impact arbitral procedures (as mentioned in answers 3, 17, 20, 27, 34 and 43). Finally, the the Brazilian Arbitration Act was also amended to expressly admit disputes involving the public administration, to be decided by an arbitral tribunal.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Interest and restatement may be awarded for principal claims and costs. In general, the interest rate is equivalent to the rate applicable for federal tax debts in Brazil (article 406 of the Brazilian Civil Code), unless the parties have agreed otherwise.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

In accordance with article 30 of the BAA, within a period of five days as from the notification of the award or within the period provided by the parties or the arbitration rules chosen by them, the interested party may request the tribunal to rectify clerical errors that may affect the judgment or any obscurity, doubt, omission or contradiction in the award. The arbitral tribunal may also take these measures by its own initiative. The tribunal shall decide on the amendment within 10 days, unless otherwise provided by the parties or the arbitration rules chosen by them.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

In Brazilian law, arbitral awards may be challenged and set aside by means of a judicial proceeding that claims the nullity of the judgment or as a defence in an enforcement proceeding.

To succeed in such claim or defence, the interested party must demonstrate, as per article 32 of the BAA, that the award:

- was rendered by someone who could not have served as an arbitrator;
- does not contain the requirements stated in article 26 of the BAA;
- does not respect the limits established in the arbitration agreement;
- was rendered in a context of breach of duty, passive corruption or graft;
- was rendered after the time limit previously established, provided that one of the parties has notified the tribunal pursuant to article 12, section III of the BAA; or
- violates the core principles stated in article 21, paragraph 2 of the BAA, such as equal treatment between all parties, opportunity to be heard and the impartiality of the arbitrator. An award may also be set aside if the arbitration clause is considered null and void.

The claim for nullity must be filed within 90 days of the receipt of the notification of the award or from the receipt of the decision on the request for correction or interpretation of the award, if applicable (article 33, paragraph 1 of the BAA).

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Considering that the claim for nullity follows the ordinary proceeding provided by the NBCPC, there are basically two levels of appeal. The challenge in a trial court may take one to three years to be decided. In the event that the interested party appeals, a challenge may take one to five years to be definitely settled before a higher court (State Court of Appeals, Federal Court of Appeals or Supreme Court of Brazil). However, the filing of the claim for nullity does not suspend the enforcement of the award, unless otherwise ruled by a court of law. The costs incurred in such proceedings may be appraised in at least 4 per cent of the value of matter in controversy. The defeated party may also be required to pay attorney fees to the winning party, which will vary according to the NBCPC and the judge's discretion. The delay in state court proceedings may vary according to the state and in extreme cases it may take up to eight years to issue a final decision.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Domestic awards are automatically enforceable, entitling the interested party to begin the enforcement of judgment as soon as the decision is definitely rendered by the tribunal. The enforcement procedure is structured to be a fast and cost-efficient solution. Foreign awards, on the other hand, only acquire enforceability after undergoing a procedure of recognition of judgment (or confirmation of judgment) by means of which the Brazilian Superior Court of Justice scrutinises its validity and conformity in relation to national public policy and, ultimately, decides upon the possibility of granting the exequatur required by the interested party. An award that is deemed to be contrary to Brazilian core principles of law will not be recognised and enforced in Brazil. However, there are very few cases in which the exequatur has not been granted. In fact, in recent years, the Brazilian Court of Justice has repeatedly positioned itself in a manner favourable to the development of arbitration, enforcing foreign awards exactly as they were rendered, with very specific exceptions.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Article 38, section 6 of the BAA states that enforcement of an arbitral award may be refused when the award has been set aside or suspended by a state court at the place of arbitration. The federal attorney general acting in the Superior Court of Justice issued an opinion denying enforceability to a foreign award that has been set aside by a state court at the place of arbitration (see SEC No. 5,782/AR). The Superior Court of Justice issued its opinion on this case, in which, by unanimous decision, it denied enforceability to a foreign award that was set aside by a state court at the place of arbitration.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

As per question 29, the BAA does not provide for any rule related to emergency arbitrator proceedings or orders. Even though the CAM BOVESPA arbitration rules provide for such proceedings, they do not have any specific rule on the enforcement of orders issued by emergency arbitrators.

47 Cost of enforcement**What costs are incurred in enforcing awards?**

The enforcement of foreign awards may vary according to the state jurisdiction. Nonetheless, attorney fees may vary from 10 to 20 per cent of the value of matter in controversy and are borne by the defeated party.

Other**48 Judicial system influence****What dominant features of your judicial system might exert an influence on an arbitrator from your country?**

One of the most relevant features is the freedom to evaluate evidence. Since the civil law tradition has waived strict rules of evidence, arbitrators are not bound to any kind of previous set of rules of evidence and usually they have different approaches to evidence production. Another relevant feature is related to the absence of discovery rules and of any provision for witness written statements.

It is understood that parties should rely on the documents in their possession, unless they have agreed to a specific discovery proceeding. In the same sense, witnesses are not required to issue prior written statements, with an exception made for parties' agreements or the arbitral tribunal's orders. Finally, party officers shall testify if ordered to do so by the arbitral tribunal, but they are not bound to a duty to tell the truth, as the Brazilian Federal Constitution grants the parties the right not to produce evidence against themselves.

49 Professional or ethical rules applicable to counsel**Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?**

Although there are no specific professional or ethical rules applicable to counsel in international arbitration in Brazil, Brazilian lawyers are

regulated by the Brazilian Bar Association Ethical Code. Even though best practice in Brazil does not contradict the IBA Guidelines on Party Representation in International Arbitration, rules regarding, for example, witness interviews, information exchange and disclosure and production of documents may be sometimes faced differently by civil law tradition lawyers.

50 Third-party funding**Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?**

Third-party funding of arbitrations in Brazil is not subject to any express legal restriction. The Brazilian Bar ethics regulations may apply in certain circumstances. CCBC is the only Brazilian Arbitration Chamber that has expressly regulated this subject through an administrative resolution dated 20 July 2016.

51 Regulation of activities**What particularities exist in your jurisdiction that a foreign practitioner should be aware of?**

There are no particularities concerning visa requirements, work permits or taxes when functioning as a foreign arbitrator or counsel in proceedings seated in Brazil. However, in order to physically attend hearings or meetings held in the Brazilian territory a regular visa is required. Even though counsels are not required to enrol with the Brazilian Bar Association to function in international arbitration proceedings, this is necessary to any judicial measure, such as procedures to claim the nullity or the recognition and enforcement of the arbitral award.

There are no unusual ethical rules that one should be aware of; when exercising their duties, arbitrators are considered comparable to public officials and judges for the purpose of criminal legislation (article 17 of the BAA) and counsels are subject to Federal Law No. 8,906/1994.

* *The authors would like to thank Laura Ghitti for her assistance with this chapter.*

LILLA, HUCK
OTRANTO, CAMARGO

ADVOGADOS

Hermes Marcelo Huck
Rogério Carmona Bianco
Fábio Peixinho Gomes Corrêa

m.huck@lhm.com.br
rogerio.bianco@lhm.com.br
fabio.peixinho@lhm.com.br

Avenida Brigadeiro Faria Lima, 1744, 11th floor
São Paulo 01451-910
Brazil

Tel: +55 11 3038 1000
Fax: +55 11 3038 1100
www.lhm.com.br

Chile

Paulo Román, Marta Arias and Rodrigo Donoso

Aninat Schwencke & Cía

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Chile is a contracting state of the New York Convention, and has acceded to it since 1975, without any declarations or reservations.

Additionally, in 1991 Chile ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (Washington Convention), which creates the ICSID (International Centre for Settlement of Investment Disputes) without notification or exclusions.

Chile is also a party, since 1976, to the Inter-American Convention on International Commercial Arbitration of 1975 (Panama Convention).

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

According to the information recorded by the UNCTAD, to date, Chile has signed 78 international investment agreements and bilateral investment treaties, 62 of which are currently in force.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The legal sources are different for domestic and international arbitration in Chile. In the former, the arbitration is governed by the Code of Civil Procedure and the Courts Statutory Code, while the latter is governed by Statute No. 19.971 of 2004, called the Law on International Commercial Arbitration (LICA). According to the article 1 of the LICA, arbitration is considered international if:

- the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states;
- one of the following places is situated outside the state in which the parties have their seat:
 - the place of arbitration, if determined in, or pursuant to, the arbitration agreement;
 - 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
- the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state.

Of major importance is Decree Law No. 2,349/1978, which regulates international contracts for public entities, allowing the bodies of the

Chilean government to submit their international economic or financial agreements to arbitration.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The LICA is based on the UNCITRAL Model Law. However, it follows the original text of 1985 and does not incorporate the amendments to the Model Law that were adopted in 2006.

In addition, the LICA incorporates the note to the first article of the Model Law in its text (article 2), which provides examples of commercial relationships that fall within the scope of international arbitration.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

According to the LICA, parties have wide autonomy to agree the rules of arbitration. Mandatory rules are imposed for certain subjects, including:

- the opportunity to promote the lack of jurisdiction of the tribunal, which cannot be raised after answering the claim, and to promote the exception of excess of mandate of the tribunal, which cannot be raised after the performance in which the excess of mandate is verified (article 16.2);
- the fair treatment that must be given by the arbitrator to the parties to ensure full opportunity to exercise their rights (article 18);
- the duty to notify the parties in advance of the hearings to examine goods and documents (article 24.2); and
- the duty to inform the parties and give them the opportunity of responding to any document, statement, report or information submitted by the other party (article 24.3).

For domestic arbitration, in accordance with the case law on the matter, there are mandatory rules on:

- capacity and impartiality of arbitrators;
- the appointment of arbitrators;
- rules on valid notifications of the parties and aggregation of trial evidence, notifying the other party in order to exercise their rights; and
- the inalienable nature of certain procedural recourses, corresponding to the complaint appeal and appeals for annulment based on the grounds of lack of jurisdiction and *ultra petita*.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

According to the LICA, the arbitral tribunal shall settle the dispute in accordance with the rules of substantive law freely chosen by the parties, without regard to conflict of laws rules. If the parties do not indicate the applicable substantive law, the tribunal shall apply the law determined by the conflict of laws rules that it considers to be applicable (article 28).

Internally, a domestic arbitration cannot be subject to foreign law when it concerns a procedure that must be resolved in accordance with the law (both procedural and substantive), since in that case the arbitrators are subject to the principle of territoriality of law in the same way that ordinary judges are (article 223 of the Courts Statutory Code).

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The most prominent arbitral institution in Chile is the Arbitration and Mediation Center (CAM) of the Santiago Chamber of Commerce:

Arbitration and Mediation Center
Santiago Chamber of Commerce
Monjitas 392, 11th Floor
Santiago
8320113
www.camsantiago.cl

The CAM has separate regulations for domestic and for international arbitration. In the first case, the arbitrators shall be appointed from among the members of the CAM list of arbitrators, unless the parties mutually agreed to appoint someone who is not from the list, which must be approved by the CAM. This last arbitration shall be located in Chile, and their language shall be Spanish, unless otherwise agreed by the parties.

In international arbitration, the parties are free to agree on the place and language of the arbitration, and, failing an agreement between them, the tribunal will decide. There are no restrictions on the parties in order to agree on a determined applicable substantive law.

Rates are subject to a fixed percentage fee based on the amount of the matter in dispute. In addition, there is an administrative fee, which is fixed based on a percentage of the amount in dispute.

There is also the National Arbitration Center, which regulates a standard proceeding and summary proceedings for low-level amounts in dispute:

National Arbitration Center
Apoquindo 3600, 5th Floor
Las Condes, Santiago
7550108
www.cna.cl

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

In Chile, it is not possible to submit to arbitration criminal matters, labour issues, antitrust cases, most family matters, those matters in which the government has equity interest and non-contentious matters.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

According to the LICA, the arbitration agreement must be in writing, providing that this requirement is met if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication that provide a record agreement, or in an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other (article 7).

In the case of domestic arbitration, there must be a distinction between whether the agreement includes the designation of the person of the arbitrator or not. In the first case, the agreement must be in writing and contain the identification of the parties, the matter referred to arbitration and the appointment of the arbitrator or arbitrators. In the second case, there is no requirement for the agreement to be submitted in writing.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

According to the LICA, an arbitration agreement is not enforceable when it is null and void, inoperative or incapable of being performed (article 8.2). A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause (article 16.1).

Among the instances in which an arbitration agreement cannot typically be performed are the following:

- the resignation of one or more of the arbitrators for legal cause;
- the removal of one or more arbitrators by the parties;
- death of one or more of the arbitrators; and
- upcoming incapacity of one or more arbitrators.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

The LICA does not regulate the effects of the arbitration agreement on third parties, as the general principle applies whereby the arbitration agreement cannot affect anyone who has not voluntarily accepted it.

Exceptions to this general principle include: the successors or heirs; the merger of corporations; the assignees of a title that states the arbitration agreement; and joint and several debtors or creditors.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

There is no general rule regarding the participation of third parties in arbitration proceedings, thus their participation in the arbitration must be by agreement of the parties. There are exceptional cases where the law allows third parties to intervene directly in arbitration on procedures related to the execution of wills or heritage.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

In this regard, the requirement of the consent of any person or legal entity to be submitted to an arbitral proceeding has resulted in consistent application in Chile.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

There is no specific regulation regarding multiparty arbitration in our domestic law. As their requirements have not been regulated, its admissibility must be determined on a case-by-case basis. In any case, CAM rules for international arbitration recognise the possibility of having multiple parties in the proceedings (article 1).

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

According to the LICA, nationality is not an obstacle to prevent a person acting as an arbitrator, unless this has been otherwise agreed by the parties (article 11.1). However, in this matter the provisions of Statute No. 20,609 of 2012 should be taken into account, as they prohibit private and public entities from discriminating without reasonable

justification based, among others, on nationality, race, gender, sexual orientation and religion or belief.

Domestically, the arbitrator (article 225 of the Courts Statutory Code) must be at least 18 years old, be able to freely dispose of his or her property or assets; be able to read and write and in the case of arbitration at law, he or she must be a lawyer. Likewise, the following cannot be appointed as arbitrators: one of the parties; ordinary judges; prosecutors; public notaries; or legal entities.

In ad hoc arbitration there are no lists of arbitrators or arbitral bodies that should be mandatorily considered.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

According to the LICA, in case of arbitration with three arbitrators, failing the agreement of the parties, each party will appoint one arbitrator and the appointed arbitrators will appoint the third. If a party fails to appoint an arbitrator within 30 days of receipt of the request from the other party to do so, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment of the third arbitrator shall be made, upon request by a party, by the president of the court of appeals of the place where the arbitration is being followed. In the case of arbitration by a sole arbitrator, failing agreement of the parties to appoint him or her, the appointment will be made by the president of the court of appeals, upon request by any of the parties. Notwithstanding the above, in the event that in an appointment proceeding agreed by the parties any party does not follow the proceeding or the appointment cannot be reached, either party may request that the president of the court of appeals take the necessary steps (article 11, points 2 to 4).

In domestic arbitration, failing agreement of the parties, the appointment of the arbitrator shall be made by the civil courts (article 232 of the Courts Statutory Code).

In the case of institutional arbitration in accordance with the CAM rules, failing appointment of the arbitrator or arbitrators by the parties, this will be made by the CAM.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

According to the LICA, an arbitrator may only be challenged if there are circumstances that give rise to justifiable doubts to his or her impartiality or independence, or if the arbitrator does not possess the qualifications previously agreed by the parties. A party may only challenge an arbitrator in whose appointment it has participated, based on reasons that the party became aware of after the appointment is done (article 12.2). The challenge procedure may be freely agreed by the parties. Failing the agreement, the parties can claim the arbitrator's inability by a written presentation within a 15-day period, after being notified either of the formation of the tribunal or a ground for ineligibility. If the request is denied, the decision can be appealed and the president of the court of appeals of the place of the arbitration will decide within a 30-day period. While this ruling is pending, the arbitrator shall remain in his or her position (article 13, points 1 to 3).

Regarding domestic arbitration, arbitrators can be removed on the same grounds for disqualification as ordinary judges, with the limitation that they cannot be challenged by the party that appointed them, unless that party has ignored the grounds for challenging at the time of the appointment (article 243 of the Courts Statutory Code).

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

The relationship between parties and arbitrators corresponds to a civil contract, different from the arbitration agreement (article 14 of the LICA).

Arbitrator fees are commonly agreed within the rules of the arbitration proceeding. The obligation to pay arbitrator fees lies on both parties.

Party-appointed arbitrators are only recognised in Chile in international arbitration or in specific areas (public construction concessions), being under the same general obligations and duties as all other arbitrators..

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators are subject to criminal liability under malice, excluding the following behaviour: contradicting the rules of the procedure producing its annulment; denying or delaying administration of justice, assistance or protection when requested; and revealing secrets or giving advice to either of the parties, conduct that can constitute negligence or inexcusable ignorance.

An arbitrator's civil liability is assessed by the estimable money damages caused to the parties through their fraud or negligence (articles 325 to 331 of the Courts Statutory Code).

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

The LICA imposes the obligation of abstention to all ordinary courts to which a matter has been submitted, if that matter is the subject of an arbitration agreement. The court shall refer the parties to the arbitration when requested by any of the parties, unless it is found that the arbitration agreement is null and void, inoperative or incapable of being performed. This action submitted to ordinary courts does not preclude initiating or continuing any arbitral proceeding while it is pending (article 8).

In the domestic sphere, the claim shall be carried out through a petition requesting the ordinary court to declare its own lack of jurisdiction. In a civil procedure, this motion must be filed within the term to respond the claim, suspending the course of the proceeding, and must be ruled as a preliminary matter without waiting for the judgment on the merits of the case. If this motion is not filed within the proscribed deadline, the jurisdiction is considered extended to the ordinary courts.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The LICA expressly empowers the arbitral court to rule about its own jurisdiction, including the existence or validity of the arbitration agreement. For these purposes, the arbitration agreement is considered as a separate clause from the contract where it is inserted (article 16.1). The motion of lack of jurisdiction must be filed at the latest when responding to the lawsuit, although the court may consider a motion filed later if deeming the delay to be justified (article 16.2). The court may decide it as a preliminary motion or in the final award, and in a case where the court decides, as a preliminary matter, to accept the jurisdiction any party may require, within a 30-day term, that the president of the court of appeals decide the matter (article 16.3).

The Kompetenz-kompetenz principle is not considered by the domestic arbitration regulations. Recent decisions have recognised the

principle but it is not yet a unanimous doctrine in Chilean case law, as courts have been reluctant to accept such principle.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Failing the agreement of the parties, the LICA empowers the arbitral court to determine the language and place of the arbitration, considering the convenience of the parties and the case circumstances (articles 20 and 22).

In the case of domestic arbitration, failing the agreement of the parties regarding the place of the arbitration, it is understood to be the place where the arbitral agreement took place (article 235 of the Courts Statutory Code). The language is not subject to regulation in domestic arbitration, but arguably in an arbitration at law the proceeding must be conducted in Spanish.

23 Commencement of arbitration

How are arbitral proceedings initiated?

Article 21 of the LICA only indicates that the arbitral proceedings will commence on the date that the defendant has received the request to submit the dispute to arbitration. This rule may be modified by agreement of the parties.

According to the CAM rules of international arbitration, the party that wishes to commence an arbitration must send to the other party, and to the CAM, a request for arbitration that must contain the requirements stated in articles 5 and 6 of the said rules. In the case of CAM rules of national arbitration, it is necessary to file a request for arbitration, to which the arbitration agreement must be attached, along with a payment receipt of the initial administration fee of the Center.

24 Hearing

Is a hearing required and what rules apply?

Article 24 of the LICA provides that, unless contrary to the agreement of the parties, the tribunal shall decide whether to hold hearings for the presentation of evidence or oral arguments, or whether the proceeding shall be conducted on the basis of documents and other evidence. However, unless the parties have agreed that no hearings will take place, the tribunal shall determine the validity of such hearings at the appropriate stage of the proceedings, being requested by a party.

Domestic arbitration under the CAM rules contemplates a first hearing in order to set the rules under which the arbitration proceeding will be conducted, as well as hearings for settlements and witnesses. In everything else, the regulation gives autonomy to the parties to determine the need for hearings. International CAM rules follow UNCITRAL Model Law rules.

In domestic arbitration, in an arbitration at law, the tribunal must follow the procedural rules that are mandatory for ordinary judges, according to the action determined (article 628 of the Code of Civil Procedure). These proceedings are mostly written. In the case of an arbitration *ex aquo et bono*, or mixed (subject to law only regarding the final judgment) there is autonomy for the parties to agree on the procedural matters, ruling supplementary those contained in the Code of Civil Procedure (articles 636 to 643).

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

In accordance with article 19 of the LICA, failing the agreement of the parties, the tribunal may conduct the arbitration in such manner as it considers to be appropriate, including the determination of admissibility, relevance and value of the evidence. In accordance with this principle, the LICA only regulates certain specific matters regarding evidence, among which are the following:

- the hearings to examine merchandise, other goods or documents (article 24.2);

- statements, documents or information that one of the parties presents, or any expert report or evidentiary documents considered by the tribunal, which should be notified to the interested parties (article 24.3); or
- experts who may be appointed by the tribunal, unless otherwise agreed by the parties, regarding reports on matters determined by the tribunal, to whom the parties are required to give any information, documents, assets or other background considered relevant.

Additionally, unless otherwise agreed by the parties, when requested by a party or determined as necessary by the tribunal, after submitting his or her report the expert must attend a hearing in which the parties may ask questions and present experts that can report on any controversial points (article 26).

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Article 5 of the LICA provides that no court shall intervene except in the cases expressly provided by it. Among these cases are:

- appointment of arbitrators (article 11);
- challenging of arbitrators (article 13);
- termination of the functions of the arbitrator (article 14);
- lack of jurisdiction (article 16.3);
- evidence, where article 27 provides that the arbitral court, or parties with the court's permission, may request the assistance of a civil court for the taking of evidence; and
- remedies and recognition of the arbitral award (articles 34, 35 and 36).

In internal matters, articles 633 and 634 of the Code of Civil Procedure, applicable to any arbitration proceedings, provide that the arbitrator may not compel witnesses to testify; thus, if the witnesses do not declare voluntarily, his or her declaration shall be taken by an ordinary court. Similarly, evidence measures to be conducted outside the place of the arbitral tribunal shall also be performed through ordinary courts.

27 Confidentiality

Is confidentiality ensured?

The LICA does not contain any rule on confidentiality. However, the parties can agree confidentiality based on the autonomy to set rules of procedure.

In domestic arbitration, CAM rules establish that during the proceedings the arbitrators must guarantee confidentiality, fairness and impartiality to the parties (article 18). Although there is no specific rule, the same principle applies for international arbitration under the CAM rules.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Article 9 of the LICA states that it is not incompatible with an arbitration agreement for a party to request and obtain from an ordinary court interim measures, either before or during the arbitration proceedings.

Regarding domestic arbitration, ordinary courts are allowed to grant interim measures or injunctions prior to the constitution of the arbitral tribunal. Once established by the acceptance of the arbitrator and his or her oath, the arbitrator has exclusive jurisdiction to order preliminary injunctions (ordered before the notification of the arbitral claim, at the moment when, as understood, the arbitral procedure commences) and precautionary measures (requested after the notification of the arbitral claim).

Courts may also intervene in arbitration when a tribunal has granted an interim measure or injunction, and it affects a third party or if the affected party does not voluntarily comply the order.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

An emergency arbitrator does not exist in ad hoc arbitration nor in institutional arbitration in Chile.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Article 17 of the LICA provides that, unless otherwise agreed by the parties, the arbitral tribunal may, if requested by one of them, order interim measures considered necessary in respect of the subject of the dispute, and may require appropriate security to either party.

In domestic arbitration, arbitrators are empowered to grant interim measures, for subsidiary application of the rules about ordinary civil procedure to arbitration, as established in article 3 of the Code of Civil Procedure. In the case of interim measures that are not specifically provided in the law, the requesting party might be compelled to offer a security to answer for any damages that might occur. This requirement is also necessary in the case of preliminary interim measures.

However, if compulsive acts are required for the enforcement of the granted measure, courts must intervene, as the arbitrators' sanctioning powers are limited.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The LICA does not provide specific sanctioning powers for the arbitral tribunal but only the authority to conduct the arbitration in the manner it deems appropriate, unless otherwise agreed by the parties (article 19.2).

The CAM rules for domestic and international arbitration follow the same principle, but enable the tribunal to dictate measures to avoid unnecessary delays and costs and ensure efficient and fair proceedings.

CAM national arbitration rules expressly provide that the parties shall at all times act in good faith, avoiding any unlawful or dilatory conduct, empowering the arbitral tribunal to take the necessary measures in order to prevent, correct and punish any action or omission that it considers contrary to good faith (article 16). CAM rules for international arbitration contain a similar provision (article 21).

In terms of domestic arbitration, arbitrators have some of the disciplinary powers given to the ordinary judges, with the exception of those involving exercising compulsive acts.

Furthermore, although the Code of Ethics of the Chilean Bar Association is only applicable to the Bar members, it has been applied as soft law by the courts for ethics disputes concerning counsels and attorneys.

Awards**32 Decisions by the arbitral tribunal**

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

According to article 29 of the LICA, unless otherwise agreed by the parties, arbitration decisions involving more than one arbitrator shall be taken by majority vote.

The CAM rules for international arbitration states that if the arbitral tribunal is composed by three arbitrators, their decisions will be taken by majority vote, and in the case that a majority cannot be achieved, the presiding arbitrator shall decide the arbitral award. The CAM rules for

domestic arbitration do not regulate this matter, thus, unless otherwise agreed by the parties, the general applicable rules will apply.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

According to article 233 of the Courts Statutory Code, if there are two or more appointed arbitrators, the parties may appoint a third arbitrator to solve the dispute between them, and also authorise the arbitrators to nominate the third, in case of disagreement (articles 237 and 238).

34 Form and content requirements

What form and content requirements exist for an award?

Article 31 of the LICA governing the form and content of the award, states that the award shall:

- be in writing;
- be signed by the arbitrator or arbitrators. However, the signing the majority of the arbitrators will suffice in case there is more than one, leaving a record of the reason for the missing signatures;
- be grounded, unless the parties agree otherwise; and
- indicate the date and place of arbitration.

Similar provisions for international arbitrations can be found in the CAM rules (article 33).

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The CAM rules of international arbitration on this matter state that the arbitral tribunal shall render its award within six months, starting from the date of the response to the claim or the date of the answer to the respondent's counterclaim if pertinent. The arbitral tribunal may ex officio and only once, extend that period, by means of a reasoned decision.

The CAM national arbitration rules note that the award must be issued within the shortest term possible and, in any case, within six months from the notification of the claim, a term which may be extended for up to six months by the arbitral tribunal if deemed necessary (articles 4 and 35).

In domestic matters, in the case of arbitration at law, the term is 60 days since remaining in state of judgment (article 162 of the Code of Civil Procedure). In the case of arbitration ex aequo et bono consideration must be given to what has been agreed by the parties and, if necessary, to the above-mentioned default rule.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

According to article 33 of the LICA, the parties may make an application for correction of the award on miscalculations, copy or typographical errors within 30 days upon receipt of the award. The arbitrator, on the other hand, may make said corrections to the award by its own initiative within 30 days from the date of the award.

The date of receipt of the award is also relevant in annulment proceedings, since the term of three months to submit said action is counted from that date, as well as on the request for an additional award, which may be requested within 30 days of the same date.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The LICA does not generally consider the possibility of a partial award, although this may be agreed by the parties as it is not banned. However, article 33.3 provides for the possibility of an additional award at the request of either of the parties, which will proceed if there are claims presented in the arbitral proceedings and that have been omitted in the final award.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

In accordance with article 31 of the LICA, except for cases when a final award is handed down, the arbitral proceedings will be terminated:

- if the applicant withdraws its claim, unless the defendant objects to this and the arbitral tribunal recognises a legitimate interest on its part in obtaining a final decision on the dispute;
- the parties agree to terminate the proceedings; and
- if the arbitral tribunal comes to the conclusion that continuation of the proceedings would be unnecessary or impossible.

In addition, under article 30, arbitration proceedings also end if a settlement between the parties takes place to resolve the dispute and, in accordance with article 25.a, when the applicant does not submit its claim within the period agreed by the parties or determined by the tribunal.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The LICA contains no rules regarding allocation of costs and expenses of arbitration.

In domestic arbitration, unless otherwise agreed by the parties, the arbitration costs follow the general rules of civil procedure, according to which costs are divided into personal costs corresponding to lawyers' fees, which are prudently set by the tribunal without being subject to a mandatory rate or the amount agreed by the parties, and procedural costs, corresponding to the rates and services of judicial officers. The general principle is that each party has to bear its own costs. However, all these costs are recoverable, as the arbitrator can allocate the costs to the defeated party in the award.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

The LICA contains no rules regarding interest in the arbitration award.

In domestic matters, the payment of interest shall be determined on a case-by-case basis.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

In accordance with article 33 of the LICA, correction of an award is possible on miscalculations, copy or typographical errors, or their interpretation, on the initiative of the parties, within 30 days of receipt of the award. To proceed to the correction or interpretation, the tribunal has 30 days upon receipt of the request. The correction of the award may also be performed at the initiative of the arbitral tribunal, within 30 days of the date of the award. The term of the tribunal for correction or interpretation may be extended if necessary.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

The LICA only allows the action for annulment against the award, which will only be accepted if:

- the party who submits it proves that:
 - a party to the arbitration agreement was incapacitated in some way, or that said agreement is not valid under the law to which the parties have subjected it or, where not specified, under the law of Chile;
 - it has not been notified of the appointment of an arbitrator or of the arbitral proceedings or was unable for any other reason to assert their rights;

Update and trends

Scholars and the arbitration community are currently seeking legal amendments and a new set of rules regarding interim measures, which will provide more extensive powers to arbitrators.

Regarding recent awards in the field of international investment arbitration, on 13 September 2016, ICSID Case No. ARB98/2 was ruled. The tribunal decided that Victor Pey Casado and Foundation Presidente Allende failed to demonstrate any loss for which they should receive compensation.

There are three cases pending where Chilean investors are parties: ICSID Case No. ARB/10/19, ICSID Case No. ARB/06/2 and ICSID Case No. ARB/03/21.

- the award deals with a dispute not contemplated by the arbitration agreement or contains decisions on matters beyond the terms of the arbitration agreement. However, if the provisions of the award relating to the matters submitted to arbitration can be separated from those that are not, the latter may be set aside;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement between the parties, unless such agreement was in conflict with a provision from which the parties cannot derogate, or, failing such agreement, which has not been adjusted to the LICA; or
- the court finds that:
 - under Chilean Law, the object of the dispute cannot be subject to arbitration; or
 - the award is contrary to public policy in Chile. This appeal will be heard by the court of appeals (article 34).

In local arbitration, the parties may waive all recourses except for the complaint appeal and appeals for annulment based on the grounds of lack of jurisdiction and *ultra petita*. The appeal based on the merits before the Supreme Court is only applicable against judgments of the second instance arbitration tribunal at law when they have issued a decision on matters within the jurisdiction of a court of appeal. In arbitration *ex aequo et bono*, an appeal based on the merits is only possible if the parties have reserved their right to use it in the arbitration clause, to be known by other arbitrators of the same nature, that should also be appointed for these purposes (article 239 of the Courts Statutory Code).

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

In the case of an action for annulment regulated by the LICA, there is only one level of appeal for a hearing before the respective court of appeal.

In the case of domestic arbitration, there is generally one level of appeal at the respective court of appeal. Against the judgments issued by the court of appeal, according to the case law it is possible to submit a complaint appeal before the Supreme Court. The time that it takes for the decision to be issued in each of these instances varies approximately between six months and one year.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

According to article 35 of the LICA, an arbitral award will not be recognised on the same grounds as those necessary to accept an action for annulment and, additionally, when the award has not yet become binding on the parties or has been annulled or suspended by a court of the country in which, or under the law, this award has been issued.

To obtain recognition in Chile of an award rendered by a foreign arbitral tribunal an *exequatur* procedure before the Supreme Court is required. This procedure gives primacy to existing international treaties regarding recognition, which makes it directly applicable the

New York Convention (article 242 of the Code of Civil Procedure). Accordingly, the Supreme Court has given prominent application to the LICA provisions in the most representative cases over the general rules on recognition of foreign judgments. However, some rulings under said regulations have imposed additional or even contrary requirements to those established in the New York Convention and the LICA, such as requiring that the foreign judgment is executed according to their country of origin, or require a certificate of authenticity of the foreign award issued by a higher court in the country of origin (articles 245 and 246 of the Code of Civil Procedure). However, the approach of the Supreme Court to the recognition of foreign arbitral awards can be described generally as respectful of the special system of international arbitration and therefore, favourable in general terms.

The exequatur is not necessary in the case of an arbitral award rendered in Chile in an international arbitration matter.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Two of the most recent cases in which the Supreme Court has ruled on the subject indicate that, to date, there is no uniform approach in this regard. In the first case (2009) the Supreme Court granted the exequatur in relation to an arbitral award that was subject of an action for annulment still not finished in the country of origin. However, in the second case (2011), the Supreme Court denied the exequatur in respect of a foreign arbitral award that had been annulled in the country of origin, making applicable the requirement of article 246 of the Code of Civil Procedure, which states that the foreign award, in order to be recognised, should be effective according to the rules of the country of origin.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Emergency arbitrators do not exist under Chilean arbitration law or rules.

According to the existing case law, Chilean courts have been reluctant to enforce orders granted by arbitrators before the tribunal is constituted, normally based on public policy and due process considerations.

47 Cost of enforcement

What costs are incurred in enforcing awards?

When the enforcement of arbitral awards is conducted before the ordinary courts, there are no costs associated with the court, but only the general (personal and procedural costs) of any judicial procedure.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Notwithstanding that Chile is in the process of reforming civil proceedings towards an oral process, to date there is a civil written proceeding supplementary to all other proceedings without a designated special rule (article 3 of the Code of Civil Procedure) that has influenced the format of arbitration. For example, on evidence, written statements of witnesses and the parties are still common practice.

At the time of writing, there is no marked tendency in Chile to incorporate the institution of US-style discovery, permitting only the possibility of preparatory evidence in the form of precautionary measures.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are no specific professional ethics regulations for international arbitration in Chile.

Ethical control depends mainly on voluntary membership of the Chilean Bar Association, which applies to its members a Code of Ethics revised in 2011 that comprehensively draws together modern regulatory standards for professional practice.

Simultaneously, in recent years there have been decisions by the courts of appeal and the Supreme Court that have recognised jurisdiction to ordinary courts to penalise lawyers ethically, independent of the Chilean Bar Association's ethical control.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

In Chile there is no third-party funding of arbitral claims. Therefore, third-party funding is not regulated by the LICA.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Chilean High Courts have recognised the validity of subjection to foreign arbitrators in international contracts and even legal representation in cases governed by the LICA by foreign lawyers who do not qualify for professional practice according to Chilean internal regulations (2014).



ANINAT SCHWENCKE & CIA

**Paulo Román
Marta Arias
Rodrigo Donoso**

**proman@asyc.com
mariaas@asyc.com
rdonoso@asyc.com**

Av. Los Conquistadores 1700, 16th Floor
Providencia
7520282 Santiago
Chile

Tel: +56 2 2887 2200
Fax: +56 2 2887 2299
www.asyc.com

China

Shengchang Wang, Ning Fei and Fang Zhao

Hui Zhong Law Firm

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

China is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 1958 New York Convention). China acceded to the 1958 New York Convention on 22 January 1987 and it entered into force in China on 22 April 1987. When acceding to the Convention, China made reciprocity reservation and commercial reservation pursuant to article I of the Convention. Upon resumption of sovereignty over Hong Kong and Macao, the government of China extended the territorial application of the Convention to Hong Kong and Macao in 1997 and 2005 respectively.

China has signed bilateral arrangements on mutual recognition and enforcement of arbitral awards with Hong Kong SAR (2000) and Macao SAR (2007).

China is a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). China signed the Convention on 9 February 1990, deposited the ratification on 7 January 1993 and the Convention was effective in China from 6 February 1993. On 7 January 1993, China notified ICSID pursuant to article 25(4) of the Convention that the Chinese government would only consider submitting to the jurisdiction of the ICSID disputes over compensation resulting from expropriation and nationalisation.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Up to 1 December 2016, China has concluded 129 bilateral investment treaties (BITs) and 19 other treaties with investment provisions (TIPs). China is a contracting party to the China–Japan–Korea Agreement for the Promotion, Facilitation and Protection of Investment. This trilateral treaty became effective on 17 May 2014 in China and it provides a wide range of options to resolve the investment dispute, which, inter alia, includes ICSID arbitration and arbitration under the UNCITRAL Rules. The Free Trade Agreement between China and Australia became effective on 20 December 2015.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

China's primary sources of law relating to arbitration are:

- the Civil Procedure Law (2013);
- the Arbitration Law (1994);
- the Contract Law (1999);
- the Law on the Applicable Law for Foreign-related Civil Relation (2011);

- the Supreme People's Court Interpretation of the Arbitration Law (2006); and
- the various judicial interpretations given by the Supreme People's Court with regard to arbitration.

The Civil Procedure Law and the Arbitration Law generally apply to both 'foreign-related' and domestic arbitrations. The concept of 'foreign-related' is defined by the Interpretation of the Supreme People's Court on Several Issues Concerning the Law Applicable to Foreign-Related Civil Relation (2012), according to which an arbitration is 'foreign-related' if any of the following conditions is met:

- either party or both parties are foreign citizens, foreign legal persons or other organisations or stateless persons;
- the habitual residence of either party or both parties is located outside the territory of China;
- the subject matter is located outside the territory of China;
- the legal fact that leads to establishment, change or termination of civil relationship happens outside the territory of China; or
- other circumstances under which the civil relationship may be determined as a foreign-related one.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

China's arbitration legislation is not based on the UNCITRAL Model Law, but the Model Law had a great influence on the Arbitration Law when the latter was drafted. The differences between the Arbitration Law and the UNCITRAL Model Law include the following:

- ad hoc arbitration is permissible under the Model Law, while it is not permitted to be conducted in mainland China under the Arbitration Law;
- the arbitrators have the power to rule their own jurisdiction under the Model Law, while the Arbitration Law delegates the power to arbitration commissions only;
- under the Model Law, the tribunal may grant interim measures at the request of a party. The Arbitration Law requires that the arbitration commission must forward a party's application for interim measures to a competent court for determination;
- the Model Law does not contain any provisions on combining mediation with arbitration. Under the Arbitration Law, the arbitral tribunal may mediate the case during the arbitration process; and
- under the Model Law, an arbitral award may be set aside or refused for enforcement by a court based on serious procedural irregularities only. The Arbitration Law imposes a crucial scrutiny on domestic arbitral award that may be set aside or refused to be enforced for both procedural irregularities and limited substantive reasons.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

In the case of arbitration seated in China, certain provisions contained in the Arbitration Law are mandatory and the parties are not

allowed to deviate from the same. The following is an indicative list of such provisions:

- the arbitration agreement must be in writing (article 16);
- a valid arbitration agreement must contain the following three elements: the expression of the parties' wish to submit to arbitration; the matters to be arbitrated; and the arbitration institution selected by the parties (article 16);
- the validity of an arbitration agreement shall be decided either by an arbitration commission or by a court (article 20);
- for domestic arbitration, the qualification of an arbitrator must satisfy the minimum conditions laid down by article 13; and
- the arbitration commission must forward a party's application for interim protection measure as to evidence or property to the competent court (articles 28, 46 and 68).

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

For foreign-related arbitration, the parties may freely decide on the law applicable to the merits of the case. For domestic arbitration, the substantive law shall be the Chinese law.

The Law on the Applicable Law for Foreign-related Civil Relation (2011) sets out a number of useful rules according to which the judges or arbitrators may decide which law shall be applied if the dispute is foreign-related. For instance, it provides that if the parties do not choose the laws applicable to contracts by agreement, the laws at the habitual residence of the party whose fulfilment of obligations can best reflect the characteristics of this contract, or other laws that have the closest relation with this contract, shall apply (article 41). However, if the application of foreign laws will damage the social public interests of China, the laws of China shall apply (article 5).

The Interpretation of the Supreme People's Court on Several Issues Concerning Application of the Law on the Applicable Law for Foreign-Related Civil Relations (2012) contains numerous conflict rules of law guiding the choice of law on merits of the disputes.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

In China, the leading arbitration commissions handling foreign-related disputes are the China International Economic and Trade Arbitration Commission (CIETAC) (also called Arbitration Court of China Chamber of International Commerce) and China Maritime Arbitration Commission (CMAC). CIETAC and CMAC have been playing a dominant role in administering foreign-related commercial and maritime arbitration cases. In 2012, CIETAC's Shenzhen Sub-Commission and CIETAC's Shanghai Sub-Commission declared they were breaking away from CIETAC. Afterwards, they announced their establishment as two independent arbitration commissions (ie, Shanghai International Economic and Trade Arbitration Commission, also called Shanghai International Arbitration Center, or SHIAC) and South China International Economic and Trade Arbitration Commission (also called Shengzhen Court of International Arbitration (SCIA)).

Headquartered in Beijing, CIETAC has nine sub-commissions, located in Hong Kong, Beijing, Shenzhen, Shanghai, Tianjin, Chongqing, Wuhan, Fuzhou and Hang Zhou respectively. In addition, CIETAC has the Online Dispute Resolution Center and Grain Industry Arbitration Center. The CIETAC list of arbitrators comprises 1,212 arbitrators from over 30 countries. CIETAC Rules permit the parties to agree on the place of arbitration, the language of arbitration and the applicable law to dispute. The fees of arbitrators are collected in advance by CIETAC from the parties as part of deposit for arbitration fees and finally allocated to the arbitrators by CIETAC. CIETAC Hong Kong Arbitration Center collects the administrative fee and arbitrator's fee separately.

CIETAC's contact details are as follows:

CIETAC

6/F, CCOIC Building, No. 2 Huapichang Hutong
Xicheng District, Beijing 100035, China
Tel: +86 10 6464 6688 / 8221 7788
Fax: +86 10 6464 3500 / 8221 7766
info@cietac.org
www.cietac.org

Details on CMAC, SHIAC and SCIA are available at their official websites as follows:

- China Maritime Arbitration Commission: www.cmac-sh.org;
- Shanghai International Arbitration Center: www.shiac.org; and
- Shenzhen Court of International Arbitration: www.sccietac.org.

The new CIETAC Arbitration Rules come into effect on 1 January 2015 to replace its old rules adopted in 2012. For the convenience of reporting, this chapter relies on the new 2015 CIETAC Rules.

In addition to CIETAC and CMAC, there are 242 more arbitration commissions located at major cities across mainland China. These arbitration commissions are independent from each other and their cases are primarily domestic. In 2015, the Beijing Arbitration Commission (BAC) published its new Arbitration Rules, which became effective as from 1 April 2015. In 2016, the SCIA adopted its new Arbitration Rules, which became effective on 1 December 2016.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The Chinese law requires that arbitration should be conducted between parties on equal footing. Articles 2 and 3 of the Arbitration Law are the primary provisions dealing with the issue of arbitrability. Both contractual disputes and tortious disputes are arbitrable if they occur between parties on an equal footing, related to economic interest and covered by the arbitration agreement.

Article 3 of the Arbitration Law lists two typical situations where the subject matters are non-arbitrable: disputes over marriage, adoption, guardianship, child maintenance and inheritance; and administrative disputes falling within the jurisdiction of the relevant administrative organs according to law.

Disputes over the validity of registered trademark and patent and disputes relating to monopoly agreement are generally not considered as arbitrable. However, disputes over copyrights and securities transactions may be resolved through arbitration.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The Arbitration Law provides that an arbitration agreement shall not be made orally and it must be in writing. The Contract Law (1999) stipulates that 'in writing' means a contract, letter or electronic message that is capable of expressing its contents in a tangible form (article 11). Incorporating an arbitration clause existing in another document or standing general terms and conditions can serve to satisfy the 'in writing' requirement. The parties cannot waive this requirement of an arbitration agreement. An arbitral award made with no written arbitration agreement is exposed to the risk of non-enforcement or being set aside.

Failure to meet the statutory requirement of the arbitration agreement can sometimes be cured if the party who could raise an objection does not object (for example, article 5 of the 2015 CIETAC Rules). When local or state entities engage in commercial transactions and conclude arbitration agreements, they are treated as parties on equal footing with their counterparts, therefore no requirement for co-signing or approval is imposed.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

If the law applicable to an arbitration agreement is the Chinese law, an arbitration agreement must satisfy the statutory requirements in order to be valid and enforceable. Article 16 of the Arbitration Law

specifies that an arbitration agreement must contain the following three elements:

- it must express an intention to submit disputes to arbitration;
- it must stipulate the matters to be arbitrated under the arbitration; and
- it must designate an 'arbitration commission' to resolve the dispute.

Accordingly, the Chinese law and practice have developed the following doctrines under which an arbitration agreement will be deemed as invalid or non-enforceable:

- the arbitration agreement is made orally and does not meet the 'in writing' requirement;
- the subject matter is non-arbitrable or exceeding the scope of arbitration provided by law;
- either or both parties to the arbitration agreements are incapable or restricted in civil acts;
- the arbitration agreement is signed by means of coercion;
- the parties concerned agree that they may either apply to an arbitration institution for arbitration or bring a lawsuit before the people's court for settlement of dispute;
- the arbitration agreement only stipulates the arbitration rules applicable to the dispute, and such arbitration rules cannot lead to indisputable designation of an arbitration institution;
- the arbitration agreement stipulates two or more arbitration institutions, and the parties concerned cannot agree upon the choice of one of the arbitration institutions;
- the arbitration institution agreed upon by the parties does not exist;
- the arbitration agreement deprives one party's right of appointing an arbitrator and thus results in obvious unfairness;
- the arbitration agreement formulates ad hoc arbitration to be conducted in mainland China; or
- the arbitration agreement refers the pure domestic disputes for arbitration outside China.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Generally, third parties are not bound by an arbitration agreement under the law. However, a non-signatory to an arbitration agreement may nevertheless be bound by the arbitration agreement in special circumstances.

The Supreme People's Court Interpretation of the Arbitration Law (2006) enumerates four scenarios where the third party is bound by the arbitration agreement unless otherwise provided by the law:

- assignment of rights or obligations: the arbitration agreement associated with such rights or obligations shall have a binding force upon the assignee;
- merge or split of an entity: the arbitration agreement shall be binding upon the successor;
- decease of a party: the arbitration agreement shall be binding upon the inheritor who inherits his rights and obligations; and
- compliance with the international treaty: the involved parties shall be regarded as admitting to arbitration in accordance with the arbitration provision in the international treaty.

The Bankruptcy Law (2006) recognises that the bankruptcy administrator may continue on behalf of the bankrupt enterprise to participate in the arbitration proceedings that are started before the application for bankruptcy is accepted by the people's courts.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

Historically, the joinder of a third party is very common in Chinese civil litigation but very rare in arbitration. However, the situation is changing with revision of arbitration rules by Chinese arbitration institutions.

The 2015 CIETAC Rules introduce new provisions allowing the joinder of additional parties under the same arbitration agreement to the existing arbitration proceedings. The admissibility of the joinder will be

decided by either the arbitration institution or the arbitral tribunal after it hears from all parties including the additional party (article 18).

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The group of companies doctrine is admitted in court litigation but not applicable to arbitration under Chinese law. The 'alter ego' or corporate veil piercing theory will overpass and go beyond the ambit of an arbitration agreement, thus the arbitral award rendered under such scenarios will be exposed to high risk of being setting aside or non-enforcement because of the lack of an arbitration agreement binding upon the non-signatory. A non-signatory of a group companies may have involved in the conclusion, performance or termination of a contract in dispute, but the behaviour of the group companies itself is not tantamount to concluding a written arbitration agreement.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The issue of multiparty arbitration or consolidation of arbitration is often addressed by the arbitration institution's rules of procedure.

The 2015 CIETAC Rules contain a significant number of rules regarding the multiparty arbitration as follows:

- Assumption of two sides only for each multiparty arbitration: there will be only two sides (ie, the claimant side and the respondent side) in a multiparty arbitration. If either side fails to jointly appoint or to jointly entrust the chair of CIETAC to appoint an arbitrator, the chair of CIETAC shall appoint all three members of the arbitral tribunal and designate one of them to act as the presiding arbitrator (article 29).
- Joinder of additional parties to the existing arbitration: during the arbitral proceedings, a party may apply to CIETAC to have an additional party join in its side (article 18.5).
- Consolidation of two or more arbitrations with multiple parties: CIETAC may decide to consolidate several separate arbitrations into one arbitration proceeding that was first commenced (article 19.2).
- Tests for consolidation of arbitrations: CIETAC may consolidate arbitrations if any of the following circumstances exists: (i) all of the claims in the arbitrations are made under the same arbitration agreement; (ii) the claims in the arbitrations are made under multiple arbitration agreements that are identical or compatible and the arbitrations involve the same parties as well as legal relationships of the same nature; (iii) the claims in the arbitrations are made under multiple arbitration agreements that are identical or compatible and the multiple contracts involved are constituted by a principle contract and its ancillary contract(s); or (iv) all the parties to the arbitrations have agreed to consolidation (article 19).

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The Arbitration Law requires that all arbitrators shall be fair and upright persons (article 13). It provides that a Chinese national may not be appointed as an arbitrator unless he or she can satisfy at least one of the following requirements:

- has at least eight years' experience working in the field of arbitration;
- has at least eight years' experience working as a lawyer;
- has served as a judge for at least eight years;
- has a senior title in the legal research or legal education field; or

- has knowledge of the law and holds a senior title or has acquired an equivalent professional level in fields such as economic relations and trade.

Appointments of foreign nationals as arbitrators are subject to article 67 of the Arbitration Law that sets out relatively flexible criteria. There are no specific laws or rules that expressly prohibit retired judges from acting as arbitrators. The Supreme People's Court has imposed a stringent restriction on the incumbent judges who are forbidden to accept the invitation to be an arbitrator or to act as an arbitrator.

In accordance with article 13 of the Arbitration Law, each Chinese arbitration institution has established its list of arbitrators and the parties are required to select and appoint arbitrators from the lists of arbitrators (the closed panel approach). Meanwhile, a few arbitration institutions, for example CIETAC, BAC, SCIA and SHIAC, permit the parties to select and appoint arbitrators from outside the lists (the open panel approach).

Parties are permitted to stipulate, by agreement, requirements for arbitrators such as nationality, religion, gender, language or expertise.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

The default appointment mechanisms set out by the Arbitration Law are twofold: first, the number of arbitrators of an arbitral tribunal shall be either one or three, no other number of arbitrators is lawful (article 30); secondly, if the parties fail to agree on a method for forming the arbitral tribunal or to appoint the arbitrators within the time limit specified in the rules of arbitration, the arbitrators shall be appointed by the chair of the arbitration commission (article 32).

Chinese lawmakers do not allow the court to intervene in the selection of arbitrators. Since no ad hoc arbitration is permitted in mainland China, the Chinese court will also not involve itself in, or assist with, the selection of an arbitrator.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

The Arbitration Law stipulates that the parties shall have the right to challenge an arbitrator on any one of the following grounds (article 34):

- the arbitrator is a party in the arbitration or a close relative of a party or of a party's counsel in the arbitration;
- the arbitrator has a personal interest in the case;
- the arbitrator has any other relationship with a party, or a party's counsel, in the case that may affect the impartiality of the arbitration; or
- the arbitrator has privately met with a party or a party's counsel, or accepted an invitation to entertainment or a gift from a party or a party's counsel.

The Arbitration Law provides that if a party challenges an arbitrator, it shall submit its challenge statement not later than the closing of the final hearing. The chair of the arbitration commission is empowered to decide whether the challenge should be approved.

Other than a successful challenge, the 2015 CIETAC Rules also provide that an arbitrator may be replaced in the following situations:

- the arbitrator being challenged voluntarily resigns;
- one party challenges an arbitrator and the other party agrees to the challenge; or
- an arbitrator is prevented de jure or de facto from fulfilling his or her duty.

These scenarios include illness, death or any other reason that prevents an arbitrator from continuing his or her work.

The parties may agree that the IBA Guidelines on Conflicts of Interest in International Arbitration be applied to arbitration.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

In China, arbitration is viewed as a professional service rendered to the parties by arbitrators according to rules of law. Article 34 of the Arbitration Law requires that an arbitrator shall refrain from having any relationship with the party or the party's representative that may influence the impartiality and independence of that arbitrator. Almost all Chinese arbitration commissions have maintained their own codes of conduct for arbitrators.

Arbitrators are entitled to receive remunerations as well as compensation for actual costs and expenses occurred. The levels of remuneration are fixed by each arbitration institution according to its own internal standards, mostly unpublished. However, CIETAC Hong Kong Arbitration Centre and BAC recognise that the parties may agree on the levels of remuneration to arbitrators in international arbitration. The arbitrators' fees may be determined by agreed hourly rate or calculated based on the amount in dispute.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Article 38 of the Arbitration Law imposes sanctions on an arbitrator in two situations:

- where the arbitrator has privately met with a party or a party's counsel, or has accepted an invitation to entertainment or a gift from a party or a party's counsel, and the circumstances are serious; or
- while arbitrating the case, the arbitrator has accepted bribes, resorted to deception for personal gains or perverted the law in the ruling.

Under these circumstances, the Arbitration Law provides that the arbitrator concerned shall assume liability 'according to the law'. It is generally understood that the liability may include either civil liability or criminal liability, or even both.

As with a judge, an arbitrator who deliberately renders an award in violation of the law and against the facts may be charged with criminal liability of up to seven years' imprisonment under article 399 of the Criminal Code.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

The Arbitration Law affirms the principle that a valid arbitration agreement may exclude court's jurisdiction over the same dispute. In case one party commences an action in a people's court without declaring the existence of the arbitration agreement and, after the court has accepted the case, the other party submits the arbitration agreement prior to the first oral hearing conducted by the court, the court shall dismiss the case unless the arbitration agreement is found to be null and void (article 26).

However, if the other party has not raised an objection to the court's acceptance of the case prior to the first oral hearing, the party shall be deemed to have waived its right of arbitration under the arbitration agreement and the court will continue to try the case (article 26 of the Arbitration Law).

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Under the Arbitration Law, the arbitral jurisdiction is reserved for determination by either an arbitration institution or a people's court. The arbitration institution may also delegate its power to the arbitral tribunal. Upon authorisation from an arbitration institution, an arbitral tribunal

may either make a separate decision on jurisdiction during the arbitral proceedings, or incorporate the decision in the final arbitral award.

An objection to jurisdiction shall be raised in writing before the first oral hearing or before the respondent's submission of the first substantive defence if no hearing is to be held.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

The Arbitration Law is silent on the default rules for ascertaining the place and language of arbitration. These questions are deferred to the authority of relevant applicable rules of arbitration.

The 2015 CIETAC Rules stipulate that where the parties have agreed on the place of arbitration and the arbitration language, the parties' agreement shall prevail. Otherwise, CIETAC will make the decision where it deems proper and necessary taking the specialties of a case into account (articles 7 and 81). The arbitral award is deemed as having been made at the place of arbitration (article 7).

23 Commencement of arbitration

How are arbitral proceedings initiated?

The Arbitration Law provides that the claimant shall submit the application for arbitration to the arbitration institution in order to commence the arbitration proceedings.

The application for arbitration must be in writing, and shall meet the following requirements (article 21):

- there is an arbitration agreement;
- there is a specific arbitration claim, with facts and reasons supported by evidence; and
- the application is within the scope of the arbitration commission's jurisdiction.

Copies of applications for arbitration and their annexes should be submitted in accordance with the number of arbitrators, plus one set for the arbitration institution as a record. The 2015 CIETAC Rules provide that the arbitration proceedings shall commence on the day on which CIETAC receives the application for arbitration (article 11).

24 Hearing

Is a hearing required and what rules apply?

The Arbitration Law provides that arbitration shall be conducted by means of oral hearings. However, if the parties agree to arbitrate their disputes without oral hearings, the arbitral tribunal may render an arbitration award on the basis of written submissions and other materials without any oral hearings (article 39). A notice of oral hearing shall be served upon the parties in advance. The claimant's absence for the hearing may be deemed as having withdrawn its application, and the respondent's absence for the hearing will not prevent the arbitral tribunal from making an arbitral award by default (article 42).

The Arbitration Law is silent on the methods of holding an oral hearing. Article 35 of the 2015 CIETAC Rules makes the method clear by providing:

- fair treatment to the parties: the arbitral tribunal shall act impartially and fairly and shall afford a reasonable opportunity to both parties to present their case;
- flexible approaches: the arbitral tribunal may adopt an inquisitorial or adversarial approach in hearing the case with regard to the circumstances of the case;
- effective procedural management tools: the arbitral tribunal may issue procedural orders or question lists, produce terms of reference or hold pre-hearing conferences, etc;
- power of the presiding arbitrator: with the authorisation of the other members of the arbitral tribunal, the presiding arbitrator may decide on the procedural arrangements in his or her own discretion; and
- a convenient place of deliberation: the arbitral tribunal may hold deliberations at any place or in any manner that it considers appropriate.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

As a general principle, the Arbitration Law requires that the parties must furnish evidence to prove their allegations (article 43). Where an arbitral tribunal deems it necessary to collect further evidence, it may collect it on its own initiative (article 45).

The categories of admissible evidence are regulated by the Civil Procedure Law (2013), which enumerates the following: statements of the parties; documentary evidence; physical evidence; audiovisual materials; electronic data; testimony of witnesses; expert conclusions; and records of inquests. The above evidence must be verified before it can be taken as a basis for ascertaining the facts (article 63 of the Civil Procedural Law). The arbitral tribunals may decide on the admissibility, relevance and weight of the evidence.

In recent years, there has been an increasing tendency for the parties to agree on, and for the arbitral tribunal to apply or seek guidance from, the IBA Rules on the Taking of Evidence in International Arbitration. In many aspects, the CIETAC Guidelines on Evidence (2015) resemble the IBA Rules.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

An arbitral tribunal may expect Chinese courts' intervention in aid of arbitration in the following circumstances:

- ruling on the validity of an arbitration agreement: at request of a party the court may rule on the validity of an arbitration agreement;
- ordering to take interim measures on preserving evidence: where evidence is vulnerable to being destroyed or is likely to be lost and will be difficult to recover, the parties concerned may apply to the court for evidence preservation;
- ordering to take interim measures on preserving property: where, because of the acts of the other party or other reasons, the arbitration award cannot be enforced, or is hard to enforce, the parties concerned may apply for putting the assets or property under the court's custody; and
- ordering one party to conduct or not to conduct certain acts: the court may order a party to conduct or not to conduct certain acts for the purpose of enforcement or elimination of damages.

27 Confidentiality

Is confidentiality ensured?

In general, commercial arbitration shall follow the principle of confidentiality. The individual rules of arbitration formulated by the arbitration institutions normally set out strict rules for confidentiality. Article 38 of 2015 CIETAC Rules provides that hearings shall be held in camera and all participants (the parties, their authorised representatives, witnesses, arbitrators, experts, appraisers and staff of the commission) in the arbitration shall not disclose to any outsider any substantive or procedural matters relating to the case.

An arbitral award under judicial enforcement will no longer enjoy the privilege of confidentiality since court hearings and judgments are generally open to the public.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Under the Chinese Law, there are three types of interim measures available for a party to seek from the people's court (ie, preservation of property, preservation of evidence and order to act or not to act). The revised Civil Procedure Law (2013) permits a party to apply for interim measures prior to initiating arbitration owing to urgent situations and upon providing a guarantee (article 101).

The competent people's courts, which have jurisdiction over an application for interim measures, are the courts where the preserved

property or evidence or the domicile of the party against whom the application is sought is located.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The CIETAC, SHIAC, SCIA and BAC have adopted new rules of arbitration to set out special provisions regarding emergency arbitrators who may order interim measures. Under the 2015 CIETAC Rules, a party may apply to the Arbitration Court of CIETAC for urgent interim relief pursuant to the CIETAC Emergency Arbitrator Procedures (Appendix III). The president of the Arbitration Court will decide on the application and appoint an emergency arbitrator within one day of the advance payment being paid in full. The salient features of the CIETAC emergency arbitrator procedures can be summarised as follows:

- flexibility of proceedings: the emergency arbitrator shall conduct the proceedings in the manner that the emergency arbitrator considers to be appropriate;
- precondition for interim measures: the emergency arbitrator may order the applicant to provide guarantees as a precondition to taking emergency measures;
- scrutiny of the orders: the emergency arbitrator or an arbitral tribunal formed later may modify, suspend or terminate the order made by the emergency arbitrator; and
- binding force of the orders: the emergency arbitrator may order necessary or appropriate emergency measures. The order of the emergency arbitrator shall have binding force on both parties.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Subject to the restrictive provisions of Chinese law, an arbitral tribunal has very few options to order interim protection measures. Nevertheless, the arbitral tribunal may order some other sorts of interim measures that are beyond the court's exclusive domain. For instance, an arbitral tribunal may issue an interlocutory award ordering sale of perishable goods, inspection and test run of equipment in dispute, audit of accounting records, or suspension or prevention of a party from carrying on certain conduct during the process of the arbitration. Unless otherwise agreed by the parties, an arbitral tribunal will not order one party to deposit security for costs for another party.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Under Chinese law, there is no express provision pursuant to which an arbitral tribunal may impose sanctions on the recalcitrant parties or their counsel who use guerrilla tactics to delay or obstruct arbitration proceedings. However, the parties are free to introduce any rules or guidelines, such as the IBA Guidelines on Party Representation in International Arbitration, into their arbitration agreement to govern the arbitration proceedings.

An alternative means to sanction the guerrilla tactics available for an arbitral tribunal is to adjust the allocating proportion of costs by exercising its discretionary power under the relevant arbitration rules. Article 52 of the 2015 CIETAC Rules allows an arbitral tribunal to decide the allocation of costs based on the principle of reasonableness. Article 51 of the 2015 BAC Rules and article 62 of the 2016 SCIA Rules expressly empower an arbitral tribunal to decide that the additional costs resulting from any delay to the arbitral proceedings shall be borne by the party responsible for causing the grounds for challenge. Owing to lack of support by laws or procedural rules, the Chinese arbitration institutions or arbitral tribunals do not have the power to impose

sanctions on a party's counsel for any conduct that infringes the integrity of the arbitration proceedings.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Where a case is examined by an arbitral tribunal composed of three arbitrators, the arbitral award shall be made in accordance with the opinion of the majority of the arbitrators. If the arbitral tribunal is unable to form a majority opinion, the arbitral award shall be made in accordance with the opinion of the presiding arbitrator (article 53 of the Arbitration Law). Chinese Law does not require that an arbitral award be made by unanimous vote, which may sometimes create a deadlock in the decision-making process. The validity, finality and enforceability of an arbitral award will not be affected if an arbitrator dissents.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

The 2015 CIETAC Rules add that written opinions of dissenting arbitrators shall be docketed into the file kept by CIETAC and may be appended to the arbitral award. The written dissenting opinions are not considered as forming a part of the arbitral award (article 49).

34 Form and content requirements

What form and content requirements exist for an award?

The Arbitration Law provides that an arbitral award must specify the nature of the claim, the facts of the dispute, the reasons for the decision, the result of the award, the allocation of arbitration costs and the date of the award. If the parties agree that they do not wish the facts of the dispute and the reasons for the decision to be specified in the arbitral award, these items may be omitted in the award. The arbitral award must be signed by the arbitrator who decides the dispute and affixed with the stamp of the arbitration institution (article 54). The dissenting arbitrator may have a choice to sign or not to sign on the arbitral award.

If the arbitral award is made in accordance with a settlement agreement reached by the parties through a successful mediation, either conducted by an arbitrator-turned-mediator or by any other neutrals, the arbitral award is categorised as a consent award. For a consent award, the facts of the dispute and the reasons on which the award is based may not be stated in the award (article 49 of 2015 CIETAC Rules). If a settlement agreement infringes the right of a third party or is contrary to the public interest, the tribunal may refuse to record the settlement agreement as a consent award (article 46 of the 2016 SCIA Rules).

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The Arbitration Law does not set out any time limit within which an arbitral award must be rendered. This issue is normally dealt with by the relevant arbitration rules.

In practice, the time limit for making award may vary depending upon the types of arbitral procedure. For an ordinary arbitration procedure, the 2015 CIETAC Rules state that an arbitral tribunal shall render an award within six months from the date the arbitral tribunal is formed (article 48). In summary procedure, the time limit is three months (article 62), and for domestic arbitration, the time limit is four months (article 71). The president of the Arbitration Court of CIETAC may, at the request of an arbitral tribunal, extend the time period if the president considers it truly necessary and the reasons for the extension truly justified. An extension of the time limit does not require the parties' consent for avoidance of any possible deadlock.

36 Date of award**For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?**

The Arbitration Law provides that a written arbitral award shall become legally effective from the date it is made (article 57). The date of making an award is usually clearly stated in the arbitral award and a tribunal may correct typographic or calculation errors or omissions on its own initiative. A party may also make a request for a correction of award within 30 days of its receipt of the award.

The Arbitration Law prescribes that if a party wishes to apply for setting aside an arbitral award, the party must do so within six months from the date of its receipt of the award (article 60). An application exceeding the prescribed time limit may lead to rejection of the application by the court.

37 Types of awards**What types of awards are possible and what types of relief may the arbitral tribunal grant?**

The Arbitration Law has prescribed that both partial awards (article 55) and final awards (article 54) are final and have binding force on the parties. In addition, a consent award is also final and enforceable.

An arbitral tribunal under CIETAC rules may make an order on interim protection measures according to the applicable law (article 23), or make a decision on jurisdiction if the tribunal is authorised to do so by CIETAC (article 6). An emergency arbitrator may make an order on interim measures as well (article 23 and Appendix III). The order or decision made by an arbitral tribunal or an emergency arbitrator has binding force on the parties concerned according to the applicable law.

A wide range of remedies are available to arbitrators. Generally, every remedy available in litigation is available in arbitration as well. The remedies often granted by arbitral tribunals include declaratory relief, specific performance, damages or monetary compensation.

38 Termination of proceedings**By what other means than an award can proceedings be terminated?**

In China, the arbitration proceedings are normally terminated by a final arbitral award (including a consent award) or by a decision made either by an arbitration institution or by an arbitral tribunal.

In the case of a lack of arbitral jurisdiction, an arbitration institution shall make a decision to terminate the arbitration proceedings.

Under the 2015 CIETAC Rules, a case shall be dismissed if the claim and counterclaim have been withdrawn in their entirety (article 46). The dismissal decision will effectively terminate the arbitration proceedings.

An arbitral tribunal may decide to terminate arbitration proceedings on its own initiative if it finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

39 Cost allocation and recovery**How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?**

The Arbitration Law contains no provision on cost allocation for arbitration. This issue is dealt with by the relevant arbitration rules.

The 2015 CIETAC Rules have provided useful guidelines for an arbitral tribunal to consider thereon. In general, a Chinese arbitral tribunal tends to adopt the principle that the costs follow the event to allocate the cost liability between the parties. In this regard, an arbitral tribunal has the power to determine in an arbitral award that the losing party shall compensate the winning party for the expenses reasonably incurred by it in pursuing the case. If a party wins in part and loses in part, an arbitral tribunal may allocate the costs in proportion to the outcome. By so doing, an arbitral tribunal enjoys a fairly broad discretionary power to make proper decision. Under special circumstances, an arbitral tribunal may deviate from the principle of costs-follow-the-event and decide that the party that has delayed or impeded the arbitration proceedings has to bear a larger proportion of arbitration costs.

The recoverable costs awarded to a winning party may include administrative fees, arbitrators' fees, attorneys' fees, in-house fees and

costs, costs of witnesses, appraiser's fees, travel expenses and other reasonable costs.

40 Interest**May interest be awarded for principal claims and for costs and at what rate?**

The issue of interest normally falls within the scope of substantive law and an arbitral tribunal may award it at request of one or both parties. Very often, the arbitral tribunals seated in mainland China award with simple or compound interest on principal claims, calculated from the date due until the date of actual payment.

According to the Civil Procedure Law (2013), if a party fails to fulfil its obligation to pay the money within the time limit specified in an arbitral award, that party is obliged to pay double interest on the debt for the belated payment (article 253). The Supreme People's Court interpreted in 2014 that the interest on the debt for the belated payment shall be calculated according to the method stated in the award plus additional interest at the rate of 0.0175 per cent per day.

Proceedings subsequent to issuance of award**41 Interpretation and correction of awards****Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?**

The Arbitration Law provides that, if there are clerical or calculation errors in an arbitration award, or if matters that have been decided by an arbitral tribunal are omitted in the arbitration award, the arbitral tribunal shall correct or supplement the award on its own initiative. Within 30 days of receipt of the arbitral award, any party may request the arbitral tribunal to make the correction (article 56). The correction constitutes a part of the award and supersedes the part in error. There is no express provision for an arbitral tribunal to issue interpretation of an arbitral award.

42 Challenge of awards**How and on what grounds can awards be challenged and set aside?**

The Arbitration Law provides that a court that has the exclusive jurisdiction over setting aside an arbitral award is the intermediate people's court where the arbitration institution is domiciled (article 58). The court may rule to set aside an award on any of the grounds enumerated by law at the request of a party, or rule to nullify an arbitral award if the court finds *ex officio* that the award is contrary to the social public interest (ie, public policy).

The grounds for setting aside an arbitral award vary depending upon the nature of the award. Chinese law gives a bifurcated treatment towards pure domestic arbitration and foreign-related arbitration.

A court may rule to set aside a domestic arbitral award if a party can furnish evidence to prove that there exists any of the following circumstances (article 58 of the Arbitration Law):

- there is no agreement for arbitration;
- the matters awarded are out the scope of the arbitration agreement or are beyond the limits of authority of an arbitration commission;
- the composition of the arbitral tribunal or the conduct of arbitration proceedings violates the procedures prescribed by law;
- the evidence on which the award is based is forged;
- evidence that has sufficient impact on the impartiality of an award has been discovered as having been concealed by the opposite party; or
- arbitrators have accepted bribes, resorted to deception for personal gains or perverted the law in the award.

A court may rule to set aside a foreign-related arbitral award if a party can furnish evidence to prove that there exists any of the following circumstances (article 70 of the Arbitration Law):

- the parties concerned have not stipulated an arbitration clause in the contract or have not subsequently reached a written agreement for arbitration;

Update and trends

The Shenzhen Court of International Arbitration (SCIA) unveiled its new rules on 26 October 2016, becoming the first institution in mainland China that will hear investor-state arbitrations and administer cases under UNCITRAL rules. The new SCIA rules comprise three sets of rules, namely the Arbitration Rules, the Special Rules of Maritime and Logistic Arbitration and the Guidelines for the Administration of Arbitration under the UNCITRAL Rules. They became effective from 1 December 2016.

The new SCIA rules represent the most updated and advanced rules of arbitration in mainland China. Aiming at respecting party autonomy and making the arbitration process more practical and efficient, the new rules introduce an array of new provisions pertaining

to bona fide principles, selection of presiding arbitrator, emergency arbitrator, stenographic record, online arbitration, arbitrators' power on cost sanctions, etc. The SCIA's newly expended jurisdiction to hear investor-state arbitration will inspire other Chinese arbitration institutions to seriously consider whether they will follow suit in the future.

Following in the footsteps of the HKIAC, the SIAC and the ICC Court became the second and the third international arbitral institutions to open representative offices in Shanghai. In March 2016, both the SIAC and ICC Court set up their offices in China (Shanghai) Pilot Free Trade Zone. The formal presence of foreign arbitration institutions on the mainland is expected to help shape China's arbitration towards a higher degree of internationalisation and modernisation.

- the applicant is not duly notified to appoint the arbitrator or to proceed with the arbitration, or the applicant fails to state its opinions owing to reasons for which the applicant is not held responsible;
- the composition of the arbitral tribunal or the conduct of arbitration proceedings is not in conformity with the rules of arbitration; or
- matters for arbitration are out of the scope of the arbitration agreement or are beyond the limits of authority of the arbitration commission.

The court shall form a collegiate bench to hear the application. Where any of the aforesaid grounds should be found, the arbitral award shall be ruled to be set aside. The time limit for a party to apply for setting aside an award is six months starting from the date of receipt of the award. During the process of setting aside, the court may afford the arbitral tribunal an opportunity to re-arbitrate the disputes at issue and render a new award in substitution of the original award, otherwise the court may proceed to set aside the original award if the arbitral tribunal declines to re-arbitrate (articles 59–61 of the Arbitration Law).

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level?

Approximately what costs are incurred at each level? How are costs apportioned among the parties?

The Civil Procedure Law stipulates that the ruling to set aside or to refuse enforcement of an arbitral award cannot be appealed (article 154). In lieu of an appeal, the Supreme People's Court issued judicial interpretations to set up a level-by-level report mechanism in 2008 to the effect that the Supreme People's Court shall have a final say on whether or not an arbitral award shall be set aside if the arbitral award is one that is foreign-related. The level-by-level report mechanism is an internal procedure within the court system, so it does not cause additional costs to the parties. This mechanism does not apply to a pure domestic arbitral award.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

The Arbitration Law sets out a general obligation on parties to comply with an arbitral award. If a party fails to comply with the award, the successful party is entitled to apply for enforcement of the award.

The grounds for refusal of enforcement of an arbitral award vary depending upon the nature of an arbitral award. Generally, there are six types of arbitral awards that may be sought for enforcement in mainland China and the grounds for refusal of enforcement are contained in different sources of law as follows:

- the arbitral award under the 1958 New York Convention (Convention award): article V of the 1958 New York Convention;
- the arbitral award of a foreign country that is not a contracting state to the 1958 New York Convention (non-Convention award): article 283 of the Civil Procedure Law that requires that the enforcement shall be pursued under the principle of reciprocity;
- the arbitral award made in Hong Kong SAR or Macao SAR: the Supreme People's Court Interpretations on recognition and

enforcement of Hong Kong arbitral awards (2000) or Macao arbitral awards (2007);

- the arbitral award made in Taiwan region: according to the Supreme People's Court Stipulation on Recognition and Enforcement of Arbitral Award Made in Taiwan Region (2015);
- the foreign-related arbitral award made in mainland China: identical to those for setting aside a foreign-related arbitral award made in mainland China (article 71 of the Arbitration Law, article 274 of the Civil Procedure Law); and
- the pure domestic arbitral award made in mainland China: identical to those for setting aside a domestic arbitral award made in mainland China (article 237 of the Civil Procedure Law).

The level-by-level report mechanism set up by the Supreme People's Court with its judicial interpretation in 1995 applies to non-enforcement of foreign-related arbitral awards, foreign arbitral awards and arbitral awards made in Hong Kong, Macao and Taiwan regions. According to the mechanism, only after the Supreme People's Court has agreed in a written reply that an intermediate people's court may issue its ruling to refuse enforcement. It is widely recognised that the report-level-by-level mechanism is centralised and effective in combating against potential local protectionism.

The procedural requirements for enforcement of an arbitral award can be summarised as follows:

- application is made to the people's court in the place where the party against whom the enforcement is sought is domiciled or where the property subject to enforcement is located;
- documents to be submitted include a written application for enforcement, original or notarised and authenticated copies of the arbitral award and arbitration agreement, proof of the applicant's identity and valid power of attorney;
- fees and expenses for enforcement are paid in deposit; and
- the time limit for submission of an application for enforcement is two years, commencing from the last date of voluntary compliance prescribed by the arbitral award or, failing that, from the date that the arbitral award becomes binding.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

The Chinese courts will generally not recognise and enforce arbitral awards that have been set aside by the courts at the place of arbitration. However, no case has been reported in which a Chinese court did not recognise and enforce an arbitral award that had been nullified at the place of arbitration.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The Arbitration Law does not contain a provision on emergency arbitration. It is generally understood that a Chinese court will not enforce the orders made by emergency arbitrators. The arbitration rules of CIETAC, SHIAC, SCIA and BAC have provisions for emergency arbitrators, which only state that the orders given by emergency arbitrators

shall have binding force on the parties. Compulsory enforcement of the orders is not mentioned.

47 Cost of enforcement

What costs are incurred in enforcing awards?

The costs for recognition and enforcement of an arbitral award are calculated and paid to the enforcing court according to the Measures on the Payment of Litigation Costs (2007) formulated by the State Council of the PRC.

The fees chart is the following:

Amount/value to be executed (yuan)	Fees (yuan)
No monetary amount or value involved	50 to 500
Less than 10,000	50
10,001 to 500,000	50 plus 1.5 per cent of the amount above 10,000
500,001 to 5 million	7,400 plus 1 per cent of the amount above 500,000
5,000,001 to 10 million	52,400 plus 0.5 per cent of the amount above 5 million
More than 10,000,001	77,400 plus 0.1 per cent of the amount above 10 million

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

The Chinese legal system belongs to the civil law system and arbitration in China shares a number of common characteristics with litigation in court. In practice, arbitrators and judges intend to take an inquisitorial approach to hear the cases. The duration of oral hearings is usually short but concentrated, and judges or arbitrators often offer to mediate the disputes in order to help the parties settle. Judges and arbitrators give a great weight to the documentary evidence that has been produced and examined at hearings. Employees or officers of the parties may testify, but normally they appear before the arbitral tribunals in the capacity of arbitration agents authorised by the parties, and their counsel alike. If the parties agree in their arbitration agreements that US-style discovery shall be employed, an arbitral tribunal is bound to honour the parties' agreement.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are a number of laws and rules that contain professional or ethical rules applicable to counsel in international arbitration in China. Article 35 of the Law on Lawyers (1997) provides that a lawyer shall not commit any acts in his or her practice activities, such as privately meeting with an arbitrator in violation of relevant regulations, providing false evidence, concealing facts, obstructing the opposing party's lawful obtaining of evidence, disrupting the order of an arbitral tribunal or interfering with the normal conduct of arbitration activities. Similar guidelines are given by Lawyers' Professional Ethics and Practice Disciplines (2001) formulated by All China Lawyers Association and the Codes of Conduct of CIETAC Arbitrators (2009). To a large extent, the best practice in China has reflected that embraced by the IBA Guidelines on Party Representation in International Arbitration.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

To date there is no piece of law or regulation governing third-party funding in mainland China. The various arbitration rules of Chinese arbitration institutions are also silent on third-party funding. The rising of third-party funding is a new phenomenon in international arbitration and it is anticipated that Chinese law will not resist introducing the mechanism in the future. A positive sign is that the National Development and Reform Commission further liberalised the price scheme in December 2014 for professional services, including attorney's fees in arbitration, so as to permit the relevant professional service providers to negotiate the fees according to market forces.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

After China's accession to WTO, the State Council of the PRC formulated the Regulation on Administration of Foreign Law Firms' Representative Offices in China (2001), which provides that the activities of a representative office of a foreign law firm and its representatives may not encompass Chinese law affairs. The Ministry of Justice clarified in 2002 that 'Chinese law affairs' include expression in arbitration activities in the name of attorney, of attorney opinions or comments on application of Chinese law or facts involving Chinese law. In practice, when arbitrating in China and where the Chinese law is the applicable law to the disputes, foreign lawyers will normally hire or be accompanied by local Chinese-qualified and practising lawyers to represent their clients at hearings.



HUI ZHONG LAW FIRM
汇仲律师事务所

Shengchang Wang
Ning Fei
Fang Zhao

wang.shengchang@huizhonglaw.com
fei.ning@huizhonglaw.com
zhao.fang@huizhonglaw.com

Suite 2304, One Indigo
20 Jiuxianqiao Road
Chaoyang District
Beijing
China

Tel: +86 10 5639 9688
Fax: +86 10 5639 9699
www.huizhonglaw.com

Colombia

Alberto Zuleta-Londoño, Juan Camilo Fandiño-Bravo, Juan Camilo Jiménez-Valencia and Natalia Zuleta-Garay

Dentons Cardenas & Cardenas

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Colombia signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) on 25 September 1979, and it received final approval through Law 39 of 1990. Internationally, for Colombia, the New York Convention has been in force since 23 December 1979. No reservations were made by Colombia concerning any rule in the New York Convention.

Colombia is a party to the following multilateral conventions relating to international commercial and investment arbitration:

- Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979, approved by Law 16 of 1981;
- Inter-American Convention on International Commercial Arbitration of 1975, approved by Law 44 of 1986; and
- Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965, approved by Law 267 of 1996.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Colombia is party to 14 international investment agreements already in force, which are comprised by seven bilateral investment treaties and seven free trade agreements that contain investment chapters. Additionally, there are seven other agreements already signed and pending to enter into force, and another six that are under negotiation.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary domestic arbitration-related sources of law in Colombia are:

- article 116 of the Constitution of Colombia, which allows individuals to be vested with the public function of justice administration when acting as arbitrators; and
- Law 1,563 of 2012 (the Arbitration Statute) that regulates both domestic and international arbitration in Colombia.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The domestic arbitration section of the Arbitration Statute was not drafted after the UNCITRAL model law (the Model Law) and more closely resembles a judicial proceeding before arbitrators than it does an arbitration as it is conceived in the Model Law. The major features of domestic arbitration as they differ from international arbitration are:

Arbitrators are considered public servants and are subject to the same disciplinary regime as judges.

A secretary will assist the arbitrators in conducting the proceedings.

Party-appointed arbitrators are not allowed. The parties to the arbitration must either mutually agree on the arbitrators, delegate the appointment to a third party, or, failing these, accept the appointment made by a civil circuit court.

The grounds for the annulment of a domestic arbitral award are wider than those provided for in the Model Law. See question 42.

Domestic awards and the rulings of annulment recourses thereof may be further revised by a national court through an exceptional recourse to revision and via a constitutional claim for the protection of fundamental rights, when the decision of the arbitrators affects fundamental rights of the parties involved, especially due process.

Unless the parties agree otherwise, arbitration panels gather evidence in the same way that civil courts do.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Pursuant to the Arbitration Statute, unless the state or a state-owned entity is a party to the proceedings, the parties may agree upon the procedure applicable to their arbitration, either directly or by reference to the rules of an arbitration institution, as long as they respect the constitutional principles that relate to due process, right of defence and party-equality.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

No. Although this issue has been the subject of debate, the prevailing opinion seems to be that, insofar as they are considered judges, domestic arbitrators are bound by Colombian conflict of law provisions.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The Arbitration and Conciliation Centre of the Chamber of Commerce of Bogotá (CAC) is the most prominent arbitral institute in the country, overseeing approximately 70 per cent of the disputes, which were close to 300 arbitration proceedings over the past year. When the CAC appoints arbitrators, they are selected from the CAC's own arbitrators'

lists. The CAC calculates the fees of the arbitration based upon the amount in dispute, not the time spent. Any domestic arbitration administered by the CAC is deemed to be seated in Bogotá, Colombia, unless otherwise agreed by the parties. Failing agreement on the seat of an international arbitration, the decision is left to the arbitral tribunal, which should take into account the convenience of the parties and the special circumstances of the arbitration.

The following is the contact information of the CAC:

Calle 76 No. 11-52
Bogotá
www.centroarbitrajeconciliacion.com

The arbitration rules of the CAC are available online: www.centroarbitrajeconciliacion.com/contenido/contenido.aspx?catID=834&conID=62.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

As a general rule, any matter that may not be waived by the parties may not be settled by arbitration. The law may include any additional specific matter that may not be settled by arbitration. Among such matters, we highlight the following:

- fundamental rights; including rights of mentally incapable persons and workers' minimum rights;
- marital status, and in general, family law;
- validity of decisions taken in a corporation's shareholders' or board of directors' meeting (except within a Sociedad por Acciones Simplificada);
- legality of administrative acts issued in exercise of 'exceptional powers'; and
- certain issues regarding antitrust law and intellectual property.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

In Colombia, there still exists the distinction between an arbitral clause and a submission agreement or 'compromiso', depending on whether the agreement is executed as part of a contract or independently after the existence of a dispute. In both cases the consent of the parties to arbitrate must be expressed in a document containing the consent of the parties to arbitrate any dispute arising out of the concerned contract or expressing the dispute the parties agree to arbitrate, if it already exists. Notwithstanding, whenever a party in a proceeding invokes the existence of an arbitral agreement and the opposing party fails to contest it, the existence of the arbitral agreement will be deemed successfully demonstrated.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The voidance of an arbitration clause may be pursued before the Arbitration Tribunal if it does not comply with the general requirements for the existence or validity of contracts, or the specific requirements for validity of arbitration agreements, as discussed in the previous point. Arbitration agreements will not cease to be enforceable on the grounds of death of one of the parties (contractual successors will be bound), bankruptcy or expiration or voidance of the contract that contains it.

11 Third parties - bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

In domestic arbitration, the person who guarantees the performance of the obligations contained in an agreement that includes an arbitration clause may be summoned to the proceedings by way of an impleader of the guarantor and, thus, be bound by the arbitration agreement.

12 Third parties - participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

Third-party participation is allowed in Colombia by the Arbitration Statute, subject to the relevant rules found in the Colombian General Code of Procedure (CGCP). The respective adhesion from the third party to the arbitration agreement and the recalculation of the arbitrators' fees that must be paid by the third party interested in participating in the proceedings or by either of the parties to the dispute is also provided for in the Arbitration Statute. In cases where a third party holds an interest against both parties to the dispute the proceedings may continue disregarding the payment of the recalculated arbitrators' fees.

Additionally, if because of the nature of the dispute, the arbitral award will have res judicata effects upon a third party that has not executed the arbitration agreement, the arbitral tribunal will order the third party to express whether or not they will adhere to the arbitration agreement. If they do not adhere, the arbitration tribunal will declare that the effects of the arbitration agreement are extinguished with regard to the dispute.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

There is no specific rule in this regard. However, there is no legal limitation to do so. Therefore, whether an arbitration agreement is extended to third parties, will most likely be defined by applying the usual test of consent.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

Regarding domestic arbitration, the Arbitration Statute does not include a rule on the matter of a multiparty arbitration agreement. In international arbitration, unless otherwise agreed by the parties, if there is more than one claimant or defendant, the arbitrator must be appointed by all claimants and defendants. If such an agreement is not achieved, the default mechanism, consisting of the appointment by the local courts, applies.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Requirements to act as an arbitrator in domestic arbitral proceedings are the same as those established in the law for whoever wishes to be appointed to an appellate court, namely:

- holding Colombian nationality and citizenship;
- being admitted to practise law in Colombia;
- having no less than eight years of professional experience; and
- not having been disqualified or removed from public office.

No special criteria, as per nationality or professional qualifications, must be met to act as an arbitrator in international arbitration proceedings.

We are not aware of a statute that would prevent the parties from considering limiting their options of arbitrators on the grounds of nationality, religion or gender.

16 Default appointment of arbitrators**Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?**

Regarding domestic arbitration, in the events where the parties must mutually agree on the appointment of arbitrators, yet fail to appoint them, the arbitration centre will make the appointments if the arbitration agreement so stipulates. This appointment must be made randomly from the centres' lists of arbitrators. In the absence of an appointment by the arbitration centre, the arbitrator(s) will be appointed by a civil circuit court or an administrative court, if one of the parties is a state entity. The latter also applies to international arbitration, pursuant to article 72 of the Arbitration Statute.

17 Challenge and replacement of arbitrators**On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?**

Challenge of an arbitrator in domestic arbitration proceedings is subject to the same grounds and procedure for the challenge of national judges found in the CGCP, the Disciplinary Code and the Code of Administrative Procedure, when one of the parties is a state entity. Such rules, generally, relate to the existence of a relationship between a judge and one of the parties to the process, or between the judge and the dispute itself, that offers a reasonable source of concern as to its independence and impartiality. Additionally, an arbitrator can be challenged on the basis of having breached the duty of disclosure.

If only one of a three-arbitrator tribunal is challenged, the challenge will be decided by the remaining two arbitrators. In the case of a sole-arbitrator tribunal, or when two or more arbitrators are challenged, the challenge will be decided by a civil circuit court.

In the case of disability or death of an arbitrator, the proceedings will be stayed, until the concerned arbitrator is replaced.

In international arbitrations, arbitrators can be challenged whenever there are justified doubts regarding their impartiality or their independence, as well as when they do not meet the qualities agreed by parties. The parties are free to agree on a procedure to challenge the arbitrators. If they remain silent, the challenge will be decided by the arbitration institution in the case of sole arbitrators and by the remaining arbitrators in the case of three-arbitrator tribunals, where the chair's vote will be the deciding vote if there is a tie.

There is no specific mention of the IBA Guidelines on Conflicts of Interest in International Arbitration in Colombian law or arbitration rules, but they are increasingly used as a reference by parties seeking to challenge an arbitrator.

18 Relationship between parties and arbitrators**What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.**

There exists no contractual, labour or commercial relationship between the parties and arbitrators. In domestic arbitrations, the arbitrator's fees cannot exceed 1,000 legal minimum wages (689,454,000 pesos). In international arbitration proceedings, fees will vary depending on the limits established by the institution in charge of administering the arbitration.

19 Immunity of arbitrators from liability**To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?**

Given that arbitrators in domestic arbitrations carry out a public function, they are subject to liability in the same conditions as national judges. In the case an arbitrator or an arbitral tribunal causes an unlawful damage to a person, they may seek reparation against the Colombian state, which may, in its way, pursue reparation against the

arbitrator or arbitrators, as long as there exists proof of their gross negligence or wilful misconduct in causing the damage.

With respect to immunity of arbitrators in international arbitration proceedings, the Arbitration Statute remains silent.

Jurisdiction and competence of arbitral tribunal**20 Court proceedings contrary to arbitration agreements****What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?**

The defendant in court proceedings that wants to invoke the existence of an arbitration agreement enforceable against the claimant must do so in the first opportunity granted to present its case. If the court finds evidence of the existence of the arbitral agreement, the court proceedings will be terminated.

If an arbitral tribunal decides that it has jurisdiction over a matter that is already being heard by a national court where a first instance ruling has not been rendered, it is entitled to order the relevant court to terminate the proceedings and submit the file docket to the arbitration panel.

21 Jurisdiction of arbitral tribunal**What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?**

Overall, no special procedure for dispute over jurisdiction exists. In domestic arbitration proceedings, the decision of arbitrators on the matter of their own jurisdiction is final and shall prevail over any other judicial decision on the matter, with the exception of what a national court may decide in the proceedings to annul the award.

Regarding international arbitration, the arbitration tribunal will decide on the matter of its own jurisdiction. The parties must object to the jurisdiction, to the latest, at the time of filing the response of the claim unless applicable rates state otherwise. The arbitration tribunal will solve these objections before, or within the final award. If the arbitration tribunal does not agree with the objections they could still be argued in the annulment recourse.

Arbitral proceedings**22 Place and language of arbitration****Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?**

Regarding domestic arbitration, failing prior agreement, the proceedings will be conducted in the manner specified by the arbitration rules of the concerned arbitral institution (the language must be Spanish and the seat will be the city where the concerned institution is located).

Regarding international arbitration, if no institution intervenes in the given proceedings, arbitrators will decide on the place and language, according to the specificities of the case.

23 Commencement of arbitration**How are arbitral proceedings initiated?**

Domestic arbitral proceedings initiate with a complaint that must satisfy all the requirements laid down in the relevant rules regarding civil judicial complaints. In general, such requirements are:

- identification of the parties to the process;
- a clear description of the facts of the dispute;
- expression of the claims;
- identification of the rules applicable to the dispute;
- an estimate of the monetary value of the claims; and
- indication of the evidence to be produced and submission of any documents that intend to be used as evidence and are in the party's power.

The complaint must be signed by the claimant's attorney and must be filed along with all the documentary evidence available, a copy for the

defendant, a copy for the tribunal and a copy for the arbitration institution, if applicable.

The beginning of an international arbitration will vary according to the rules chosen. According to article 94 of the Arbitration Statute, it will take place with a request for arbitration. Requirements that exist in the context of domestic arbitrations are not applicable to international arbitrations.

24 Hearing

Is a hearing required and what rules apply?

In domestic arbitrations, the Arbitration Statute provides for various hearings, namely the: installation hearing, settlement hearing, first hearing, evidentiary hearings, closing arguments hearing, award hearing and the clarification, correction, or addition of the award hearing.

The celebration of hearings in international arbitration proceedings is for the arbitral tribunal to decide, upon the specific circumstances of the case.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Taking of evidence in domestic arbitration as provided for in the law, and absent an agreement of the parties that provides otherwise (which is a rare occurrence in Colombia (if in fact it has ever happened)) is subject to the same rules as judicial proceedings. The most prominent provisions in this regard are:

- documents: these must be submitted by the parties along with the complaint or response to the complaint, respectively. Notwithstanding, if so requested by a party, the tribunal may order the opposing party to submit additional documents;
- witnesses: the parties are required to express the name and domicile of the persons they intend to call as witnesses to the proceedings, as well as a brief indication of the purpose of the witness's declaration. Witnesses are summoned for oral testimony and no written testimonies may be filed. No depositions exist prior to the rendering of the testimony;
- experts: parties to a domestic arbitration may choose between submitting expert reports drafted by party hired experts or requesting that the tribunal order the expert reports to be drafted by tribunal appointed experts; and
- party declarations: if so requested, the arbitral tribunal and the counterparty may ask a party, or its legal representative, on the facts of the dispute. Additionally, the GCCP introduced a new rule that allows parties to ask their own legal representatives to testify in court on the facts of the case.

International arbitral proceedings are ruled by a provision drafted after article 19 of the Model Law whereby tribunals are free to establish the rules for taking of evidence in the absence of an agreement of the parties on the matter.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

With regard to domestic arbitration, national courts may intervene in arbitral proceedings in the following circumstances (among others):

- to collect pre-arbitration evidence;
- to designate the arbitrators;
- to decide the challenge against the sole arbitrator or the majority of the arbitral tribunal;
- to assist the tribunal in the practice and enforcement of interim measures; and
- through a constitutional action aimed at protecting fundamental constitutional rights.

In international arbitration, court involvement opportunities are:

- ordering and enforcement of interim measures;
- appointment of arbitrators;
- deciding the challenge of an arbitrator;

- gathering of evidence;
- action to set aside awards; and
- recognition and enforceability of awards.

27 Confidentiality

Is confidentiality ensured?

The Arbitration Statute remains silent on the matter. Nevertheless, in international arbitration, parties are free to agree that proceedings remain confidential.

Furthermore, the rules of the CAC provide that domestic arbitration proceedings are to remain confidential unless the parties agree otherwise, except for the arbitral award, which is always public.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Regarding international arbitration, the Arbitration Statute provides that before or during the arbitration proceedings, any given party is entitled to seek interim relief from local courts, and such request will not constitute a waiver of the arbitration agreement. No such provision exists for domestic arbitrations.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

No.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Both domestic and international arbitration tribunals may order interim measures as they see fit. For international arbitration the parties may agree otherwise. Domestic arbitration tribunals may additionally order the same interim measures available to the courts where, absent the arbitration agreement, the dispute would have been resolved, and other interim measures that may be required in order to:

- protect the right subject to dispute;
- prevent the infraction of the right subject to dispute;
- avoid the consequences regarding the infraction of the right subject to dispute;
- prevent damage;
- put an end to the damage caused; or
- assure the claim's effectiveness.

Interim relief may also be ordered in order to recover evidence.

In the case of international arbitrations the arbitral tribunal can order an interim measure in order to:

- maintain or restore the status quo while the dispute is solved;
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award may be satisfied; or
- preserve evidence that may be relevant and material to the resolution of the dispute.

Moreover, the Arbitration Statute provides that before or during the arbitration proceeding, any given party is entitled to seek interim relief from local courts, and such request will not constitute a waiver of the arbitration agreement.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Yes. Arbitrators have the same duties and powers as judges. Therefore, they may expel people from hearings, impose fines and order arrest penalties, among others. However, this rarely occurs.

Awards**32 Decisions by the arbitral tribunal**

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

For domestic arbitration, the arbitral award must be decided by the majority of the members of the arbitral tribunal.

For international arbitrations, the arbitral award must be decided by the majority of the members of the arbitral tribunal, unless otherwise stated by the parties.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

In domestic arbitrations, arbitrators may express dissenting as well as concurring opinions. However, if an arbitrator expresses a dissenting opinion regarding the decision of the jurisdiction of the tribunal issued in the first hearing, the arbitrator will cease its functions and will have to be replaced.

For international arbitration, the Arbitration Statute remains silent on the matter.

34 Form and content requirements

What form and content requirements exist for an award?

Regarding domestic arbitration, the arbitral award is the judicial decision that is rendered by the arbitral tribunal. Hence, the arbitral award must comply with the formal requirements of judicial decisions by:

- indicating the place and date of issuance;
- giving the reasoning of the tribunal for the decision on the merits with mention to the assessment of evidence and legal arguments that support it;
- giving the dispositive part of the award, including the decision on the allocation of costs and ordering the registration of the award, when necessary and the submittal of the file docket to the respective archive; and
- having the signature of the arbitrators.

Regarding international arbitration, awards must:

- be written and signed by the arbitrators; however, the default of the signatures does not affect the validity of the award;
- provide the reasoning of the arbitral tribunal unless otherwise agreed by the parties; and
- state the date and seat of the arbitration.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

Regarding domestic arbitration, except when otherwise stated in the arbitration agreement, the time limit for the arbitrators to render the arbitral award and, when applicable, the clarification, correction, or addition of the award, is six months from the first hearing, which is the moment in which the tribunal makes a decision on its own jurisdiction and orders the collection of evidence. This term may be extended as requested by the parties, but the extension cannot exceed an additional

six months. There are no rules concerning the duration of international arbitrations in the Arbitration Statute.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Regarding both domestic arbitration and international arbitration, the decisive date is the date of the delivery of the award.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

In domestic arbitration, the arbitral tribunal can issue arbitral awards in law, technical awards, or *ex aequo et bono*, when expressly stated by the parties. There are two arbitral awards: the final award, and if applicable, the addition to the final award.

Regarding international arbitration, the award can be in law or *ex aequo et bono*, when authorised by the parties. Partial awards are allowed in international arbitration, as per the applicable arbitration rules.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Domestic arbitration may terminate by settlement or the claimant choosing to desist from the claims. There are no default judgments under Colombian law, in arbitration or otherwise. Written briefs should be filed for this purpose.

International arbitrations may be terminated in any way consistent with applicable arbitration rules.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

In domestic arbitration, as per article 25, and 26 of the Arbitration Statute, the arbitrators will determine the costs and expenses that must be paid by the parties.

As per article 13 of the Arbitration Statute, in the award, the tribunal shall decide upon the final allocation of costs and expenses and shall order the losing party to pay them. This will include the expenses of the proceeding (ie, arbitration fees, experts opinion's fees, etc, and the attorney's fees of the prevailing party).

Regarding international arbitration, costs will be allocated as determined by the applicable arbitration rules.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Applicability of interest as well as applicable rates will be determined by applicable substantive law.

Proceedings subsequent to issuance of award**41 Interpretation and correction of awards**

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

In domestic arbitrations, the arbitral tribunal can clarify, correct, or make additions to the award *sua sponte* within the five days following delivery of the award. Within the same time frame, the parties may request the clarification, correction, or addition of the award.

In the case of international arbitrations, within the next month after the delivery of the award and unless otherwise agreed, any party can request the correction of a calculation, typographical or transcription mistake, as well as the clarification of the award; the arbitral tribunal may, *sua sponte*, correct a calculation, typographical or transcription mistake in the award; and any party can request the addition

of the award regarding claims that were brought to the arbitral tribunal during the arbitration proceeding and that were omitted in the award.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

In domestic arbitrations, the party that wishes to request the annulment of the award has 30 days from the service of the award or from the decision that decides the clarification, correction, or addition of the award to submit the annulment to the tribunal.

The arbitral award can be set aside when:

- (i) the arbitration agreement is non-existent, null, or unenforceable;
- (ii) the action is time-barred or there is lack of jurisdiction;
- (iii) the tribunal was not duly integrated;
- (iv) one of the parties was not duly represented in court or was not duly notified (this applies only if the defect was not amended during the proceedings);
- (v) a piece of evidence duly requested was not ordered or when ordered was not collected, as long as the defect was mentioned in the corresponding legal remedy filed against the tribunal's decision and the same was relevant to the ruling;
- (vi) the arbitral award or any addition, correction or clarification thereof was issued after the expiration of the period fixed for the arbitration process;
- (vii) the award was issued in equity (*ex aequo et bono*), when it should have been issued in law, on the condition that this circumstance appears evident in the award;
- (viii) the award contains contradictory statements or mathematical or other errors in the part of the judgment or with an influence on it, provided that these errors were previously pointed out to the tribunal; and
- (ix) the award was rendered on issues that were not subject to the arbitrators' decision, awarded in excess of that which was claimed or failed to decide on issues that were subject to the arbitration.

Grounds (i), (ii) and (iii) may be invoked only if the appellant alleged these defects at the moment of filing a motion to reconsider against the tribunal's decision during the arbitral proceeding. Ground (vi) may not be alleged by the party that failed to present it before the tribunal prior to the expiration of the established term.

Grounds for annulment of an award rendered by an international tribunal seated in Colombia are the following:

At the request of one of the parties:

- such party to the 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 Colombian law;
- such party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case;
- the award refers to a difference not contemplated by or not falling within the scope of the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only the latter will be set aside; or
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, except when such agreement comes in conflict with a mandatory provision of Colombian international arbitration law or, failing such agreement, was not in accordance with Colombian international arbitration law.

Further grounds for annulment of an award are when the annulment judge finds that:

- the subject matter of the difference is not capable of settlement by arbitration under the laws of Colombia; or
- the recognition or enforcement of the award would be contrary to Colombian international public policy.

The Arbitration Statute allows parties to an arbitration that is seated in Colombia to partially or completely waive recourse to annulment, when all parties are domiciled outside Colombia. An award rendered

Update and trends

This year, foreign investors have requested an arbitration before the International Centre for Investment Disputes, seeking relief because of Colombia's alleged disregarding of the commitments laid out in those agreements. The requests for arbitration that have been made public were served by mining companies Glencore, EcoOro Mineras Corp and Cosigo Resources Ltd, and the telecommunications company Claro-America Móvil. These requests involve issues related to expropriation and to the breach of fair and equitable treatment because of the legal uncertainty generated by the state's actions. Moreover, in July, Colombia was served a notice of dispute by Spanish energy company Gas Natural Fenosa, because of the default of payments by customers in the country's Caribbean region.

under such a waiver requires a recognition proceeding in order to be enforced in Colombia.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level?

Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Arbitral awards are not subject to appeal; nevertheless they can be challenged through annulment recourse, revision, and, in some instances through a constitutional action for the protection of fundamental rights.

The Constitutional Court established general grounds for the admissibility of the petition for constitutional protection against awards as well as special grounds for granting the protection of a fundamental right violated by an award. Hence, the plaintiff must prove each and every one of the general requirements as well as at least one of the special grounds for an award to be annulled.

The great majority of constitutional actions that are attempted against arbitration tribunals or the awards they render are unsuccessful. Constitutional actions will be solved within 10 days; however that decision may be appealed and ultimately reviewed by the Constitutional Court.

Costs will be mainly attorney's fees.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Regarding domestic arbitrations and international arbitrations seated in Colombia, awards can be enforced immediately, except in international arbitration when parties agreed to renounce to the annulment recourse; in this case, the award must be recognised as it will be treated as a foreign award.

In order to seek the recognition of a foreign award, the interested party shall submit to the Supreme Court of Justice the request with a copy of or the original arbitral award.

The sole grounds for denying the recognition of a foreign arbitral award are identical to the ones in article 36 of the Model Law.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

There are no reported cases on the matter.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

No.

47 Cost of enforcement**What costs are incurred in enforcing awards?**

Doing Business 2017 (www.doingbusiness.org/data/exploreeconomies/colombia#enforcing-contracts) states that enforcing a judgment in Colombia will cost around 12.1 per cent of the claim's value.

Other**48 Judicial system influence****What dominant features of your judicial system might exert an influence on an arbitrator from your country?**

Owing to the well-known judicial nature of domestic arbitration, many aspects of our judicial system permeate arbitration such as: formalities regarding complaint and response content; rules regarding evidence; time terms; and final decision to pay costs and expenses.

49 Professional or ethical rules applicable to counsel**Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?**

Law 1123 of 2007 regulates the Disciplinary Code for Lawyers in Colombia, and it is applicable for lawyers acting in Colombia or outside of the country if the assignment was requested in Colombia. Arguably, it could be applicable for foreign lawyers working in Colombia.

50 Third-party funding**Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?**

No.

51 Regulation of activities**What particularities exist in your jurisdiction that a foreign practitioner should be aware of?**

Regarding domestic arbitration, arbitrators must fulfil the requirements laid down in our answer to question 15. Counsellors must be lawyers.

Regarding international arbitration see question 49.

Regarding taxation, the fees for foreign arbitrators serving in an arbitration seated in Colombia are subject to withholding income tax at the rate of 33 per cent. The fees are also levied with VAT, which would be collected by the Colombian payer via the reverse-charge mechanism without exerting any withholding or discount on the payment.

According to Colombian migratory law, there are two legal ways that a foreigner may enter Colombia to provide professional services:

- PIP 6: This permit is issued to foreigners who do not require a visa to enter Colombia and is requested before 'Migración Colombia' in the Colombian airport upon their arrival; and
- Visa TP12: This kind of visa is issued by the Colombian Ministry of Foreign Affairs or a Colombian Consulate in another country for a foreigner with restricted nationality who wants to enter Colombia with or without a labour contract to perform commercial activities, business matters, or labour activities, for a period of 90 calendar days. Nevertheless, according to the Arbitration Statute, the arbitrators could perform their duty by conference calls, hence, never actually entering the country.


**CARDENAS
& CARDENAS**

Alberto Zuleta-Londoño
Juan Camilo Fandiño-Bravo
Juan Camilo Jiménez-Valencia
Natalia Zuleta-Garay

alberto.zuleta@dentons.com
juan.fandino@dentons.com
juan.jimenez@dentons.com
natalia.zuleta@dentons.com

Carrera 7 No. 71-52
Torre B, Piso 9
Bogotá
Colombia

Tel: +57 1 313 7800
Fax: +57 1 312 2420
<http://dentons.cardenas-cardenas.com>

Croatia

Zoran Vukić, Iva Sunko and Ana Pehar

Vukić & Partners Ltd

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Croatia is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Convention was primarily adopted by the former Socialist Federative Republic of Yugoslavia in 1982 and has entered into force on 8 October 1991. By notification on succession of 26 July 1993, the Convention has become a part of the Croatian legal system.

Croatia adhered to the declarations made by the former Yugoslavia that the Convention will only apply to:

- recognition and enforcement of awards made in the territory of another contracting state;
- differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law; and
- those arbitral awards that were adopted after the entry into effect of the Convention.

Croatia is also a party to the following multilateral conventions relating to arbitration:

- the Geneva Protocol on Arbitration Clauses of 1923;
- the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927;
- the European Convention on International Commercial Arbitration of 1961;
- the Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington Convention) of 1965; and
- the Energy Charter Treaty of 1994.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Croatia has signed 59 bilateral investment treaties with other countries, namely with Albania, Argentina, Austria, Azerbaijan, Belarus, Belgium-Luxembourg Economic Union, Bosnia and Herzegovina, Bulgaria, Cambodia, Canada, Chile, China, Cuba, the Czech Republic, Denmark, Egypt, Finland, France, Germany, Greece, Hungary, India, Indonesia, Iran, Israel, Italy, Jordan, Korea, Kuwait, Latvia, Libya, Lithuania, the Former Yugoslav Republic of Macedonia, Malaysia, Malta, Moldova, Mongolia, Montenegro, Morocco, the Netherlands, Oman, Poland, Portugal, Qatar, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Thailand, Turkey, Ukraine, the United Kingdom, the United States of America and Zimbabwe.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary domestic source of law relating to arbitral proceedings and recognition and enforcement of arbitral awards is the Arbitration Act, which covers arbitration proceedings that have their seat in Croatia, recognition and enforcement of arbitral awards, and court jurisdiction and procedure regarding arbitration.

The Arbitration Act defines domestic arbitration as arbitration having its seat in the territory of Croatia and thus foreign arbitration as having its seat outside Croatia.

The Arbitration Act governs domestic and international disputes, where a dispute is considered international if at least one of the parties is a foreign person or a foreign legal entity.

Recognition and enforcement of foreign arbitral awards are also regulated by the Conflict of Laws Act, and enforcement of all arbitral awards is regulated in the Croatian Enforcement Act.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The Croatian Arbitration Act is based on the UNCITRAL Model Law and a number of the main features of the UNCITRAL Model Law have been introduced, however, there are some differences. Contrary to the UNCITRAL Model Law, the Croatian Arbitration Act applies not only to international commercial arbitration, but to all types of arbitral proceedings having a seat in Croatia, with both domestic and international disputes.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Although parties in arbitration are free to agree on the rules of procedure, the Croatian Arbitration Act contains mandatory provisions from which the parties may not deviate.

These relate primarily to: the arbitrability of the dispute; the equality of the parties (obligation of arbitrators to notify the parties in good time of each hearing; obligation that all information or documents supplied to the tribunal by one party must be communicated to the other party); the impartiality of the arbitrators and their independence; the legal capacity of parties; the written form of arbitral award; the grounds on which the award can be challenged; and the rule that parties may not waive their right to challenge the award in advance.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The arbitral tribunal has to apply the substantive law chosen by the parties. Should the parties fail to choose the substantive law, the arbitral

tribunal has to apply the law that it considers to be most closely connected with the dispute.

A decision on the grounds of *ex aequo et bono* is admissible only if the parties have expressly authorised the arbitral tribunal to do so.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The most prominent arbitral institution in Croatia is the Permanent Arbitration Court at the Croatian Chamber of Commerce:

Permanent Arbitration Court at the Croatian Chamber of Commerce
Rooseveltovo trg 2
pp 630
10 000 Zagreb
Croatia
Tel: +385 1 456 1555
Fax: +385 1 482 8380
E-mail: sudiste@hgk.hr
<http://en.hgk.hr/about/pemanent-arbitration-court>.

The Permanent Arbitration Court governs procedure under its Rules of Arbitration (the Zagreb Rules), published in Official Gazette No. 129/15.

There are no restrictions on the place or the language of arbitration. Also, parties are free to appoint any person to be an arbitrator, not only those who are on the list of arbitrators of the Permanent Court of Arbitration.

The fee structure for arbitrators is based on the amount in dispute according to the Decision on Costs in Arbitration Proceedings.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The Arbitration Act considers any dispute in which parties can freely dispose of their rights to be arbitrable. In this sense, status-related disputes (such as certain family law disputes, establishment of maternity, marital disputes) are not arbitrable, nor are they criminal matters.

In disputes with an international element, parties can agree on arbitration outside the territory of Croatia, except if such dispute may be subject only to the jurisdiction of the Croatian courts (eg, disputes over ownership and other property rights, disputes over trespass on real estate, disputes arising during, or as a result of, bankruptcy proceedings, etc).

There is a limitation that two Croatian legal entities or citizens cannot submit their dispute to arbitration having its seat abroad.

The Arbitration Act does not regulate question of arbitrability of intracompany disputes, however, it may be concluded that such disputes are not arbitrable.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

An arbitration agreement must be in writing, it may be concluded by a separate agreement or as an arbitration clause within a contract.

The 'in writing' requirement includes agreements contained in documents signed by the parties or agreements reached in an exchange of letters, telex, facsimiles, telegrams or other means of telecommunication that provide a record of the agreement, whether signed by the parties or not. Also, the reference in a contract to a document containing an arbitration clause (general terms of a contract, text of other agreement or similar) constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

The arbitration agreement is deemed to be concluded in writing:

- if it is contained in an written offer, or if a third party transmitted to both parties such an offer, against which no timely objection was raised;
- after an orally concluded arbitration agreement, if a party imparts a written communication to the other referring to the arbitration agreement concluded earlier orally, and the other party fails to object in a timely manner, and such failure, according to

trade usages, may be considered to constitute acceptance of the offer; and

- the issuance of a bill of lading with an explicit reference to an arbitration clause in a charter party.

A formal defect in the arbitration agreement is cured if the respondent does not contest the jurisdiction of the arbitral tribunal prior to filing its statement of defence.

In consumer contracts, an arbitration agreement must be contained in a separate document signed by both parties that comprises no agreements other than those that refer to the arbitral proceedings (the second condition does not apply if the agreement was drawn up by a notary public).

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

Arbitration agreements can be challenged under the general principles of Croatian contract law, in particular on the grounds of legal incapacity of the parties, error, deceit or duress, impossibility, inadmissibility, the ambiguity or indeterminacy of the obligation, lack of proper form of the agreement, etc.

In the event of insolvency, the legal successor is, in general, bound by the arbitration agreement.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

As a general rule, only the parties who signed the arbitration agreement (as well as their universal successors) are bound by the same, whereas third parties can be bound by the arbitral agreement by way of singular succession. Also, in case an arbitration agreement is contained in a contract in favour of a third party, it will be binding upon such third party if the third party exercises its rights under such contract.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The Arbitration Act does not contain provisions with respect to third-party participation in arbitration.

Pursuant to the Zagreb Rules, a person who has a legal interest to intervene on the side of one party may join that party only if both parties agree. In case a third party is not allowed to join the proceedings (if one of the parties objects), the third party will not be bound by the arbitral award.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The group of companies doctrine is not recognised in Croatian legal system and courts and arbitral tribunals are not allowed to extend an arbitration agreement to a non-signatory parent company or subsidiary companies of a signatory company, in cases where the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The Croatian Arbitration Act does not contain any specific provision regarding the multiparty arbitration agreement, however, it is possible to conclude these agreements. There are no special requirements for a multiparty arbitration agreement to be valid.

In cases with several claimants or respondents, the Zagreb Rules provide that they have to previously agree on the appointment of the same arbitrator. If they fail to do so, the arbitrator will be appointed by the appointing authority agreed on by the parties, and in default of such agreement, the president of the Arbitration Court from the list of arbitrators.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The Arbitration Act does not provide for any specific qualifications of arbitrators, while parties are free to agree on the same, respecting the general rule of the Arbitration Act in regard to the eligibility of arbitrations stating that no person shall be precluded by reason of his or her nationality from acting as an arbitrator, unless otherwise agreed by the parties, thus, a contractually stipulated requirement for arbitrators based on nationality, religion or gender would not be recognised by the Croatian courts.

Only a natural person can be appointed as an arbitrator.

The Arbitration Act sets one restriction regarding the appointment of judges of Croatian courts as arbitrators, which is that they may only be appointed as presiding arbitrators or as sole arbitrators.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

The Arbitration Act provides that if the parties fail to appoint the sole arbitrator, he or she shall be appointed by the competent court upon the request of one of the parties. In arbitrations with three arbitrators, if a party fails to appoint an arbitrator and inform the other party that they have not done so within 30 days of receipt of the notice of appointment by the other party accompanied by a request to appoint an arbitrator, or if two arbitrators fail to agree on the third arbitrator within 30 days, the appointment of the arbitrator shall be made, upon the request of one of the parties, by the competent court.

According to the Zagreb Rules, if the parties fail to appoint the arbitrator or the arbitrators fail to appoint the chairman, he or she shall be selected by the appointing authority (person chosen by the parties) or by the president of the Chamber (if the parties failed to choose the appointing authority).

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality, if he or she does not possess qualifications agreed to by the parties, or if he or she fails to conduct the arbitration with due expeditiousness and undertake measures on time in order to avoid any delay of the proceedings. A party may challenge an arbitrator appointed by it, or in whose appointment he or she has participated, only for reasons that occurred after the appointment or for reasons that the party has become aware of after the appointment has been made.

The parties are free to agree on a procedure for challenging an arbitrator or, failing such agreement, a party who intends to challenge an arbitrator shall, within 15 days of becoming aware of the appointment of the arbitrator or after becoming aware of any circumstances for challenging, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his or her office or the other party agrees to the challenge, the arbitral court, including the arbitrator subject to the challenge, shall promptly decide on the challenge.

If a challenge under the above prescribed procedure is not successful, the challenging party may, within 30 days of having received notice of the decision, reject the challenge, or if the arbitral tribunal does not decide on the challenge within 30 days after the challenge was made, in a further 30 days from the moment of the expiration of the first 30 days, request the competent court to decide on the challenge.

If an arbitrator becomes incapable of performing his or her tasks for legal or factual reasons, his or her mandate can be terminated on his or her own request or upon the agreement of the parties.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

An arbitrator may be appointed either by the parties or the appointing authority. An arbitrator has to accept the appointment in writing, either by a separate written statement or by co-signing the arbitration agreement executed by the parties.

An arbitrator has the right to reimbursement of expenses and a fee for his or her work, unless he or she has waived these rights in writing. The parties are jointly and severally liable for the payment of such expenses and fees. The Arbitration Act does not contain any specific provision in regard to arbitrator's fees. The amount of arbitrator's fees is usually set in the applicable institutional rules. Pursuant to the Arbitration Act, in case the parties do not accept the amount of arbitrator's fee set forth by the arbitrator who determined the fees and expenses by himself or herself, the amount will be determined by the competent court.

The Arbitration Act does not regulate the relationship between parties and arbitrators (it is basically a form of a service agreement), but it prescribes rights and obligations of arbitrators, such as their duty to conduct the arbitration with due expeditiousness and undertake measures on time in order to avoid any delay of the proceedings, their duty to disclose any circumstances that may put their independence or impartiality in doubt, etc.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The Arbitration Act contains no explicit provisions concerning the immunity of arbitrators from liability.

If the arbitrator fails to fulfil his or her obligations, he or she can be held liable for the damages incurred owing to such failure according to the general rules on indemnification of damages.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Where court proceedings are initiated in a dispute with an arbitration agreement, upon objection of the respondent the court will declare itself as incompetent, annul all actions and reject the claim, except when it finds that the arbitration agreement is not valid, has ceased to be valid or is incapable of being performed.

The respondent can raise an objection at the preliminary hearing at the latest, or the main hearing if the preliminary hearing was not held, before the end of the presentation of the statement of defence.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

An arbitral tribunal can rule on its own jurisdiction.

The respondent has to raise the objection challenging the tribunal's jurisdiction not later than in the submission of the statement of

defence in which the respondent raised issues related to the substance of the dispute. The fact that a party has already appointed an arbitrator does not prevent it from filing such an objection.

An objection that the arbitral tribunal is exceeding the scope of its authority has to be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may allow delayed objections if it finds the reasons for delay justified, in regard to both objections.

The arbitral tribunal can decide on the jurisdictional objection either as a preliminary question or in an award on the merit. If it decides the objection as a preliminary question, each party can request the competent court to re-examine the decision within 30 days of the receipt of the decision (the competent court is the Commercial Court in Zagreb for commercial disputes or the County Court in Zagreb for other disputes).

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

The parties are free to agree on the place of the arbitration.

If there is no agreement between the parties on the actual place of arbitration, the arbitral tribunal shall determine the same, bearing in mind the convenience of the place of arbitration for the parties. If the place is not determined, the place stipulated in the award shall be deemed to be the place of arbitration.

The parties are free to agree on the language to be used in the arbitral proceedings, failing which the arbitral tribunal will determine the language to be used in the proceedings. Until the language of the proceedings has been determined, a claim, a defence and other pleadings can be submitted in the language of the main contract, language of the arbitration agreement or in Croatian.

If neither parties nor arbitrators can reach an agreement on the language of arbitration, the language of arbitration will be Croatian.

23 Commencement of arbitration

How are arbitral proceedings initiated?

If not agreed otherwise by the parties, the arbitral proceedings commences when the statement of claim is received either by the arbitral institution (in case of institutional arbitration) or (in case of ad hoc arbitration) on the date on which the respondent receives the notification of the appointment of an arbitrator or a proposal for appointing a sole arbitrator, accompanied by an invitation to appoint the other arbitrator or declare whether he or she accepts the proposed sole arbitrator, and the statement of claim that submits the dispute to arbitration. According to the Arbitration Act, unless agreed otherwise, the claimant has to state the facts supporting its claim, the points at issue and relief or remedy sought. The claimant may submit, along with its statement, all documents it considers to be relevant, or may add a reference to the documents or other evidence it will submit.

According to the Zagreb Rules, the signed statement of claim has to contain the indication and contact details of parties, the claim, statement of facts, motions regarding the evidence, arbitration agreement, appointment of arbitrator and an indication of the amount in dispute. A copy of the main agreement and arbitration agreement must be enclosed thereto.

24 Hearing

Is a hearing required and what rules apply?

Pursuant to the Arbitration Act, oral hearing is not required.

Parties may agree on whether proceedings shall be in writing only or if there shall be also an oral hearing. If the parties have not agreed otherwise, the arbitral tribunal can decide whether to schedule and hold oral hearings or whether the proceedings will be conducted on the basis of documents.

In addition, the tribunal will hold oral hearings at an appropriate stage of the proceedings at the request of one of the parties (unless the parties have agreed that no hearings will be held).

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Parties are free to agree on the rules of procedure, subject to mandatory provisions of the Arbitration Act.

Witnesses, experts, documents and inspections are admissible evidence.

Oral witness testimony is a general rule provided by the Arbitration Act. Witnesses are not sworn before the tribunal and it is possible to cross-examine the witnesses. The arbitral tribunal may request that witnesses answer the questions in writing. Also, the tribunal may hear parties or party officers.

Unless otherwise agreed by the parties, the arbitral tribunal has the power to appoint experts to provide reports on specific issues and to require the parties to give the expert any relevant information, or to produce or provide relevant documents, goods or other property for inspection.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

The interference of the court in arbitration proceedings is limited to those cases expressly provided in the Arbitration Act.

The arbitral tribunal may request assistance from a court for the following:

- evidence that cannot be taken by the arbitral tribunal itself; or
- service of the arbitral award, in case of non-institutional arbitration.

The parties to an arbitration may request the intervention of a court in the following circumstances:

- appointment, recusal or revocation of arbitrators, if there is no agreement of the parties as to the appointing authority;
- competence of the arbitral tribunal;
- enforcement of interim measures ordered by the arbitral tribunal;
- ordering interim measures;
- certification and deposition of the arbitral award;
- setting aside of the arbitral award; and
- recognition and enforcement of the arbitral award.

The validity, duration or enforceability of an arbitration agreement may also be decided by a court if the issue is raised within court proceedings.

27 Confidentiality

Is confidentiality ensured?

The Arbitration Act does not contain specific provisions regarding confidentiality of the proceedings, except to state that arbitration proceedings are closed to the public unless otherwise explicitly agreed by the parties. With this in mind, confidentiality rules will be governed by the agreement of the parties or the procedural rules that they have chosen to govern the arbitration.

For example, under the Zagreb Rules, oral hearings in an arbitration are closed to the public unless otherwise explicitly agreed by the parties.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Under the Arbitration Act, a court may order interim measures for securing the claim, or order enforcement of interim measures ordered by the arbitral tribunal, at the request of one of the parties.

The Arbitration Act does not specify the type of interim measures that may be ordered, which implies that the parties are entitled to request any and all interim measures permitted by law, provided the general requirements have been met (eg, balance of probabilities in favour of the party's claim and the jeopardy to its fulfilment without the interim measure).

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Croatian domestic arbitration law does not provide for an emergency arbitrator prior to the constitution of the arbitral tribunal.

However, the Zagreb Rules, as entered into force on 27 November 2015, provide for this possibility – in such case the president of the Arbitration Court or an arbitrator from the institution's list of arbitrators appointed by him or her will act as an emergency arbitrator.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The provisions of the Arbitration Act in this regard are quite general in scope, as it is determined that the arbitral tribunal may order a party to take any measure the arbitral tribunal deems appropriate considering the subject matter of the dispute or order a party to provide appropriate security regarding such measure.

Article 48 of the Zagreb Rules lists examples of interim measures that may be ordered by an arbitral tribunal, such as:

- order certain actions to maintain or establish a certain status for the duration of arbitration proceedings;
- forbid a party to take certain actions;
- allow one of the parties to take certain actions in order to preserve the current status or establish a previous one, depending on the issue in dispute;
- order the seizure of certain items and entrusting them to the custody of the applicant or third party;
- regulate relations between the parties on a temporary basis;
- order a party to post bond as a precondition to order or not to order another interim measure, or as a means of increasing the efficiency of other measures ordered or as a security out of which the applicant could recover his or her claim, including costs; and
- order and carry out securing of evidence.

The list is not exhaustive.

The Arbitration Act does not regulate the issue of security for costs, so this issue will depend on the parties' agreement or the procedural rules they have selected (eg, in the above-cited article of the Zagreb Rules, this may be carried out through an interim measure).

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Domestic law and the Zagreb Rules do not contain particular provisions concerning sanctions against parties or their counsel who use 'guerilla tactics' in arbitration or gross violations of the integrity of the arbitral proceedings. However, counsel are subject to disciplinary liability enforced by the Croatian Bar Association, in case of any breaches of the Code of Ethics and other regulations governing professional conduct.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Unless otherwise agreed by the parties, the arbitral tribunal renders its decisions by a majority of votes.

If a majority of votes cannot be reached, the tribunal discusses the reasons for each opinion again. If the majority cannot be reached after the second discussion, the chairperson of the arbitral tribunal shall render the award.

When the tribunal is not in session, the chairperson of the arbitral tribunal can handle administration of the proceedings and decisions in this respect independently, unless this would be contrary to the parties' agreement or the tribunal's decision.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

The Arbitration Act contains no provisions on the possibility for arbitrators to give dissenting opinions.

34 Form and content requirements

What form and content requirements exist for an award?

Under the Arbitration Act, the award has to be made in writing.

As to content, the award must contain:

- grounds for the award (unless otherwise agreed by the parties or if the award is based on the parties' settlement);
- date and venue; and
- arbitrators' signatures.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

Domestic arbitration law does not provide for a time limit for rendering an arbitral award.

The Zagreb Rules provide that a draft award must be submitted to the Court's Secretariat for analysis and approval within a 60-day deadline from the hearings being closed, which may be extended for another 30 days if justified under the circumstances, while acknowledging that arbitration proceedings must be completed within one year from the appointment of the tribunal.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

As it concerns the parties, the decisive moment for all time limits is the date of delivery of the award. These are, specifically:

- request for a supplementary award;
- request for a correction of the award;
- request for interpretation of the award; and
- submission of the motion to set aside the award.

The date of award is only decisive in respect to the right of the arbitral tribunal to ex officio correct errors in the award (30 days).

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The Arbitration Act provides for the following types of awards:

- a final award;
- partial awards and interim awards (unless otherwise agreed by the parties); or
- award based on the parties' settlement (if so requested by the parties).

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Arbitration proceedings may also be terminated by the parties' settlement (unless the parties request an award to be rendered as specified above) or by an order of the arbitral tribunal when:

Update and trends

In recent years, there has been a strong campaign to direct the parties towards alternative dispute resolution – conciliation and arbitration – mainly because of long and inefficient judicial proceedings. The results of this effort are still not satisfactory, but the tendency is growing. The Permanent Court of Arbitration, by the Croatian Chamber of Economy, tries to promote arbitration by organising the annual international conference, Croatian Arbitration Days, where trends in arbitration, challenges for the parties and quality of the arbitration service are discussed.

The Zagreb Rules were revised at the end of 2015, and there are ongoing discussions regarding amendments to the Arbitration Act after 15 years of its application. However, no legislative proceedings are currently under way.

In the field of international investment arbitration, an ICSID award was rendered on 2 November 2016 in the case of *Lieven J van Riet, Chantal C van Riet and Christopher van Riet v Republic of Croatia* (ICSID Case No. ARB/13/12).

There are several cases pending before the ICSID, such as: *UniCredit Bank Austria AG and Zagrebačka Banka d.d. v Republic of Croatia* (ICSID Case No. ARB/16/31), *Amlyn Holding BV v Republic of Croatia* (ICSID Case No. ARB/16/28), *B3 Croatian Courier Coöperatief UA v Republic of Croatia* (ICSID Case No. ARB/15/5), *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia* (ICSID Case No. ARB/13/32) and *Georg Gavrilovic and Gavrilovic d.o.o. v Republic of Croatia* (ICSID Case No. ARB/12/39).

- the claimant withdraws the claim, unless the respondent contests the withdrawal and the tribunal finds that the respondent has a legal interest in having the matter resolved by a final award;
- the parties decide to terminate the proceedings; or
- the arbitral tribunal finds it is unnecessary or impossible to carry on with the proceedings for any other reason.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The costs of arbitral proceedings are allocated at the discretion of the tribunal, taking into consideration all relevant circumstances, and in particular the outcome of the proceedings. Therefore, even if the Arbitration Act does not say so explicitly, costs are generally allocated in proportion with a party's success in an arbitration, which is a rule also applicable in domestic litigation proceedings.

As for recoverable costs, the Arbitration Act defines these as 'cost necessary for the proceedings', including representation costs and arbitrators' fees. When it comes to representation costs or attorneys' fees, Croatian law does not recognise negotiated fees, but only statutory fees (those regulated by the Tariff on Attorneys' Fees rendered by the Croatian Bar Association).

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

The issue of awarding interest for principal claims and costs is subject to the applicable substantive law the parties have agreed on. The Arbitration Act does not contain any provisions in this regard.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The arbitral tribunal has the power to correct and interpret the award at the party's request. The correction can cover only clerical, typing, arithmetical or other similar errors. Any decision on correction or the interpretation of a certain part of the award shall constitute an integral part of the award.

A party may request the correction or interpretation of the arbitral award within 30 days from its receipt, whereas the tribunal may make the corrections it is authorised to make within 30 days of rendering the award.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

Arbitral awards may only be challenged before the competent court, by filing a claim or motion to set aside the award.

The award may be set aside if the party filing the motion to set aside proves:

- that there was no arbitration agreement or that the agreement was not valid;
- that a party to the proceedings did not have the legal capacity to enter into an arbitration agreement and have legal standing, or that the party was not properly represented;
- that the party filing the motion to set aside was not duly informed of the initiation of arbitration proceedings or was otherwise prevented from participating in the proceedings before the arbitral tribunal;
- that the award pertains to an issue not covered by the arbitration agreement or not included in its provisions, or that the award contains decisions on issues exceeding the scope of the arbitration agreement (if those decisions may be separated from the remainder of the award, only those may be set aside);
- that the constitution of the arbitral tribunal or course of the proceedings were contrary to the Arbitration Act or the parties' agreement in a way that could influence the contents of the award;
- that the award does not contain grounds or signatures as provided by the Arbitration Act; or
- if the court finds, irrespective of a party's allegations, that:
 - the matter is not arbitrable under Croatian law; or
 - the award is against public policy.

If expressly agreed by the parties in the arbitration agreement, the award may be challenged if a party learns of new facts or is able to produce new evidence that would lead to a more favourable outcome for the party concerned had they been presented in the previous proceedings. This applies solely if the party was unable to present these facts or the evidence in previous proceedings for reasons beyond its control.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level?

Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Under Croatian law, there are two levels of appeal, or three levels if the value in dispute exceeds a certain census or if specific preconditions are met.

An arbitral award can be challenged by the motion to set aside, which has to be submitted to the Commercial Court or County Court in Zagreb respectively, depending on the subject matter of the case. Against the first instance decision, an appeal can be submitted to the High Commercial Court of Croatia or the Supreme Court of Croatia, respectively.

At the third level, there is the possibility of judicial review by the Supreme Court of Croatia.

The recent practice of the Croatian Constitutional Court shows that a constitutional action can be also raised under certain conditions. Although it is unclear whether constitutional action may be filed against an arbitral award, the constitutional action may be filed against rulings of commercial courts for a violation of constitutional rights.

The anticipated duration of the first-instance proceedings in the best case scenario can be estimated at one year, and of the second instance approximately three years, even though it should be noted that no precise estimate can be made because of a variety of factors that

influence the duration of the proceedings – availability of the parties, service, applicable law, case load of the judge in question, etc.

The costs of appeal depend on the amount in dispute. The court fees are determined under the Court Fees Act, and the costs of legal representation under the applicable tariff on attorneys' fees rendered by the Croatian Bar Association, and apportioned according to a party's success in the proceedings.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

The request for recognition or enforcement of an arbitral award has to be supported with the original or certified copy of the arbitral award. In case of recognition or enforcement of a foreign arbitral award, the request must also be supported with an original or certified copy of the arbitration agreement. A certified translation into Croatian is also necessary in the case of documents in foreign languages.

In case the proceedings for setting aside the award or suspension of a foreign award have been established before the competent court, when deciding on recognition or enforcement of the award, the court can, if it considers appropriate, adjourn its decision until the termination of the proceedings for setting aside or suspension and may, upon request of the party seeking recognition or enforcement, condition the termination with appropriate security given by the other party.

When deciding on the recognition and enforcement of the award, the procedure for domestic awards differs from the one prescribed for foreign awards.

As regards domestic awards, they need not undergo a separate recognition process. Rather, based on a domestic award, the court is to order enforcement unless it finds that:

- the matter is not arbitrable under Croatian law;
- the award is against public policy; or
- a claim for setting aside the award on these grounds had been previously denied.

A foreign award may be recognised and enforced in Croatia unless:

- the court finds that there are reasons to set aside as prescribed in the Arbitration Act based on the objection of the opposing party (see question 42);
- the court finds that the award is not yet binding on the parties; or
- the court at the place of arbitration or in the country whose law applies to the dispute has set aside the award or delayed its entry into effect.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Foreign awards set aside by the courts at the place of arbitration will not be recognised in Croatia, provided that the opposing party has brought this to the attention of the court.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Neither Croatian arbitration legislation nor Zagreb Rules contain any particular procedural rules regarding the enforcement of orders by emergency arbitrators. Provisions on emergency arbitrators have been entered into the Zagreb Rules only in their latest version, which entered into force on 27 November 2015, so case law on this matter has yet to be produced.

47 Cost of enforcement

What costs are incurred in enforcing awards?

The costs of enforcement of an arbitral award depend on the amount in dispute, the method of enforcement, the necessity for legal representation, etc and generally include court fees, attorneys' fees and enforcement costs.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

In civil and commercial matters, Croatian law practitioners tend to rely mostly on the system set out by the Civil Procedure Act in litigation. Litigation is still the predominant dispute resolution mechanism in Croatia. Therefore, an arbitrator from Croatia might be influenced by the rules of litigation proceedings regarding, for example, oral witness testimonies, production of documents (which is only significant if they have been signed or stamped by the party at fault or supported by such documents), expert witnesses appointed by the court, etc.

A party is not obliged to disclose all the documents it has, and parties will generally disclose only those they rely on. Accordingly, the court or tribunal has no obligation to consider any facts or evidence not presented by the parties. Any and all documents presented have to be disclosed to the other party.

Written statements are not common; witnesses generally have to be heard. Parties or party officers have the right, but not the obligation, to testify.

L A W F I R M
VUKIĆ, JELUŠIĆ, ŠULINA, STANKOVIĆ, JURCAN & JABUKA

Zoran Vukić
Iva Sunko
Ana Pehar

zoran.vukic@vukic-lawfirm.hr
iva.sunko@vukic-lawfirm.hr
ana.pehar@vukic-lawfirm.hr

Nikole Tesle 9/V-VI
51 000 Rijeka
Croatia

Tel: +385 51 211 600
Fax: +385 51 336 884
www.vukic-lawfirm.hr

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

No specific professional or ethical rules apply to counsel in international arbitration, other than those proscribed by law or the Code of Ethics of the Croatian Bar Association.

Best practice in Croatia generally reflects the IBA Guidelines on Party Representation in International Arbitration, except for guidelines pertaining to witnesses and expert witnesses – party representatives are generally not allowed to participate in the preparation of witness and expert witness testimonies, as these are expected to be entirely objective.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

The issue of third-party funding of arbitral claims is still unregulated in Croatia.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Requirements for visas and work permits depend on the arbitrator's and counsel's country of origin.

A foreign attorney can practise in Croatia in one of three ways (with each subsequent option being narrower in scope):

- being admitted to the Croatian Bar under the domestic title 'Odvjetnik';
- being admitted to the Croatian Bar under the title from the country of origin; or
- registering to perform certain activities as an attorney.

If a foreign attorney works in Croatia long enough to be considered a resident (over 183 days in any one year), his or her income is subject to personal income tax (at rates of 12 per cent, 25 per cent and 40 per cent) and depending on the amount, to VAT (if overall income in a year exceeds 220,000 kuna, VAT applies from the following year; salary is not included in the income, this applies solely to independent practitioners).

There should not be any procedural or ethical rules that differ significantly from those in other civil law jurisdictions, but surprises may come in the form of frequent changes in legislation, so the 'rules of the game' may change at some point.

Dominican Republic

Fabiola Medina Garnes

Medina Garrigó Attorneys at Law

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

The Dominican Republic is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It was ratified without declarations or notification and entered into force in 2001 by Congress Resolution 178-01. With the ratification of this Convention, the Dominican state recognises the authority of the arbitration judgments, as well as agreeing to enforce them under the Convention clauses.

Furthermore, our country is party to the Inter American Convention on International Commercial Arbitration (The Panama Convention) ratified and entered into force in 2007 by Congress Resolution 432-07.

Moreover, the country signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (The Washington Convention) on 20 March 2000, but until now it has not been subject to the approval of Congress as established in the Dominican Constitution.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Over the years, the Dominican Republic has entered into 13 bilateral investment treaties (BITs) set out below:

Country	Signed	Entry into force
Spain	16 March 1995	7 October 1996
France	14 January 1999	30 October 2002
China	5 November 1999	27 November 2001
Chile	28 November 2000	8 May 2002
Ecuador	26 June 1998	4 November 2006
Argentina	16 March 2001	N/A
Switzerland	27 January 2004	12 March 2006
Morocco	23 May 2002	4 January 2007
Panama	6 February 2003	18 September 2006
Finland	27 November 2001	21 April 2007
Netherlands	30 March 2006	29 August 2007
Italy	12 June 2006	18 July 2007
Korea	30 June 2006	21 May 2008

In addition, on 5 August 2004 the Dominican Republic signed a trade treaty with the governments of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and the United States (DR-CAFTA). The treaty entered into force on 1 March 2007.

Most recently, on 18 December 2007, the Dominican Republic, along with other Caribbean countries that belong to the Caribbean Community and the European Union (EU), entered into the Economic Partnership Agreement. The treaty aims to substitute the regime of unilateral preferences supplied by the EU to this region as part of a group of countries of the African, Caribbean and Pacific Group of States, with a reciprocal commercial regime, compatible with the norms of the World Trade Organization.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Our primary domestic source of law relating specifically to domestic and foreign arbitral proceedings, and recognition and enforcement of awards, is Law No. 489-08 on Commercial Arbitration of the Dominican Republic of 30 December 2008 (the Commercial Arbitration Law), which revoked articles 1003 to 1028 of the Civil Procedure Code that previously governed domestic arbitration, and became the first legislation to govern international commercial arbitration in the country.

Under article 1 of the Commercial Arbitration Law, arbitration proceedings are considered foreign if:

- the parties, at the moment of entering into the arbitral agreement, have establishments in different states;
- the parties have their domicile outside the Dominican Republic; and
- the place of execution or compliance of a substantial part of the obligations is different from the one where the parties have their domicile.

In addition, Law No. 181-09 that modifies Law No. 50-87 of the Chambers of Commerce, created an institutional procedure for the Dispute Resolution Centre of the Chamber of Commerce and Production of Santo Domingo (CRC).

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The Commercial Arbitration Law is based on the Model Law of Arbitration of the Commission of the United Nations for the International Commercial Law (CNUDMI), with some adjustments to the country's law. Certainly, one of the most important adjustments in the Dominican Law is the implementation of a one-tier system that makes it applicable both domestically and internationally.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The Commercial Arbitration Law is the general legal framework applied to all arbitrations conducted within the territory of the Dominican Republic. According to article 23 of such law, the parties have the freedom to agree on the procedure to be followed by an arbitral tribunal, and in the case of institutional arbitration and if the

regulation of the institution provides a mandatory procedure, this procedure will be applied. In the absence of an agreement, the arbitral tribunal may conduct the arbitration as it considers appropriate, pursuant to the provisions of the Law.

If the Dominican state is the respondent party, there is a special procedure to notify the claim that must be followed by the claimant. Also, due process should be observed faithfully, according to the Dominican Constitution.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The applicable law will always be the one freely chosen by the parties as established in article 33 of the Commercial Arbitration Law. In this sense, the arbitrators shall decide the dispute in accordance with the rules of law chosen in the agreement as applicable to the substance of the dispute.

In the absence of an explicit election made by the parties, the arbitral tribunal shall apply the rules they deem appropriate. In all cases, the arbitral tribunal will decide in accordance with the terms of the contract, taking into account the applicable uses.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The most renowned arbitral institution in the Dominican Republic is the Alternative Dispute Resolution Center of the CRC, created by Law No. 50-87 of the Chambers of Commerce.

The homepage for the CRC is: www.camarasantodomingo.org.do/productos-y-servicios/conciliacion-y-arbitraje/.

The CRC has an official list of arbitrators, with prestigious professionals in different areas. In the absence of agreement between the parties regarding the number of arbitrators, the managing board shall appoint one arbitrator, except when the circumstances require an arbitral tribunal of three or more members.

The parties are free to agree on the language or languages of the arbitration and the place of arbitration. In the absence of agreement, the managing board shall decide depending on the circumstances of the case.

The proceedings of the arbitration shall be governed by the Rules of the CRC. The *lex arbitri* or procedural law of arbitration are those established in the Rules. Parties may choose subsidiary sources of procedural law (such as the IBA's) or the arbitral tribunal may refer to Procedural Civil Law, also as a subsidiary source, when necessary. In accordance with the Complementary Rules of the CRC, the administrative fees and payment of the arbitrators are usually calculated by the managing board based on the amounts in dispute. The administrative fees are revised yearly, also on the basis of the amount in dispute.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

There are only a few subject matters that are not considered arbitrable by article 3 of the Commercial Arbitration Law:

- conflicts related to the civil status of individuals, donations and legacies of nourishment, shelter and clothing, separation between husband and wife, guardianship, minors and interdicted or absent individuals;
- causes related to public policy; and
- generally, all disputes not subject to settlement.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The arbitral agreements are usually established as a contract clause or separate agreement, but the Commercial Arbitration Law is very flexible in its definition of agreement, allowing the validity of an arbitration pact whenever the agreement is contained in a written document

or in an exchange of letters, faxes, telegrams, emails or other means that can provide evidence of the understanding and are accessible for subsequent reference in an electronic, optical or other format.

Also, article 10 of the Commercial Arbitration Law considers there is an arbitral agreement if it is contained in an exchange of statements of claim and defence in the arbitration proceedings, in which the existence of the agreement is alleged by one party and not denied by the other party.

Arbitral tribunals have accepted theories such as 'group of companies', alter ego, related juridical business and others to join a party that has not signed a written clause or agreed to the voluntary intervention of a party that is accepted by all others.

The Commercial Arbitration Law is also flexible in curing formal requirements that may be considered to have been waived by the parties, except in matters related to public policy or formalities that are of the essence of the procedure.

When the arbitration is international, the agreement will be valid and the dispute arbitrable if it meets the requirements of the law chosen by the parties, the legal standards applicable to the merits of the dispute, as well as Dominican law.

Arbitration agreements can be contained in general terms and conditions except in contracts regarding consumer law.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

Any arbitration agreement that is part of a contract shall be considered as an independent agreement. Consequently, the non-existence, or the partial or total annulment of the contract or legal act, does not imply the absence, ineffectiveness or invalidity of this arbitration agreement. The arbitrators may rule on the dispute submitted to its decision, which may be related to faults affecting the contract or legal act containing the arbitration agreement.

Nevertheless, where the complete annulment of the contract is ruled by a final and irrevocable decision by the court, the arbitration agreement will not stand.

Common civil causes of non-enforceability of judgments apply to arbitral awards, such as insolvency, legal incapacity and administrative orders of suspension. In the event of the death of the debtor, awards are enforceable against its patrimonial successors, if any exist.

A very interesting discussion has taken place among experts, both judicial and private, regarding the survival and recognition of an international award declared void by national courts of the site of the arbitration. The issue has not yet been decided by the Supreme Court of Justice.

11 Third parties - bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Based on the principle of relativity of contract established in article 1165 of the Dominican Civil Code, a third party, as it is known under Dominican common law, is not, in principle, bound by an arbitration agreement. However, as explained, the extension of the arbitration clause to non-signatories is admitted, with regard to parties of the transaction or arbitration agreement who did not sign the contract.

12 Third parties - participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The Commercial Arbitration Law does not contain any special provision regarding the extension of the arbitration agreement to non-signatories, or third-party intervention. However, the rules of the CRC establish specific provisions that reflect the CCI practice on the subject.

In accordance with article 9.1 of the rules of the CRC, the arbitral tribunal may, at the request of a party, accept the intervention in the arbitration of one or more third parties, provided that: the third party is part of the arbitration agreement; there are specific demands against this party; and there is a direct and legitimate interest in the outcome

of the arbitration. The arbitral tribunal shall issue a single award or several, with regard to all parties involved in the procedure.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the ‘group of companies’ doctrine?

Arbitration practice in the Dominican Republic, especially the CRC has recognised the use of the ‘group of companies’ doctrine in previous decisions, especially the award granted on 1 December 2006, provided the existence of operations of corporate groups in their overall context and based on different notions, as the piercing of the corporate veil, alter ego or principle of good faith and estoppel, as well as the Graham doctrine and the famous *Thomson v AAA* case, which acknowledges a group of companies as beneficiary of the arbitration agreement. Furthermore, some regulations, such as fiscal, monetary, banking and finance, have regulated the operations of company groups.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The Commercial Arbitration Law doesn’t establish any requirement for a valid multiparty arbitration agreement. However, article 8 of the CRC Rules recognises the validity of a multiparty agreement. If the arbitral tribunal shall be composed by three or more arbitrators, the plaintiffs must jointly designate an arbitrator and the defendants must appoint the second arbitrator, the president of the tribunal will be appointed by the managing board of the CRC.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The Commercial Arbitration Law does not refer to restrictions as to who may act as an arbitrator, including but not limited to the nationality, religion, education or gender of the arbitrators. Nevertheless, the availability and neutrality of the arbitrator shall be taken into consideration. Retired judges may act as arbitrators.

Contractually stipulated requirements for arbitrators based on nationality, religion, education or gender may be recognised by local courts pursuant to the provisions of article 1165 of the Dominican Civil Code. However, if pursued further, they may be declared unconstitutional as a result of article 39 of the country’s Constitution.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

In the absence of agreement between the parties or the arbitrators, the following default mechanisms for the appointment of arbitrators apply:

- In the case of institutional arbitration, the arbitrators shall be appointed pursuant to the rules of the arbitral institution.
- In ad hoc arbitration with one or more arbitrators, at the request of one of the parties, the arbitrators shall be appointed by the first instance court of the place of arbitration under article 9.1 of the Commercial Arbitration Law. When there is no place of arbitration determined, the domicile of one of the defendants will be the place of arbitration. If the defendants do not have a domicile within the Dominican Republic, the plaintiff’s domicile will be the applicable place of arbitration.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

According to the Commercial Arbitration Law, arbitrators can resign, be challenged or be replaced when they are prevented from performing their duties impartially and independently, or if the arbitrator does not comply with the requirements agreed by the parties. The request for replacement or challenge of the arbitrator will be held before the competent court of appeal, unless the arbitrator was appointed by the other arbitrators, in which case there will be an administrative procedure. The resolution for the replacement shall not be appealed.

On the other hand, for the challenge of an arbitrator, the procedure can be established in the arbitration agreement. If the procedure is not mentioned in the agreement, article 17.2 of the Commercial Arbitration Law provides the following dispositions:

- In ad hoc arbitration, the parties are free to agree on a procedure for challenging the arbitrator.
- In the absence of an agreement, a party that intends to challenge an arbitrator shall present in writing to the arbitral tribunal the reasons for the objection, within 15 days after becoming aware of the acceptance of the arbitrator, or becoming aware of any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.

If the challenge does not succeed under the procedure agreed by the parties or the procedure established in the absence of an agreement, the challenging party may rely on the court of appeal of the place of the arbitration. The same procedure should be followed in the case of appointment of a sole arbitrator or challenge of the entire arbitral tribunal.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Pursuant to the provisions of the Commercial Arbitration Law, every arbitrator appointed shall reveal in writing the circumstances that could cast doubt on his or her impartiality or independence. Arbitrators should be neutral, assuring the parties of fair and equitable treatment.

The Commercial Arbitration Law does not mention the standards for remuneration and expenses of the arbitrators. Consequently, it shall be an agreement between the parties and the tribunal to solve this matter.

Regarding the CRC, the Rules established the signature of Terms of Reference, similar to the International Chamber of Commerce (ICC) model, which not only defines the main elements of the arbitration process but is also considered to be a formal agreement between the tribunal and the parties.

The Complementary Rules of the CRC establish that the amount to be paid to each arbitrator, both in the principal claim and the counterclaim, if any, shall never be less than 100,000 Dominican pesos or more than 1 million Dominican pesos, except in exceptional cases by recommendation of the secretary and the treasurer, and approved by the management firm.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The Commercial Arbitration Law does not expressly establish any provision that limits or absolves arbitrators from liability for their conduct in the course of the arbitration, and based on the principle that the author of any wrongful act that causes injury must accept liability, arbitrators may be held liable for their actions. As judges, arbitrators should act in an impartial and independent manner at all times. However,

that is not the case for arbitrators of the ICC or arbitrators of the CRC, because their rules have stated express immunity for their arbitrators.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

The mere existence of an arbitration agreement should be sufficient for the judicial courts to send the dispute to the domain of the arbitrators. Pursuant the procedures established in the Commercial Arbitration Law, a jurisdictional objection regarding the incompetence of the court should be raised not later than the time to present the defence, consequently, the court will have to rule on the objection before deciding on the merits of the case.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Article 20 of the Commercial Arbitration Law establishes the following provisions in case there are disputes over jurisdiction if court proceedings are initiated:

- the arbitral tribunal shall be entitled to decide its own competence, even against the jurisdictional objections related to the existence or validity of the arbitration agreement or any other plea that prevents the tribunal from continuing;
- a jurisdictional objection regarding the incompetence of the arbitral tribunal shall be raised not later than the time to present the defence. A party is not prohibited from raising a jurisdictional objection by the fact that they have appointed an arbitrator or participated in the appointment. A jurisdictional objection that the arbitral tribunal has exceeded its authority shall be raised as soon as the alleged matter arises during the arbitration proceedings; and
- the arbitral tribunal shall rule on a jurisdictional objection before deciding on the merits. The decision of the arbitrators can only be challenge by annulment of the award, if the jurisdictional objection is rejected the action for annulment of the award does not suspend the arbitration.

As the above demonstrates, the Commercial Arbitration Law follows the Kompetenz-Kompetenz principle and considers the arbitrators to be the only judges of their own jurisdiction.

Nevertheless, a party that is sued before the judicial courts and does not raise a jurisdictional objection before discussing the merits or engaging the debates may be precluded from doing it later.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

The parties will have the freedom to decide the place and language of the arbitration. If the place is not established in the agreement, it will be determined by the rules of the arbitral institution or by the arbitrators if it is not an institutional arbitration.

Also, if the language is not determined in the agreement, the arbitrators shall decide. The selected language will be used in all the documents, hearings, awards and communications between the parties or arbitrators. However, for the enforcement of the award in the Dominican jurisdiction the language shall be Spanish.

23 Commencement of arbitration

How are arbitral proceedings initiated?

Unless the parties have agreed otherwise, the date the defendant receives the request to submit the dispute to arbitration is considered the beginning of the proceedings. The Commercial Arbitration

Law establishes the following requirements to begin the arbitration proceedings:

- along with the notice of claim, the plaintiff must propose the name or appoint its arbitrators as applicable;
- starting from the notice of claim, the defendant has a period of 15 days to make its defence, and propose or designate the arbitrators, as applicable. This period may be extended on account of distance, or according to the provisions of common law;
- the appointment of the arbitrators shall be in the 30 days following the notice of claim; and
- the parties shall provide all the documents they deem important or refer to those documents in the content of the claim, as well as mentioning the evidence they are going to provide.

On the other hand, the rules of the CRC establish that the plaintiff shall deposit its claim, and the documents that support it, in the secretary's office. The date of the deposit will be considered as the beginning of the arbitration.

The claim shall contain the following requirements:

- the name and information of the plaintiff and its representatives;
- the name and information of the defendant, and the address where the claim must be notified;
- a description of the nature of the claim and circumstances that instigate it;
- a description of the claims;
- the arbitration agreement; and
- a request for the appointment of arbitrators in accordance with the arbitration agreement.

24 Hearing

Is a hearing required and what rules apply?

Pursuant to the provisions of article 28 of the Commercial Arbitration Law, the parties have the freedom to agree on whether a hearing shall be held and the exhibition of evidence, or whether the proceedings shall be conducted on the basis of documents and other evidences. However, unless the parties have agreed that no hearings will be held, the arbitrators will conduct hearings at the appropriate stage of the proceedings, at the request of one or both parties.

The parties should be notified at least eight days before the hearing and either respond directly or through their representatives, with the required assistance of an attorney.

If the parties have agreed to hold arbitration hearings in the CRC, the arbitral tribunal shall notify the parties of the date, time and place of the hearing. The parties shall attend in person or their duly authorised representative shall attend. The absence of one of the parties does not prevent the conclusion of the hearing.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

In the absence of an agreement between the parties, the arbitrators may decide on the admissibility, relevance, value and utility of evidence, always in compliance with the law. Also, arbitrators may request clarification or information from the parties, as well as any evidence they deem necessary at any stage of the process. Pursuant to article 30 of the Commercial Arbitration Law, the presentation of the evidence will be held in hearings, except in the case of documentary evidence.

In addition, the rules of the International Bar Association (IBA) on the taking of evidence in international arbitration proceedings were adopted on 1 January 2012 by the CRC, complementing the rules that apply to the conduct of the arbitration proceedings.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

The Commercial Arbitration Law limits the intervention of the national courts in the arbitral process to assistance and supervision functions as expressly contained in the law. The arbitral tribunal, or any party with court approval, may request the assistance of a jurisdictional court

for the collecting, presenting and examining of evidence, including attendance of witnesses without holding a hearing at the court.

As aforementioned, the assistance from a court is often requested for the appointment of arbitrators in the absence of an agreement and replacement or challenge of arbitrators, as well as the enforcement of awards and interim measures, as will be discussed later in the chapter.

27 Confidentiality

Is confidentiality ensured?

On the subject of confidentiality, article 22.2 of the Commercial Arbitration Law states that the arbitrators, parties and arbitration institutions are required to maintain the confidentiality of any information acquired through the arbitration proceedings. The parties can, of course, agree otherwise. With the consent of the parties, the information already disclosed can be referred to in subsequent proceedings.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

The parties are allowed to request the courts to order interim measures before or during the arbitral proceedings, such as banking funds seizure or conservatory seizure of assets, designation of a guardian, sale of perishable goods, etc. As established in the Commercial Arbitration Law, if the court orders the measure, the party that requested the measure shall submit its claim for arbitration within 60 days following the date of issuance of the order.

The court may also ask the party requesting an interim measure to provide appropriate collateral.

Interim measures may also be requested after the arbitral tribunal has been created. If the tribunal orders the suspension or termination of the interim measures adopted by the court, the decision of the arbitrators shall prevail.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The Commercial Arbitration Law does not contain any special provision regarding interim measures by an emergency arbitrator prior to the constitution of the arbitral tribunal. As mentioned in question 28, the parties are allowed to request a court to order an interim measure before or during the arbitral proceedings.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

At the request of a party, the arbitral tribunal may order any interim measure it deems necessary. Also, the arbitral tribunal may ask the applicant to provide appropriate collateral. The decisions on interim measures are subject to the rules of annulment and enforcement of awards and for the application of those rules, the intervention of a court will be necessary.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The Commercial Arbitration Law does not expressly establish any provision regarding sanctions against parties or their counsel who use 'guerrilla tactics' or gross violations of the arbitral proceedings. Nonetheless, Dominican counsel will be subject to the Code of Ethics

of the Bar Association of the Dominican Republic in arbitral proceedings in the country.

The CRC Rules state that the tribunal may take inappropriate conduct into consideration when deciding which party will bear the costs of the procedure in order to punish the indiscriminate presentation of incidental issues and other delaying tactics (guerrilla tactics). (Article 38.5 of the CRC Rules of 2011 states that 'The final award shall determine party bearing costs of the procedure, taking into account the decision rendered and the behaviour of the parties during the proceedings'.)

Also, the CRC is currently considering the adoption of the Guidelines of the IBA on Party Representation in International Arbitration. It has already adopted complementary rules in addition to IBA Rules on the taking of evidence in international arbitration proceedings, which could be considered as soft law.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

In arbitration proceedings where there is more than one arbitrator, any decision of the arbitral tribunal shall be made by majority vote, unless otherwise agreed by the parties. If majority is not reached, the decision shall be taken by the president of the tribunal. Also, unless otherwise agreed by the parties or the arbitrators, the president of the arbitral tribunal may decide questions of planning, agenda and timing of the process.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Pursuant to article 36.2 of the Commercial Arbitration Law, arbitrators may express their dissenting opinion in the award. The opinion may not reveal any element of the deliberation process.

When more than one arbitrator is involved in the dispute, the decision of the majority of the members of the tribunal will be sufficient. It will be valid even if only the majority sign, provided that the award expresses the reason for the lack of one or more signatures.

34 Form and content requirements

What form and content requirements exist for an award?

An award should be in writing and signed by the arbitrators who, as established in question 33, can express their dissenting vote. The award shall be determined by the arbitral tribunal, unless the parties have agreed otherwise. Also, the award shall establish the date of the decision and the place of arbitration. Subject to what the parties may have agreed, the award may also include arbitration costs, including professional fees and expenses of the arbitrators and attorneys representing the parties, as well as the administrative cost of the institution, and other expenses related to the proceedings.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The Commercial Arbitration Law does not state a time limit for the award to be rendered. On the other hand, article 32 of the Rules of the CRC establishes that arbitrators shall present a draft of the award to the Secretary's Office within 30 days of concluding debates. However, this deadline may be extended for a justified cause with prior approval from the managing firm. The arbitrators may shorten the time for delivery of the award in the case of interim measures, partial awards, awards on competence of the tribunal or any other decision on part of the litigation.

36 Date of award**For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?**

The relevant date for the commencement of any applicable time limit for the correction or challenge of an award shall be the date the parties have been given proper notice of the award. In accordance with the Commercial Arbitration Law, the parties shall be notified of the award within five days of the decision.

37 Types of awards**What types of awards are possible and what types of relief may the arbitral tribunal grant?**

The arbitrators shall resolve the dispute with one award or as many partial awards as the arbitral tribunal deems necessary. As mentioned before, there can be awards for interim measures in the development of the proceedings as well as partial awards that refer to the settlement of the dispute, jurisdiction, bifurcation of liability and damages, and others. Procedural orders may also be adopted by the tribunal.

38 Termination of proceedings**By what other means than an award can proceedings be terminated?**

Pursuant to article 35 of the Commercial Arbitration Law, the dispute can be terminated as follows:

- the claimant withdraws his or her claim, unless the respondent objects and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute;
- the parties agree to terminate the proceedings; and
- the tribunal finds that the continuation of the proceedings would be unnecessary or impossible.

In case of settlement, the parties shall notify the agreement to the tribunal and if the tribunal does not object, it will record the settlement in the form of an award.

39 Cost allocation and recovery**How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?**

Subject to what the parties have agreed, arbitrators may state the costs of arbitration in the award, including the fees and expenses of the arbitrators and, if applicable, the fees and expenses of the attorneys representing the parties, the cost of the service provided by the institution managing the arbitration and other expenses incurred and admitted in the arbitration.

40 Interest**May interest be awarded for principal claims and for costs and at what rate?**

Arbitrators are allowed to decide on the interests, costs and fees of the dispute. Since elimination of the statute of legal fees, arbitral tribunals may accord reasonable interests responding to market circumstances. Regarding costs, the general practice is to condemn the party that succumbs, but arbitrators can allocate fees and costs between parties according to the results of the award and, as previously explained, even take into consideration the parties' conduct during the proceedings.

Proceedings subsequent to issuance of award**41 Interpretation and correction of awards****Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?**

Unless the parties have agreed otherwise, within 10 days of the notice of the award, either party will be able to request the correction of the award regarding a miscalculation, typographic error or any error of that kind, or the clarification of a part of the award, or the issuance of

an additional award with regard to claims made and unresolved in the first award.

Also, within the 10 days following the date of the award, arbitrators may ex officio correct errors of the nature outlined above.

42 Challenge of awards**How and on what grounds can awards be challenged and set aside?**

Awards can be challenged on the following bases:

- a party of the arbitration was affected by some incapacity or the agreement is not valid under the law to which the parties have subjected it or under domestic law;
- there has been disregard for the rules of the proceeding that results in a violation of the rights of defence of a party;
- the award deals with a dispute not contemplated in the agreement or decisions that exceed the matters of the arbitration agreement. Nevertheless, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award may be set aside;
- 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 law which the parties cannot derogate, or, failing such agreement, was not in accordance with the law;
- the matter of the dispute is not arbitrable under the laws of the Dominican Republic; and
- the award is in conflict with public policy of the Dominican Republic.

43 Levels of appeal**How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?**

In accordance with article 39.1 of the Commercial Arbitration Law, arbitral awards are not subject to appeal in the Dominican Republic. They can be annulled, which has a different nature from an appeal in Dominican law, since it is a new and principal instance and is limited to very specific causes, which are almost exactly the same criteria as are applicable when refusing to acknowledge a foreign award.

The action for annulment of an award shall be requested within the month of its notice. In cases when a correction or interpretation of the award has been requested, the time limit begins after the notice of that request.

As previously stated, arbitrators establish the costs of the awards, including the fees and expenses of the arbitrators, attorneys or representatives, the cost of the service provided by the institution managing the arbitration and other expenses incurred in the arbitration. In general, the party that succumbs is condemned to pay such costs, but arbitrators can also allocate fees and costs between parties in accordance to the arbitration agreement.

44 Recognition and enforcement**What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?**

The recognition and enforcement of a domestic award shall be granted by the court of first instance of the place of the arbitration. The party seeking to obtain an exequatur for the enforcement of an award must present an original of the award and the arbitration agreement, or contract that contains the agreement. The award submitted shall be enforced under the rules of domestic law and within the limits of applicable international conventions.

The requirements of the Commercial Arbitration Law are the same as the New York Convention. According to The Commercial Arbitration Law and the International Private Law of the Dominican Republic, foreign awards may be enforced through an authorisation or exequatur rendered by the Civil and Commercial Chamber of the Court of First Instance of the National District.

Update and trends

Recently, the Dominican Olympic Committee and the Major League Baseball signed an agreement with the Alternative Dispute Resolution Centre of the Chamber of Commerce and Production of Santo Domingo (CRC), so that this institution can serve as a venue for national or international disputes of associations, institutions or sports federations.

The following are some of the main decisions in the field of international investment arbitration to which the Dominican Republic was a party:

- *Société Générale in relation to DR Energy Holdings Ltd and Empresa Distribuidora de Electricidad del Este, SA v Dominican Republic* (LCIA Case No. UN7927): On 15 March 2007, the Dominican state was sued by Société Générale, according to the BIT signed between Dominican Republic and France in 1999;
- *TCW Group, Inc and Dominican Energy Holdings, LP v Dominican Republic* (CPA Case TD-DR): Notified on 21 December 2007, this was the first submission to arbitration under Chapter 10 of DR-CAFTA;
- *Empresa Distribuidora de Electricidad del Este, SA, v Corporación Dominicana de Empresas Eléctricas Estatales* (CCI Case No.15749/JFR): This was submitted at the International Chamber of

Commerce (ICC) on 9 November 2007 and supported by the alleged violation of a series of basic agreements between the parties involved;

- *Elsamex Internacional, SL v Dominican Republic*: This was submitted on 12 August 2008, for alleged violations to the BIT between Spain and Dominican Republic, and resolved under the arbitration rules of the CNUDMI;
- *Centro de Negocios del Atlántico, SA, Grupo Elpidio Sánchez Marcos, SA, Emerging y Decaulion, SL v Dominican Republic*: Based in alleged violations of the BIT subscribed between Spain and Dominican Republic, this was submitted on 25 June 2008 and based on the arbitration rules of the CNUDMI;
- *Concesionaria Dominicana de Autopistas y Carreteras, SA (CODACSA) v Dominican Republic*: This was submitted on 23 June 2008 and based on ICC procedure; and
- *Corona Materials, LLC v Dominican Republic* (ICSID Case No. ARB (AF)/14/3): Submitted on 30 July 2014, this was based on the ownership of an exploitation concession for the Joama area in the Dominican Republic. This case was decided in favour of the Dominican state in 2016.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Courts are not unanimous in this matter. The issue has not yet been decided by the Supreme Court of Justice, but it is worthy to note that the Dominican courts follow French jurisprudence in many cases, since the Civil Code is Napoleonic.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

As mentioned previously, the Commercial Arbitration Law and the rules of the domestic arbitration institutions contain provisions that establish the faculty of parties to request orders and interim measures by the judicial courts before the arbitral proceedings. The foreign sentences resulting from these procedures can be enforced in the Dominican Republic, after obtaining due recognition and an exequatur in Dominican courts. The same is also true for interim measures ordered by the arbitral tribunal.

Despite the fact that the role of an emergency arbitrator is not expressly established in Dominican law and the rules of domestic institutions (unless otherwise agreed by the parties), it is generally perceived that the appointment of such a figure can be considered as an interim measure ordered by the arbitral tribunal or the ordinary courts in their role of judiciary assistance.

47 Cost of enforcement

What costs are incurred in enforcing awards?

Awards are not subject to any fees or taxes, other than the cost of the registry of the decision.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

In the absence of an agreement between the parties, arbitrators may rule on the value, admissibility and relevance of the evidence. Arbitrators may request any evidence they deem necessary at any stage of the process. However, as the Commercial Arbitration Law establishes, the courts may assist in obtaining evidence when necessary (eg, in the disclosure of documents). Currently, US-style discovery is not a tendency; rather, the great majority of tribunals are inclined

towards the production of documents, according to the principle *actori incumbit probatio*.

For the production of written or oral witness statements, it is necessary to consider the rules established in the Dominican Civil Procedure Code, which is a subsidiary source in arbitration. In judicial courts, the people that will be heard as witnesses will be sworn to tell the truth, those that are heard unsworn, as in arbitration, shall be informed of their obligation to always tell the truth. The statements shall be recorded in transcripts that shall be signed by the witness.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

In general, Dominican lawyers are subject to the Code of Ethics of the Bar Association of the Dominican Republic. The Code of Ethics for Arbitrators, Mediators and Conciliators also governs the conduct of counsels in arbitral proceedings being held in the CRC.

The rules that govern the conduct of counsel in the Dominican Republic may also apply to counsel from other countries in arbitral proceedings that take place in the Dominican Republic, when they are reputed to have a public policy nature.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

The Commercial Arbitration Law does not have restrictions as to third-party funding of arbitral claims. Nevertheless, the Code of Ethics of the CRC states that arbitrators bear a great responsibility that includes ethical obligations. For such purpose, arbitrators, mediators and conciliators and the parties involved shall have certain standards of ethical behaviour as a guide. In this regard, the code sets four guiding principles for the conduct of the arbitrator: neutrality, confidentiality, impartiality and independence.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Arbitration is not considered to be subject to Law No. 91-83 that creates the Bar Association of the Dominican Republic. Also, pursuant to DR-CAFTA, a foreign lawyer who is not a member of the Dominican Bar Association can provide legal assistance in foreign law.

There is no specific rule that prevents a foreign lawyer from assisting a client as a consultant at an international arbitration taking place in

the Dominican Republic. In addition, nothing prohibits a foreign arbitrator from being part of an arbitral tribunal in the Dominican Republic.

Visa requirements are listed on the website of the Ministry of Foreign Relations. Local taxes will apply. As stated in question 49, Dominican lawyers are subject to the Code of Ethics of the Bar Association of the Dominican Republic. On the other hand, in arbitral proceedings of the CRC, counsel are subject to the Code of Ethics for Arbitrators, Mediators and Conciliators.

**MEDINA
GARRIGÓ** | ABOGADOS

Fabiola Medina Garnes

fmedina@mga.com.do

Ave Gustavo M Ricart No 102
Edificio Corporativo 20/10, Suite 904
Piantini, Santo Domingo
Dominican Republic

Tel: +1 809 683 4422
Fax: +1 809 547 5122
www.mga.com.do

Ecuador

Rodrigo Jijón Letort, Juan Manuel Marchán, Juan Francisco González and Javier Jaramillo
Pérez Bustamante & Ponce

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Ecuador is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, in force since 3 April 1962. Ecuador has not made any declarations or notifications under articles I, X or XI of the Convention.

According to Ecuador's legal system, international law is subordinated to the Constitution and prevails over and above any other domestic laws, except in respect of human rights where international instruments may prevail over the Constitution if they stipulate more favourable rights to persons.

Other multilateral conventions on the subject to which Ecuador is party are: the 1928 Havana Convention on Private International Law, the 1966 International Convention on Settlement of Investment Disputes between States and Nationals of other States (the Washington Convention) (denounced in 2009), the 1975 Inter-American Convention on International Commercial Arbitration (the Panama Convention), and the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Ecuador is party to bilateral investment treaties (BITs) with the following countries: Argentina, Bolivia, Canada, Chile, China, France, Germany, Italy, the Netherlands, Peru, Spain, Switzerland, Sweden, the United Kingdom, the United States and Venezuela.

Although Ecuador has not formally withdrawn from the BITs signed with Costa Rica, Cuba, Egypt, El Salvador, Finland, Guatemala, Honduras, Nicaragua, Paraguay, Dominican Republic, Romania, Russia and Uruguay, most of them have been declared unconstitutional by the Constitutional Court. This declaration was issued mainly because the BITs provide for international investor-state arbitration, 'disregarding' the jurisdiction of domestic courts and tribunals. It should also be stated that the remaining BITs are under observation by the National Congress in order to resolve whether or not to denounce these treaties.

We believe that an arbitral tribunal could be validly constituted under these BITs (it should be kept in mind that Ecuador is not a party to the ICSID) but, especially in Ecuador, enforcement of the award could face some challenges on grounds of public policy for the above-mentioned reasons.

On 6 May 2013, the Ecuadorian President issued Executive Decree 1506 by which the Commission for the Citizens' Integral Audit of Treaties on Reciprocal Protection of Investments and of the International Arbitration System on the Subject of Investments (CAITISA) was created. CAITISA's objectives are to examine and

evaluate the execution and negotiation process of BITs and other agreements on investment signed by Ecuador, as well as the consequences of their application, the content and compatibility of those treaties with Ecuadorian legislation, the validity and appropriateness of the actions and proceedings adopted and of the awards and decisions issued by the entities and jurisdictions that are part of the international arbitral system on the subject of investments that have taken cognisance of arbitral proceedings against Ecuador. Furthermore, CAITISA will be able to determine the legality, legitimacy and fairness of the decisions and to identify inconsistencies and irregularities that have caused or may have effects on the Ecuadorian state in economic, social and environmental matters. In order to complete its tasks, CAITISA will have an eight-month period (extendable for an additional eight months) and broad access to 'the entire content of instruments for treatment of foreign investment and dispute resolution on the matter'. All public institutions are obliged to provide CAITISA with the information it requests. To date, CAITISA has not issued a formal declaration on any matter. CAITISA will issue its report in December 2014.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The main source of law is the Arbitration and Mediation Law of 1997 (AML). The AML proposes a dualist regime comprised of rules governing local arbitration in detail and a few, albeit determinant, rules on international arbitration. Pursuant to the AML, the Code of Civil Procedure (CCP), the Organic Code for the Judiciary (OCJ) and the Civil Code are also applicable to arbitration, absent an AML's applicable provision and provided that the parties agree to resolve their dispute in law.

With regard to international arbitration, article 42 of the AML categorically provides the following:

International arbitration shall be regulated by treaties, conventions, protocols and other acts of international law signed and ratified by Ecuador. Every natural or juridical person, public or private with no restrictions whatsoever is at liberty, directly or by reference to an arbitration regulation, to stipulate everything concerning the arbitration proceeding, including its establishment, discussions, language, applicable legislation, jurisdiction and seat of the arbitration panel, which may be in Ecuador or in a foreign country.

This provision sets forth the principle of pre-eminence of free will in matters of international arbitration on the basis of which everything relating to the arbitration proceeding can be freely agreed by the parties resulting in important consequences, for example:

- the parties can select the rules that will conduct the process, either ad hoc arbitration or regulated arbitration. In principle, the procedural rules for international arbitration chosen by the parties are valid unless they clash with local law or infringe legal provisions pertaining to the public policy (which is not clearly defined in Ecuador). Despite this lack of definition, we consider that provisions such as those relating to the due process, to be specified further, would be included in this category;

- the AML provisions for local arbitration proceedings are not necessarily applicable to international arbitration;
- Ecuador does not have a specific law for international arbitration; and
- substantive non-procedural provisions in the AML could be important and applicable to international arbitration in certain circumstances.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The AML took some of the legal provisions of the UNCITRAL Model Law, such as granting arbitrators with enough powers to enforce provisional measures, granting awards and, in general, in establishing the procedural rules of arbitration. However, there are several differences, such as the management of the arbitral proceedings, in establishing the rules for the annulment of arbitral awards, and the recognition and enforcement of international arbitration awards.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

In general, AML provisions are dispositive in nature. Mandatory provisions are the exception. For example:

- in cases where the state submits a controversy to arbitration, the arbitration agreement must be approved by the Attorney General; and
- arbitration proceedings against the state cannot be decided *ex aequo et bono*.

Other default provisions apply in cases where parties have not agreed on a certain topic. For example:

- absent a provision in the contrary the arbitral tribunal will decide the case *ex aequo et bono*; and
- absent a provision in the contrary the proceedings will not be confidential.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The parties are free to decide on the substantive law that will be applicable to their contracts and disputes. In arbitration where the Ecuadorian state is a party, any submission to foreign law must be authorised by the state's attorney general.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The most prominent arbitration institutions in Ecuador are:

- the Arbitration and Mediation Centre of the Quito Chamber of Commerce;
- the Arbitration and Mediation Centre of the Ecuadorian American Chamber of Commerce; and
- the Arbitration and Conciliation Centre of the Guayaquil Chamber of Commerce.

All these arbitral institutions have rules of procedure that are very similar to each other and there are no special particularities to note. These institutions are private and handle most of the disputes solved by arbitration or mediation.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

In Ecuador, there are certain types of disputes that are not arbitrable. According to our Constitution, the AML, and the Civil Code,

arbitrability is possible for disputes related to matters in which compromises or settlements can be reached.

The Civil Code specifies what types of disputes are not arbitrable:

- criminal matters;
- marital status of persons;
- the right to receive alimonies (unless judicial approval is granted);
- third-party rights; and
- matters that have already been resolved in a final judgment.

In the context of investment arbitration, the Republic of Ecuador argues that there are other matters that cannot be resolved by arbitration such as taxation matters.

Other bodies of law that grant arbitrability are:

- the Intellectual Property Law, which states that disputes regarding intellectual property rights are arbitrable;
- the General Insurance Law, which grants arbitrability to insurance matters;
- the Modernisation Law of the State, which states that matters dealing with commercial issues may be resolved 'by national or international arbitration, as established in the respective contract and pursuant to the laws in force'; and
- the Stock Market Law, which provides that any dispute 'between stock market participants relating to the laws and obligations deriving from this law may be submitted to arbitration in accordance with the Arbitration and Mediation Law and applicable regulations'.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Article 5 of the AML defines the arbitration agreement as 'a written agreement whereby the parties decide to submit to arbitration all disputes or certain disputes arising or that may arise between them in respect of a given juridical relationship – contractual or non-contractual'. Thus, it makes a differentiation between a clause relating to the parties' submission to arbitration (*clause compromissoire*) and an arbitration commitment (*compromis*), both having the same legal value and effects.

Among the requirements for the validity of an arbitration agreement, it must be stated in writing. This includes not only formal contracts but also agreements 'resulting from an exchange of letters or other written communications evidencing the parties' will to submit to arbitration'. The lawmaker's intention was to record the parties' unequivocal desire to resort to arbitration, no matter if their consent is expressed in one act or in several simultaneous or consecutive acts.

In the case of a *compromis*, article 6 of the AML requires that it must be made 'in a document stating the name of the parties and an unequivocal definition of the legal transaction to which it refers'.

When the dispute involves civil indemnities for felonies or unintentional tort, that is, for extra-contractual liability, 'the arbitration agreement must refer to the facts with which the arbitration will deal.'

If the arbitration agreement is within the context of public contracting (where a public entity participates or if entered into with an entity governed by private law where the state has some participation in order to 'purchase or lease goods, perform works and provide services, including consultancy'), the Constitution, the AML, the Law on Public Contracting and the Organic Law for the Office of the Attorney General of the State set forth the following additional requirements for local and international arbitration:

- the 'favourable opinion of Attorney General of the State';
- the 'express authorisation of the highest authority of the respective institution';
- the agreement must refer to a juridical relationship of contractual character, extra-contractual matters are not arbitrable;
- it must state how arbitrators are to be selected; and
- it must be executed by 'a person authorised to contract on behalf of the institution'.

It should be noted that, according to article 4 of the AML, 'failure to comply with the requirements set forth above shall bring about nullity of the arbitration agreement'.

With the above requirements in context, it is possible to evidence that Ecuador's body of laws still has misgivings about arbitration in matters involving public contracting.

The arbitration agreement does not need to be inserted in the main contract. Reference thereto, or to specific events and circumstances is sufficient to have a valid arbitration agreement.

The AML expressly recognises the severability principle. As a result, the arbitration agreement will be valid and enforceable even if the contract is void. The arbitration system avails the principle of competence-competence and the principle that in case of doubt, arbitration as an agreed-upon dispute settlement mechanism will be honoured. It is also worth keeping in mind that if the arbitral agreement is contested before the court system, the otherwise competent judge will have to summarily decide on the existence (not its validity, sufficiency or enforceability applying the negative consequence of the competence-competence principle), of the arbitration agreement as failure to do so could result in nullity of the entire case before that court. If the judge decides on the existence of the arbitral agreement favourably, he or she must dismiss the claim in its entirety.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement is not enforceable in the following circumstances:

- in general terms, if the clause is considered 'pathological' (meaning that it does not contain the express and unequivocal will of the parties to submit the dispute to arbitration, if its vagueness renders it unenforceable or if it does not allow a tribunal to find that it has jurisdiction over a certain dispute);
- when the clause is not stated in writing;
- in consumer claims, when arbitration is not expressly ratified by the consumer;
- in contracts with public entities if the Attorney General has not approved the arbitration clause, or if the arbitrator selection method is not stated;
- when the arbitration agreement is deemed 'waived' by the parties (eg, when the respondent is sued before the court system and he or she does not contest the court's jurisdiction on the grounds of the arbitration agreement); and
- when the dispute or the matter of the arbitration is not considered arbitrable and negotiable by law.

11 Third parties - bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Ecuadorian law does not regulate the cases in which third parties or non-signatories will be bound by an arbitration agreement. To determine when third parties could be bound by an arbitration agreement other laws must be referred to, such as the Civil Code, the Insurance Law and other laws that regulate legal or mandatory assignment of rights under contracts.

12 Third parties - participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

There is no reference regarding third-party participation in Ecuador's arbitration legislation.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

This matter is not expressly covered in Ecuadorian legislation.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The AML does not regulate multiparty arbitration agreements; nor does any other Ecuadorian law.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Article 3 of the AML states that 'if the award is to be issued on the basis of equity [...] the arbitrators do not have to be lawyers necessarily. If the award is to be issued on the basis of law, then the arbitrators [...] must be lawyers'. Consequently, when the AML is applicable in international arbitration it is necessary to comply with this professional requirement in the case of arbitration at law.

Active judges are not allowed to act as arbitrators and arbitrators need to be either selected from a list or appointed by the parties.

Aside from those mentioned, there are no other requirements in order to appoint arbitrations, including those based on nationality, religion or gender.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

When the parties have not agreed on the arbitration selection method, the arbitrators will be selected from a list (of all arbitrators who are members of the particular centre where the arbitration is taking place) following a ballot procedure. Each arbitration institution has its own list of qualified individuals who are able to act as arbitrators in local or international arbitral proceedings. There is no court involvement for the appointment of arbitration panels.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

The AML contains a specific procedure for the removal of arbitrators if they fall into the inabilities or causes stated in the general civil procedure. For administered arbitration, the director of the arbitration institution must resolve this request. In ad hoc arbitration, the request must be resolved by the other members of the tribunal or by the director of the closest arbitration institution in the domicile of the plaintiff. The reasons or causes are provided for in the CCP. In most cases, these causes are conflict of interest and biased arbitrators.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Arbitrators have duties and responsibilities derived from their appointment under law. Arbitrators have a mandate granted by the parties by which they must resolve the dispute under the specific instructions granted by the parties. Article 18 of the AML states the following.

Once the arbitrators accept their position as such, they have the unrestricted obligation to comply with the functions established in this Law and shall be held liable to the parties if failing to comply with such obligations for any damages caused by their action or inaction, unless a justified impediment exists.

Compliance with such obligation, pursuant to the law, at a minimum level include the following specific obligations:

- to adjudicate the dispute in a binding and definitive manner;
- to resolve the dispute strictly following the applicable principles and rules;
- to conduct the proceedings in an impartial, independent and diligent manner;
- to observe the guarantees of due process;
- to complete the arbitrator's task until the arbitral award is issued unless there are justified reasons to discontinue the task pursuant to applicable principles and rules; and
- to ensure that the award can be recognised and enforced in the respective jurisdiction.

As mentioned in article 18 of the AML, the arbitration mandate is a source of civil liability in relation to the parties to a dispute. Therefore, the parties are entitled to request indemnity for damages generated by an eventual breach of the arbitrator's obligations.

Duty of revealing ineligibilities

As a consequence of the duties of impartiality and independence mentioned above, an arbitrator is compelled to reveal if '[...] he is included in [any] ineligibility to perform his task' so he may be replaced. Article 19 of the AML makes reference to circumstances occurring after the arbitrator's appointment because the obligation of disclosure continues during the proceeding.

Duty of rejecting procedural events that may delay the proceeding

The arbitrator has a duty and the power to reject 'any incidents (procedural delays) generated by the parties to delay the proceeding or to hinder any actions'.

Power to request evidence at all times

Article 23 of the AML grants the arbitrators the power to request any kind of evidence deemed relevant in order to clarify the events prior to issuing the arbitral award, whether requested by the parties or decided ex officio. Because of its usefulness, the power of requesting further evidence to better decide is used repeatedly by arbitrators and parties in Ecuador. In some cases this may result in abuse by the parties.

Power to order precautionary measures

The AML gives the arbitrators to power to order precautionary measures as deemed necessary in an arbitration proceeding. There is reference made to this power in further detail below.

All the arbitrators, including party-appointed arbitrators, have the same obligations in regard to independence, impartiality and the obligation to comply with the parties' mandate.

In administered arbitration, the arbitrators' remunerations and expenses are decided by the arbitration institution according to a table based on the amount in dispute.

In ad hoc arbitration, the parties and the arbitrators must find and agreement in regard to remuneration and expenses.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators are subject to the general rules of liability that apply to judges under the CCP. Under the law, arbitrators are not immune from liability for their conduct in the course of the arbitration.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

A valid arbitration agreement is also a source of obligations of non-action that apply to the parties and to the local judicial system. Article 7 of the AML states that a party are 'not to submit the case to the ordinary justice' and also requires for judges to 'abstain from handling any claim dealing about juridical relations' that are the subject matter of the arbitration agreement, 'save in the cases of exception established

in this Law'. This rule even characterises the favor arbitralis principle, whereby, if in doubt about the existence of an arbitration agreement or of the will of the parties 'the respective judiciary shall favour that any controversies should be resolved in arbitration.'

Under article 8 of the AML, when a party files a lawsuit in violation of an arbitral agreement, the defendant must file an answer to the claim and argue that there is a binding arbitral agreement. Such an argument will have to be resolved by the court as a threshold matter, which will require both parties to submit evidence about the existence (not its validity, sufficiency or enforceability applying the negative consequence of the competence-competence principle) of the arbitral agreement without dealing with the merits of the case. If the court concludes that the arbitral agreement is valid, the case will be closed in the judiciary and the dispute will be resolved in arbitration.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The competence-competence principle is clearly set out in the AML. According to article 22, one of the first actions of the arbitration panel during the first hearing is to decide on 'its own competence' to handle the case.

In *Latin American Telecom Inc v Pacifictel SA*, the National Court of Justice ratified this principle and declared that 'only the arbitration panel is competent to decide about its competence on the matter submitted for resolution.' The respondent party can object to the tribunal's jurisdiction on its written response to the claim.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Pursuant to article 36 of the AML, local arbitration proceedings must be held in Spanish. For international arbitration proceedings can be held in the language agreed upon by the parties as long as it is considered an 'international arbitration' under article 41 of the AML.

Regarding the place of the proceedings, local arbitral proceedings need to be seated in the domicile of the arbitral institution that administers the case. In the case of international arbitration, the rules selected by the parties will determine the place of arbitration.

23 Commencement of arbitration

How are arbitral proceedings initiated?

The AML provides that the arbitration proceeding begins with the submission of the arbitral claim, which must be signed by the plaintiff or his or her representative and a registered attorney. One particular aspect of Ecuadorian law regarding arbitration proceedings is that all evidence that known to exist at the time the claim is filed must be included in the claim. If further evidence is found a later moment, the tribunal may exceptionally allow the parties to submit such evidence.

For the submission of the arbitral claim in administered arbitration, a fee must be paid to the arbitral institution. The amount to be paid in fees depends on the quantum of the dispute.

24 Hearing

Is a hearing required and what rules apply?

Local arbitration proceedings require three hearings. In the first hearing the arbitrators decide on their jurisdiction to hear and resolve the dispute and determine the execution or rejection of evidentiary requests made by the parties. After the evidence term has been completed, the parties may request a second hearing in which they will make their final arguments.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The rules of evidence in arbitration are the general rules of evidence that are stated in the Code of Civil Procedure and also in the arbitration rules of each arbitral institution. There are no specific rules regarding witnesses, experts or production of documents. However, local arbitral tribunals are usually very keen on accepting broad international arbitration standards.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

According to Ecuadorian law, the courts do not intervene or assist the tribunal during the normal course of arbitral proceedings. However, it is possible that arbitral tribunals may require the assistance of judges and courts to enforce precautionary measures in arbitral proceedings. The AML states that when competence is not granted to arbitral tribunals to issue provisional measures, parties may request courts to grant provisional measures at any stage.

27 Confidentiality

Is confidentiality ensured?

According to the provisions of article 76(7)(d) of the Constitution and article 34 of the AML, arbitration proceedings are public, unless the arbitration agreement states otherwise. Therefore, if the parties wish to have a confidential proceeding, the arbitration agreement must state so.

Interim measures and sanctioning powers**28 Interim measures by the courts**

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Courts can order interim measures before arbitral tribunals are appointed or in arbitral proceedings where the parties do not expressly authorise the arbitrators to enforce the requested precautionary measures. Tribunals have held that appealing to courts for interim relief does not constitute a waiver of the agreement to arbitrate.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The AML does not regulate or provide for an emergency arbitrator prior to the constitution of the arbitral tribunal for local arbitration proceedings.

For international arbitration proceedings, the AML allows for emergency arbitrators if the applicable arbitration rules allow for such situation.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The AML gives broad powers to the arbitrators to order and to enforce precautionary measures in an arbitration proceeding. Article 9 of the AML allows the arbitrators to order interim measures 'pursuant to the rules of the Code of Civil Procedure or those deemed necessary for each case' which means that arbitrators are not limited to the interim measures listed in the CCP. Interim measures can be issued 'secure the goods that are the subject matter of the proceeding or to guarantee its results'. Arbitral Tribunals may request the assistance of judges and court official for the application of interim measures in order to secure compliance of such measures. This possibility was included because, in

Ecuador, arbitrators lack imperium to enforce the parties or third parties to comply with such measures.

A relevant precedent in international arbitration, in *City Oriente Limited v Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (Petroecuador)* after the ICSID arbitral tribunal issued a provisional measures order by which all local judicial proceedings and actions involving City Oriente Limited employees and officials had to be stopped. The National Court of Justice stated that since the ICSID resolution meant a legal obstacle for local judicial actions, the prosecutor should have not initiated the local evidentiary proceeding until the order was lifted, and consequently order the annulment of all local judicial actions issued after the provisional measures order.

Arbitral tribunals can request bonds from the parties to guarantee the appropriateness of the measures requested or to suspend their effects, as deemed necessary.

Regarding securities for costs, article 9 of the AML states that an arbitration tribunal may, at its own discretion, require a party to provide securities in order to cover the execution of the measure or in order to mitigate the damages that the measure may cause where the award recognises the right in favour of the non-requesting party. Also according to article 9 of the AML, the non-requesting party may file a motion requesting the tribunal not to grant the measure, in which case the non-requesting party has to provide enough funds or securities to mitigate the damages that may cause the plaintiff not having a measure.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

According to the AML, arbitrators have the power to order sanctions against parties that do not cooperate with the arbitration proceeding. The OCJ determines that arbitrations have the same powers as judges which means that where a party is using guerrilla tactics such party may be sanctioned in the award to pay all expenses of the arbitration. This sanction will apply against any party who has litigated in bad faith.

With regard to counsel that use guerrilla tactics, the arbitral tribunals may report the attorney to the local bar association in order to commence a misconduct and ethics violation inquiry.

Awards**32 Decisions by the arbitral tribunal**

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

According to article 26 of the AML, the decisions of the tribunal must be taken by a majority of its votes. No unanimous decision is required. An arbitrator who has a dissenting opinion may write his or her own opinion. There are no consequences for the arbitrator's dissent.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

The AML states that awards will be rendered by the majority of members of the tribunal, and in the case of a dissent the dissenting arbitrator will prepare a separate reasoning that will be deemed as part of the award (which is not enforceable).

34 Form and content requirements

What form and content requirements exist for an award?

The AML only deals with final awards. The Ecuadorian legal framework does not have specific provisions for partial or non-final awards that are customary in international arbitration.

In regard to the requirements that must be observed when the final award is issued, articles 26 to 29 of the AML mention the following:

- that it must be issued by the majority of the arbitral tribunal;
- that it must be signed by all the arbitrators;
- that it must be properly reasoned and supported; and
- that it must be read to the parties in a hearing.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

Article 25 of the AML states that the arbitral tribunal 'shall be allowed a maximum 150-day period to issue the award' starting from the date of the first hearing and that it may order an additional 150-day period 'in strictly necessary cases [...] whether by specific agreement of the parties or because the panel declares it *ex officio*'.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

According to the law, the decisive date is the date of delivery of the award. From this date parties have three days to request clarifications or expansion of the award and 10 days to request the annulment of the award. The rules of local arbitration institutions do not set specific time limits for rendering the arbitral award.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The AML has specific provisions for final awards only. The types of relief that can be granted in a final award are ample and depend on the request of relief made by the claimant as long as it is legally possible. Common types of relief include the order to comply with contractual obligations and the termination of the contract. In both cases, the parties may also request as relief the indemnification of damages.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

The proceedings may end by settlement of the dispute or when the claimant ceases to pursue the claim in which case the proceeding will be filed. A decision of lack of jurisdiction reached by the tribunal may also terminate the proceeding without officially involving an award.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

If the arbitral agreement does not state otherwise, in the final award the arbitral tribunal has the power to allocate the costs to one specific party.

Usually, arbitration costs will be allocated to the party that has litigated in bad faith.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

If the award includes a monetary obligation, post-award interest accrues until the sum is paid to the winning party. The award needs to establish the date from which the interest runs and in the enforcement proceedings the judge will make a liquidation of interest at the 'legal rate' (published on a monthly basis by the Central Bank of Ecuador), until payment is made.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Article 30 of the AML, considered jointly with article 282 of the OCJ, provides for horizontal recourses for clarification or expansion of the award. Clarification, for purposes of 'correcting numerical errors, mistakes of calculation, typographical or similar errors' when the award is unclear, and expansion for purposes of amending an award that 'has not resolved a controversial issue or if it omits a decision on fruition, interest or court costs'. Once the award is issued, the parties are allowed three working days to submit those recourses and the arbitrators are allowed the same period of time to resolve them. Pursuant to article 30 of the AML, 'arbitral awards shall not be susceptible to any other recourse not established in this law'.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

The AML lists the grounds for annulment of an arbitration award. The reasons or causes that may annul an award are very narrow and are:

- when the defendant has not been notified about the proceeding;
- when one of the parties has not been notified about the arbitral tribunal's orders, or if the right of defence is not observed;
- when the execution of evidentiary orders are not complied with or are not notified to a party;
- when the award resolves on matters not submitted for arbitration or if the awards grants more than what has been requested by the claimant; and
- when the arbitral tribunal has been formed illegally.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

There is no appeal from the arbitral award rendered in local arbitral proceedings. There is a possibility to appeal from the ruling that resolved an annulment request before the courts, but there is no appeal from the tribunal decisions.

The Constitutional Court has held that arbitral awards can be subject to an extraordinary protection action for violation of constitutional rights of the parties.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Domestic awards

The interested party requests the judge to enforce the award. There are no requirements or formalities for this petition in Ecuadorian legislation. Once the judge receives the petition, the judge must make a pronouncement by means of a writ known as an enforcement order.

Once the order has been issued, the person compelled to enforce it will only be allowed 24 hours to oppose recognition and enforcement of the award according to the mechanism selected by the plaintiff.

Foreign awards

Ecuador's General Assembly has enacted the General Organic Code of Proceedings (the GOCP). This code brings some changes to provisions regarding enforcement of foreign arbitral awards.

Under the reformed provisions, foreign arbitral awards are to be recognised and enforced in the same way as domestic awards. Under GOCP provisions before its enforcement, a foreign award must be subject to a recognition process or *exequatur*. The GOCP states that such process should not last more than 30 days and must be brought before the correspondent appellate court of each jurisdiction. Unlike the New

York Convention, the exequatur process puts the burden of proof on the petitioner, which must demonstrate that:

- the award complies with all the formalities required by the state where it was rendered;
- the award is final and has a *res iudicata* effect under the law it was rendered;
- documentation attached is translated (if applicable);
- due process rights of the parties were met; and
- the request indicates the domicile of the respondent for subpoena purposes.

Additionally, if the arbitral award was rendered against the state, the petitioner must demonstrate that the award does not contravene any constitutional, treaty or legal provision.

Once the competent court decides favourably on the recognition, the petitioner must file an enforcement petition before the correspondent trial judge. The process, then will be the one mentioned above for domestic awards.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

In practice, domestic courts used delay enforcing foreign award because of lack of familiarity with the proceeding. The practice remains to be seen under the GOCP recognition and enforcement process.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The GOCP, case law and domestic rules do not provide for the enforcement of orders by emergency arbitrators.

47 Cost of enforcement

What costs are incurred in enforcing awards?

There are no fees or taxes to be paid to the court for the enforcement process.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Arbitration, as a modern dispute settlement mechanism, is relatively new (the AML was enacted in 1997) and the justice system is beginning to cope with it. Consequently, there are many grey areas as to the influence that the justice system may exert over an arbitrator or an arbitral procedure.

The CCP applies to local arbitration, which means that Ecuadorian arbitral proceedings are conducted under civil procedure rules. Each party to the dispute has the burden of proving its allegations and its facts, and each party has the burden of producing the evidence to that effect. Each party will have to produce its documentary evidence and each party will present its witnesses. In practice documentary evidence will outweigh fact testimony.

The arbitral tribunal may appoint expert witnesses, or they may be appointed by each party, this largely depends on the arbitral rules of each centre and the decision of the arbitral tribunal.

Written statements are common for expert witnesses but the general practice for receiving testimony is through oral examination.

The arbitral tribunal has the power to order the production of any evidence it considers necessary and, depending on the method for producing such evidence, court intervention through court orders may be necessary.

Since the entry into force of the new Constitution, a new possibility for court intervention has arisen (ie, court intervention during the proceeding and not for the purposes of enforcing the award). A party that feels its constitutional rights are in jeopardy (ie, an immediate and grave threat) may request any judge to issue an order for precautionary measures to protect its constitutional rights. There have been a few cases in which the arbitral proceedings have been suspended for this reason.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are no specific rules that apply to counsel in international arbitration proceedings. However, IBA Guidelines are a common point of reference.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding of arbitral claims is not regulated in Ecuador.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Foreign practitioners will not be allowed to submit written pleadings with their own signature and will not be allowed to speak as counsel in local arbitration proceedings. There is no such prohibition for foreign counsel in international arbitration cases seated in Ecuador.

Fees earned by arbitrators or counsel for services rendered in Ecuador will be subject to overseas remittance tax (5 per cent) and VAT will also apply (12 per cent). However, if payments are made abroad other tax rules will apply.

PÉREZ
BUSTAMANTE
& PONCE **PBP**

Rodrigo Jijón Letort
Juan Manuel Marchán
Juan Francisco González
Javier Jaramillo

rjijon@pbplaw.com
jmarchan@pbplaw.com
jgonzalez@pbplaw.com
jjaramillo@pbplaw.com

Av. República de El Salvador 1082 y Naciones Unidas
Quito
Ecuador

Tel: +593 2 382 7640
www.pbplaw.com

Egypt

Ismail Selim*

Al Tamimi and Company

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Egypt adhered to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1959 without making any declarations or notifications. Moreover, in 1974 Egypt acceded to the 1965 Convention of the International Bank of Reconstruction and Development of Washington (IBRD) that established the International Centre for the Settlement of Investment Disputes (ICSID).

Further, Egypt has ratified several regional conventions relating to international commercial and investment arbitration, including:

- the 1954 Convention on Enforcement of Decisions between the States of the Arab League;
- the 1974 Convention on the settlement of Investment Disputes between the Hosting Countries of Arab investors and the nationals of other Arab countries;
- the Amman Arab Convention on Commercial Arbitration of 1987; and
- the Unified Agreement on the investments of Capitals in Arab States of 1980, which was signed in Amman and entered into force on 7 September 1981.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Egypt has signed 115 bilateral investment treaties (BITs) that include possible recourse to arbitration, of which 30 did not enter into force and 13 were terminated.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Law No. 27 of 1994 concerning Arbitration in Civil and Commercial Matters (the Arbitration Law) applies to domestic, international and foreign arbitrations. The said Law applies to arbitration proceedings taking place in Egypt, regardless of the nature of the dispute, even if one or both parties are public juristic persons. The Egyptian Arbitration Law also applies to international commercial arbitration proceedings conducted abroad when the parties agree to be subject to its provisions. Finally, the Court of Cassation ruled that in compliance with article III of the New York Convention of 1958, the Arbitration Law shall govern the enforcement of foreign awards even if the parties had not agreed to subject their relevant foreign arbitration proceedings to the said Law.

A distinction shall be made between international and foreign arbitration proceedings.

In one respect, article 3 of the Arbitration Law states that arbitration proceedings are considered international if the subject matter relates to international trade. A matter is deemed to relate to international trade in the following circumstances:

- the respective head offices of the parties are situated in two different countries;
- the agreement is to resort to institutional arbitration;
- the dispute is linked to more than one state; and
- the respective head offices of the parties are situated in the same country but one of the places listed hereunder is located outside such country:
 - the seat of arbitration;
 - the place of performance of the essential part of the obligations; or
 - the place most closely linked to the subject matter of the dispute.

In another respect, arbitration proceedings are foreign under the said Law if they are merely conducted outside Egypt, meaning that the seat of arbitration is outside Egypt.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

In specific areas, the Arbitration Law departs from the UNCITRAL Model Law, particularly with regard to the challenge of an arbitrator, the duration of the proceedings and an additional ground for annulment (ie, in case the arbitral tribunal disregards the application of the law that the parties have agreed to apply to the substance of their dispute (article 53(d))).

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The Egyptian Arbitration Law adopted the principle of ‘party autonomy’, therefore parties are at liberty to choose or to designate the way in which the arbitrators are to be chosen, and most of the arbitral proceedings are dependent upon the agreement of the parties. However, the Court of Cassation dictated a mandatory rule to be applied if an arbitrator is replaced. In this case, at least one hearing shall be held in the presence of the substitute arbitrator.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

As mentioned in question 5, the Arbitration Law adopted the principle of freedom to arbitrate with preference always given to the contractual provisions, including those regulating the choice of the applicable law. However, if the parties fail to agree on the legal rules to be applied to the merits of the dispute, the arbitral tribunal shall apply the substantive rules of the law it deems most closely connected to the dispute.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The Cairo Regional Centre for International Commercial Arbitration
1 Al Saleh Ayoub St
Zamalek
Cairo
Egypt
info@crcica.org.eg
www.crcica.org.eg

Since its establishment in 1979, the CRCICA adopted the UNCITRAL Arbitration Rules with minor modifications. The list of international arbitrators and experts maintained by the Centre includes eminent practitioners from all over the world. However, parties are not obliged to appoint their arbitrators among this list. There are no restrictions regarding the language of arbitration or the applicable law. Fees are calculated on the basis of the amount in dispute.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Arbitration is not permitted in matters that cannot be subject to compromise. It is not permissible to refer to arbitration disputes concerning personal status or public policy, such as criminal matters, constitutionality of law, real estate ownership, etc.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The requirements for an arbitration agreement are those generally required for any agreement. Pursuant to article 12 of the domestic Arbitration Law, the arbitration agreement must be in writing; otherwise it will be null and void. It shall be considered in writing not only if it is included in a document signed by both parties, but also if it is included in letters, cables or other means of written communication exchanged between the parties.

If either party to a dispute proceeds with the arbitration proceedings in spite of its knowledge that there has been a violation of a certain requirement under the arbitration agreement or non-compliance with a non-mandatory provision of the law, and if the party does not state its objection to such violation or non-compliance within the period agreed upon and does not raise an objection within a reasonable period in the absence of an agreement, such inaction shall be deemed to constitute a waiver of the party's right to object.

With regard to disputes relating to administrative contracts, agreement on arbitration shall be reached upon the approval of the competent minister or the official assuming his or her powers with respect to public juridical persons.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The arbitration agreement is no longer enforceable if it is declared null and void by a judicial decision or an arbitral award; Law No. 27/1994 adopted the principle of the separability of the arbitral agreement (article 23). Thus, if any doubt arises with respect to the validity of the contract in which the arbitration agreement is embodied, the outcome of such doubt shall in no way affect the arbitration agreement. The nullity or termination of the contract will not affect the arbitration clause, provided that the clause is valid per se.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

An arbitration agreement, like any agreement, imposes certain obligations on its parties. However, only its parties are bound by it. Thus,

the extension of the arbitration agreement to non-signatories is generally prohibited.

Article 145 of the Civil Code provides that the effect of a contract extends to the contracting parties and the general successors without prejudice to the rules relating to inheritance, unless it appears from the contract, the nature of transaction or from the law that such intention shall not affect the general successor.

The general principle is that third parties or non-signatories are not bound by an arbitration agreement except in very limited cases. Indeed, the Egyptian Court of Cassation decided on 22 June 2004 that an arbitration agreement may be extended to a non-signatory if it was proven that it had taken part in the execution of the obligations entered into by the signatory, or created confusion regarding the party vested with obligations.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The Egyptian Arbitration Law does not regulate third-party participation in arbitration. However, CRCICA rules regulate the joinder of a third person to the arbitration proceedings provided that such third person is a party to the arbitration agreement.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

As it appears in articles 145 and 152 of the Civil Code of Egypt, the Egyptian Civil Law has limited the cases in which the effect of the contract extends to third parties and it does not allow any further extension of such effect. However, the decision of the Court of Cassation on 22 June 2004, as mentioned in question 11, allowed the extension of the arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was involved in the performance of the contract in dispute or created confusion regarding the party vested with obligations.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The Arbitration Law does not provide special rules in this respect.

On the other hand, the CRCICA rules provide particular rules concerning the appointment of arbitrators in multiparty arbitrations. According to article 10 of the CRCICA rules, where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or as respondent, shall appoint an arbitrator. In the event of failure of the multiple parties to jointly appoint an arbitrator, the Centre shall, at the request of any party, constitute the arbitral tribunal, and in doing so, may revoke any appointment already made, and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

National legislation often contains some minimal requirements that those selected to serve as arbitrators must satisfy. According to article 16 of the Arbitration law, any natural person may be selected to act as an arbitrator, provided that he or she has legal capacity. There

are no restrictions based on gender or religion; however, judges who are still in active service must obtain permission to act as arbitrators.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

If a party fails to appoint an arbitrator or if the two appointed arbitrators fail to agree on a matter on which their agreement is required or if a third party does not perform an act entrusted to him or her in this regard, then the competent judicial court will carry out the required procedure upon the request of either party, unless the agreement provides for another method of accomplishing such a procedure or act.

Under CRCICA rules, if the arbitral tribunal has not been appointed within the time period agreed by the parties or within 30 days of receipt by the CRCICA of a party's request for appointment, a sole arbitrator, a second arbitrator or a presiding arbitrator, as the case may be, shall be appointed by the CRCICA.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Under the Arbitration Law, an arbitrator may be challenged in the case of circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. An arbitrator may also be challenged if he or she does not possess the qualifications agreed to by the parties. It is important to note that arbitrators must resign if faced with a clear conflict of interest. Article 19 provides that the request for recusal shall be submitted in writing to the arbitral tribunal, indicating the reasons for recusal, within 15 days from the date the applicant becomes aware of the composition of such tribunal or the conditions justifying the recusal. Such request shall be referred by the tribunal to the state court for its final decision.

Pursuant to article 20 of the Arbitration Law, if an arbitrator is unable to perform his or her mission or fails to perform it, interrupts performance in a manner that leads to unjustifiable delay in the arbitral proceedings, does not abstain or is not removed by agreement between the parties, the competent state court may terminate his or her mission on the basis of the request of either parties.

According to the prevailing scholarly view as well as jurisprudence, institutional rules regulating challenges and removal of arbitrators shall apply provided that the removal is decided by an independent panel.

On the other hand, there is no tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

All arbitrators, including those who are party-appointed, have to be independent and impartial. The arbitrator shall avoid ex parte communications with any party regarding the arbitration.

The parties' agreements or the concerned arbitration centre's rules, as the case may be, provide for the method of remunerating the arbitrators. Under the CRCICA rules, the fees of the arbitrator shall be determined based on the sum in dispute (aggregate value of all claims, counterclaims and set-offs). If the sum cannot be ascertained, the CRCICA shall determine the fees of the arbitral tribunal taking all relevant circumstances into account.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The general rules of law concerning liabilities apply to the arbitrator's liability, meaning that the liability of arbitrators is not explicitly regulated in Egyptian law and that arbitrators may be liable for both negligence and intentional breach of duty.

However, if the arbitration is governed by the CRCICA rules, article 16 provides the exclusion of liability of the arbitrators.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

The arbitral tribunal is empowered to rule on motions related to its non-competence, including motions predicated on the absence of an arbitral agreement, its expiry or nullity or its failure to include the subject matter of the dispute. This shall be invoked no later than the date of submission of the respondent's statement of defence. Those pleas may be decided upon by the arbitral tribunal before ruling on the merits or join them to the merits in order to adjudicate both together.

A state court seized with a dispute in respect of which an arbitral agreement exists must decide that the action is non-admissible if the defendant invokes a plea of non-admissibility before raising any request or defence in the case.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The Arbitration Law adopted the competence-competence principle by virtue of which the arbitral tribunal has jurisdiction to rule on its own jurisdiction. This is also enforced by the principle of separability of the arbitration agreement.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

The arbitration is conducted in Arabic, unless another language or languages are agreed upon by the parties or determined by the arbitral tribunal.

The parties to the arbitration are entitled to agree on the place of arbitration in Egypt or abroad. Without such an agreement, the arbitral tribunal will determine the place of arbitration, taking into consideration the circumstances of the case and the convenience of the place to the parties. This shall be without prejudice to the power of the arbitral tribunal to convene in any place it considers appropriate to undertake any of the arbitral proceedings.

Under CRCICA rules, in absence of an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. The same applies to the place of arbitration that shall be determined by the arbitral tribunal, in absence of the parties' agreement, having regard to the circumstances of the case.

23 Commencement of arbitration

How are arbitral proceedings initiated?

The arbitral proceedings commence on the date on which the respondent receives the request for arbitration from the claimant, unless the parties agree on another date.

The Arbitration Law does not provide for formal requirements for the notice of arbitration. However, under CRCICA rules, the notice of arbitration shall be filed with the CRCICA and shall include:

- the names and contact details of the parties;
- a demand that the dispute be referred to arbitration;
- an identification of the arbitration agreement;
- an identification of the disputed contract or the relevant disputed relationship;
- a brief description of the claim;
- an indication of the amount involved; and
- the relief or remedy sought.

24 Hearing

Is a hearing required and what rules apply?

Under the Arbitration Law, the arbitral tribunal shall hold pleading sessions to enable each party to explain the subject matter of its claim and to present its arguments and evidence. However, it may limit proceedings to the submission of written memos and documents unless the parties otherwise agree. The parties must be notified of the dates of the sessions sufficiently in advance of the scheduled dates. Also a summary minutes of each meeting held shall be recorded in a *procès-verbal*, and a copy thereof shall be delivered to each of the parties, unless they agree otherwise.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Each party shall have the burden of proving the facts relied on to support its claim or defence. Witnesses, including expert witnesses who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise. Their statements are presented in written form and signed by them. The arbitral tribunal determines the admissibility, relevance, materiality and weight of the evidence offered.

The arbitral tribunal may appoint one or more experts to submit on certain specific issues determined by the arbitral tribunal, a written report or an oral report to be included in the meeting. A copy of the terms of reference regarding the report entrusted to the expert will be sent to each party immediately after its submission, granting each party the opportunity to express its opinion thereon. Each of the parties is entitled to review and examine the documents upon which the expert relied in his or her report.

The arbitral tribunal may decide, after the submission of the expert's report, whether on its own initiative or upon the request of a party to the arbitration, to hold a hearing to hear the expert and to provide the parties with the opportunity to examine and cross-examine the expert about his or her report. During the meeting, each of the parties may present one or more expert witnesses to give testimony on the issues raised in the report of the expert appointed by the arbitral tribunal, unless otherwise agreed upon between the parties.

The IBA Rules on the Taking of Evidence are not regulated under Egyptian law. There are no legal impediments preventing the parties from agreeing to apply or seek guidance from said Rules. Articles 20–22 and 27 of the Law of Evidence in Civil and Commercial Matters (the Evidence Law) regulate production of documents with rules that are somewhat similar to the IBA Rules on the Taking of Evidence.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

The president of the concerned court is competent, upon the request of the arbitral tribunal, to condemn any witness who refrains from attending or declines to reply, by inflicting the sanctions prescribed in the Evidence Law. This shall entail the suspension of the arbitral proceedings until a decision by the court is issued.

27 Confidentiality

Is confidentiality ensured?

No particular mention is made of the question of confidentiality in the Arbitration Law save for article 44(2), which provides that the arbitral award may not be published in whole or in part unless the parties have given approval.

However, under CRCICA rules, the parties undertake to keep confidential all awards, decisions and materials submitted by the parties in the arbitral proceedings. This undertaking applies to the arbitrators, the tribunal-appointed experts and the secretary of the arbitral tribunal. Though they may, in writing, expressly agree to the contrary.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

The parties to an arbitration may agree that the arbitral tribunal can take any temporary or interim measure that may be required according to the nature of the dispute at the request of a party. For example, the tribunal may maintain or restore the status quo pending determination of the dispute, take action that would prevent, or refrain from taking action that is likely to cause, current or imminent prejudice to the arbitral process, etc. The tribunal may modify, suspend or terminate an interim measure it has granted upon application of a party or on the tribunal's own initiative. The tribunal may ask the parties to present whatever guarantee that it deems sufficient to cover the expenses of such temporary or interim measure.

Thus, the parties should explicitly and specifically agree to grant arbitrators this power.

If the party against whom the order was issued fails to execute it, the arbitral tribunal, upon the request of the other party, may authorise the latter to undertake the procedures necessary for the execution of the order, without prejudice to the right of said party to apply to the president of the concerned court for rendering an execution order.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The Arbitration Law does not provide for an emergency arbitrator prior to the constitution of the arbitral tribunal. CRCICA Rules do not provide for an emergency arbitrator either.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The parties to arbitration may agree that the arbitral tribunal can, pursuant to a request by one of the parties, order either party to take whatever provisional or conservatory measures it deems necessary according to the nature of the dispute, and can request the submission of an adequate guarantee to cover the expenses of the measures it orders.

Article 26 of the CRCICA rules empowers the arbitral tribunal to order a party, without limitation, to, *inter alia*:

- maintain or restore the status quo pending determination of the dispute;
- take action that would prevent, or refrain from taking action that is likely to, cause current or imminent prejudice to the arbitral process itself;
- provide means of preserving assets out of which a subsequent award may be satisfied; and
- preserve evidence that may be relevant and material to the resolution of the dispute.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

No.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be rendered by the majority of all its members after deliberations conducted in the manner determined by the arbitral tribunal, unless the parties agree otherwise. If the arbitral tribunal consists of more than one arbitrator, the signatures of the majority of the arbitrators shall suffice, provided that the award states the reasons as to why the minority dissented. The arbitral award must be made in writing and signed by the arbitrators.

However, article 33(2) of the CRCICA rules specifies that questions of procedure may be decided by the presiding arbitrator, if so authorised by the arbitral tribunal or where there is no majority.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Dissenting opinions are made by individual arbitrators who do not agree with the majority in the result of the arbitration. Therefore, under the Arbitration Law, dissenting opinions shall be in writing and are attached to the decision of the majority of the arbitral tribunal.

34 Form and content requirements

What form and content requirements exist for an award?

The arbitral award must be in writing and signed by the arbitrators including the reasons upon which it is based, unless the parties to arbitration have agreed otherwise.

The arbitral award must include:

- the names and addresses of the parties;
- the names, addresses, nationalities and capacities of the arbitrators;
- a copy of the arbitration agreement;
- a summary of the parties' claims, submissions, and documents;
- the dispositive part of the award and the date and place of its issuance; and
- the reasoning, whenever its inclusion is required.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The agreement of the parties may impose a time period within which the arbitral tribunal must make its award to ensure that the case is dealt with efficiently. In the absence of such an agreement, the award that finally disposes of the entire dispute must be rendered within 12 months of the date of commencement of the arbitral proceedings. In all cases, the arbitral tribunal may decide to extend the deadline, provided that the period of extension does not exceed six months, unless the parties agree on a longer period.

If the arbitral award is not rendered within the 12-month period, the parties to arbitration may request the president of the competent court to issue an order either extending the time limit or terminating the arbitral proceedings. In the latter case, a party may bring the dispute to the court having initial jurisdiction to adjudicate the case.

The Court of Cassation has decided that the arbitral proceedings governed by UNCITRAL or CRCICA rules are not bound by a time limit for rendering the final award.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The Arbitration Law requires that the action for setting aside shall be brought within 90 days following the notification of the final arbitral award to the losing party.

Moreover, article 49 of the Arbitration Law entitles parties to the arbitration, within 30 days after the receipt of the award, to request the arbitral tribunal to elucidate any ambiguity appearing in the dispositive part of the award.

Furthermore, article 50 entitles the arbitral tribunal to correct any material mistake in the award within 30 days following the issuance of the award or the submission of a request for correction as the case may be.

Finally, article 51 entitles the parties to request the arbitral tribunal, within 30 days from receiving the award, to issue an additional award on a claim submitted in the course of the proceedings and overlooked by the arbitral award.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The arbitral tribunal may issue:

- final awards, disposing of the entire dispute;
- interpretation and correction of awards, upon the request of either parties (the clarification or correction shall be made in writing);
- additional awards, on a claim submitted in the course of the proceedings and overlooked by the arbitral award;
- interim awards, determining matters that may save considerable time and money; and
- partial awards, disposing of one or more monetary or other substantive issues between parties.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

If the parties agree on a settlement that terminates the dispute during the arbitral proceedings, they may request that the terms of the settlement be recorded by the arbitral tribunal and the tribunal will pass a decision containing the agreed terms and terminate the proceedings. Such an award will have the same effect with regard to enforcement as all other arbitral awards.

The arbitral proceedings are terminated either by the making of the award ending the dispute or by a court's decision ordering the closing of the arbitral proceedings where the time limit for rendering the final award has been exceeded.

The arbitral proceedings can also be terminated by a decision of the tribunal in the following cases:

- the parties agree, during the arbitral proceedings, on a settlement ending the dispute;
- the claimant withdraws its claim, unless the arbitral tribunal decides, based on the objection of the respondent, that the latter has a legitimate interest in continuing the arbitral proceedings until the dispute is settled by a final award; or
- for any other reason the arbitral tribunal considers that the continuation of the proceedings has become futile or impossible.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Costs include the tribunal's fees, counsel's fees and the administrative fees of the arbitration centre, if any. The arbitral tribunal shall fix the costs of arbitration in the final award.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

The interest is 4 per cent per annum in civil matters and 5 per cent per annum in commercial matters. However, the parties may agree upon another rate of interest either in the event of delay in effecting payment or in any other case in which interest has been stipulated, provided that it does not exceed 7 per cent. A creditor may demand damages in addition to interest if he or she establishes that a loss, in excess of the interest, was owing to bad faith on the part of the debtor.

According to article 50(3) of the Commercial Code, in case of commercial loans or cost incurred by a merchant in favour of its customer, the merchant may claim interest at the rate applicable by the Central Bank. Such rate is currently 11.75 per cent per annum.

Finally, interest on banking loans and transactions with bank customers are determined by virtue of party autonomy without being subject to any maximum statutory rate.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

A party to the arbitration may request the arbitral tribunal, within the 30 days following the reception of the arbitral award, to give an interpretation clarifying any ambiguity that appears in the dispositive part of the award. The party requesting clarification must notify the other party of the request before presenting it to the tribunal.

The interpretation decision must be made in writing within the 30 days following the receipt of the request for clarification by the tribunal. The panel may extend that period by another 30 days if it considers such an extension necessary. The clarificatory award shall be deemed an integral part of the arbitral award and shall be subject to its provisions.

The arbitral tribunal must undertake to correct any exclusively material errors in its award, such as errors in computation, any clerical or typographical errors, etc. Those corrections will be undertaken by the tribunal on its own initiative or upon request from a party. The tribunal will make the correction without holding any hearing within the 30 days following the communication of the award.

The correction decision shall be rendered in writing by the arbitral tribunal and notified to the parties within 30 days of the date of its issue.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

Arbitral awards rendered in accordance with the provisions of the Arbitration Law may not be challenged by any of the means of recourse provided for in the Code of Civil and Commercial Procedures.

An action for the nullity of the arbitration award may be instituted in the following cases:

- if there is no arbitration agreement, if it was void, voidable or its duration had elapsed;
- if either party to the arbitration agreement was, at the time of conclusion of the arbitration agreement, fully or partially incapacitated according to the law governing his or her legal capacity;
- if either party to the arbitration was unable to submit a defence as a result of not being duly notified of the appointment of an arbitrator, of the arbitral proceedings or for any other reason beyond his or her control;
- if the arbitral award excluded the application of the law agreed upon by the parties to govern the subject matter in dispute;
- if the composition of the arbitral tribunal or the appointment of the arbitrators had been undertaken in violation of the law or contrary to the parties' agreement;
- if the arbitral award dealt with matters not falling within the scope of the arbitration agreement or exceeding the limits of this agreement; or
- if the arbitral award is null and void or the arbitration proceedings affecting the award are null and void.

The court adjudicating the action for nullity shall ipso jure annul the arbitral award if it contains a violation of public policy in Egypt.

The action for nullity of the arbitral award must be brought before the competent court within 90 days following the date of notification of the arbitral award to the party against which it was rendered.

Update and trends

It is worth mentioning that the Egyptian government is currently adopting a policy of endeavouring amicable settlement of its disputes with foreign investors. Hence, we note that in 2015, four orders of discontinuance of ICSID proceedings have been issued in cases where Egypt was the respondent. Similarly, discontinuance orders have been issued in 2016 in four other ICSID proceedings initiated against Egypt.

Eight ICSID proceedings brought against Egypt are still pending.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level?

Approximately what costs are incurred at each level? How are costs apportioned among the parties?

An arbitral award cannot be subject to an appeal; however, the decision of the court on the nullity proceedings may be challenged before the Court of Cassation.

The necessary cost of the execution and challenge of arbitral awards is regulated by Judicial Fees Law No. 90, 1944 (JFL), in addition to unpublished internal regulations.

Pursuant to the said Law, the cost of an annulment action, including judicial fees as well as other taxes, shall not exceed 150 Egyptian pounds.

To the contrary, the cost of enforcement of an arbitral award is significantly higher since the applicable judicial fees are in proportion to the amounts awarded. Such judicial fees are mainly the 'proportional fees', amounting to 1.25 per cent of the amounts awarded (articles 1 and 6 JFL), and the 'service fees', estimated as half as the proportional fees, in addition to other fees. In a nutshell, the applicable judicial fees on enforcement proceedings are approximately equivalent to 2.5 per cent of the amounts awarded.

The cost is determined and apportioned among the parties by the competent court in its judgment.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Arbitral awards issued according to the Arbitration Law have authority of res judicata and are enforceable by the president of the court competent of the dispute. The application for enforcement of the arbitral award shall be accompanied by:

- the original award or a signed copy;
- a copy of the arbitration agreement;
- an Arabic translation of the award if it is not issued in Arabic; and
- a copy of the procès-verbal attesting the deposit of the award.

The president of the court issues his or her decision without hearings.

However, enforcement may be refused for three reasons:

- contradiction with a judgment previously rendered by the courts on the subject matter of dispute;
- violation to public policy in Egypt; or
- non-communication with the party against whom it was rendered.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

There are no precedents as to the position of Egyptian courts regarding the enforcement of a foreign arbitral award that has been set aside by the courts at the place of arbitration.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

No.

47 Cost of enforcement

What costs are incurred in enforcing awards?

The court fees are around 2.5 per cent of the amount decided by the arbitral award.

Other**48 Judicial system influence**

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Egyptian law does not recognise US-style discovery. However, articles 20–22 and 27 of the Evidence Law regulate production of documents on condition of specificity, materiality and relevance.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

No, only the provisions of the attorneys' Law No. 17/1983 apply.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding of arbitral claims (TPF) is not regulated under Egyptian law. Further, there are no regulatory restrictions specific to TPF. Indeed, TPF has already happened in practice and its relevant agreement is valid insofar as it does not violate any mandatory rule of Egyptian law.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Dissenting from the provisions of Law No. 17/1983, the Egyptian jurisprudence has authorised foreign counsels to represent parties in institutional arbitration.

* *Dr Ismail Selim resigned from the firm to take up a senior post as the Director of CRCICA for a four-year term starting on 1 January 2017.*

التميمي و شركاه
AL TAMIMI & CO.

Contact

infoegypt@tamimi.com

Star Capital Tower
Building No 5 & 7, 10th floor
Geziret El Arab Street
Mohandseen
12654 Giza
Egypt

Tel: +20 33 68 1000
Fax: +20 33 68 1002
www.tamimi.com

England & Wales

Adrian Jones, Gordon McAllister, Edward Norman and John Laird

Crowell & Moring LLP

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

The New York Convention has been in force in the United Kingdom, of which England and Wales are a part, since 1975. This is, however, subject to the 'reciprocity reservation', meaning recognition and enforcement are limited to awards made in other contracting states. The application of the Convention was subsequently extended to the following overseas territories of the UK: Gibraltar (1975), the Isle of Man (1979), Bermuda (1979), the Cayman Islands (1980), Guernsey (1985), Jersey (2002) and most recently the British Virgin Islands (2014).

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the ICSID Convention) entered into force in the UK in 1967.

The Energy Charter Treaty 1994 has been in force in the UK since 1998.

On 17 March 2015, the UK became a founding signatory to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration. The Convention will enter into force after ratification by three signatory states (currently pending).

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

As of December 2016, the UK has entered into 110 bilateral investment treaties (BITs) with other countries, according to the list provided on the United Nations Conference on Trade and Development (UNCTAD) website. Of these, 96 are currently in force. The treaties entered into by the UK do not extend to any of its various overseas territories unless there is an exchange of notes between the contracting states explicitly extending the reach of a treaty to specific territories.

These treaties typically express an intention to encourage and promote investment from each contracting state into the other, and provide that, if certain investment protections set out in the treaty are breached, the investor can resolve its dispute with the host state by international arbitration. BITs typically provide for arbitration under institutional rules (most commonly ICSID) or for ad hoc arbitration under UNCITRAL rules.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary source of domestic arbitration law is the Arbitration Act 1996 (the Act), which governs both domestic and foreign arbitral proceedings. Under section 2, the Act applies where the seat of the arbitration is in England or Wales. With the exception of Part III of the Act,

which deals with recognition and enforcement of foreign awards, the Act does not differentiate between domestic and foreign proceedings. While sections 85–87 relate to 'domestic arbitration agreements', these sections are not in force, and are, therefore, without legal effect.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The Act adopted the principles set out in the UNCITRAL Model Law of 1985, although not the Model Law itself. The Departmental Advisory Committee led by Lord Justice Saville (as he then was) considered it more appropriate to draft a new arbitration law setting out in statutory form and, in a structure similar to that of the Model Law, the existing principles of arbitration law in England.

The Act includes the majority of the key features of the 1985 Model Law, but there are a number of significant differences, including:

- the default provision under the Act provides for a tribunal to be composed of a single arbitrator, while the Model Law contemplates a tribunal of three arbitrators;
- under the Act, the parties are free to opt out of the provision that the arbitration agreement is separable from the substantive agreement in which it appears;
- similarly, the parties are free to opt out of the Act's provision that competence to rule on the jurisdiction of the arbitration tribunal lies with the tribunal itself; and
- the Act permits a party to challenge an arbitration award on a question of English law arising out of the award in narrowly defined circumstances.

The Act has not been amended to take account of the revisions included in the 2006 UNCITRAL Model Law.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Schedule 1 of the Act lists the mandatory provisions of Part 1 of the Act. These include:

- the provisions relating to the stay of court proceedings where an arbitration agreement is in place (sections 9–11);
- the power of the court to extend the time limit for commencing arbitration proceedings (or other dispute resolution mechanisms which must be exhausted before recourse to arbitration) beyond that set out in the arbitration agreement (section 12);
- the application of the Limitation Acts (as defined in the Act) to arbitral proceedings (section 13);
- the power of the court to remove an arbitrator under certain circumstances (section 24);
- the effect of the death of an arbitrator (section 26(1));
- the joint and several liability of the parties to pay the arbitrators' reasonable fees and expenses (including the fees of any expert appointed by the tribunal) (sections 28 and 37(2));
- the immunity of arbitrators for acts done or omitted in the discharge or purported discharge of their functions as arbitrators,

- and an equivalent immunity for arbitral institutions (sections 29 and 74);
- that objections to the substantive jurisdiction of a tribunal should be made before the first step in the proceedings to contest the merits is taken (section 31);
 - the court's power to determine questions of a tribunal's substantive jurisdiction (section 32);
 - the general duties of the arbitral tribunal to act fairly and impartially, and to adopt procedures suitable to the circumstances of the case (section 33);
 - a requirement that the parties do all things necessary for the proper and expeditious conduct of the arbitral proceedings (section 40);
 - the availability of court procedures to secure the attendance of witnesses (by agreement of the parties or with the tribunal's permission) (section 43);
 - the power of a tribunal to refuse to deliver an award without payment of the arbitrators' fees (section 56);
 - a provision that an agreement that the costs of the arbitration are to be borne by one party is only valid if made after the dispute arose (section 60);
 - that an arbitral award may be enforced in the same manner as a court judgment or order (with the court's leave) (section 66);
 - the provisions relating to challenging an award in the courts because the tribunal lacked substantive jurisdiction, or because there was a serious irregularity affecting the tribunal, the proceedings or the award (sections 67 and 68 (and sections 70 and 71, insofar as they relate to sections 67 and 68));
 - the rights of a person alleged to be a party to arbitral proceedings but who takes no part in them (section 72);
 - that a party who fails to make a timely objection to the jurisdiction of the arbitral tribunal on the manner in which the proceedings have been conducted cannot raise that objection later, unless that party can demonstrate that it did not know, and could not with reasonable diligence have known, of the grounds for objection at the time (section 73); and
 - that a power to charge property recovered in relation to arbitral proceedings with the payment of solicitors' costs exists for arbitral proceedings (section 75).

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Section 46 of the Act states that a tribunal shall determine the dispute in accordance with the substantive law chosen by the parties.

Alternatively, the parties may agree that the tribunal can decide the dispute in accordance with such other considerations as the parties or the tribunal itself may determine. Such considerations may include trade uses, *lex mercatoria*, amiable composition and *ex aequo et bono* decisions.

Where no such agreement is discernible, section 46 provides that a tribunal shall apply the conflict of laws rules 'which it considers applicable'.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The most prominent institution based in England that deals with international commercial arbitration is the London Court of International Arbitration (LCIA).

London Court of International Arbitration
International Dispute Resolution Centre
70 Fleet Street
London
EC4Y 1EU
Tel: +44 20 7936 6200
Fax: +44 20 7936 6211
lcia@lcia.org
www.lcia.org

The LCIA traces its origins back to 1883. Based in London, the LCIA's caseload is primarily international. More than 300 new cases are referred to the LCIA each year, with only around 17 per cent of the parties being English. The LCIA has also established an arbitration centre in Mauritius, and is closely involved in the UAE through the DIFC-LCIA Arbitration Centre.

Under the LCIA's International Arbitration Rules, the parties are free to choose the seat of the arbitration, but if they have failed to express a choice, the LCIA Rules default to arbitration in England. The parties are also free to nominate any arbitrators, subject to their confirmation by the LCIA Court. The secretariat administers cases submitted to the LCIA, with the LCIA Court overseeing the proper application of the LCIA Rules. The court has 35 members, all very prominent and well-respected international arbitration experts, only five of whom are English.

The LCIA adopted new arbitration rules with effect from 7 October 2014 (the 2014 LCIA Rules). These rules include a number of new features, including:

- LCIA arbitration tribunals are explicitly empowered to impose costs sanctions on parties who engage in 'non-cooperation resulting in undue delay';
- party representatives are deemed to have agreed to abide by principles of ethical conduct set out in the Annex to the 2014 LCIA Rules; and
- new rules were adopted for the appointment of emergency arbitrators.

LCIA fees are assessed on the basis of specified hourly rates, as opposed to being a percentage of the value of the dispute.

The Chartered Institute of Arbitrators (CI Arb) also offers international arbitration services including its own rules and acting as an appointing authority. However, it is principally renowned in the international arbitration community for its key role in the training and accreditation of arbitrators.

The Chartered Institute of Arbitrators (CI Arb)
International Arbitration and Mediation Centre
12 Bloomsbury Square
London
WC1A 2LP
Tel: +44 20 7421 7444
Fax: +44 20 7900 2917
info@ciarb.org
www.ciarb.org

After maintaining the same rules in force since 2000, CI Arb introduced new arbitration rules on 1 December 2015. These rules include modernisations of procedure in line with other institutional rules such as emergency relief and in Appendix II, a list of proposed matters for consideration by the parties and the arbitral tribunal at a case management conference.

A considerable proportion of international commercial arbitration seated in London involves specialist fields with a long history of arbitration, including shipping, insurance and commodities. Specialist arbitration bodies administer many of these arbitrations, including:

London Maritime Arbitrators' Association (LMAA)
The Baltic Exchange
38 St Mary Axe
London
EC3 8BH
Tel: +44 20 7283 7701
Fax: +44 20 7283 7702
info@lmaa.org.uk
www.lmaa.org.uk

Insurance and Reinsurance Arbitration Society (ARIAS (UK))
London Underwriting Centre
3 Minster Court
Mincing Lane
London EC3R 7DD
Tel: +44 1732 832 475
Fax: +44 1732 835 677
www.arias.org.uk

Grain and Feed Trade Association
9 Lincoln's Inn Fields
London
WC2A 3BP
Tel: +44 20 7814 9666
Fax: +44 20 7814 8383
post@gafta.com
www.gafta.com

Federation of Oils, Seeds & Fats Associations
4-6 Throgmorton Avenue
London
EC2N 2DL
Tel: +44 20 7283 5511
Fax: +44 20 7623 1310
contact@fosfa.org
www.fosfa.org

London Metal Exchange (LME)
56 Leadenhall Street
London
EC3A 2DX
Tel: +44 20 7264 5555
Fax: +44 20 7680 0505
tom.hine@lme.com
www.lme.com

In addition, many arbitrations seated in London are conducted under the international arbitration rules of institutions based elsewhere, including the International Court of Arbitration of the International Chamber of Commerce and the International Centre for Dispute Resolution, a division of the American Arbitration Association.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The Act does not exclude any specific categories from arbitration and, in general, English courts take an inclusive view of what is arbitrable. Section 1(b) of the Act provides that parties should be free to decide how their disputes will be resolved, limited only by safeguards necessary in the public interest. Section 6(1) of the Act provides that both contractual and non-contractual disputes are arbitrable, but does not go further. Criminal and certain family law matters are not considered arbitrable (although the High Court has made a consent order in the terms of an arbitral award made by the Beth Din in matrimonial proceedings (*AI v MT* [2013] EWHC 100 (Fam))). As a matter of practicality, where a state grant of a right or protection is concerned (such as a patent) the dispute will not be able to be fully resolved by recourse to an arbitral tribunal. Similarly, where a debt arises in an agreement subject to arbitration, a winding-up petition may be more appropriate than arbitration where the dispute concerns whether the debtor is capable of settling the debt (*Salford Estates (No. 2) Limited v Altomart Limited* [2014] EWCA 575 Civ). Consumer disputes for sums under £5,000 are not arbitrable (Unfair Arbitration Agreements (Specified Amount) Order 1999 (SI 2167/99)).

9 Requirements

What formal and other requirements exist for an arbitration agreement?

An arbitration agreement is an agreement to submit to arbitration present or future disputes, whether contractual or not (section 6).

Oral arbitration agreements are possible at common law, but they do not receive the statutory protections of the Act. The Act applies only to arbitration agreements in writing (section 5), save for a few exceptions set out below. Agreements in writing are defined very broadly, including:

- agreements made in writing, whether or not signed by the parties (section 5(2)(a));
- an exchange of communications in writing, or an agreement evidenced in writing (section 5(2)(b) and (c)); and

- an agreement otherwise than in writing by reference to terms that are in writing (section 5(3)).

This definition therefore includes general terms and conditions. Where one party to arbitration proceedings alleges the existence of an agreement to arbitrate, if the other party fails to deny the allegation, this also creates an arbitration agreement under the Act (section 5(5)).

The requirement for writing is excluded in some scenarios:

- termination of arbitration agreements (section 23(4));
- consumer arbitration agreements are governed by the Unfair Terms in Consumer Contracts Regulations, which is recognised at sections 89 to 91 of the Act;
- small claims arbitration in the county court (section 92);
- arbitrations involving a judge as arbitrator (section 93); and
- statutory arbitrations (sections 94 to 97).

It has been held that where parties have agreed to arbitrate disputes under one agreement, this agreement may become an implied term of subsequent agreements, such as settlement agreements (*Interserve Industrial Services Ltd v ZRE Katowice SA* [2012] EWHC 3205 (TCC)).

In *Transgrain Shipping BV v Deiulemar Shipping SpA (In Liquidation)* [2014] EWHC 4202 (Comm), the court considered two inconsistent sets of arbitration provisions in a sub-charter, one of which provided for a tribunal of two arbitrators and an umpire, while the other provided for three arbitrators. The court preferred the clause that best gave effect to the parties' objective intentions.

An agreement providing that the parties would 'endeavour to first resolve the matter through Swiss arbitration', but failing such resolution would submit the dispute to the courts of England was interpreted by the English court to constitute a mere agreement to attempt to agree an arbitration process rather than being a binding agreement to arbitrate (*Kruppa v Benedetti* [2014] EWHC 1887 (Comm)).

Clauses providing that parties 'may' submit a dispute to arbitration can be treated as non-exclusive, allowing litigation instead; however, if a party to such a clause insists on arbitration, it is likely the court would uphold that choice (*Anzen Limited & ors v Hermes One Limited* [2016] UKPC 1).

In instances where the parties' agreement is reflected in a single contract, an arbitration clause can be incorporated, along with other terms, simply by reference to another document. However, where the arbitration clause is found in a contract with a third party, it must be expressly referred to in order for it to be incorporated (*Barrier Limited v Redhall Marine Limited* [2016] EWHC 381 (QB)).

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

English courts approach issues of the enforceability of an arbitration agreement from a pro-arbitration perspective. Section 7 of the Act embodies the principle of separability, unless the parties agree otherwise. Consequently, even if the underlying agreement is unenforceable, the arbitration agreement will be enforceable, unless there are circumstances that impeach the arbitration agreement itself (*Fiona Trust & Holding Corporation v Yuri Privalov* [2007] EWCA Civ 20). Although section 7 is a non-mandatory provision, its operation is not displaced by a choice of law as to the merits, only by express waiver or agreement as to alternative law on the issue by the parties (*National Iranian Oil Company v Crescent Petroleum Company International Ltd & Crescent Gas Corporation Ltd* [2016] EWHC 510 (Comm)).

Under section 8 of the Act, an arbitration agreement is not discharged by the death of a party, and it may therefore be enforced against that party's personal representative.

One of the parties may inadvertently waive the right to arbitrate a dispute in circumstances where it takes a step in court proceedings which are inconsistent with the agreement to submit disputes to arbitration. See, by way of example, *Nokia Corp v HTC Corp* [2012] EWHC 3199 (Pat).

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Under English law, on assignment of contractual rights, an assignee is usually bound by an arbitration agreement in the contract as an ‘inseparable component of the transferred rights’ (*West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA* [2005] EWHC 454 (Comm)). Where an arbitration is already under way, the assignee must first give notice to the other parties and the arbitrators. The arbitration may then continue, and orders or awards already made are ‘reinstated’ as between the other parties, the tribunal and the assignee (*Republic of Kazakhstan v Istil Group Inc* [2006] EWHC 448 (Comm)). Notice may postdate the assignment itself (*Eurosteel Ltd v Stinnes AG* [2001] 1 All ER (Comm) 964), although delay in giving notice beyond a reasonable time may lead an English court to conclude that the arbitration has lapsed (*NBP Development Ltd & ors v Buildko and Sons Ltd* [1992] 8 Const LJ 377).

Where the *lex fori* or *lex arbitri* is English law by virtue of the arbitration agreement, the court will likely apply English law to determine the effect of an assignment of an agreement to arbitrate even where the governing law of the contract is otherwise foreign. See, for example, *Navigation Maritime Bulgare v Rustal Trading Ltd (The Ivan Zagubanksi)* [2000] EWHC 222 (Comm); and *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA* [2005] EWHC 454 (Comm).

The civil law concept of universal succession (whereby a company can cease to exist without liquidation, its rights and liabilities transferring wholesale to another company) does not exist in English law. If a foreign company is subject to such a process in another jurisdiction, English law views the succession as analogous to an assignment, which would bind the successor to any arbitration agreements of the prior entity. However, notice is required to continue an arbitration in progress at the time of succession (*Republic of Kazakhstan v Istil Group Inc* [2006] EWHC 448 (Comm)).

The administrator of an insolvent company is bound by arbitration agreements entered into by that company, because the administrator acts as an agent of the company under paragraph 69, Schedule B1 of the Insolvency Act 1986. A liquidator of a company may bring or defend legal proceedings in the name and on behalf of the company being wound up, and so would be bound by an arbitration agreement contained in a contract entered into by the company, pursuant to paragraph 4, Schedule 4 Insolvency Act 1986.

The Third Parties (Rights Against Insurers) Act 1930 provides that a third party with a debt claim against an insolvent debtor has a direct claim against an insurer of that debtor. However, in pursuing such a claim, the claimant is bound by any arbitration agreement between the insured and insurer (*Socony Mobil Oil v West of England Shipowners Mutual Insurance Association (London) Ltd (The Padre Island)* (No. 2) [1991] 2 AC 11). It is not clear whether such a third party with a debt claim may replace the insured in an existing arbitration, although it is likely by analogy with assignment (*Baytur SA v Finagro Holdings SA* [1992] QB 610).

Where an insurer may enforce an insured’s rights against a third party through subrogation, the insurer is generally bound by any arbitration agreement governing those rights; and if subrogation occurs when arbitration is already under way, the insurer must give notice to the parties and arbitrators (*Starlight Shipping Co & Anor v Tai Ping Insurance Co Ltd* [2007] EWHC 1893 (Comm)).

Unless this is expressly excluded in the parties’ contract, a specific statutory right under the Contracts (Rights of Third Parties) Act 1999 (the CRTP Act) allows a third party to enforce terms of contracts that purport to confer a benefit on that third party. A third party exercising such a right is bound by any agreement to arbitrate (section 8(1) CRTP Act; *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm)). In *Fortress Value Recovery Fund LLP & ors v Blue Sky Special Opportunities Fund LP (A Firm)* [2013] EWCA Civ 367, the Court of Appeal concluded that clear language was required to make the right of a third party to avail itself of an exclusion clause in a contract subject to an arbitration clause in the same agreement.

Third parties who have obtained rights governed by an arbitration agreement (by which they are themselves therefore bound) may pursue anti-suit injunctions in the same manner as the original parties (*Shipowners’ Mutual Protection and Indemnity Association (Luxembourg)*

v Containerships Denizcilik Nakaliyat Ve Ticaret AS (‘Yusuf Cepnioglu’) [2016] EWCA Civ 316). See, further, questions 20 and 28.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The primary feature of arbitration is party consent, from which it follows that a tribunal may not add or substitute a party to any proceedings without the acquiescence of the existing parties. For the same reason, under section 35 of the Act, a tribunal may not consolidate its arbitration with another unless the parties consent, even if the separate proceedings relate to similar or the same subject matter.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the ‘group of companies’ doctrine?

The group of companies doctrine does not exist in English law (*Peterson Farms Inc v C & M Farming Ltd* [2004] EWHC 121 (Comm)).

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

Multiparty arbitration agreements are often adopted in contracts governed by English law and applied in arbitrations seated in England. However, the Act itself does not deal with multiparty arbitration agreements directly, or impose any requirements for such agreements to be valid. Under sections 16(7) and 18 of the Act, if any appointment mechanism contained in a multiparty arbitration agreement should fail, any party may apply to the court for assistance with the appointment of the tribunal.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Under section 93(2) of the Act, judges of the Commercial Court of England and Wales are precluded from sitting as arbitrators without approval of the Lord Chief Justice.

As to specific restrictions of qualification by the parties: the applicability of discrimination laws in the selection of arbitrators within Europe has now been referred to the European Commission, with a request that the issue be addressed by the European Court of Justice. In 2011, the Supreme Court confirmed in *Jivraj v Hashwani* [2011] UKSC 40, that arbitrators are not employees of the parties, and that a requirement that an arbitrator should be of a particular religion did not contravene the anti-discrimination provisions of the Employment Equality (Religion or Belief) Regulations 2002. The Supreme Court ruled that nationality and religion may validly be taken into account in the selection of arbitrators.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Unless otherwise agreed, either in the arbitration agreement itself, or by the selection of rules of arbitration, section 15(3) of the Act provides that the tribunal shall be comprised of a sole arbitrator.

Section 16 deals with the mechanics of the appointment process, giving the parties 28 days to agree on the appointment of a sole arbitrator, or in the case of a three-member tribunal, 14 days for each party to nominate an arbitrator, the two arbitrators so nominated forthwith

selecting the third, who acts as chair of the tribunal. If one party refuses to participate in the appointment process, section 17 permits the other party to declare that its selected arbitrator will act as the sole arbitrator. The defaulting party may then apply to the court under section 18 to set aside the appointment.

Article 5.8 of the 2014 LCIA Rules also provides for the appointment of a sole arbitrator unless the parties have otherwise agreed, and unless the LCIA Court determines that a three-member tribunal would be appropriate in the circumstances. The LCIA Court alone is empowered to appoint arbitrators, taking into account any written agreement between the parties (article 5.7). If the parties have agreed that each of them shall nominate one arbitrator to a three-member tribunal, they must make their nominations in the request for arbitration (article 1.1(v)) and the response (article 2.1(v)). However, the parties' nominees will not be appointed unless they certify that there are no circumstances currently known to the candidate which are likely to give rise to any justifiable doubts as to his or her impartiality or independence, and that the candidate is ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration (article 5.4).

Unless otherwise agreed, any party may apply to the court under section 18 of the Act to give directions as to the making of any necessary appointments; to direct that the tribunal shall be constituted by any appointments that have already been made; to revoke any appointments already made; or to make any necessary appointments itself. A useful example of the way the court handles such applications is *Man Enterprise Sal v Al-Waddan Hotel Ltd* [2013] EWHC 2356 (TCC), in which the court confirmed that, to have jurisdiction to make an order under section 18, there must be a good arguable case that there is a valid arbitration agreement.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Under section 24 of the Act, a party to an arbitration may apply to the court for the removal of an arbitrator on the following grounds:

- the existence of circumstances raising 'justifiable doubts' as to the arbitrator's impartiality;
- the arbitrator does not possess the qualifications required by the arbitration agreement;
- the arbitrator is physically or mentally incapable of conducting the proceedings, or there are justifiable doubts as to his or her capacity to do so; or
- the arbitrator has failed to conduct the proceedings properly or efficiently.

In all cases, the applicant must also be able to demonstrate a 'substantial injustice has been or will be caused' by the appointment.

The arbitrator has a right under section 24 to be heard by the court. If the court decides to exercise its power of removal, it may make an order determining the fees the arbitrator should be paid, or require the arbitrator to repay fees or expenses already received.

The relevant test for section 24(1)(a), impartiality of the arbitrator, is 'whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'. This test, formulated by the House of Lords in *Porter v Magill* [2001] UKHL 67, is objective. The Court of Appeal confirmed that this test is applicable to arbitrators as well as judges in *AT&T Corporation v Saudi Cable Co* [2000] EWCA Civ 154.

English courts have also considered the IBA Guidelines. In *A v B* [2011] EWHC 2345 (Comm) the court concluded that the IBA Guidelines are not intended to override national law, and that 'it necessarily follows that if, applying the common law test, there is no apparent or unconscious bias, the Guidelines cannot alter that conclusion', and in *W Limited v M SDN BHD* [2016] EWHC 422 (Comm) the court criticised the Guidelines for their inflexibility in providing for some non-waivable 'Red List' scenarios which would automatically indicate bias. On the other hand, the Guidelines have also recently been used to

support a finding of apparent bias (*Cofely Ltd v Bingham & Anor* [2016] EWHC 240 (Comm)).

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

The relationship between the parties and the arbitrators is contractual in nature. However, despite this, and regardless of which party appointed them, all arbitrators share an overriding obligation under section 33 of the Act to act 'fairly and impartially between the parties, giving each party a reasonable opportunity of putting his case'.

English law does not determine an arbitrator's level of remuneration or expenses. However, under section 28 of the Act, the parties are 'jointly and severally liable' to pay 'such reasonable fees and expenses (if any) as are appropriate' and it is, therefore, open to the court to review an arbitrator's remuneration. Under section 56(1), a tribunal sitting in England may refuse to deliver an award except upon full payment of the arbitrators' fees and expenses.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Under section 29 of the Act, unless acting in bad faith, arbitrators have immunity for acts and omissions in the purported discharge of their duties.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Section 9 of the Act provides that when a claim (or counterclaim) is commenced in the courts against a party to an arbitration agreement, that party can apply to stay those court proceedings (see, by way of example, *Hashwani v OMV Maurice Energy Ltd* [2015] EWHC 1811 (Comm)). Such an application is to be made at the usual point in the proceedings for challenging the court's jurisdiction, namely after the proceedings have been acknowledged by the defending party (there is a place on the form acknowledging service of the proceedings to indicate whether or not jurisdiction will be contested), but before any substantive step in the proceedings is taken by that party. It has been held that an action impliedly affirming the court proceedings is such a step (for example, agreeing to a consent order after a case management conference was found to be an unequivocal step affirming proceedings in *Nokia Corp v HTC Corp* [2012] EWHC 3199 (Pat)).

In most cases, the acknowledgement of service form is to be submitted within 14 days following service of the claim, so the served party must react promptly.

Section 9(4) makes the granting of a stay by the court mandatory unless the court is satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed. An incapability of performance does not include a party's impecuniosity. A previously granted stay may be lifted on the grounds the arbitration agreement is inoperative where both parties signal to the court that they have abandoned the arbitral proceedings (for both points, see *Trunk Flooring Ltd v HSBC Asset Finance (UK) Ltd & Anor* [2015] NIQB 23). The issue can come close to a question of arbitrability (see, for example, the discussion of *Salford Estates (No. 2) Limited v Altomart Limited* [2014] EWCA 575 Civ in question 8). Parties should be aware that their acceptance of joinder in litigation proceedings may debar them from later raising section 9 to seek a stay of a related counterclaim which may otherwise have been subject to arbitration (see, for example, *Unwired Planet International Ltd v Huawei Technologies Co Ltd and Ors* [2015] EWHC 2097).

The court also has an inherent jurisdiction to grant a stay of litigation in favour of arbitration even where the litigation involves different

parties, if the court is persuaded that there are significant overlapping issues and potential for duplication of costs, although exercise of this power is rare (*Stemcor UK Ltd v Global Steel Holdings Ltd and Anor* [2015] EWHC 363 (Comm); *In the matter of Fenox (UK) Limited sub nom J & W Sanderson Limited v Fenox (UK) Limited & Ors* [2014] EWHC 4322 (Ch)).

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Section 30 of the Act provides that the arbitral tribunal may rule on whether there is a valid arbitration agreement, whether the tribunal is properly constituted, and what matters have been submitted to arbitration. The court also has the power to make an injunction to restrain the pursuit of arbitral proceedings (or even their commencement) under section 37 of the Senior Courts Act 1981, although it will often defer to the tribunal's own power to decide its jurisdiction under section 30 of the Act, or when the arbitral proceedings at issue are in a foreign jurisdiction (see, by way of example, *AmTrust Europe Ltd v Trust Risk Group SpA* [2015] EWHC 1927 (Comm)).

Section 31 provides that a challenge to the tribunal's jurisdiction in the arbitral proceedings must be raised no later than the time when the challenging party takes its first step in the proceedings to contest the merits of the matter over which it alleges the tribunal has no jurisdiction. Appointing an arbitrator will not prevent a party from contesting the tribunal's jurisdiction. Where a party considers that a tribunal is exceeding its jurisdiction once proceedings are under way, any objection must be made as soon as possible.

Under section 32 of the Act, an application can be made to the court to determine a preliminary point of jurisdiction only if all parties consent in writing to the application being made, or the arbitral tribunal gives permission to make the application and the application is made promptly, determination of the question is likely to produce substantial cost savings, and there is a good reason why the court should decide the matter.

A party to the arbitration can challenge any award issued by the arbitral tribunal for lack of jurisdiction (section 67), provided that the challenging party has no available right of review or appeal under the arbitral process and makes the challenge within 28 days of the date of the award (as opposed to the date at which the parties have sight of the award: *S v A and B* [2016] EWHC 846 (Comm)) (or the conclusion of the appeal or review process) (section 70(2) and (3)).

A party that fails to avail itself of an opportunity to challenge jurisdiction within the established time period under the Act is debarred from raising the objection at a later stage, either before the arbitral tribunal or the court, unless it can show it could not with reasonable diligence have discovered the ground for objection at the time (section 73(1)).

Where a tribunal issues a partial award (see question 37) on the matter of its jurisdiction, a party's failure to challenge that award under section 67 within the time frame laid out in section 70 deprives it of the right to raise the challenge at a later time (section 73(2); see, by way of example, *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Limited* [2015] EWHC 1452 (Comm)).

The Act also makes provision for persons alleged to be a party to the arbitral proceedings, but who take no part in them, to question through the courts whether there is a valid arbitration agreement, whether the tribunal is properly constituted, and what matters have been submitted to arbitration, or to challenge an award once made for lack of jurisdiction (section 72; see, by way of example, *Hashwani v OMV Maurice Energy Ltd* [2015] EWHC 1811 (Comm)).

In circumstances of related disputes deriving from separate contracts providing for litigation and arbitration, parties should exercise caution if electing to raise claims or counterclaims before the different bodies. In *Swallowfalls Limited v Monaco Yachting & Technologies SAM and Mr Peter Landers JR* [2015] EWHC 2013 (Comm) the defendants had brought counterclaims in arbitration which were dismissed. When the defendants subsequently sought to raise those same claims in the litigation, the court struck them as already adjudicated given the defendants' prior election to raise them in the arbitral proceedings.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Under section 3 of the Act, in the absence of any agreement between the parties, and if so authorised by the parties, the tribunal may select the seat of the arbitration. Failing such agreement, it is for the court to determine the seat, having regard to 'all the relevant circumstances'. Unless agreed by the parties, the tribunal may determine under section 34 of the Act where the proceedings are held.

Section 34 of the Act also deals with the language of the arbitration, which, absent agreement between the parties, is a matter for the tribunal to determine.

23 Commencement of arbitration

How are arbitral proceedings initiated?

If there is no agreement between the parties or choice of arbitration rules setting out how the arbitration is to be initiated, section 14 of the Act provides that arbitration is deemed to have commenced when one party gives notice in writing to the other party or to the appointing authority requiring that person to make an appointment. There are no particular formal requirements, except that this notice must be in writing. Although there is flexibility for parties to agree the mode of service of a notice of arbitration under section 76 of the Act, such service must be to the other party directly, or to an agent expressly empowered to accept service (*Sino Channel Asia Ltd v Dana Shipping and Trading PTE Singapore & Anor* [2016] EWHC 1118 (Comm)).

In the case of arbitrations under the 2014 LCIA Rules, article 1.4 provides that arbitration is commenced once a request for arbitration is received by the registrar. The request for arbitration should be accompanied by the relevant filing fee. Under article 1.1(vi), if the required filing fee has not been paid, the arbitration is deemed not to have commenced.

Article 1.1 sets out the elements that must be included in the request for arbitration, being: the names and contact details of all parties and their legal representatives; a copy of the arbitration agreement and the document in which it appears; a brief statement describing the nature and circumstances of the dispute and the claims that are advanced; a statement of matters such as the seat and language of the arbitration and the appointment of the arbitrators on which the parties have agreed or on which the claimant wishes to make a proposal; and any nomination of an arbitrator that is required by the arbitration agreement.

24 Hearing

Is a hearing required and what rules apply?

There is no rule requiring a hearing in English arbitration proceedings; however, it is usual practice to hold one. Under article 19.1 of the 2014 LCIA Rules, any party may insist on a hearing unless the parties have previously agreed in writing to a 'documents-only' arbitration.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Section 33 of the Act requires the tribunal to act fairly and impartially, and to adopt procedures suitable to the circumstances of the case. Section 34 gives the tribunal power to decide all procedural and evidential matters, subject to any agreement between the parties, including disclosure, questioning of witnesses, what rules of evidence should apply, and the manner in which the evidence should be presented.

The powers granted to a tribunal sitting in England and Wales therefore give the tribunal very broad discretion to determine all matters relating to evidence. It is unusual for a tribunal to adopt the strict rules of evidence that would apply in court proceedings, but tribunals do commonly use the IBA Rules of the Taking of Evidence in International Commercial Arbitration, either as the rules governing the proceedings or as a guide in the exercise of its discretion.

Disclosure of documents is not uncommon, although its scope is usually more limited than would be the case in English court proceedings.

Any person may appear as a witness, including the parties themselves. Witnesses of fact usually give their direct evidence by way of witness statements, and are cross-examined on their evidence during the hearing. The parties may appoint expert witnesses who submit written reports and appear at the hearing for cross-examination and questioning by the tribunal. The tribunal may also appoint experts under section 37 of the Act, although this power is rarely exercised.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

The court may assist an arbitral tribunal in a number of ways. It can enforce a peremptory order if that order is not complied with in the time prescribed (or a reasonable time) and the applicant has exhausted available arbitral procedures for forcing compliance (section 42 of the Act). With the permission of the tribunal or agreement of the other parties, a party to an arbitration may seek the court's assistance to secure the attendance of a witness, or to obtain disclosure of documents or other evidence, just as in court proceedings (section 43). The court may also assist in relation to the following matters under section 44 (unless this is excluded by agreement of the parties):

- taking witness evidence;
- preserving evidence;
- making orders relating to the inspection, detention, sampling, etc of property that is the subject of the proceedings (in *Assimina Maritime v Pakistan Shipping Corporation* [2004] EWHC 3005 (Comm) the High Court ordered a third party to produce a report for inspection);
- authorising entry to premises in possession or control of a party;
- the sale of goods that are the subject of the proceedings;
- the granting of an interim injunction or appointment of a receiver; and
- orders for the preservation of evidence or assets, in cases of urgency.

The court may also determine a question of law arising in the course of arbitration proceedings, either by the agreement of the parties or with the arbitral tribunal's permission on application by a party to approach the court, if the court is satisfied that determining the question will produce a substantial costs saving and the application was made without delay (section 45). This is rarely sought in practice, but a recent example is found in *Secretary of State for Defence v Turner Estate Solutions Ltd* [2015] EWHC 1150 (TCC).

Given the tribunal's power to decide its own jurisdiction under the Act (see question 21), the court will be reluctant to interpose its own judgement on whether an arbitration agreement is valid, except under the rules and procedures for appeal of arbitral awards (see, eg, *HC Trading Malta Ltd v Tradeland Commodities SL* [2016] EWHC 1279 (Comm), where the court declined to rule on the validity of an arbitration agreement where arbitration proceedings were contemplated by one of the parties but not yet initiated).

27 Confidentiality

Is confidentiality ensured?

The Act makes no particular provision regarding confidentiality, but it is generally recognised that arbitration proceedings are private and members of the public cannot attend hearings as they can proceedings in open court. Some institutional rules include a duty of confidentiality (eg, 2014 LCIA Rules article 30); others do not. Typically, a tribunal will address the issue of confidentiality in its procedural orders. This is important as English law does not clearly define the scope of the confidentiality obligation.

English law typically treats confidentiality as an implied term of the arbitration agreement (see *Ali Shipping Corporation v Shipyard Trogir* [1997] EWCA Civ 3054, but note that this approach was criticised by the Privy Council as being insufficiently flexible in *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Company of Zurich (Bermuda)* [2003] UKPC 11).

The duty of confidentiality is subject to a number of recognised exceptions, including the consent or agreement of the parties to dispense with or limit obligations on confidentiality, where disclosure is required or permitted by a court (for example, by order of the court in other proceedings, *Science Research Council v Nassé* [1980] AC 1028), where disclosure is necessary to establish or protect legal rights (for example, to claim an indemnity for its liability to the other arbitrating party, *Hassneh Insurance Co of Israel v Mew* [1993] 2 Lloyd's Rep 243; and where a principal wishes to obtain documents put before arbitral proceedings in which it has a financial interest and its agent is a party to the arbitration, *AMEC Foster Wheeler Group Limited v Morgan Sindall Professional Services Limited & Ors* [2015] EWHC 2012 (TCC)) and where it is in the interests of justice (for example, to prevent an overseas court being misled about the scope of an arbitration, *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184). In *Westwood Shipping Lines inc & Anor v Universal Schiffahrtsgesellschaft MBH & Anor* [2012] EWHC 3837 (Comm), where an arguable claim could not otherwise be pursued in court, a party was permitted to rely on documents used in an earlier arbitration proceeding because it was considered reasonably necessary to protect the claimant's legitimate interests, and it was in the interests of justice. More recently, the court has indicated that a claimant does not need permission to bring litigation proceedings in the protection of its legitimate interests, although otherwise in violation of arbitral confidentiality, but it acts at its own risk in so doing (*Sarah Lynette Webb v Lewis Silkin LLP* [2015] EWHC 687 (Ch)).

The rules governing English court procedure (the Civil Procedure Rules (CPR)) provide that court proceedings relating to arbitration are generally heard in private, except for those relating to the determination of a preliminary point of law under section 45 or an appeal on a point of law under section 69 of the Act (CPR 62.10(3)), although the court has a general discretion to make any arbitration claim hearing private (CPR 62.10(1)). However, this is counterbalanced by a public interest in judgments of the court being public, particularly in relation to appeals under section 68 of the Act. See *Department of Economic Policy of the City of Moscow v Bankers Trust* [2004] EWCA Civ 314.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Section 44(1) of the Act states that the court has the same powers in support of arbitration proceedings as it would in court proceedings to make orders having to do with, for example, the taking and preservation of evidence and the granting of interim injunctions, or the appointment of a receiver. The court's powers under section 44 are not mandatory and may be restricted by agreement between the parties. Furthermore, the court may only exercise its powers under section 44 where, in a case of urgency, it is necessary to preserve evidence or assets, or where the application is made with the permission of the tribunal or the agreement of the other party. In either case, section 44(5) provides that 'the court shall act only if or 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.'

In practice, the powers conferred on the court by section 44 of the Act are used with restraint (see *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618) and in circumstances where the tribunal is unable to act for one reason or another (section 44(5)). For example, arbitral tribunals lack jurisdiction over third parties, thus some interim measures may only be sought from the court (such as a freezing order over money held by third parties).

The Supreme Court in *AES UST-Kamenogorsk Hydropower Plant LLP v UST-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35 examined the interplay between section 37 of the Senior Courts Act 1981 and section 44 of the Act. The Supreme Court held that, even where no arbitration had been commenced and none was intended, section 37 of the Senior Courts Act 1981 gave the court jurisdiction to grant an anti-suit injunction. This was followed in *Southport Success SA v Tsingsham Holding Group Co Ltd* [2015] EWHC 1974 (Comm). However, anti-suit injunctions must be made promptly, and a party that takes significant steps to address the merits of a dispute in court proceedings before seeking such an injunction is likely to be denied relief (*ADM*

Asia-Pacific Trading PTE Ltd v Toepfer International Asia PTE Ltd & Anor [2016] EWHC 1427 (Comm).

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The Act does not provide for emergency arbitrator appointments.

The 2014 LCIA Rules have added a provision for appointment of an emergency arbitrator on application in writing to the LCIA Court stating reasons for the need of emergency relief (article 9B), as well as providing for expedited formation of a tribunal also on application in writing (articles 5 and 9A). The LMAA Terms of Appointment 2012 do not make explicit provision regarding emergency arbitrators, although at clause 8(b)(iv), should a tribunal of three be in the process of formation, but the third arbitrator not yet have been selected, the two presently appointed arbitrators may make decisions, orders and awards upon 'any matter' on which they are agreed. The CI Arb arbitration rules established on 1 December 2015 include provisions for the appointment of an emergency arbitrator at article 26 and Appendix I.

A recent judgment has indicated that, where emergency arbitration procedures are available but the presiding arbitral institution has declined to activate them in response to a party's application, the court is unlikely to step in to use its powers under section 44 of the Act to offer relief instead (*Gerald Metals SA v Timis & Ors* [2016] EWHC 2327 (Ch)).

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Under the Act, and to the extent not otherwise agreed by the parties, the tribunal may order:

- security for costs (section 38(3) (though this may not be on the basis that the claimant is resident, or a corporation formed or substantially controlled from, outside the UK) (section 38(3)(a) and (b)));
- the inspection, photographing or preservation of a party's property (section 38(4)(a)); and
- the preservation of evidence (section 38(6)).

In addition, section 39 of the Act allows the parties to agree to empower the tribunal to make any order on a provisional basis granting relief that it would have the power to grant in a final award.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Section 40 of the Act is a mandatory provision imposing a general duty on the parties to arbitration to 'do all things necessary for the proper and expeditious conduct of the arbitral proceedings'. This general duty may be enforced by the tribunal under section 41, with sanctions in some specified circumstances including a dismissal of the claim or defence of the party in breach. If the party fails to comply with a peremptory order of the tribunal, the tribunal or the other party with the permission of the tribunal may apply to the court for an order under section 42. The breach of such an order of the court would be treated as contempt, which could result in fines or a term of imprisonment. The tribunal also has a further opportunity to sanction a recalcitrant party in determining its award of costs under section 61 of the Act.

The 2014 LCIA Rules include an annex entitled General Guidelines for Parties' Legal Representatives, setting out five general principles governing the conduct of party representatives. Article 18.5 empowers an LCIA arbitration tribunal to sanction party representatives for breach of these guidelines by imposing a written reprimand or caution,

or adopting other measures (article 18.6). It remains to be seen how these provisions will be applied in practice.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Usually, in the case of a three-member tribunal, one of the arbitrators is appointed to act as the chair of the tribunal, and in this case section 20 of the Act permits an award to be made by a majority of the arbitrators, with the view of the chair prevailing if the arbitrators cannot reach a unanimous or majority decision. Alternatively (and quite rarely) the third arbitrator may act as an umpire under section 21 of the Act. In the event that the other arbitrators are unable to reach an agreement, the umpire can, by order of the court, replace them as the tribunal with power to make all decisions in the arbitration.

These procedures are not mandatory under the Act and may be displaced by party agreement (sections 20(1), 21(1) and 22(1)).

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Although dissenting opinions are allowed under English law, they are infrequent. Section 52(3) of the Act provides that a dissenting member of the tribunal need not sign the award. A dissenting opinion does not form part of the award under the Act. Consequently, a party cannot rely on a dissenting opinion to sustain a challenge for serious irregularity under section 68 (*F v M* [2009] EWHC 275 (TCC)). But a dissenting opinion might be admissible as evidence in relation to procedural matters or on an appeal on a point of law under section 69 (*B v A* [2010] EWHC 1626 (Comm)).

34 Form and content requirements

What form and content requirements exist for an award?

There is no statutory definition of an award in the Act. The parties are free to agree on the form of an award, failing which section 52 of the Act sets out the formal requirements. The award must be in writing, signed by all of the arbitrators who assent to it, and it must state reasons unless it is an agreed award or the parties have agreed to dispense with reasons. In addition, the award must state the seat of the arbitration and the date on which the award is made.

The court gave useful guidance on the adequacy of the reasons stated for an award in *Compton Beauchamp Estates Limited v Spence* [2013] EWHC 1101.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The Act does not include time limits for the tribunal to render an award, although it is always open to the parties to agree upon a particular time limit. If a time limit is imposed by agreement of the parties, unless they agree otherwise, this may be extended by the court upon the application of a party or of the tribunal under section 50 of the Act if the court considers that substantial injustice would otherwise result.

Under clause 20 of the LMAA Terms of Appointment 2012, the award 'should normally be available within not more than six weeks from the close of the proceedings'. The LCIA and CI Arb arbitration rules make no provision for award deadlines.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Any application for the correction of an award or for an additional award under section 57 of the Act must be made within 28 days of the date of

the award (or any longer period agreed by the parties). Challenges to an award relating to the jurisdiction of the tribunal, alleging a serious irregularity affecting the tribunal, the proceedings or the award, or an appeal on a point of law under sections 67 to 69 of the Act must also be brought within 28 days of the date of the award (or, if there has been some form of review or appeal of an award, within 28 days of the date when the applicant was notified of the result of that process) (section 70(3)). These time limits run from the date of the award rather than from the date when the award was delivered to the parties (*S v A and B* [2016] EWHC 846 (Comm)).

The court may extend this time limit under section 79, but this power will only be exercised where the court is satisfied that all other recourse has been exhausted and that a substantial injustice would otherwise be done. See, for example, *Nicola Rotenberg v Sucafin SA* [2011] EWHC 901 (Comm).

In *K v S* [2015] EWHC 1945 (Comm), the court found that the time limit for an application to challenge an award under section 67 and 68 of the Act should not be delayed by an application for correction of the award under section 57. The court held the application for correction was immaterial because, in that case, the applicant was aware of the grounds for the challenge from the date of issue of the award. It followed that the limit for challenging the award commenced from that date, rather than from the issuance of the corrected award.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

Under section 48 of the Act, the parties are free to agree which remedies the tribunal may award. In the absence of any agreement, the tribunal may make declarations, order the payment of damages, grant injunctions, order specific performance, and order the rectification, setting aside or cancellation of a document.

Under section 47 of the Act, the tribunal may make partial awards on different aspects of the dispute.

Under section 51 of the Act, the tribunal may grant consent awards.

Under section 57 of the Act, the tribunal may correct an award or make an additional award.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

If the parties reach a settlement before an award is granted, under section 51 of the Act they may request the tribunal to terminate the proceedings and record the settlement as an agreed award. An agreed award must meet all of the formal requirements of an award, and must state that it is an award of the tribunal.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Section 61(1) of the Act provides that the tribunal may make an award allocating the costs of the arbitration between the parties. This power is subject to any agreement by the parties (either in the arbitration agreement itself or in the institutional rules selected). However, an agreement that one party is to pay the whole or part of the costs of the arbitration regardless of its outcome is only valid if made after the dispute in question has arisen (section 60).

It is usual in English court proceedings that 'costs follow the event', and this position is reflected in section 61(2) of the Act which provides that an arbitral tribunal shall award costs on the basis of this general principle (unless this is inappropriate in the circumstances). The term 'costs' includes the fees and expenses of the arbitrators, the fees and expenses of any arbitral institution, and the legal and other costs of the parties (section 59).

It has recently been confirmed that 'other costs' may, at least in some circumstances, include the costs of third-party dispute funding (*Essar Oilfields Services Limited v Norscot Rig Management PVT Limited* [2016] EWHC 2361 (Comm)). See question 50 for further discussion of third-party funding. Sections 62 to 65 of the Act set out additional detailed rules relating to the recovery of costs.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Section 49 of the Act provides that the parties are free to agree on the powers of the tribunal with regards to interest and if no such agreement is made, the tribunal may award simple or compound interest at rates it considers 'meet the justice of the case'. Therefore, absent agreement of the parties on the point, the tribunal has considerable flexibility over the award of interest under the Act.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative?

What time limits apply?

Section 57 of the Act empowers the tribunal, on its own initiative or on application by a party, to correct an error or remove an ambiguity in an award, or to issue an additional award in respect of a claim that was presented to the tribunal but not dealt with in the original award. An applicant must show that any claim it says was omitted was in fact presented to the tribunal, and the focus should be on the substance rather than the form (*Cadogan Maritime Inc v Turner Shipping Inc* [2013] EWHC 138 (Comm)). An application under section 57 must be made within 28 days of the date of the original award (which may be less than 28 days from the date when the award was served) and the new award must be issued within 28 days of the date of the application. The tribunal may also issue a corrected award under section 57 under its own initiative within 28 days of the date of the original award. The parties may agree an extension to the time limits under section 57.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

The Act departs from the Model Law in some respects in relation to challenges to an arbitration award issued by a tribunal within the jurisdiction. However, the court has adopted a constrained approach to appeals under the Act and few have been successful.

An award may be set aside on the following grounds:

- The tribunal lacked substantive jurisdiction (section 67). Such a challenge must be made at the earliest possible opportunity, failing which the right to object will be waived under section 73. Where a tribunal issues a partial award (see question 37) on the matter of its jurisdiction, a party's failure to challenge that award under section 67 within the time frame laid out in section 70 (see question 21) deprives it of the right to raise the challenge at a later time (section 73(2); see, by way of example, *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Limited* [2015] EWHC 1452 (Comm)). The grounds on which the appeal is made must have been considered by the tribunal (*Athletic Union of Constantinople v National Basketball Association (No. 2)* [2002] EWCA Civ 830). They usually concern the existence of a valid arbitration agreement between the parties. See, for example, *Finmoon Ltd v Baltic Reefers Management Ltd* [2012] EWHC 920 (Comm). Generally, the court is slow to exercise its discretion; see, for example, *Integral Petroleum v Melars Groups Ltd* [2015] EWHC 1893 (Comm), where an application for relief under section 67 was refused, even though it was found that the tribunal's ruling that it lacked jurisdiction was incorrect.
- The award was affected by a serious irregularity (section 68). It is rare for an appeal under section 68 to be successful. It is limited to those cases where justice requires the court to intervene. The grounds constituting a serious irregularity are divided into those affecting the arbitral procedure (including issues regarding apparent bias of an arbitrator (see question 17)) and those affecting the award. None of them permit the court to reconsider the merits of the award, or whether the tribunal's findings of fact or law were correct (see *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43; *Primera Maritime (Hellas) Ltd and others v Jiangsu Eastern Heavy Industry Co Ltd and another* [2013] EWHC 3066 (Comm)). Nor will the court overturn an award on the basis

that the tribunal failed to give sufficient weight to particular evidence (*Schwebel v Schwebel* [2012] EWHC 3280 (TCC)), because an award was made conditional upon a failure to show cause why the debt was not owed (*U&M Mining Zambia Ltd v Konkola Copper Mines plc* [2014] EWHC 2374 (Comm)), or because of delay in issuing the award (*B.V. Scheepswerf Damen Gorinchem v The Marine Institute* [2015] EWHC 1810 (Comm)). A tribunal's award based on the conclusion that one provision was a penalty was overturned where the party advancing the penalty argument had applied it to a different provision of the parties' agreement (*Brockton Capital LLP v Atlantic-Pacific Capital, Inc* [2014] EWHC 1459 (Comm)). The Commercial Court Guide clarifies that an appeal under section 68 may be dismissed without a hearing, and that a party could be sanctioned with indemnity costs if it loses an appeal under section 68 having refused to allow the appeal to proceed on the papers without a hearing.

• An appeal on a point of English law (section 69). This is a departure from the Model Law, but it is limited in scope. An appeal under section 69 may only be brought with the permission of the court or with the agreement of all other parties to the arbitration. The Court of Appeal has a threshold discretion to allow an appeal under section 69, but this will only be exercised in limited circumstances: *Kyla Shipping Company Ltd v Bunge SA* [2013] EWCA Civ 734. The point of law under appeal must substantially affect the rights of at least one of the parties. In addition, it must be one on which the conclusion of the tribunal is obviously wrong, or it must be a question of general public importance and the decision of the tribunal must be open to serious doubt. The right to appeal under section 69 may be excluded by agreement of the parties.

The language of the statute is permissive: the court 'may' rather than 'shall' make an order to confirm, vary, set aside or remit the award, as relevant under these various sections, if it is satisfied sufficient reasons are present. This is understood to allow the court, where appropriate, to make no order at all (*Integral Petroleum SA v Melars Group Limited* [2016] EWCA Civ 108).

An application to appeal on any of these grounds must be made within 28 days of the date of the award being appealed. The court may, under section 70, make orders for security for the respondent's costs of the application, and for payment into court of any sums due under the arbitration award. In *X v Y* [2013] EWHC 1104 (Comm), Teare J made an order for security for costs against X where there was a real risk that any costs order made against that party would not be enforced without considerable delay and expense.

Parties should also be conscious of those decisions of a tribunal which are challengeable under these procedures, and those that are not. 'Award' is not defined in the Act, but case law has established that an award must finally dispose of an issue in an arbitration, to be contrasted with procedural orders or directions (*Brake v Patley Wood Farm LLP* [2014] EWHC 4192 (Ch)). For example, a recent challenge under sections 68 and 69 to a tribunal's order refusing to strike out a claim was not acted upon by the court, as such refusal was not finally determinative of a claim and could have been revisited by the tribunal (*Enterprise Insurance Co Plc v (1) U-Drive Solutions (Gibraltar) Ltd (2) James Drake QC* [2016] EWHC 1301 (QB)).

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

In theory, there are three potential levels of appeal. The initial application must be made to the Commercial Court, the part of the High Court that is charged with dealing with applications on arbitration matters. The application must be made within 28 days of the date of the award being challenged, and a hearing would usually take place within six to nine months of the date of the application.

Further appeals may only be made with permission. The Commercial Court may grant permission to appeal to the Court of Appeal, but the Court of Appeal may not grant permission itself to hear an appeal if the Commercial Court refuses. A further appeal is possible to the Supreme Court, again only with permission. This is rarely

granted. Indeed, we are only aware of two cases in which the Supreme Court addressed an issue under the Act dealing with an arbitration seated in the jurisdiction: *Jivraj v Hashwani* [2011] UKSC 40 and *NYK Bulkship (Atlantic) NV v Cargill International SA* [2016] UKSC 20.

Appeals at each level routinely take more than a year to reach judgment. The general rule is that costs follow the event (ie, the losing party will be ordered to pay the reasonable costs of the successful party).

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Section 66 of the Act provides that with leave of the court an award made by an arbitral tribunal may be enforced in the same manner as a judgment or order of the court, with judgment being entered in the terms of the award. Leave will not be given if the party against whom the award is to be enforced can demonstrate that the tribunal lacked the jurisdiction to make the award (section 66(3)).

With regards to foreign arbitration awards made in a New York Convention state, sections 100 to 103 of the Act provide for recognition and enforcement of these awards upon the production to the court of an authenticated original or certified copy of the award together with the original or certified copy of the arbitration agreement. If the award is in a foreign language, a certified translation must also be provided (section 102). With the leave of the court, these awards may be enforced in the same manner as a judgment or order of the court (section 101(2)).

The grounds under section 103 of the Act for refusing recognition and enforcement of a New York Convention award are narrow and include:

- that a party to the arbitration was under some incapacity;
- that the arbitration agreement was not valid under the relevant law;
- that the person against whom the award is invoked was not given proper notice of the arbitration or was otherwise unable to present its case;
- that the award is beyond the scope of the matters submitted to arbitration;
- that the composition of the tribunal was contrary to the parties' agreement or the relevant law;
- that the award is not yet binding on the parties, or has been set aside or suspended by a competent authority under the relevant law;
- that the award relates to matters which are not capable of settlement by arbitration; and
- that it would be contrary to public policy to enforce the award.

Awards to which the New York Convention does not apply remain enforceable under the Arbitration Act 1950 (section 99 of the Act).

The relevant procedural rules for applying for enforcement of an award are set out at CPR 62.18.

The case of *Ecobank Transnational Inc v Tanoh* [2015] EWHC 1874 (Comm) serves as a reminder for those seeking to avoid enforcement that such an application can be defeated by delay. In that case, eight months had passed since foreign court proceedings had been commenced in breach of an arbitration agreement.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Section 103(2) of the Act sets out the limited grounds on which recognition or enforcement of a New York Convention award may be refused. These include that 'the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.' The mere fact that an application has been made in a foreign jurisdiction to set aside the award will usually result in a stay of enforcement proceedings. See, for example *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v Republic of Kazakhstan* [2015] EWHC 2542 (Comm), where the High Court exercised its inherent case management powers to adjourn an application for enforcement of an ECT award while annulment proceedings were under way in the Swedish courts.

Update and trends

In March 2016, the Lord Chief Justice of England and Wales, Lord Thomas, gave a lecture in which he opined that the encouragement of arbitration in England had frustrated the development of the common law by limiting opportunities for judges to rule on disputes, and thereby create precedent. Owing to the 'arbitration-friendly' approach of sections 45 and 69 of the Arbitration Act 1996, the circumstances in which the court may intervene in an arbitration on a point of law are quite limited. Under section 45 it may do so as a preliminary point, but only with the agreement of all parties or consent of the tribunal. Under section 69, a party may appeal an award on a point of law, again with the agreement of all other parties to the arbitration, or with the permission of the court (which under the present system must be in response to a decision on which the conclusion of the tribunal is obviously wrong, or a question of general public importance where the decision of the tribunal is open to serious doubt). Moreover, both avenues may be excluded entirely by agreement of the parties, debarring any opportunity for the court to intervene. The Lord Chief Justice particularly focused on potential reform of section 69.

The Lord Chief Justice's comments, although somewhat softened in a subsequent speech in July 2016, have been met with resistance from other judges, such as Lord Saville, former Supreme Court Justice, and Sir Bernard Eder, former Commercial Court judge. It is indeed common practice in institutional rules, such as at the LCIA and the ICC, for the parties to agree to waive any right to appeal on a point of law, and so any reform of section 69 could ultimately lack teeth. Whether there is any appetite for reform of section 69 beyond the Lord Chief Justice's comments remains to be seen. However, it may be noted that the common law of contract, in particular with regard to interpretation of contractual terms and issues of damages, has seen many developments in recent years, as well as various areas of tort law including conspiracy to cause economic harm. The extent to which the Lord Chief Justice's concern is legitimate is therefore perhaps open to debate.

The result of the British referendum on exiting the European Union on 23 June 2016 has led to much speculation regarding the future of many of the United Kingdom's relationships and institutions. There is little about the legal framework of English-seated arbitration, or English contract law as it applies to commercial contracts, that will be significantly affected by any departure from the EU. As discussed in previous years, in 2008, the European Court of Justice determined in

West Tankers that anti-suit injunctions within the EU were incompatible with Regulation 44/2001 (the Brussels Regulation, which concerns the interaction between domestic courts within the EU). That meant the English court could no longer issue an injunction to prevent a party to an arbitration agreement from pursuing in the courts of another member state an action against its counterparty in the arbitration agreement. It is unclear at this stage, what – if anything – will replace the (now 'recast') Brussels Regulation, but it is possible that the United Kingdom's departure from the EU will restore the English court's power to issue anti-suit injunctions on common law principles in respect of proceedings in the courts of member states, thereby expanding its powers.

English court judgments appeared for the first time in 2016 with regard to newly developing international arbitration trends, third-party funding costs and emergency arbitration measures:

- in *Essar Oilfields Services Limited v Norscot Rig Management PVT Limited* [2016] EWHC 2361 (Comm), the Commercial Court upheld an ICC tribunal's assessment that 'other costs' as referred to in section 59(1) of the Arbitration Act may, at least in some circumstances, include the costs to the claimant of its third-party dispute funding. If such a position is sustained, this could set arbitration apart from litigation, with arbitrators enjoying greater flexibility in awarding costs than do judges in litigation conducted under the Civil Procedure Rules; and
- a recent chancery judgment has indicated that, where emergency arbitration procedures are available but the presiding arbitral institution has declined to activate them in response to a party's application, the court is unlikely to step in to use its powers to offer relief instead (*Gerald Metals SA v Timis & Ors* [2016] EWHC 2327 (Ch)). This suggests that, where parties do not opt out of arbitral institutional provisions for emergency procedures, the court is unlikely to offer emergency interim assistance outside of circumstances where an order is sought against third parties (who are not bound by an arbitration agreement and over which the tribunal has no jurisdiction), or there is reason to hear and accept an application without notice to the opponent in the arbitration (which is not possible under arbitral rules; given the consensual nature of arbitration, emergency procedures in institutional rules typically require that applications are made on notice to the other side).

In *Yukos Capital SARL v OJSC Rosneft Oil Company* [2014] EWHC 1288 (Comm), the court considered as a preliminary issue whether the enforcement of an arbitral award that had been set aside by the courts of the seat is precluded under common law. The court concluded that it was not, and if the claimant could satisfy the court that the foreign court's judgment offended against basic principles of honesty, natural justice and domestic concepts of public policy, the court would have power to enforce the award.

Although the New York Convention allows enforcement to be declined on grounds of public policy, a foreign award granting relief under principles which would not prevail under English law may nevertheless be enforced (see, eg, *Pencil Hill Ltd v US Citta di Palermo Spa* (Case BA40MA109) (unreported), where a Swiss award granting relief under a contractual penalty, which would not have been granted in English law, was enforced by the English court).

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

We are not aware as yet of any judgments discussing enforcement of an emergency arbitrator order.

The Act refers to 'arbitrators' or the 'arbitral tribunal', but does not expressly refer to 'emergency arbitrators'. Section 41 does permit the tribunal to make 'peremptory orders', which the court may enforce pursuant to section 42. However, it is not clear whether the court will consider an emergency arbitrator to fall within the definition of 'the tribunal', whose orders would be enforceable under section 42. These provisions are not applicable to arbitrations seated outside the jurisdiction. Furthermore, section 66 only provides for the enforcement of an 'award'. 'Award' is not defined in the Act, but case law has established

that an award must finally dispose of an issue in an arbitration, to be contrasted with procedural orders or directions (*Brake v Patley Wood Farm LLP* [2014] EWHC 4192 (Ch)). Accordingly, it is questionable whether an emergency arbitrator order to which the main tribunal is not bound – which is expressly the case under some institutional rules – would fall within the English court's definition of an award.

The issue is perhaps even more uncertain with regard to decisions of an emergency arbitrator in foreign proceedings. As well as the issues just discussed, even where an 'award' is issued, the court may not view it as sufficiently final and binding within the meaning of article V of the New York Convention to warrant enforcement.

Article 9.9 of the LCIA Rules 2014 provides that the award of an emergency arbitrator shall 'take effect as an award under article 26.8', making it 'final and binding on the parties'. While this is perhaps designed to encourage enforcement by the court, we are not aware of any case law specifically on this point. In practice, institutional rules generally include an undertaking to comply with any awards or orders, which, conscious of alienating the tribunal, and the potential for adverse costs orders, parties are unlikely to breach lightly. This may explain why the English courts do not appear to have addressed this issue yet.

47 Cost of enforcement

What costs are incurred in enforcing awards?

A party seeking enforcement of an arbitral award must comply with the procedure set out in CPR 62.18 and pay a court fee. The application must be made to the court, and supported by the arbitration agreement, the award, and an affidavit or witness statement and a draft order. Typically, most of the cost of enforcement will be made up of legal fees, which could rise quickly if the application is contested. However these may be recoverable by a successful party under the usual adverse costs principles applicable to English litigation. The applicant will also be liable for the associated costs of serving the defendant, which should be

borne in mind particularly if the defendant is located abroad. Finally, identifying and seizing the defendant's assets will involve additional costs, which could also be considerable.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Some particular features of the English legal system and establishment likely to affect arbitration include:

- English (and other common law) arbitrators may be more likely than their civil law counterparts to make orders for extensive document disclosure;
- there is an assumption that the English rules of privilege will apply; and
- the assumption of 'loser pays' costs codified in the Act is a significant consideration for arbitration in England.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

No specific framework governs the ethical conduct of counsel in international arbitration. The general ethical standards for solicitors are set out in the Solicitors Regulatory Authority's Code of Conduct. For those 'practising overseas' on a non-temporary basis, the SRA's Overseas Rules apply, which exclude some of the Code of Conduct rules – including those relating to advocacy – which would otherwise apply. The conduct of barristers is governed by the Code of Conduct in the Bar Standards Board's (BSB) Handbook. Both codes govern conduct of English counsel in international arbitration.

European counsel working in Europe are subject to article 6(1) of EU Directive 98/5/EC, which provides that 'a lawyer practising under his home-country professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the host member state in respect of all the activities he pursues in that territory.' In theory, therefore, a European lawyer would be subject to the applicable Code of Conduct. However, it is unclear whether European lawyers practising temporarily in the jurisdiction, for example, at an arbitration seated in London, fall within the scope of the Directive. European lawyers may also be subject to the Council of Bars and Law Societies of Europe's Code of Conduct for European Lawyers.

For other foreign lawyers, no mandatory conduct rules apply. The 2014 LCIA Rules include an annex described as General Guidelines for the Parties' Legal Representatives. Absent the parties' agreement to

the contrary, these guidelines apply to all arbitrations conducted under the 2014 LCIA Rules, whether or not seated in the jurisdiction.

The IBA Guidelines on Party Representation in International Arbitration likely represent best practice in England and Wales. Guidelines 18 to 24 relate to the preparation of witness evidence. Counsel are permitted to liaise with witnesses and experts, and to assist in the preparation of their evidence. While these provisions are most likely compatible with the Solicitors' Code of Conduct, the BSB's Code arguably requires a higher standard. Rule C2.rC9.4 provides: 'You must not rehearse, practise with or coach a witness in respect of their evidence.' A similar prohibition exists under English common law (*R v Momodou* [2005] EWCA Crim 177).

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

There are no statutory regulations specific to the contemporary practice of third-party funding in this jurisdiction. However, third-party funding is regulated by, and impacts, a variety of principles and procedures in English law based arbitration and dispute resolution more generally.

The historic restrictions on champerty, the funding or 'maintenance' of a litigant's suit by a third party, have been diluted but not entirely eliminated. In order for a third-party funding arrangement to be deemed champertous today, the court would look to whether the arrangement appears designed to 'inflation damages' or the funder otherwise appears to have taken control of the litigation or arbitration for its own ends, beyond entering into an arrangement merely to fund a disputant in exchange for a share of proceeds (see, eg, *Arkin v Borcard Lines Ltd & Ors* [2005] EWCA Civ 655 and *Excalibur Ventures LLC v Texas Keystone Inc & Ors* [2014] EWHC 3436).

If a funding agreement is deemed champertous, it is unenforceable by the funder. In the event of unsuccessful litigation, a funder may be liable for adverse costs up to the amount of their funding contribution in normal circumstances, and its liability in this regard may be unlimited if the agreement is champertous (*Arkin v Borcard Lines Ltd & Ors* [2005] EWCA Civ 655). However, the situation in arbitration is unclear. As a point of first principle, a funder would not normally be a party to the arbitration agreement. Accordingly, a tribunal cannot be expected to have jurisdiction to order costs against it. Nor does it appear to be the case that the English court would have such jurisdiction; costs orders against third parties not being among the powers exercisable by the court in support of arbitration under sections 42 to 44 of the Act.

By contrast, it has recently been confirmed that, in arbitration, 'other costs' as referred to in section 59(1) of the Act may, at least in some circumstances, include the costs to the claimant of its third-party dispute funding to be awarded as costs of the arbitration at the discretion of the tribunal (*Essar Oilfields Services Limited v Norscot Rig Management PVT Limited* [2016] EWHC 2361 (Comm)).

Third-party funding is also affected by issues of privilege and confidentiality. It appears the process of a funder receiving documents from the funded party or their legal advisers ought to be covered by

crowell  **moring**

Adrian Jones
Gordon McAllister
Edward Norman
John Laird

arjones@crowell.com
gmcallister@crowell.com
enorman@crowell.com
jlaird@crowell.com

Tower 42
25 Old Broad Street
London
EC2N 1HQ

United Kingdom
Tel: +44 20 7413 0011
Fax: +44 20 7413 0333
www.crowell.com

common-interest privilege, although we are not aware that this is as yet settled law. Transmission of documents to funders and potential funders could take place under the terms of a confidentiality agreement, given that confidentiality is an essential element of privilege.

We are not aware of any requirement that a funded party to arbitration inform its opponent or opponents of such arrangements.

A code of conduct for third-party funders has been published by the Association of Litigation Funders (last revised in January 2014), and is a form of self-regulation of members.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Overall, London is an attractive and commonly selected situs for arbitration, largely because London has a high level of infrastructure and support for the procedure of arbitration. It has laws and courts that are very respectful of arbitration and are designed to allow the process to be followed largely without intervention by the court; it has a great many experienced arbitrators and counsel based in London or in nearby European jurisdictions; and it also has a number of hearing centres such as the International Dispute Resolution Centre and the Chartered Institute of Arbitrators.

Foreign practitioners should be aware that visas are required for entry into the UK for citizens of many non-European countries.

Equatorial Guinea

Agostinho Pereira de Miranda and Sofia Martins

Miranda & Associados

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Equatorial Guinea is not a signatory state to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Equatorial Guinea is a member state of the Organization for Harmonization of Business Law in Africa (the OHADA). The OHADA was created by an international treaty signed on 17 October 1993.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

According to both UNCTAD and ICSID databases, Equatorial Guinea has signed bilateral investment treaties with: China (signed 20 October 2005, in force from 15 November 2006), Ethiopia (signed 11 June 2009), France (signed 3 March 1982, in force from 23 September 1983), Morocco (signed 5 July 2005), South Africa (signed 17 February 2004) and Spain (signed 22 November 2003, in force from 11 August 2009). According to UNCTAD, Equatorial Guinea has also signed bilateral investment treaties with Ukraine (signed 15 December 2003), Portugal (signed 16 January 2009) and the Russian Federation (signed 6 June 2011). Only BITs with France, Morocco, Russia, South Africa and Spain are available to the public, on the UNCTAD database. Only BITs entered into with China, France and Spain appear to be in force according to both UNCTAD and ICSID.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

As mentioned in question 1, Equatorial Guinea is an OHADA member state, the main purpose of the OHADA Treaty being to harmonise business laws of its member states (article 1 of the OHADA Treaty) through the adoption of uniform acts (article 5 of the OHADA Treaty), which are directly and immediately applicable and enforceable in all member states and override any conflicting provisions of prior or subsequent domestic legislation (article 10 of the OHADA Treaty). Therefore, the OHADA Uniform Act on Arbitration (the UAA), which was enacted on 11 March 1999 and entered into force on 11 June 1999, is in force in Equatorial Guinea and is its primary source of law respecting arbitration.

According to the Advisory Opinion No. 001/2011/EP dated 30 April 2001 of the OHADA Common Court of Justice and Arbitration (the CCJA), the provisions of national laws on arbitration of each OHADA state not conflicting with the UAA remain in force.

It is, however, our understanding that the UAA has superseded the pre-independence Spanish Law on Private Arbitration, dated 22 December 1953, which used to apply in Equatorial Guinea.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The UAA is based upon the UNCITRAL Model Law but diverges from it in many aspects, for example:

- the UAA makes no distinction between domestic and international arbitration, and is not limited to commercial matters; UAA article 2 provides that arbitration can be resorted to in respect of any rights that can be freely disposed of;
- the UAA contains virtually no rules on procedure; UAA article 9 dictates that parties must be treated with equality and that each party must be given the opportunity to present its case. This is the only mandatory provision dealing with procedure. Provided article 9 is not breached, parties are free to determine which rules of procedure shall govern the arbitration;
- the grounds that allow a party to challenge arbitrators are not clearly set forth in the UAA, although they may arise from article 6, whereby the arbitrator must remain independent in relation to the parties. The procedure for such a challenge is also not set out in the UAA. Where a party wishes to challenge an arbitrator, and unless the parties have agreed upon another procedure for challenging an arbitrator, it must apply directly to the national courts of the seat of arbitration to rule on the challenge;
- the UAA contains no provision granting the arbitral tribunal authority to order expert evidence. At the same time, the UAA does not provide for any specific interim measures that can be ordered by the arbitral tribunal;
- the UAA does not specify what happens if one party refuses to participate in the arbitral process;
- in the absence of an agreement between the parties, the arbitral tribunal has six months from the date on which the last arbitrator accepted his or her appointment to render the final award. This period may only be extended by either party agreement or a decision rendered to that effect by the national court of the seat of the arbitration; and
- if, in arbitral proceedings with more than one arbitrator, a minority refuses to sign the award, the refusal must be mentioned in the award, but the reason for the omitted signature does not need to be stated.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The UAA contains virtually no rules on procedure. In fact the only mandatory provisions on procedure from which parties may not deviate are those contained in UAA article 9, according to which arbitral proceedings must comply with the following principles of due process, mandatory for any arbitration (both domestic and international) taking place in Equatorial Guinea:

- parties must be treated equally; and
- parties must be given the opportunity to fully present their case before the tribunal, and defend themselves.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Pursuant to UAA article 15, parties are free to choose the law applicable to the merits. If the parties fail to do so, the tribunal can choose the law that it considers most appropriate, taking trade customs and usages applicable to the transaction into due account.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The OHADA Treaty provides for institutional arbitration under the auspices of the CCJA (articles 21 et seq of the OHADA Treaty) in accordance with the CCJA Arbitration Rules of 11 March 1999. The parties wishing to submit their disputes to the CCJA Arbitration Rules must make express reference to this set of rules.

The parties may also agree to apply the rules of another institution or, as an alternative, that no institutional rules apply, in which case the UAA will govern the proceedings, assuming the arbitration is seated in Equatorial Guinea.

Other than the CCJA, there is no active arbitral institution in Equatorial Guinea.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

UAA article 2 provides that arbitration can be resorted to in respect of any rights that can be freely disposed of.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Under UAA article 3, the arbitration agreement must be entered into in writing or by any other means allowing its existence to be proved, notably by reference to a document where such an agreement is provided (ie, a written instrument signed by the parties or any correspondence exchanged between the parties).

According to some legal commentators, there would be room to argue that an oral agreement held before a witness in such respect would also be admissible under UAA article 3. However, to date, we have not been able to find case law to sustain such an understanding. Additionally, UAA article 31 requires that the original version of the arbitration agreement entered into between the parties be evidenced upon enforcement. In light of this, we take the view that the written form is, at least, strongly advisable.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The UAA expressly adopts the doctrine of separability in article 4 by stating that the arbitration agreement is autonomous in relation to the other clauses of the contract in question. Consequently, a decision rendered by the arbitral tribunal on the contract's nullity does not entail the invalidity of the arbitration clause ipso iure unless it is shown that such a contract would not have been entered into without said agreement.

Should the arbitration agreement be considered manifestly null and void it will no longer be enforceable. This will require that a national court is seized with an action, such issue is raised and the national court finds that the arbitration agreement is manifestly null and void.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

The UAA does not contain a provision on the extension of arbitration agreements to third parties. However, UAA article 25 allows any third party whose rights have been affected by an award to challenge the award before the arbitral tribunal.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The UAA does not address this issue. However, as mentioned in the preceding answer, UAA article 25 allows any third party whose rights have been affected by an award to challenge the award before the arbitral tribunal.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The UAA does not address this issue and there is no publicly available information on case law.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The UAA does not address this issue.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

According to the UAA, arbitrators must be natural persons. Besides this requirement, no other limitation as to who may act as an arbitrator is imposed by the UAA.

There is no available information as to whether any contractually stipulated requirement for arbitrators based on nationality, religion or gender would be recognised by judicial courts.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Pursuant to UAA article 8, the arbitral tribunal can be composed of one or three arbitrators. Articles 5 and 8 set forth that arbitrators shall be appointed by national courts at the request of any of the parties when any of the parties has failed to appoint an arbitrator within 30 days of receipt of the notice to select an arbitrator, the two appointed arbitrators fail to agree on the choice of the third arbitrator within 30 days of their appointment or the parties fail to agree on the choice of the arbitrator.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

The grounds that allow a party to challenge arbitrators are not clearly set forth in the UAA, although they may derive from article 6, whereby the arbitrator must remain independent and impartial in relation to the parties. The procedure for such a challenge is also not set out in the UAA, save for the reference in article 7 where it is stated that where a party wishes to challenge an arbitrator, it must apply to the national courts of the seat of arbitration to rule on the challenge, unless the parties have agreed on a different procedure regarding challenge. It is further stated that any ground for challenge shall be raised without delay by the party that intends to rely on such ground.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Pursuant to the UAA, arbitrators must meet the requirements of independence and impartiality and are bound to disclose all facts that may have potential implications on their impartiality and independence. Besides this, no reference is made to any of the aspects referred to above.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The UAA and the general law of the country do not address the matter of immunity of arbitrators.

Jurisdiction and competence of arbitral tribunal**20 Court proceedings contrary to arbitration agreements**

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Under UAA article 13, which recognises the negative effect of the principle of competence-competence of arbitral tribunals, if the parties have agreed to refer their dispute to arbitration, the national courts cannot hear the dispute if the arbitration agreement is invoked by any of the parties, regardless of whether or not arbitration proceedings have commenced. In the latter case, national courts must decline jurisdiction unless the arbitration agreement is manifestly null and void. An agreement to arbitrate implies the waiver by the parties to initiate proceedings before the national courts on the matters or disputes submitted to arbitration and can be relied upon by the respondent with a view to request the dismissal of such proceedings. As a result, once parties have agreed to resort to arbitration, the intervention of the national courts is limited to the situations set forth in the UAA (eg, ordering of interim or conservatory measures as long as this does not involve the hearing on the merits of the dispute). However, national courts cannot decline jurisdiction *ex officio*, such an issue having to be raised by the parties. No time limit is set forth in the UAA. Pursuant to the applicable law on civil procedure, such issue may be raised autonomously, in which case the respondent does not have to submit its statement of defence until the issue has been decided, but the issue must be raised within six days of service of the claim. If such six days are exceeded, then the issue may only be raised in the actual statement of defence, with the time frame depending on what type of procedure is at stake.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

UAA article 11 recognises the positive effect of the principle of competence-competence of arbitral tribunals. The parties must raise such issue no later than the time of submission of the statement of defence on the substance except where the facts on which it is based were discovered subsequently, pursuant to UAA article 11. The arbitral tribunal shall rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, and it may do so in an award on the merits or in a partial award subject to recourse for annulment.

Arbitral proceedings**22 Place and language of arbitration**

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

The UAA is silent in this regard. As such, it would be advisable that parties agree on both the place and the language of proceedings within the arbitration agreement.

23 Commencement of arbitration

How are arbitral proceedings initiated?

UAA article 10 stipulates that proceedings are deemed to have been initiated as soon as one of the parties submits the dispute to the tribunal in accordance with the arbitration agreement, and where arbitrators have still to be appointed, when one of the parties institutes the appointment process.

24 Hearing

Is a hearing required and what rules apply?

The UAA is silent in this regard. According to UAA article 14, unless the parties have agreed on the rules of the procedure, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

There are no specific rules of evidence under the UAA.

According to UAA article 14, parties are bound to provide evidence to sustain their claims. Also, pursuant to the same article, the arbitral tribunal may invite the parties to render clarifications on the facts under discussion as well as to file all legally admissible means of evidence necessary to the proceedings.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

According to the UAA, national courts can only be called upon to assist the arbitral tribunal in the course of arbitration proceedings for the following purposes:

- to grant interim measures (which can be ordered prior to the commencement of the arbitral proceedings) – article 13;
- to appoint arbitrators when the parties fail to do so – article 8;
- to appoint the third arbitrator when the tribunal is to be composed of more than one arbitrator and such an appointment has not been carried out – article 8;
- to decide on challenges – article 7; and
- to assist the tribunal in the taking of evidence – article 14.

National courts are also called to intervene in setting aside or enforcement proceedings.

27 Confidentiality**Is confidentiality ensured?**

The UAA contains no rules in respect of confidentiality of proceedings, other than that the tribunal's deliberations are secret (UAA article 18). However, it is generally accepted that arbitral proceedings under the UAA are confidential in nature. Confidentiality clauses can be included in arbitration agreements as a means to ensure that proceedings are confidential to the greatest extent possible.

Interim measures and sanctioning powers**28 Interim measures by the courts****What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?**

UAA article 13 allows national courts to order any appropriate interim measures in support of arbitrations, whenever ordering such measures does not require the national courts to rule on the merits of the dispute.

According to the UAA, courts may be called upon to assist the arbitral tribunal to grant interim measures during arbitration proceedings. Additionally, these sorts of measures may also be granted by national courts prior to the commencement of arbitral proceedings whenever ordering such measures does not require the national courts to rule on the merits of the dispute. Local civil procedure rules refer to specific interim measures such as the seizure of assets and, in general, to any measure required to ensure effectiveness of the final ruling.

29 Interim measures by an emergency arbitrator**Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?**

The UAA does not address the issue of emergency arbitrators.

30 Interim measures by the arbitral tribunal**What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?**

The UAA does not provide rules on the power of the arbitral tribunal to grant interim measures.

31 Sanctioning powers of the arbitral tribunal**Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?**

The UAA is silent on this matter.

Awards**32 Decisions by the arbitral tribunal****Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?**

Pursuant to the UAA, whenever the tribunal is composed of more than one arbitrator, the award must be rendered by a majority vote.

33 Dissenting opinions**How does your domestic arbitration law deal with dissenting opinions?**

If, in arbitral proceedings with more than one arbitrator, a minority refuses to sign the award, the refusal must be mentioned in the award, but the reason for any omitted signature does not need to be stated.

34 Form and content requirements**What form and content requirements exist for an award?**

Pursuant to UAA articles 19 et seq, the award must be rendered in the manner and procedure agreed by the parties and, in the absence of such an agreement, by a majority vote whenever the tribunal is composed of three arbitrators. In any case, the award must be made in writing and include the following:

- the arbitrator's or arbitrators' full identification;
- the date of the award;
- the seat;
- the parties' names, addresses and registered offices and, if applicable, identification of their counsel and representatives;
- a description of the parties' claims and grounds, of the subject matter of the dispute and of the main procedural steps followed; and
- the arbitrator's or arbitrators' signature or signatures.

In addition, the award must be reasoned.

35 Time limit for award**Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?**

In the absence of an agreement between the parties, the arbitral tribunal has six months from the date on which the last arbitrator accepted his or her appointment to render the final award. This period may only be extended by either agreement of the parties or a decision rendered to that effect by the national court of the seat of the arbitration or by the arbitral tribunal itself.

36 Date of award**For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?**

The arbitral proceedings shall terminate upon the expiration of the time limit for the arbitration, except in the case of extension, as per the preceding answer.

Setting-aside proceedings have to be brought before the national court within one month of the date of notification of the award bearing an exequatur.

The relevant date for requesting the correction or interpretation of an award or an additional award is 30 days counting from the date of notification of the award.

37 Types of awards**What types of awards are possible and what types of relief may the arbitral tribunal grant?**

The UAA does not expressly distinguish between different types of awards although it does expressly make reference to additional awards to be rendered at the request of a party in cases where the tribunal fails to address all issues raised in the relevant proceedings. It also refers to partial awards on jurisdiction.

38 Termination of proceedings**By what other means than an award can proceedings be terminated?**

The arbitral proceedings shall terminate when the final award is rendered or upon the expiration of the time limit for the arbitration, in the case of withdrawal by the claimant or by settlement between the parties.

39 Cost allocation and recovery**How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?**

The UAA is silent on this matter.

Update and trends

There are no ongoing reforms in respect of arbitration.

The only known concluded investment treaty arbitration case against Equatorial Guinea is ICSID Case No. ARB(AF)/12/2 brought by a Spanish construction group in respect of the construction of housing and sports facilities on 23 March 2012. According to an award dated 4 December 2015, the case was dismissed as it was considered, by majority, by the tribunal, that the claimant was not a protected investor under the 2003 Spain–Equatorial Guinea BIT as it did not make an investment in accordance with the host state law. The award is available on the ICSID case database, in Spanish.

According to the ICSID database, there is another pending case registered on 15 May 2015, brought by Hess Equatorial Guinea, Inc and Tullow Esquatorial Guinea Limited concerning a hydrocarbon concession, under the ICSID Additional Facility – Conciliation Rules. Proceedings are pending and the suspension of the constitution of the commission has been extended until 31 March 2017 pursuant to the parties' agreement reached on 6 October 2016.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Whether interest is awarded depends on the law applicable to the merits. Pursuant to EG law, interest can be awarded to the parties only if so requested by the parties. According to the Civil Code, interest is to be computed according to the agreement of the parties or to the statutory rate applicable to each case. However, if no statutory rate has been published, the default rate of 6 per cent pursuant to article 1108(2) of the Civil Code will be applied.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Under UAA article 22, the arbitral tribunal may correct or interpret the award at the parties' request, within 30 days of service of the award.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

The UAA contains few rules on setting-aside proceedings. Setting-aside proceedings have to be brought before the national court within one month from the date the award is served bearing exequatur (UAA articles 25 and 27). Unless provisional enforcement of the award has been ordered by the arbitral tribunal, the commencement of setting-aside proceedings suspends the enforcement of the award until a judgment on these proceedings is rendered (UAA article 28). The judgment rendered by the national court can be challenged by an appeal lodged with the CCJA (UAA article 25). The grounds for annulment are set out in article 26, annulment being admissible only if:

- the arbitral tribunal has ruled without an arbitration agreement or on the basis of a void or expired agreement;
- the arbitral tribunal was improperly constituted or the sole arbitrator was irregularly appointed;
- the tribunal failed to comply with its assigned mission;
- the principle of adversarial proceedings has not been respected;
- the tribunal has violated a rule of international public policy of the OHADA member states; or
- the award does not state the reasons on which it is based.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Arbitral awards cannot be subject to appeal pursuant to the UAA.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

To recognise and enforce an award rendered by an arbitral tribunal having its seat in one of the OHADA member states, the award must be submitted to the Equatorial Guinea Supreme Court to obtain an enforcement order (exequatur) (UAA article 30).

UAA article 34 deals, on the other hand, with arbitral awards rendered by tribunals not having their seat in an OHADA member state: such awards are 'recognised' in the member states in accordance with applicable international conventions or, failing such conventions, in accordance with the UAA.

Although this suggests a rule that would also apply to the enforcement of awards rendered by tribunals with their seat outside the OHADA, a difficulty can arise because UAA article 34 uses the word 'recognised' but not 'enforced'. Therefore, it leaves room for national courts to consider that recognition and enforcement of awards rendered by tribunals that do not have their seat in an OHADA member state are subject to the pre-independence legislation applicable to the recognition and enforcement of foreign judgments in Equatorial Guinea, which allows the Supreme Court to refuse to recognise and enforce an award in a number of cases.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

There is no publicly available case law in this regard.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The UAA is silent on the issue of enforcement of orders by emergency arbitrators and there is no publicly available case law regarding this matter.

47 Cost of enforcement

What costs are incurred in enforcing awards?

A party seeking to enforce an arbitral award will be subject to payment of regular court fees, depending mainly on the economic value of the case.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Equatorial Guinea is a civil law jurisdiction and there is no tendency towards US-style discovery. The UAA is silent on written statements and party officer testimonials, such matters being left to party autonomy.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

The UAA contains no reference to ethical rules applicable to counsel acting in international arbitrations (the same being applicable to domestic arbitration). Also, we are not aware of the existence of any soft law or guidelines regarding party representation in Equatorial Guinea.

The information available is not enough to allow for a conclusion on whether the best practice in Equatorial Guinea reflects or contradicts the IBA Guidelines on Party Representation in International Arbitration.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

There is no regulatory framework for third-party funding in Equatorial Guinea.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

In principle, foreign practitioners may act as arbitrators in Equatorial Guinea with no limitation on nationality (see question 15), but not as counsel.

In Equatorial Guinea, independent service providers are subject to VAT at the legal rate.

All foreign citizens are required to hold a visa when entering the country, although an exception is made for US nationals.

MIRANDA
Miranda & Associados Sociedade de Advogados RL

Agostinho Pereira de Miranda
Sofia Martins

agostinho.miranda@mirandalawfirm.com
sofia.martins@mirandalawfirm.com

Av. Eng. Duarte Pacheco 7
1070-100 Lisbon
Portugal

Tel: +351 217 814 800
Fax: +351 217 814 802
www.mirandalawfirm.com

France

Thomas Bevilacqua and Ivan Urzhumov

Foley Hoag LLP

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

France signed the New York Convention on 25 November 1958, and it was ratified on 26 June 1959 and entered into force on 24 September 1959. At the time of ratification, France exercised its right under article I(3) to declare that it would apply the Convention on the basis of reciprocity, that is to say to the recognition and enforcement of awards made in other contracting states. In reality, this reservation is more theoretical than anything else, because codified French arbitration law itself does not contain any such limitation, and article VII(1) of the Convention confirms that the Convention does not deprive parties of more favourable rights they might enjoy under the law of the country in which enforcement of the foreign award is sought.

A further reservation made by France under article I(3), and which limited application of the Convention to differences that could be considered under French law to be commercial in nature, was withdrawn in November 1989.

France is also a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (entry into force on 20 September 1967), the Energy Charter Treaty (entry into force on 27 December 1999) and the European Convention on International Commercial Arbitration (entry into force on 7 January 1964). Although sometimes forgotten by commentators (probably because it was conceived in the particular historical context of the Cold War) the European Convention on International Commercial Arbitration remains an important legal instrument. It is in legal force in 31 states including Cuba, Russia, Turkey and Ukraine, and provides a useful set of rules addressed to both state courts and arbitrators, covering different issues including the validity of arbitration agreements.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

France has signed 115 bilateral investment treaties, 96 of which are in force as of December 2016.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

French arbitration law was codified in the Civil Procedure Code (CPC) in the early 1980s and resulted from a 14 May 1980 decree on domestic arbitration and a 12 May 1981 decree on international arbitration. Over the course of the succeeding three decades, French arbitration case law filled in certain gaps in the governing legal text, usually arriving at solutions broadly deemed to be favourable to the continued development of France as a desirable place of arbitration.

In early 2011, the provisions of the CPC relating to both domestic and international arbitration were replaced in their entirety, through the publication of Decree No. 2011-48 of 13 January 2011 (the Decree) (with an entry into force of most provisions on 1 May 2011). The Decree was codified in the CPC at articles 1442 to 1503 (domestic arbitration) and 1504 to 1527 (international arbitration).

The Decree reorganised the existing law in several respects, simplified the drafting of many provisions for enhanced readability while retaining their essential terms, and introduced a modest number of innovations. It also brought the legal text up to date with French jurisprudential developments that had occurred in the preceding 30 years.

Among the noteworthy features resulting from the Decree are the following:

- parties can agree in advance to waive their right to seek to set aside an arbitral award rendered in France (article 1522, CPC); and
- the filing of petitions to set aside awards rendered in France and appeals of enforcement orders no longer lead to the automatic suspension of execution of awards (article 1526, CPC). (The references here, and throughout this chapter, are all to the CPC as revised following the Decree.)

French law considers that an arbitration is international whenever it affects the interests of international trade (article 1504, CPC). This is a broad and inclusive notion. The nationality of the parties is thus not determinative in French law on the question of whether an arbitration is international. It should be noted, however, that while case law has generally adopted a liberal approach to declaring 'international' disputes that appear to only barely affect the interests of international trade, one recent decision (Paris Court of Appeal, 17 February 2015, No. 13/13278, *Tapie*) rendered in a high-profile case adopted a somewhat more restrictive approach. This case involved an arbitral award rendered in a dispute involving the sale of shares in the German company adidas AG by the French businessman and former minister Bernard Tapie to a pool of buyers, via the intermediary of the French state-owned bank *Crédit Lyonnais*. The dispute revolved around Mr Tapie's allegation that *Crédit Lyonnais*, which intervened in the transaction on the basis of a sale mandate received from Bernard Tapie, violated its duty of loyalty toward its principal and breached the rule found in article 1596 of the French Civil Code that agents cannot acquire assets for which they received a mandate of sale. The Paris Court of Appeal declared this dispute to be a 'domestic' one, and set aside the arbitral award by applying the rules specific for domestic arbitration. In deciding that the arbitration was domestic, as opposed to international, the Paris Court of Appeal noted that it arose out of the agency relationship between a French bank and its French clients and did not involve any flow of money or other assets across the border. An appeal against this decision is pending before the French Court of Cassation.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

French arbitration law has never been based on the UNCITRAL Model Law and is considered to be more actively pro-arbitration and

non-interventionist than the Model Law, particularly with regard to international arbitration.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Despite the broad freedom that parties enjoy under French law to tailor make the proceedings, the law clearly sets certain basic limits on the conduct of arbitration proceedings. For instance, article 1464, CPC provides that the parties and arbitrators must act with promptness and good faith in the proceedings. Article 1510, CPC states that irrespective of the procedural rules chosen by the parties, the tribunal must always ensure the equal treatment of the parties and due process. As a consequence, French courts must set aside or decline to allow enforcement of an arbitral award – whether domestic or international – that conflicts with the fundamental principles of equality and due process considered to be part of international public policy. An example of an arbitral award that was set aside on the ground that it violated the parties' equal right to designate arbitrators was provided by the famous ruling in the *Dutco* case, discussed in more depth in question 14 (Court of Cassation, 1st Civil Chamber, 7 January 1992, Case No. 89-18.708, *Dutco*).

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

In domestic arbitration, an arbitral tribunal is under an obligation to render its decisions based on law, unless the parties have invited the arbitrators to rule as *amiables compositeurs* (rule in equity) (article 1478, CPC).

In international arbitration, article 1511, CPC provides that the tribunal must resolve the dispute on the basis of the legal rules chosen by the parties and, if there has been no such choice of law, by the legal rules that the tribunal determines to be appropriate. Note that arbitrators are thus not required under French arbitration law to determine the governing law through a traditional conflicts of law analysis. Finally, this same article requires arbitrators sitting in international arbitrations governed by French arbitration law to 'in all cases' take trade usages into account.

If, however, the arbitrators' mandate from the parties is to serve as *amiables compositeurs*, then they must rule in equity (article 1512, CPC). If the arbitrators fail to indicate expressly in their award that it results from a consideration of equity, the award is liable to being set aside in France (Court of Cassation, 2nd Civil Chamber, 2, 10 July 2003, No. 01-16964; Court of Cassation, 1st Civil Chamber, 1 February 2012, No. 11-11084.)

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

Numerous arbitral institutions have facilities in Paris.

The International Court of Arbitration of the International Chamber of Commerce needs no introduction to arbitration practitioners. The ICC Secretariat moved into new headquarters in the Trocadéro neighbourhood of Paris in the autumn of 2013 (33-43, avenue du Président Wilson, 75116 Paris; www.iccwbo.org/court). Arbitration conferences are frequently organised at the ICC's premises. Also in the Trocadéro neighbourhood, the ICC runs a separate hearing facility centre, where rooms can be rented and hearing services contracted for ICC and other types of hearings (112, avenue Kléber, 75116 Paris; www.icchearingcentre.org). The location of the ICC in Paris is one of the leading factors behind the development of Paris as a leading centre of arbitral practice. A revised version of the ICC Rules of Arbitration takes effect on 1 March 2017.

The French Arbitration Association (AFA) is an independent arbitration institution that administers domestic and international arbitrations under its own rules of arbitration (8, avenue Bertie Albrecht, 75008 Paris; www.afa-arbitrage.com).

The Paris Centre for Mediation and Arbitration (CMAP) is an arbitration and mediation institution associated with the Paris/Ile-de-France Chamber of Commerce and Industry that administers

domestic and international arbitrations under its own rules of arbitration (39, avenue Franklin Roosevelt, 75008 Paris; www.cmap.fr).

The Paris International Arbitration Chamber (CAP) is yet another independent arbitration institution administering domestic and international arbitrations under its own rules of arbitration (6, avenue Pierre 1er de Serbie, 75116 Paris; www.arbitrage.org).

In addition, a number of matter-specialised centres exist in Paris, such as the Paris Maritime Arbitration Chamber (CAMP), which specialises in arbitration relating to maritime affairs (16, rue Daunou – 75002 Paris; www.arbitrage-maritime.org) and the French Insurance and Reinsurance Arbitration Centre (CEFAREA), which specialises in insurance matters (www.cefarea.com).

Not to be overlooked is the growing number of investor-state arbitrations involving Paris-based counsel or arbitrators. Many ICSID hearings are conducted at the World Bank's facilities in Paris.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Article 2059 of the French Civil Code deals with the topic of arbitrability by providing generally that one may agree to arbitration with regard to freely alienable rights. Article 2060 of the Civil Code furnishes additional detail on the subject of arbitrability, by providing in ostensibly wide-ranging language that 'one may not submit to arbitration matters of civil status and capacity of individuals, or those relating to divorce or judicial (legal) separation of spouses, or disputes concerning public sector jurisdictions and public establishments, and, more generally, any matter concerning public policy. Nevertheless, different categories of public establishments of an industrial and commercial nature may be authorised by Decree to enter into arbitration agreements.'

Over the years, the interdictions found in article 2060 relating to public sector entities and matters affecting public policy have been very significantly pared back. Thus, in its notable *Galakis* decision of May 1966, the Court of Cassation found that the prohibition does not apply to international contracts that the state enters into under normal conditions of international commerce. Moreover, the final sentence of article 2060 (quoted above) was added in 1975, and in the years since then a number of exceptions have been enacted via decree or law to permit public entities to enter into arbitration agreements (SNCF, La Poste, etc).

As far as the reference to public policy is concerned, it is now beyond contest that no general public policy exception exists to the arbitrability of disputes. Indeed, disputes raising issues of public policy are routinely arbitrated in France. Perhaps the most typical example consists of arbitrations relating to article L442-6 of the Commercial Code. This provision, which is deemed in French law to rise to the level of a public policy matter, provides for civil liability when a commercial actor breaks off an established commercial relationship without providing written notice of the discontinuation of relations that is of suitable duration in light of the length of the relations and a host of other factors specific to the relationship (Court of Cassation, 1st Civil Chamber, 8 July 2010, No. 09-67013).

To provide another example, international disputes involving antitrust or competition law issues may be submitted to arbitration. Thus, in its important decision in *Labinal v Sociétés Mors and Westland Aerospace* of 19 May 1993, the Paris Court of Appeal noted that even though EU competition law would preclude arbitrators from granting injunctions or imposing fines, 'arbitrators may nevertheless draw civil consequences from behaviour that would be deemed illegal under the public policy rules directly applicable to the parties' relations.' The case involved an allegation that respondents had in the course of a bidding process entered into an entente banned by European competition law. One of the parties challenged the tribunal's jurisdiction, arguing that the dispute was governed by public policy competition law rules and purportedly non-arbitrable.

Arbitrators have also found that it falls within their jurisdiction to make determinations regarding intellectual property rights, when such a determination is needed as an ancillary matter to resolve the principal question presented of assessing contractual rights (such as determining the validity of a patent in order to ascertain whether a party is contractually entitled to the payment of royalties). French courts reviewing awards wherein holdings were made regarding IP rights as a precursor to assessing contractual liability appear to uphold this approach

(Paris Court of Appeal, 1st Civil Chamber, 28 February 2008; Court of Cassation, 1st Civil Chamber, 12 June 2013, No. 12-16864).

By contrast, although labour law disputes are not per se non-arbitrable, they may be submitted to arbitration only by an agreement made after the employment contract has been terminated. In other words, an employee cannot be forced to arbitrate (Court of Cassation, Social Chamber, 30 November 2011, Nos. 11-12905, 11-12906; Court of Cassation, Social Chamber, 28 June 2005, No. 03-45042).

Finally, mention should be made of article 2061 Civil Code, which was recently amended and now provides generally that when a contractual arbitration clause was not entered into in the context of a business activity, it is not binding on a party and cannot be enforced against that party's will. Contractual arbitration clauses contained in employment or consumer contracts, for instance, are therefore no longer automatically considered null and void but cannot be enforced against the unwilling employee or consumer. The employee or consumer may refuse application of an arbitration clause, though that employee or consumer has the option of electing to take advantage of such a clause. The drafting of the new article 2061 does not indicate, however, whether this provision applies to international disputes or transactions. (The former version of this article provided that 'contractual arbitration clauses are null and void unless the law provides otherwise,' but case law had found the provision inapplicable to disputes or transactions that could be characterised as international in nature.) This issue will no doubt be decided by the courts before long.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Article 1443, CPC requires that domestic arbitration agreements be in writing to be valid. The writing can consist of an exchange of documents or a reference in a principal contractual instrument to another document containing the relevant clause, such as standardised general terms of sale.

Article 1507, CPC provides that in international arbitration, by contrast, the arbitration agreement is subject to no condition of form whatsoever, and hence it need not be contained in a writing. Of course, it would be exceedingly rare in international commerce for an agreement to arbitrate to not be in writing, and it is in any event recommended to have a writing as proof of the agreement's existence. In this latter regard, note that the CPC provides that a copy of the arbitration agreement is to be produced as part of the request for a recognition and enforcement order (articles 1515, 1516, CPC).

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

In the field of international arbitration, no substantive or formal requirements exist under French law to render an arbitration agreement valid and enforceable, except for rules governing arbitrability of the dispute. Furthermore, in its well-known 1963 decision *Gosset*, the French Court of Cassation found that the arbitration agreement is autonomous and separable from the contract in which it is inserted and is not affected by that contract's invalidity. Today this principle, one of the cornerstones of French arbitration law, is codified in article 1447, CPC. In addition to this 'separability' principle, there is also another substantive rule of French law of international arbitration that provides that the existence and the validity of an arbitration agreement is assessed without reference to any domestic law but on the sole basis of the will of the parties (Court of Cassation, 1st Civil Chamber, 20 December 1993, Case No. 91-16.828, *Dalico*; Paris Court of Appeal, 11 February 2014, No. 12/19130).

Note that under French jurisprudence, an arbitration agreement can be considered as waived when one party commences a court proceeding relating to a dispute falling within the scope of the agreement to arbitrate and the opposing party proceeds to assert its defences in the court action without invoking the arbitration agreement to challenge the court's jurisdiction.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

As a general matter, pursuant to the principle of privity of contract, arbitration agreements are not binding on third parties or non-signatories. But this proposition is, of course, not absolute. For instance, and least controversially, a third party may be bound by an arbitration agreement contained in the contract that it has not signed when there has been a transfer to it of substantive rights and obligations arising out of that contract. For instance, the transfer of the arbitration agreement has been found to occur 'automatically' in cases involving a chain of contracts conveying propriety over the goods. Under French law of contracts, the end buyer of goods has a right to assert a direct claim against the goods' manufacturer, even if those goods were acquired from the distributor. In that case, the arbitration agreement contained in the sale of goods contract concluded between the manufacturer and the distributor is viewed as an 'accessory' of the end buyer's substantive right to directly sue the manufacturer (Court of Cassation, 1st Civil Chamber, 9 July 2014, No. 13-17.402).

In addition to the situations where the arbitration agreement is deemed transferred to a third party, the French courts have occasionally allowed the extension of an arbitration agreement to non-signatories involved in the negotiation and performance of the contract that contains the arbitration clause. The notion of 'extension' typically refers to situations involving a group of contracts or a group of companies. Although these cases tend to generate significant attention in legal literature, the fact is that the case law is extremely fact specific and these cases escape ready generalisation or pigeonholing. It should not be assumed that the effect of an arbitration clause will necessarily be extended to a non-signatory simply because the facts would appear to bring the case within a category such as 'group of companies'. In the cases where extension to a non-signatory is permitted, the non-signatory has generally played a significant role in the negotiation or performance of the contract and has thereby manifested, at least implicitly, an intention to be bound by the contract, including its arbitration clause (Paris Court of Appeal, 7 December 1994, *Jaguar*; Paris Court of Appeal, 5 May 2011, *Kosa v Rhodia*; Paris Court of Appeal, 26 February 2013, *SARL Lola fleurs v Société Monceau fleurs et autres*).

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

No, French arbitration law does not contain express provisions relating to the participation of third parties in arbitration.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Yes, this is possible, though the cases are quite fact-specific, and the involvement must generally be extensive. See question 11.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

French arbitration law addresses the issue of a multiparty arbitration agreement expressly only in article 1453, CPC. Despite this relative lack of explicit attention given to multiparty arbitration in the CPC, certainly nothing in French law precludes the existence of multiparty arbitration agreements, and indeed they are as commonplace as multiparty contracts.

In its well-known *Dutco* decision of 7 January 1992, the French Court of Cassation considered that the equality of parties in the process of designating the arbitral tribunal rises to the level of public policy. The *Dutco* case held that a party is not permitted to waive its right to absolute

equality in this process before the dispute has arisen – through, for example, a contractual arbitration clause that would allow a sole claimant to designate a co-arbitrator, while requiring two or more respondents to have to agree together on the second co-arbitrator. Article 1453, CPC now attempts to deal with this situation by providing, ‘when a dispute involves more than two parties and they do not agree on the manner for composing the arbitral tribunal, the entity tasked with administering the arbitration or, if there is none, the court judge acting in aid of arbitration [referred to hereafter as ‘assisting judge’] appoints the arbitrator or arbitrators.’ Any agreement reached by the parties would need to respect the public policy principle enunciated in *Dutco*.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Active judges may not sit as arbitrators; retired judges may. Other than this, French law does not contain restrictions as to who may sit as arbitrator or otherwise set out any particular requirements as to the profile of individuals who can serve as arbitrators or their qualifications. French law requires that in domestic arbitration, arbitrators be physical persons and be designated in an odd number (articles 1450 and 1451, CPC). In both domestic and international arbitration, and unless the parties agree otherwise, the choice of arbitrators remains in the parties’ sole discretion (subject to the requirement of independence and impartiality). They need not be selected from a list, unless, of course, use of a list process forms part of the designation process of the agreed upon administering institution.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Article 1452, CPC provides that if the parties have not agreed on a process for appointing the arbitrators, then:

- in cases where a sole arbitrator is to be appointed, if the parties do not agree on an individual, that arbitrator shall be designated by the administering institution or, if there is none, by the assisting judge;
- in cases where three arbitrators are to be appointed, each party must choose one arbitrator and the two arbitrators so appointed will choose the third arbitrator. If a party fails to make a designation within one month, or if the two party-appointed arbitrators do not agree on the third arbitrator within a period of one month, the designation will be made by the administering institution or, if there is none, the assisting judge.

The article contains no further details about how the assisting judge is to proceed. The foregoing rules are, of course, subject to article 1453, CPC on multiparty arbitration discussed above.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Before accepting his or her mission, an arbitrator has a duty under French law to disclose any circumstance that may affect his or her independence or impartiality; the duty is a continuing one and any such circumstance that arises after the arbitrator’s mission has commenced must be disclosed promptly (article 1456, CPC). In the event of a dispute about whether the arbitrator should be removed, the question of recusal shall be decided by the administering arbitration institution or, if there is none, by the assisting judge. An application for recusal must be initiated within one month of the revelation or discovery of the factual circumstance underlying the challenge.

The sanction for the lack of disclosure can be the annulment of the award for improper constitution of the tribunal (article; 1520(2), CPC).

In recent years, the appellate courts have rendered two high-profile judgments, setting aside the award in one case and disallowing recognition and enforcement of a foreign award in the other, on the basis of arbitrator’s incomplete disclosure (each case involved a situation in which lawyers in other offices of the arbitrator’s law firm represented an entity related to an arbitrating party in an unrelated matter. *Avax v Tecnimont*, Reims Court of Appeal, 2 November 2011, reversed on other grounds, Court of Cassation, 25 June 2014, Case No. P 11–26,529; *SA Auto-Guadeloupe Investissements v Colombus Acquisitions Inc*, Paris Court of Appeal, 14 October 2014). The arbitrator’s duty of impartiality was again at stake in the Paris Court of Appeal’s ruling whereby the court withdrew the arbitral award rendered in the Bernard Tapie case on the ground that one of the arbitrators maintained close ties with the party that appointed him or her and that party’s lawyer failed to disclose these circumstances prior to his or her appointment (Paris Court of Appeal, 17 February 2015, No. 13/13278, *Tapie*).

French arbitration practitioners routinely refer to the IBA Guidelines on Conflicts of Interest in International Arbitration; they appear to be quite influential with administering institutions.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

The arbitrators’ mission is both jurisdictional and contractual in nature. Concerning the former aspect, an arbitration award is considered under French case law to be tantamount to a judicial decision and can, for instance, be used as a basis to obtain the freezing of assets even before a recognition and enforcement order has been obtained (Court of Cassation, 2nd Civil Chamber, 12 October 2006, No. 04–19,062).

All arbitrators – whether they be party-appointed or designated by the other arbitrators, the arbitration institution or a court – have a duty to remain independent of and impartial toward the parties. The concept of a party-appointed ‘advocate’ arbitrator, authorised, for instance, under certain sets of arbitral rules in the United States, is inconsistent with French arbitration law (article 1456, CPC).

The arbitrators’ relations with the parties are also contractual in nature. Arbitrators are entitled to the payment of reasonable fees and expenses, which they are not permitted to fix unilaterally, and the parties are jointly and severally liable therefor. French law does not contain express provision for how the remuneration of the arbitrators should be calculated, though the courts can act in exceptional cases to adjust fees. An attribution of responsibility for those fees that differs from the 50 per cent–50 per cent manner in which they were advanced by the parties can be made by the arbitrators in their award; any such shifting of responsibility for costs will depend on, inter alia, the outcome of the claims and defences and the overall manner in which the parties conducted themselves during the proceedings.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators benefit from a form of qualified immunity from liability regarding the fulfilment of their mission. As such, liability is in general naturally excluded for an arbitrator’s rendering a decision that is objectively in error on legal, factual or other grounds. However, the immunity of arbitrators is not absolute, and it is now well established that an arbitrator can be held personally responsible for fraudulent misrepresentation, gross negligence or a denial of justice (Paris Court of Appeal, 1 March 2011, No. 09/22701, affirmed, Court of Cassation, 1st Civil Chamber, 15 January 2014, No. 11–17196; *Bompard v Consorts C et autres*, Paris Court of Appeal, 13 June 1993).

Moreover, one question for which the courts can be particularly strict is the time limit for arbitrators to issue an award. Absent a contrary arrangement by the parties in their arbitration agreement, article 1463, CPC sets a time limit of six months in domestic arbitration following the constitution of the tribunal for it to issue its award (this period can be extended by the parties or the assisting judge). If arbitrators do not obtain an extension of this time limit and issue their award after it has expired, not only may the award be annulled, but the arbitrators can

be held personally liable (Court of Cassation, 1st Civil Chamber, 6 December 2005).

Further, an arbitrator's immunity does not extend to the realm of criminal matters. In fact, articles 434-9 and 435-7 of the French Penal Code, which relate to corruption, bribery and influence peddling involving actors in the justice sector (judges, court personnel, jurors, experts, etc) refer expressly to arbitrators carrying out their functions under French or foreign arbitration law.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

According to article 1448, CPC, whenever a court is seized of a dispute notwithstanding the existence of an arbitration agreement in whose scope the dispute falls, that court must decline jurisdiction unless no arbitral tribunal has yet been seized of the dispute and the arbitration agreement is manifestly void or manifestly inapplicable to the dispute. In practice, it is quite rare that a court seized of a dispute notwithstanding the existence of an arbitral agreement would consider that this agreement is manifestly void or inapplicable (Court of Cassation, 1st Civil Chamber, 15 May 2013, No. 12-14.726, *M Michel Bruno v Mme Nancy Lemont-Avet*; Court of Cassation, 1st Civil Chamber, 10 July 2013, No. 1225-535, *Consistoire israélite de Marseille v Ouaki*; Court of Cassation, 1st Civil Chamber, 6 October 2010, No. 09-68.731, *Blonde d'Aquitaine v SCEA Plante Moulet*). This rule, which represents the 'negative effect' of competence-competence, furthers the primacy of the arbitral tribunal in assessing its jurisdiction.

Article 1448 also provides, however, that a court may not by its own initiative raise its lack of jurisdiction resulting from the existence of an arbitration clause. Parties must file a motion to dismiss raising their jurisdictional objections before raising defences related to the admissibility or merits of the claim (ie, in *limine litis*). Further, when one party brings a claim subject to arbitration before a French court and the other presents its defence to those claims before the court, the parties are considered to have waived the right to arbitrate that dispute.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

France applies the principle of competence-competence, which is codified at article 1465, CPC. That article provides that the arbitral tribunal 'is alone empowered to rule on objections to its jurisdiction'. The arbitral tribunal's determination on the issue of its jurisdiction is subject to later review by the state court when either enforcement and recognition of the award is sought or a petition to set the award aside is filed. In cases where the tribunal has upheld its jurisdiction only in a final award that also resolves the merits of the claim, the practical effects for the objecting party may have been a significant wait for judicial review of the jurisdictional question as well as an obligation to incur significant expense to defend itself on the merits of the claim.

While the CPC does not define a specific timeframe for asserting jurisdictional objections, it does provide, at article 1466, that a party who has knowledge of an 'irregularity' but who without good cause fails to raise it in a timely manner shall be deemed to have waived its right to raise the objection. While doubts can be entertained about whether this provision was designed specifically to deal with unspoken objections to jurisdiction (as opposed to irregularities of procedure, for instance) or even whether all valid objections to jurisdiction can be characterised as 'irregularities' capable of waiver, it may nevertheless readily be accepted that in most cases when a party who has grounds to challenge a tribunal's jurisdiction elects to proceed with the arbitration without saying anything (in *limine litis* or otherwise), such party can be deemed to have waived any right to invoke that objection and to have consented to the arbitration.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

French arbitration law does not set out a default mechanism for fixing the place of arbitration or the language of the proceedings. However, it is increasingly common for parties to international arbitrations to include explicit provisions in their agreement to arbitrate relating to the place of arbitration and the language or languages of the arbitration (with terms on the latter point sometimes being sufficiently detailed that they address separately the language or languages that may be employed by the tribunal, by the parties in their written and oral submissions, and by the parties for the evidence placed in the record).

Moreover, institutional arbitration rules typically address these questions to provide for cases in which the parties did not have the foresight to consider them. The ICC Arbitration Rules provide, for instance, that the International Court of Arbitration will set the place of arbitration if the parties have not agreed on this point (ICC Arbitration Rules article 18(1)). As to the question of the language or languages of the arbitration, the Rules leave this to the arbitrators to decide, again failing an agreement of the parties (ICC Arbitration Rules, article 20).

In cases where there is no advance agreement of the parties and the parties are not subject to a set of institutional rules, then a tribunal in France can rule on these issues in accordance with its general power under French arbitration law to set rules for the arbitral proceedings (article 1464, CPC first paragraph (domestic arbitration) and article 1509, second paragraph (international arbitration)).

23 Commencement of arbitration

How are arbitral proceedings initiated?

Article 1462, CPC states simply that the dispute shall be submitted to the tribunal by the parties jointly or by the party who takes the initiative of commencing the proceeding. The CPC does not set out any further particulars. If the arbitration agreement sets out requirements regarding pre-conditions to the commencement of arbitration, such as a defined 'cooling-off' or negotiation period, that requirement must be satisfied before arbitration may be commenced.

Institutional arbitration rules typically contain additional detail about how an arbitration proceeding should be commenced (the information that must be contained in the request for arbitration – such as the nature of the claims and the relief sought, the number of copies of the request that must be filed, service of the request, filing fees, etc).

Article 1456, CPC states that the constitution of an arbitral tribunal shall be complete upon the arbitrators' acceptance of their mandate. Further, as of that date, the tribunal is seized of the dispute. Thus, on the date when the third arbitrator accepts the arbitral mission, both the constitution of the arbitral tribunal and the referral of the dispute to the arbitral tribunal are now deemed to occur.

24 Hearing

Is a hearing required and what rules apply?

French law does not set out either a requirement for a hearing or instructions as to how the hearing is to be conducted (other than the admonition contained in article 1510, CPC, generally applicable to the proceedings as a whole, that the arbitrators should ensure the equality of the parties and due process). In arbitrations where the amount in dispute is quite low, it is possible for the arbitrators to rule solely on the basis of the written submissions. In practice, however, it is nowadays quite rare for arbitrators to do so or for parties to be agreeable to its proceeding in that manner.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

As for other aspects of the proceedings, respect for due process and the equality of the parties are the overarching principles that will govern the tribunal's decision-making on issues of evidence. Other than this,

French arbitration law says little about the taking of evidence, and arbitral tribunals enjoy wide discretion in overseeing the fact-gathering process. Article 1467, CPC the sole article in the CPC dealing uniquely and expressly with the issue of evidence in arbitration, provides, *inter alia*, that a tribunal may call any person to provide oral evidence (without an oath being taken). That same article also provides that a tribunal may enjoin a party to produce documents or information in its possession and that it may issue financial sanctions against that party if it fails to do so, such as a daily fine for each day of delay in producing the evidence (such an order would, however, have to be enforced through the courts). Moreover, as part of its power to 'take all measures necessary for fact finding' (article 1467, CPC), a tribunal may appoint its own experts.

In international arbitrations, arbitrators frequently agree that they will draw inspiration from the IBA Rules on the Taking of Evidence in International Arbitration, without necessarily being bound by its provisions. Note that it has become rather commonplace in France in larger cases for there to be an organised phase for requests for production of documents (whereas such requests were still relatively uncommon only a decade ago). Document requests nevertheless remain the exception in cases with a relatively small amount in controversy, in domestic arbitration and more generally whenever the arbitration involves principally arbitrators, counsel and parties coming from a civil law tradition.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

French arbitration law authorises the assisting judge to act in the following instances: to assist with the composition of the tribunal in the event of a blockage (articles 1451–1454, CPC); to declare that there is no reason to appoint a tribunal when the arbitration clause is manifestly void or manifestly inapplicable (article 1455); to rule on a request for the recusal of an arbitrator (articles 1456–1457); and to extend the time period for the tribunal to complete its mission (article 1463). If the parties have elected an administered arbitration, blockages in the constitution of the tribunal, recusals, and time limits are generally resolved by the institution rather than by the assisting judge.

Prior to the constitution of the arbitral tribunal, a party may also seek an order from the jurisdictionally competent national court for the preservation of evidence that could have a decisive impact on the resolution of the case (article 1449, CPC). Also, with leave of the arbitral tribunal, a party may seek an order from a court requiring a third party to produce evidence held by it (article 1469, CPC). Finally, as will be discussed in question 28, parties can call on state courts in relation to provisional or conservatory measures.

27 Confidentiality

Is confidentiality ensured?

In the popular perception, the view that arbitration is a confidential process lives on, and French arbitration law does indeed provide that domestic arbitrations are confidential unless the parties decide otherwise (article 1464, CPC). Because this provision is not among those domestic arbitration provisions expressly made applicable to international arbitration by article 1506, CPC (which provides the list of domestic arbitration rules that apply equally to international arbitration), some commentators have concluded that confidentiality is not a default rule of international arbitration and that confidentiality will exist only when there exists a specific agreement between the parties. Other commentators would argue against such a *contrario* interpretation, arguing that the silence on this point in the portion of the CPC applicable to international arbitration was not intended to set a universal default rule of non-confidentiality for international arbitration, but only to permit the conduct of non-confidential arbitrations in the arena of investor-state arbitration.

Note that article 1479, CPC, which is applicable in both domestic and international arbitration, provides that the arbitral tribunal's deliberations are always confidential.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

The existence of an arbitration agreement does not, as such, preclude a party from applying to French courts for conservatory or provisional measures, unless the agreement provides otherwise. Although arbitrators, too, have jurisdiction to order many types of interim measures and attach penalties to their order (article 1468, CPC), their jurisdiction becomes effective only after the constitution of the arbitral tribunal, which usually takes several weeks after the filing of the request for arbitration. Yet, it is often necessary to seek urgent measures directly from a state court even before the constitution of the arbitral tribunal. Furthermore, not all interim measures can be ordered by arbitrators; state courts have exclusive jurisdiction to order such conservatory measures as the registration of a judicial mortgage or pledge on the debtor's assets, or a conservatory seizure thereof (article 1468, CPC).

The types of measures that can be sought from state courts depend on whether the arbitral tribunal has already been constituted.

When the arbitral tribunal has not yet been constituted, French courts may order any urgent provisional measures designed to maintain the status quo or to put an end to an emergency situation (TGI Paris, 2 July 2013, No. 11-08522, *Interpane Glass v Pilkington Technology Management*). For example, the court may order discontinuation of activities that create a manifestly illegal state of affairs, such as conduct amounting to infringement of a patent. If circumstances so require, these measures may be ordered by way of an *ex parte* procedure (articles 812 and 874, CPC). When, in addition to urgency, a claimant can demonstrate that its claim is not 'seriously disputable', it can file a summary action and obtain an order compelling the adverse party to make a provisional down payment towards the amount claimed, provided however that the dispute has not yet been referred to the arbitrators (Court of Cassation, 1st Civil Chamber, 6 March 1990, No. 88-16.639; Court of Cassation, 2nd Civil Chamber, 13 June 2002, No. 00-20.077).

When the arbitral tribunal has already been constituted, French courts cease to have general jurisdiction to order any urgent interim measures. However, irrespective of whether the arbitral tribunal has been constituted, parties can always apply through an *ex parte* application for conservatory measures, such as the registration of a judicial mortgage or pledge on the debtor's assets located in France, or a conservatory seizure thereof (article 1468, CPC). Two conditions apply for the grant of such measures: the existence of a claim that appears to be grounded in principle on the merits (*fumus boni iuris*) and the existence of such circumstances which may threaten the recovery of the debt (*periculum in mora*).

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

French arbitration law does not include provisions on emergency arbitrators.

An important feature of the 2012 ICC Arbitration Rules is the emergency arbitrator procedure that allows parties to an arbitration agreement concluded after 1 January 2012 to seek urgent interim or conservatory measures prior to the transmission of the file to the arbitral tribunal and without regard to whether a request for arbitration has already been submitted (article 29). The decision on whether to grant such measures belongs to an emergency arbitrator appointed by the president of the ICC International Court of Arbitration. Proceedings before the emergency arbitrator are conducted *inter partes* and come to an end with an order issued within 15 days of the emergency arbitrator's receipt of the file. The decision rendered by the emergency arbitrator takes the form of an order and not an award. By adopting the ICC Rules in their arbitration agreement, the parties undertake to comply with the emergency arbitrator's orders, but it remains unclear whether the enforcement of such orders can be obtained before French courts. Full details of the procedure applicable to emergency arbitrator proceedings is available at Appendix V to the Rules.

The request for the appointment of an emergency arbitrator may be brought only by the original parties to the arbitration agreement (article 29 of the 2012 ICC Rules). Thus, the provisions on emergency arbitrators cannot be invoked by or against non-signatories of the arbitration agreement, even if they may eventually be considered by the arbitral tribunal as being bound by the arbitration agreement.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Arbitrators sitting in France have the general power to order any interim measures, with the only exceptions being the specific measures of registration of a judicial mortgage or pledge on the debtor's assets located in France, or a conservatory seizure thereof (article 1468, CPC). These specific kinds of measures (conservatory seizure and registration of a judicial mortgage or pledge) require the imperium – which the arbitrators do not have – and therefore fall within the exclusive jurisdiction of state courts (article 1468, CPC).

In practice, an arbitration tribunal can order measures designed to:

- ensure the execution of the forthcoming award, such as an order forbidding a party to dissipate certain assets or ordering it to post a security; or
- maintain the status quo, such as an order to a supplier to continue delivering goods.

Measures ordered by a tribunal do not always enjoy the same concrete effect or scope as measures ordered by a court, especially because the compulsory execution of measures ordered by an arbitration tribunal can be accomplished only with the assistance of the judiciary. However, as interim measures are often ordered near the start of an arbitration, parties may be unwilling to run the risk of antagonising the tribunal by defying its orders early in the proceedings. One technique that arbitrators can adopt to increase the effectiveness of their orders for interim measures directed at parties to arbitration is to include a provision in their order calling for the application of a cumulative daily penalty in the event of non-compliance. The power of arbitrators to resort to daily penalty provisions has long been recognised in French jurisprudence (Paris Court of Appeal, 7 October 2004) and was confirmed by the Decree (articles 1467 and 1468, CPC).

Security for costs applications are not dealt with in the French CPC. However, article 28 of the ICC Rules, though silent on such applications, appears broad enough to include their possibility. In the practice of ICC tribunals, security for costs is well accepted, but the requirements to obtain such measures are quite stringent. In particular, a security for costs application may not exclusively rely on the probable insolvency of the opposing party. Rather, the requesting party must demonstrate either a serious deterioration of a party's financial status since the time the arbitration agreement was concluded or bad faith conduct in which the party against which the request is directed has engaged in order to frustrate the other party's potential future cost claim.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Article 1464, CPC provides that 'the parties and the arbitrators shall act diligently and in good faith in the conduct of the proceedings.' However, French law does not include any sanctions in case of violation of that rule and no specific powers are granted to the arbitral tribunal in this regard. The only way for the tribunal to deal with such tactics is by exercising its general powers. For example, it may grant any interim measures aimed at preventing 'guerrilla' tactics or other kinds of bad faith conduct. Even though such interim orders would not be automatically enforceable as judicial orders are, a party's wilful non-compliance with such orders will be taken into consideration by the arbitral tribunal, including for the allocation of costs. To increase the effectiveness of its orders the tribunal may include a provision for the application of a cumulative daily

penalty in the event of non-compliance (see question 30) and it may also address bad faith tactics by excluding improperly obtained evidence from the record.

Similarly, the ICC Rules remain silent on the issue of 'guerrilla tactics'. However, both the arbitral tribunal and the parties have a duty to 'make every effort to conduct the arbitration in an expeditious and cost-effective manner' (article 22), and the arbitral tribunal has the power to 'adopt such procedural measures as it considers appropriate' to ensure effective case management (article 22). As regards the allocation of costs, the 2012 ICC Rules invite tribunals to consider 'the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner' (article 37).

As discussed in question 49, there is no specific code of conduct binding counsel involved in international arbitration proceedings in France. However, lawyers admitted to the French Bar are bound by the common code of ethics that provides for the general duty of loyalty. More often than not, it will be the arbitral tribunal's task to supervise the proceedings and to prevent the use of dilatory tactics by the parties and their counsel.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

In international arbitration, the default rule is a majority decision but, when no majority can be reached, the chair may rule on his or her own. In principle, all arbitrators should sign the award, but if one of them refuses to do so, the majority arbitrators should mention it in the award. Whether it be rendered by the majority (with or without a dissenting opinion), or by the presiding arbitrator alone, the award produces the same legal effects (article 1513, CPC).

In domestic arbitration, the rule also calls for a majority decision (article 1480, CPC). If a majority is not achieved, no valid award can be issued. The award must be signed by all tribunal members, and if the minority arbitrator refuses to do so, there should be included an indication to that effect in the award.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

The term dissenting opinion is unknown to French law. However, French courts have ruled that the expression of a dissenting opinion does not violate the binding principle of confidentiality of deliberations (article 1479, CPC) as long as the details of the deliberations are not revealed. Moreover, French courts have held that a dissenting opinion is neither itself a basis for challenging the award nor does it violate international public policy unless no collegial deliberation was held at all (Paris Court of Appeal, 7 April 2011).

34 Form and content requirements

What form and content requirements exist for an award?

Under article 1481, CPC domestic and international arbitration awards must be made in writing. An award must specify at least the identity of the parties, counsel and arbitrators, the date and place of the award, as well as a brief summary of the parties' claims and submissions and the tribunal's reasoning. Although these requirements apply to both domestic and international arbitration, their non-fulfilment by an international arbitral award does not amount to a ground for annulment of such award, as it is the case in the field of domestic arbitration (article 1492). However, an international arbitral award that states no reasons for the tribunal's decision may amount to a denial of due process and could lead to the setting-aside or refusal of enforcement of that award for violation of international public policy (Paris, 18 November 2010).

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

French law does not provide a time limit for rendering an award in the field of international arbitration. Under the ICC Rules, the time limit to render the award is six months from the signature or approval of the terms of reference (article 30), but the ICC Court in practice typically extends that time limit on one or more occasions (upon request of the arbitral tribunal or on its own initiative) until the award is rendered.

In domestic proceedings, the time limit for rendering an award is six months (article 1463, CPC) and it may be extended by agreement of the parties or, failing such agreement, by the assisting judge, but not by the arbitral tribunal's own decision (Paris Court of Appeal, 4 November 2014, No. 13/22288). A decision rendered after the expiration of the time limit agreed to by the parties runs the risk of being annulled (Paris Court of Appeal, 18 June 2013, No. 12/00480).

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Both domestic and international arbitral awards may be the subject of a petition to set aside made by the unsuccessful party at any time between the award's issuance and the expiry of one month (three months for parties residing abroad) following its notification to the parties (articles 1494 and 1519, CPC). Unless the parties have agreed otherwise, the notification of the award must be made by way of an official service by a bailiff. In both domestic and international arbitrations, the awards have the effect of *res judicata* as soon as they are issued with regard to the adjudicated claims. This allows, among other things, that conservatory measures be undertaken immediately without first seeking a special authorisation and even before an enforcement order is obtained or even requested (Court of Cassation, 2nd Civil Chamber, 12 October 2006).

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

Under French law, there is no limit as to the types of awards that can be made (eg, final award, partial award, interim award, consent award).

The only limitation relates to the type of relief that may be granted by arbitrators, notably conservatory seizures and judicial securities may be granted only by French courts (articles 1449 and 1468, CPC). Aside from such restriction, arbitrators may order any type of relief (payment of sums of money, specific performance, annulment or rescission of contracts, injunctive relief, etc).

Whether the arbitral tribunal's decision qualifies as an 'award' is for the courts to set, regardless of the tribunal's or the parties' given characterisation. Only a decision putting an end to a dispute on the merits or definitively dismissing claims for lack of admissibility or jurisdiction or a ruling on a procedural objection that ends a dispute, may be considered an 'award' (Court of Cassation, 1st Civil Chamber, 12 October 2011, No. 09-72439).

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

In both domestic and international arbitration, default by the claiming party may result in the termination of the proceedings if no counterclaim has been lodged against it. Proceedings may be terminated by the settlement of the parties, either by way of a consent award or by the withdrawal of all the parties from the proceedings. No formal requirements are applicable.

In domestic arbitration, following a stay or abatement, the arbitral tribunal may terminate the proceedings following a lack of action by the parties towards resuming the arbitration (article 1474, CPC). Furthermore, article 1477, CPC expressly provides that domestic arbitral proceedings, as opposed to international arbitral proceedings, shall come to an end upon expiration of the time limit set for the arbitration (unless otherwise extended).

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

In the absence of an agreement of the parties or a provision in the applicable institutional arbitration rules, cost-allocation decisions are left to the discretion of the tribunal. Costs usually include the arbitrators' fees and expenses, the administrative expenses of the arbitral institution, and the reasonable fees of the parties' legal counsel. Although not nearly as common, costs may also include internal expenses incurred by the prevailing party, such as the loss of productivity of its employees due to the time devoted to the arbitration, though tribunals tend to consider this as a non-recoverable cost of doing business.

Under French law, the unsuccessful party is not automatically bound to bear its opponent's fees and costs. Arbitral tribunals consider various factors when allocating costs, including the quantities of upheld and rejected claims, the reasonableness of the parties' legal fees and the parties' procedural conduct.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Interest on any monetary claims may be awarded by arbitrators. Parties should ensure that a specific request for interest has been made, along with particulars as to the calculation of or justification for the requested interest rate. Absent such specificities, tribunals may be disinclined to award interest, for fear of having their award overturned as ruling *ultra petita*.

Usually, the determination of interest's rate and calculation is left to their discretion. However, the *lex monetae* is often used by arbitrators to fix the rate while the *lex causae* is used to set the starting point of interest. The Paris Court of Appeal held that a rate that would be considered as usury under French domestic law is not per se contrary to international public policy (Paris, 27 October 2011, No. 10/12982). If an award does not provide for post-award interest, if enforcement is sought in France, interest at the French legal rate (fixed every year by decree) automatically applies from the date of the enforcement order (article 1153-1 Civil Code).

Proceedings subsequent to issuance of award**41 Interpretation and correction of awards**

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Under article 1485, CPC, domestic or international arbitral tribunals may, upon one of the parties' request, interpret, correct their award or make an additional award where they omitted ruling on a claim, after having afforded the parties an opportunity to be heard. Such power may neither be used to modify rights and obligations of the parties created in the award or to alter its meaning. Any interpretation request may only be aimed at rectifying unclear or ambiguous holdings included in the award. Similarly, a request of correction may only be lodged to correct clerical, calculation or typographical errors. Such requests may be filed within three months of the award's notification (article 1486, CPC). Unless otherwise agreed between the parties, the correcting award should be issued within three months of the parties' request.

Under ICC Rules article 35, the arbitral tribunal is entitled 'on its own initiative' to correct clerical errors within 30 days of the date of the award. Otherwise, the parties are afforded a 30-day time limit to apply for correction or interpretation of the award.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

Domestic awards may either be challenged or appealed, depending on the parties' agreement (article 1491, CPC). Any agreement to forego any recourse against the award is null and void. An international arbitration award issued in France may be set aside subsequent to an application being made by the losing party before the court of appeal at the place of issuance of the award. Such request may be filed any time between

the award's issuance and the expiry of a one month period following its notification to the parties (article 1519, CPC).

In domestic arbitration, there are six grounds on which an award can be set aside, and one less in international arbitration. Four of the grounds for setting aside an arbitral award are identical both in domestic (article 1492, CPC) and international arbitration (article 1520, CPC).

Ground No. 1: The arbitral tribunal wrongly upheld or declined jurisdiction. Under this ground, the judge is entitled to rely on every relevant legal provision and factual circumstance in order to exercise full control over the arbitral tribunal's determination on the issue of the existence and scope of the arbitration agreement (Paris Court of Appeal, 19 March 2013, No. 11/22077).

Ground No. 2: The tribunal was not properly constituted (Paris Court of Appeal, 14 October 2014, *SA Auto-Guadeloupe Investissements v Columbus Acquisitions Inc*). This is one of the most often cited grounds for setting aside the award, as it provides a basis for the party to argue that the tribunal was not properly constituted due to the lack of independence or impartiality of an arbitrator, following new information that was unknown to that party at the time of the proceedings. On the contrary, if such information was known by that party at the time of the proceedings, the fact that it failed to raise a challenge against the arbitrator prevents it from challenging the award after it has been issued (Court of Cassation, 1st Civil Chamber, 25 June 2014, *Société Tecnimont SPA v Société J&P Avax*, No. 11-26.529).

Ground No. 3: The arbitral tribunal ruled without complying with the mandate conferred upon it. (Court of Cassation, 2nd Civil Chamber, 9 December 1997, *Hispano Suiza v Hurel Dubois*: award set aside on the ground that the arbitral tribunal exceeded its mandate by awarding damages on the basis of a damages theory that had not been argued by either party).

Ground No. 4: Due process was violated (Paris Court of Appeal, 2 April 2013, Case No. 11/18244, *Blow Pack*: award set aside on the ground that the challenging party had not been afforded equal opportunity to present its case due to the lack of translation of certain exhibits).

Ground No. 5: Recognition or enforcement of the award is contrary to international public policy. This ground is applicable, with a slight adjustment, to both domestic and international arbitration. Domestic awards may be annulled if the award itself 'is contrary to public policy' (article 1492, CPC) whereas the setting aside of an international award may only be obtained if its 'recognition and enforcement is contrary to international public policy' (article 1520, CPC). In international arbitration, contrariety to international public policy can take many forms, such as incompatibility between an award and an earlier court decision enjoying *res judicata* effect (Paris Court of Appeal, 17 January 2012, *Planor Afrique SA v Emirates Télécommunications corporation 'Etisalat'*, reversed on other grounds by Court of Cassation, 1st Civil Chamber, 10 July 2013).

Ground No. 6: Failure to state reasons in the award, to indicate the date on which it is issued, the names or signatures of the arbitrators or whether the award was not made following a majority decision. Ground No. 6 is only applicable to domestic awards.

The 2011 reform allowed parties to agree at any time to waive their right to challenge an international award issued in France by means of a petition to set-aside (article 1522, CPC), although they will always be able to appeal the issuance of an enforcement order relating to the award. Unlike other jurisdictions, French law does not tie this possibility to the parties having their domicile, habitual residence and place of business outside of France.

Finally, it should also be noted that recourse actions against awards relating to certain administrative contracts concluded with French public entities are subject to the exclusive jurisdiction of the Council of State, as opposed to the private law courts (Tribunal des Conflits, 17 May 2010, *INSERM v Fondation Letten F Saugstad*, No. C3754). Before the Council of State, an award can be set aside on the basis of grounds similar to the six grounds examined above (Council of State, 9 November 2016, *Société Fosmax LNG*, No. 388806).

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level?

Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Arbitral awards are not appealable, except in domestic cases and only when the parties have agreed on the right to make an appeal (article 1489, CPC). Apart from that, an award may be challenged only via an application to set aside a domestic or international award made in France or an application to oppose enforcement. In both cases, the action is brought directly before the relevant court of appeal. Decisions issued by French appellate courts may be subject to further review, on purely legal issues, by the Court of Cassation. Subject to the outcome of the Court of Cassation proceedings, the case may end after the decision rendered by the Court of Cassation or be remanded to another court of appeal for further review.

Proceedings before the court of appeal and before the Court of Cassation frequently last for 12 to 18 months, but may in some cases extend over longer periods. Relevant costs to be considered include court costs and costs incurred in the service of documents by a bailiff (which are both fairly reasonable), as well as variable translation costs and attorneys' fees. French courts do not usually impose large costs orders on the losing party, although recent case law shows an increase in amounts of costs awarded, especially against parties filing frivolous challenges to awards.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

With regard to international awards issued in France, the enforcement proceeding is commenced before the enforcement judge of the civil court for large claims (*tribunal de grande instance* (TGI)) within whose territorial jurisdiction the award was issued (article 1516, CPC). The process for requesting recognition and enforcement is simple, and the request is made *ex parte*. The request consists of a short demand in more or less standard language that is typically written by hand on the original or a copy of the award. This is submitted to the TGI together with a copy of the arbitration agreement (with a translation of these documents if they are not in French; translations generally need not be done by a court certified translator, following the 2011 reform) (article 1515, CPC). The enforcement judge issues an order generally within a few weeks (at most). The judge will recognise and order enforcement of the award if both the award's authenticity has been proven by the party seeking its recognition and enforcement and the recognition and enforcement are not manifestly contrary to international public policy (article 1514, CPC).

The order allowing recognition and enforcement comprises a standard order that is simply stamped on the face of the award. In the rare instances when the order denies enforcement, it must state its reasons, and such an order is appealable (articles 1517 and 1523, CPC). There is no appeal open against a TGI decision granting an enforcement order concerning an international arbitration award rendered in France (article 1524, CPC). The only means of recourse is a petition to set aside the award. If, however, the parties explicitly waived their right to request setting aside a future arbitral award, the TGI enforcement order can nevertheless be appealed on the same grounds as those provided for setting aside the award (articles 1522 and 1524, CPC) (see question 25).

With regard to foreign awards, the enforcement proceeding is the same as that which applies to international awards issued in France, except that the judicial authority jurisdictionally competent to issue the order for a foreign award is the Paris TGI (article 1516, CPC). If an enforcement order is granted for a foreign arbitral award, the party against whom enforcement is sought can appeal that order on the same grounds as those provided for setting aside an international arbitral award issued in France (articles 1520, 1525, CPC).

For both foreign awards and awards issued in France, the enforcement order allows the interested party to pursue forced execution of the arbitral award. An important feature of French law is that, generally, neither a petition to set aside the award nor an appeal against

the enforcement order suspends the forced execution of the award in France (article 1526, CPC).

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Decisions of foreign courts annulling an arbitral award (regardless of their source) are not taken into consideration by French courts when ruling on the enforcement of the said award in France (see the decisions of the Court of Cassation in Norsolor (1st Civil Chamber, 9 October 1984, No. 83-11355), Hilmarton (1st Civil Chamber, 1, 23 March 1994, No. 92-15137, and 10 June 1997, No. 95-18402), and Putrabali (1st Civil Chamber, 29 June 2007, No. 05-18053)).

International awards are considered to be detached from any domestic legal system. The relevant test used by the French courts is whether the foreign award meets the French criteria for enforcing foreign awards (articles 1525 and 1520, CPC). In that regard, French enforcement conditions are more favourable than those of the New York Convention. When verifying whether an award complies with the requirements of international public policy, the French Court of Cassation follows a liberal approach, by looking solely for 'flagrant, effective and concrete' violations of enforcement requirements (1st Civil Chamber, 4 June 2008, *SNF v Cytec*; 1st Civil Chamber, 29 June 2011). Although the word 'flagrant' has disappeared in some of the more recent decisions (Court of Cassation, 1st Civil Chamber, 10 July 2013, No. 12-13,351; 1st Civil Chamber, 12 February 2014, No. 10-17,076; Paris Court of Appeal, 25 November 2014, No. 13/11333), the general approach seems to remain the same.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

French arbitration law does not include provisions on emergency arbitrators. However, rules dealing directly with emergency arbitrators are provided in the 2012 ICC Rules of Arbitration. According to said rules, the decision rendered by the emergency arbitrator takes the form of an order and not an award. By adopting the ICC Rules in their arbitration agreement, the parties undertake to comply with the emergency arbitrator's orders, but it remains unclear whether the enforcement of such orders can be obtained before French courts. Strictly speaking, the emergency arbitrators, and the arbitral tribunal, cannot enforce their orders, since they do not have the power to compel. However, arbitrators can certainly draw adverse inferences from a party's failure to comply with an emergency arbitrator's order. One technique that emergency arbitrators can perhaps adopt to increase the effectiveness of their orders is to include a provision calling for the application of a cumulative daily penalty in the event of non-compliance. The power of arbitrators to resort

to daily penalty provisions is acknowledged by article 1468, CPC, which probably applies to emergency arbitrators as well.

47 Cost of enforcement

What costs are incurred in enforcing awards?

Costs such as lawyers' fees and costs incurred in the tracing of assets may be significant and are not, for the most part, recoverable. Other costs are determined on a fixed scale and are recoverable. They include courts', bailiffs', and other administrative costs, depending on the enforcement measures taken (seizures, attachments, pledges and mortgages, public sales of assets, etc). Translation costs may also be recoverable.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

The French judicial system is based on civil law principles. Judges take an active role in the fact-finding process and often rely on court-appointed experts to conduct factual and technical investigations. Parties are often advised to actively participate in such court-ordered expert analyses. Documentary evidence is typically given great weight, and witness oral evidence is rare in civil and commercial proceedings. Although judges may order a party or a third party to produce specifically identified documents in its custody when a party makes a specific request for such an order, such requests are relatively uncommon in practice, and there does not exist any generally applicable, US-style discovery provision in the Code of Civil Procedure. For instance, a party is under no general obligation to disclose relevant documents.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There is no specific code of conduct binding counsel involved in international arbitration proceedings. Lawyers admitted to the Paris Bar are bound by a common code of ethics. However, in some specific instances, for example, in relation to the ban on French lawyers to prepare witnesses for cross-examination, the French National Council of Bars issued a specific resolution relevant to international arbitration proceedings, located in France or abroad. The resolution states that 'witness preparation by a lawyer before the hearing does not affect the essential principles of the legal profession and is part of a commonly accepted practice in which the lawyer should be able to fully exercise his or her role as a defender' (26 February 2008, Bar Bulletin 2008 No. 9).

The principle of procedural loyalty (or good faith) laid down in article 1464, CPC is applicable to arbitral proceedings. Pursuant to this principle, parties must share information in a timely manner on their claims and contentions so as to avoid a claim being raised tardily or



Thomas Bevilacqua
Ivan Urzhumov

tbevilacqua@foleyhoag.com
iurzhumov@foleyhoag.com

153 rue du Faubourg Saint-Honoré
75008 Paris
France

Tel: +33 1 70 36 61 30
Fax: +33 1 70 36 61 31
www.foleyhoag.com

in a dilatory manner (Paris Court of Appeal, 18 November 2004). The IBA guidelines' preamble adopts a similar approach and provides that the Guidelines were inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

There are currently no regulatory restrictions in France related to third-party funding of arbitral claims.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

There are no restrictions or unusual rules specifically applicable to individuals involved in arbitral proceedings taking place in France.

Counsel fees are freely determined by agreement between the attorney and the client. French law generally prohibits an attorney from employing a success fee arrangement (*pacta quota litis*) when it represents the entirety of the attorney's fees (article 10, Law No. 71-1130 of 31 December 1971). However, the ban on pure success fee arrangements (which is absolute in judicial representation matters) may be somewhat eased when an attorney's mission relates to international arbitration (even one with its seat in France), provided the agreed fees are not manifestly excessive (Paris Court of Appeal, 10 July 1992).

France has long been at the forefront of the development of international arbitration. Its pro-arbitration approach is often widely acclaimed by international arbitration practitioners. Consequently, Paris is home to a large community of experienced professionals (legal and support) and is filled with excellent facilities for the holding of arbitration hearings. Both aspects make France a preferred destination for arbitration and enforcement proceedings.

Germany

Stephan Wilske and Claudia Krapfl

Gleiss Lutz

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

The New York Convention has been in force in Germany since 28 September 1961. Germany has not made (or withdrawn) any declarations or notifications.

- Germany is also a party to the following multilateral conventions:
 - the Geneva Protocol on Arbitration Clauses of 1923;
 - the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927;
 - the European Convention on International Commercial Arbitration of 1961;
 - the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965; and
 - the Energy Charter Treaty of 1994.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

As of November 2016, Germany has signed 139 bilateral investment treaties (BITs), of which 129 are in force. Most of these BITs offer the possibility for investors to institute arbitral proceedings against the state parties to the BIT.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The law on arbitration is contained in the Code of Civil Procedure (ZPO), 10th book, sections 1025 to 1066. The text can be found in German and English at www.disarb.org. The 10th book of the ZPO governs all arbitration proceedings with their seat in Germany without distinguishing between domestic and international arbitration.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

German arbitration law, in effect since 1 January 1998, is based on the UNCITRAL Model Law, with only a few minor differences.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

German arbitration law contains a small number of mandatory provisions, which include:

- the parties shall be treated equally and each party shall be given a full opportunity of presenting its case (ZPO, section 1042(1));
- counsel may not be excluded from acting as authorised representatives (ZPO, section 1042(2));
- any default of a party justified by that party to the arbitral tribunal's satisfaction will be disregarded (ZPO, section 1048(4));
- an arbitral tribunal can rule on its own jurisdiction (ZPO, section 1040(1)); and
- several provisions relating to the right of recourse to the state courts (ZPO, sections 1034(2), 1037(3) and 1041(2) and (3)).

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Pursuant to the ZPO, section 1051, the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given state shall be construed, unless otherwise expressly agreed upon by the parties, as directly referring to a substantive law of that state and not to its conflict of laws rules. Failing any designation by the parties, the arbitral tribunal shall apply the law of the state with which the subject matter of the proceedings is most closely connected.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The most prominent arbitral institution is the German Institution of Arbitration (DIS), with its main office in Cologne and further offices in Berlin and Munich.

German Institution of Arbitration
Beethovenstrasse 5-13
50674 Cologne, Germany
Tel: +49 221 28552 0
Fax: +49 221 28552 222
welcome@disarb.org
www.disarb.org

The DIS was formed on 1 January 1992. The DIS Arbitration Rules (the DIS Rules), in force since 1 July 1998, follow German arbitration law in all major aspects. The fee structure for arbitrators is based on the amount in dispute according to a schedule of costs, with its most recent revision dating from 1 April 2014.

Arbitration agreement

8 Arbitrability**Are there any types of disputes that are not arbitrable?**

German arbitration law has adopted a liberal and expansive view of arbitrable disputes. Generally, any claims involving an economic interest are arbitrable. Claims not involving an economic interest are arbitrable to the extent that parties are entitled to conclude a settlement on the issue in dispute (ZPO, section 1030). Examples of disputes that are not arbitrable include questions involving criminal law and most family law matters.

Patent disputes are considered to be arbitrable.

Private disputes in competition law matters may also be referred to arbitration including, for example, disputes arising out of an agreement containing restrictive trade practices.

The matter of how far intracompany disputes are arbitrable is disputed. This is especially controversial for applications to set aside corporate resolutions adopted in a general meeting of shareholders. According to the case law of the Federal Court of Justice, an arbitration clause for such disputes must fulfil four minimum requirements:

- the arbitration clause must be included in the articles of association or in a separate agreement agreed upon by all shareholders;
- all shareholders must be made aware of the arbitration proceedings and must be given an opportunity to join;
- all shareholders must be able to participate in the selection and appointment of the arbitrator insofar as the arbitrator is not appointed by a neutral entity; and
- all applications for the setting-aside of corporate resolutions relating to the same matter in dispute must be put before one arbitral tribunal.

9 Requirements**What formal and other requirements exist for an arbitration agreement?**

The formal requirements for an enforceable arbitration agreement are as follows (ZPO, section 1031):

- the arbitration agreement shall be contained either in a document signed by the parties or in an exchange of letters, faxes, telegrams or other means of telecommunication that provide a record of the agreement;
- the form requirement shall be deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties and – if no objection was raised in good time – the contents of such document are considered to be part of the contract in accordance with common usage;
- the parties may also refer to an arbitration agreement contained in the standard terms and conditions of one of the parties;
- an arbitration agreement is also concluded by the issuance of a bill of lading, if the latter contains an express reference to an arbitration clause in a charter party;
- arbitration agreements to which a consumer is a party must be contained in a document that has been personally signed by the parties. The written form may be substituted by an electronic form. No agreements other than those referring to the arbitral proceedings may be contained in such a document or electronic document (this shall not apply in the case of a notarial certification); and
- any non-compliance with form requirements is cured by the party who could raise objections to the form entering into argument on the substance of the dispute in the arbitral proceedings without raising such objection as to the form.

10 Enforceability**In what circumstances is an arbitration agreement no longer enforceable?**

The arbitration agreement is independent of the underlying contract (ZPO, section 1040). Therefore, avoidance, rescission or termination of the underlying contract has no influence on the arbitration agreement. An arbitration agreement can be terminated upon agreement of both parties and may be rescinded in the case of fraud or similar circumstances.

The insolvency of one of the parties to an arbitration agreement does not lead to its invalidity. However, if an insolvent or impecunious party can no longer pay its share of the advance on costs, the other party must be given the opportunity to pay the entire advance on costs, but should it refuse, the arbitration agreement will become inexecutable.

11 Third parties – bound by arbitration agreement**In which instances can third parties or non-signatories be bound by an arbitration agreement?**

An arbitration agreement generally only binds the signatories of the agreement. However, in cases of assignment, agency, succession and insolvency, the assignee, principal, successor and insolvency administrator will be bound by the arbitration agreement as well.

12 Third parties – participation**Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?**

German arbitration law does not explicitly provide for such third-party participation in arbitration. It is, however, generally accepted in academic writing that a third party may join arbitration proceedings (following a third-party notice or of its own accord) if the parties to the arbitration consent to the joinder of the third party. This also means that a third party cannot (unless there is, for example, an existing multi-party arbitration agreement) be forced to join an arbitration or enforce its joinder.

Thus, should a seller wish to bring the manufacturer into an arbitration between itself and the end user, it may invite the manufacturer to do so (eg, by third-party notice), but would have to obtain consent by both the manufacturer and the end user.

13 Groups of companies**Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the ‘group of companies’ doctrine?**

The ‘group of companies’ doctrine has not been embraced by German court practice. In 2014, the Federal Court of Justice confirmed that the ‘group of companies’ doctrine is not recognised in Germany, but may be applicable under foreign law and that such application violates German public policy only in extreme and exceptional cases.

14 Multiparty arbitration agreements**What are the requirements for a valid multiparty arbitration agreement?**

German arbitration law does not contain an explicit provision on multiparty arbitration. However, German courts have held that all parties must have the same opportunity to influence the constitution of the arbitral tribunal (see ZPO, section 1034(2)). It is accepted in German practice that the procedure is valid when all arbitrators are appointed by a neutral third party if multiple parties on one side cannot agree on an arbitrator (see, for example, DIS Rules, section 13).

Constitution of arbitral tribunal**15 Eligibility of arbitrators****Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?**

Generally, any person who has the capacity to enter into a contract may act as an arbitrator. Although active judges or other civil servants may act as arbitrators, they require approval from their respective supervisory authorities before they can accept appointments. No such restrictions apply to retired judges. In 2016, the Federal Court of Justice held that the lack of such approval is no reason to set aside an award,

because this only affects the relationship between the judge and the supervisory authorities.

Contractually stipulated requirements for arbitrators based on nationality, religion or gender are highly likely to be recognised by German courts, at least as long as there is a valid reason for such requirement. It is generally accepted practice to stipulate, in particular, the nationality of arbitrators in arbitration agreements in order to ensure that the arbitrators are from a neutral jurisdiction in relation to the parties.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Failing party determination, the number of arbitrators shall be three (ZPO, section 1034). In the absence of an agreement between the parties on the appointment of the arbitrators (ZPO, section 1035; DIS Rules, sections 12 to 14), a sole arbitrator shall, if the parties are unable to agree on his or her appointment, be appointed by the court (DIS appointing committee) upon request of a party. In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator who shall act as chairperson of the arbitral tribunal. If a party fails to appoint an arbitrator within one month (30 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 one month (30 days) of their appointment, the appointment shall be made, upon request of a party, by the court (DIS appointing committee).

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

The appointment of an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess qualifications agreed on by the parties (ZPO, section 1036; DIS Rules, section 18). An arbitrator must disclose any circumstances likely to give rise to justifiable doubts of his or her impartiality or independence as soon as he or she becomes aware of them. Regarding grounds for justifiable doubts, the German arbitral community and courts tend to seek guidance from the IBA Guidelines on Conflicts of Interest.

Failing party agreement, a party that intends to challenge an arbitrator shall, within two weeks of becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to above, send a written statement of the reasons for the challenge to the arbitral tribunal (ZPO, section 1037). Unless the challenged arbitrator withdraws from his or her office or the other party agrees with the challenge, the arbitral tribunal shall decide on the challenge. If such challenge is not successful, the challenging party may, within one month of having received notice of the decision rejecting the challenge, request the court to decide on the challenge; the parties may agree on a different time limit.

An arbitrator's mandate terminates upon his or her own withdrawal or by agreement of the parties if he or she becomes unable to perform his or her functions or for other reasons fails to act without undue delay (ZPO, section 1038; DIS Rules, section 19). If the arbitrator does not withdraw or the parties cannot agree on his or her termination, any party may request the court to decide on the termination of the mandate.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Although the ZPO is silent on the contractual relationship between parties and arbitrators, it is generally accepted that the arbitrator's

contract is a service contract. The amount of fees is usually set either in the arbitrator's contract or in the applicable institutional rules.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators have a duty to act neutrally and may be liable for negligence under the general rules of applicable law, unless this is excluded in the arbitrator's contract or according to the institutional rules applicable (see, for example, DIS Rules, section 44). However, arbitrators will always be liable for intentional wrongdoing or intentional breach of duty.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

A court before which an action is brought in a matter that is the subject of an arbitration agreement shall, if a respondent raises such objection, reject the action as inadmissible unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed (ZPO, section 1032). The respondent must raise such an objection prior to the beginning of the oral hearing on the substance of the dispute, otherwise, it is precluded from raising such objection.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The arbitral tribunal may rule on its own jurisdiction and on the existence or validity of the arbitration agreement (ZPO, section 1040). Any challenge to the arbitral tribunal's jurisdiction must be raised no later than the submission of the statement of defence. If the arbitral tribunal rules in favour of its own jurisdiction at this stage, any party may request the court to decide the matter within one month of receipt of the arbitral tribunal's ruling. Otherwise, the arbitral tribunal's ruling is binding. If a party does not raise the objection in a timely manner, it will be precluded from raising such objection at a later point in time (ZPO, section 1027).

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Failing party agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties (ZPO, section 1043). In any event, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for an oral hearing. Failing party agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings (ZPO, section 1045).

23 Commencement of arbitration

How are arbitral proceedings initiated?

A claimant can initiate arbitral proceedings by sending a notice of arbitration to the respondent (ZPO, section 1044). The proceedings commence on the date on which the notice of arbitration is received by the respondent. The notice of arbitration must include the names of the parties, a short description of the issues in dispute and a reference to the arbitration agreement, and should further include the nomination of an arbitrator.

Proceedings under the DIS Rules commence upon receipt of the statement of claim by the DIS secretariat (DIS Rules, section 6). The statement of claim shall contain the identification of the parties,

specification of the relief sought, particulars of the facts, reproduction of the arbitration agreement and, where applicable, nomination of an arbitrator. The statement of claim shall be submitted in a number of copies sufficient to provide one copy for each arbitrator, for each party and for the DIS (DIS Rules, section 4). The DIS secretariat will deliver the statement of claim to the respondent if it has received the necessary number of copies and the claimant has paid the administrative fee and the provisional advance on the arbitrator's costs (DIS Rules, sections 7 and 8).

An express requirement of signature of a notice of arbitration does not exist under the ZPO or under the DIS Rules, but there are strong arguments for the necessity of such a requirement.

24 Hearing

Is a hearing required and what rules apply?

The parties may choose whether they want the proceedings to include an oral hearing or not (ZPO, section 1047(1); DIS Rules, section 28). Failing party agreement, this decision is up to the arbitral tribunal.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Failing party agreement and in the absence of provisions in the German arbitration law, the arbitral tribunal shall conduct the arbitration in such a manner as it considers appropriate. The arbitral tribunal is empowered to determine the admissibility of taking evidence, take evidence and freely assess such evidence (ZPO, section 1042).

Witnesses, experts, documents and inspection are admissible as evidence. The arbitral tribunal has full discretion on how to conduct the taking of evidence. It is accepted that anyone can be a witness, including parties or party officers. Although in domestic court proceedings court-appointed experts are the norm, party-appointed experts are regularly used in arbitration. There is a distinct tendency in the German arbitral community to seek guidance from the IBA Rules on the Taking of Evidence, but not to agree upon their applicability specifically in a procedural order.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

German courts may not intervene during a pending arbitration, except in the following circumstances:

- court decision on the arbitral tribunal's jurisdiction (ZPO, section 1040(3));
- appointment of arbitrators by default (ZPO, section 1035);
- a decision upon challenge of an arbitrator (ZPO, section 1037(3));
- interim relief (ZPO, section 1041); and
- court assistance in taking evidence (ZPO, section 1050).

27 Confidentiality

Is confidentiality ensured?

There is no provision on confidentiality in German arbitration law. According to the very broad confidentiality provision under DIS Rules, section 43, the parties, the arbitrators and the persons at the DIS secretariat involved in the administration of the arbitral proceedings shall maintain confidentiality towards all persons regarding the conduct of arbitral proceedings, and in particular regarding the parties involved, the witnesses, the experts and other evidentiary materials.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

An arbitration agreement shall not prevent a court from granting, at the request of a party before or during arbitral proceedings, an interim measure relating to the issue in dispute in the arbitral proceedings

(ZPO, section 1033). There is no exclusivity for courts or for the arbitral tribunal.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Neither German arbitration law nor the DIS Rules provide for an emergency arbitrator. Only the DIS Sports Arbitration Rules in section 20 provide for the option of an agreement between the DIS and a sports organisation for an arbitrator to be available at all times for interim measures prior to the constitution of the arbitral tribunal. The unique process organised by the DIS means that an arbitrator is available 24 hours a day. There are approximately 100 sports arbitrators accepted by the DIS, each of whom must make himself or herself available as an emergency arbitrator for three or four days a year. A list of who is on standby is available on the internet.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order such interim measures as it may consider necessary in respect of the subject matter of the dispute (ZPO, section 1041; DIS Rules, section 20) or, in exceptional circumstances, security for costs. Furthermore, the arbitral tribunal may require any party to provide appropriate security in connection with such measure. Decisions may include orders for a bank guarantee or an attachment.

To enable enforcement the court may, at the request of a party, permit enforcement of such a measure ordered by the arbitral tribunal unless application for a corresponding interim measure has already been made to a court. The court may amend such an order if necessary for enforcement of the measure.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

There are no specific rules in German arbitration law or in the DIS Rules allowing arbitral tribunals to order sanctions. However, the arbitral tribunal can sanction the parties in the context of its costs decision, where it has discretion to take into consideration any circumstances it considers appropriate (see question 39), including the use of 'guerrilla tactics' in the course of the arbitration. There are no reported cases where an arbitral tribunal or the DIS has sanctioned counsel directly for using 'guerrilla tactics' or for gross violations of the integrity of the arbitral proceedings. However, there is no rule in German arbitration law or in the DIS Rules that would prohibit the arbitral tribunal or the DIS from doing so. An arbitral tribunal might consider reporting such activity to the relevant bar association, or – if the conduct amounts to a criminal act – to the public prosecutor. No such cases have been reported either, which may be due to the confidentiality obligation of arbitral tribunals, which stops them from reporting such activity.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. If an arbitrator refuses to take part in the vote on a decision, the other arbitrators may

take the decision without him, unless otherwise agreed by the parties. Individual questions of procedure may be decided by the chairperson alone if so authorised by the parties or all members of the arbitral tribunal (ZPO, section 1052 and DIS Rules, section 33).

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

German arbitration law is silent on the question of whether an arbitrator may issue a dissenting opinion. It is, however, generally accepted that a dissenting arbitrator may issue such an opinion, as long as he or she observes the fundamental principle of the secrecy of the internal deliberations of the arbitral tribunal and does not reveal such deliberations.

34 Form and content requirements

What form and content requirements exist for an 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. The award shall state its date and the place of arbitration (ZPO, section 1054 and DIS Rules, section 34).

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

There is no explicit time limit for rendering an award. However, it should be rendered within a reasonable time (DIS Rules, section 33.1).

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The date of the award is not of decisive importance. The date of delivery of the award is decisive for applications for correction and interpretation of an award and for applications for setting aside an award.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

Possible types of awards are final awards, partial awards, interim or interlocutory awards and awards on agreed terms.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

The arbitral tribunal shall order the termination of the proceedings if:

- the claimant fails to communicate its statement of claim and does not show sufficient cause for the delay;
- the claimant withdraws its claim, unless the respondent objects and the arbitral tribunal recognises a legitimate interest on the part of the respondent in obtaining a final award resolving the dispute;
- the parties agree on the termination of the proceedings;
- the parties refuse to continue the proceedings although the arbitral tribunal has so requested; or
- the arbitral tribunal finds that the continuation of the proceedings has for any other reason become impossible (ZPO, section 1056; DIS Rules, section 39).

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Unless the parties agree otherwise, the arbitral tribunal shall allocate, by means of an arbitral award, the costs of the arbitration between the

parties, including those incurred by the parties necessary for the proper pursuit of their claim or defence. It shall do so at its discretion and take into consideration the circumstances of the case, in particular the outcome of the proceedings (ZPO, section 1057; DIS Rules, section 35).

In domestic arbitration proceedings in Germany, arbitrators will usually adhere to the general principle in German civil procedure that the costs will be allocated in proportion to the outcome. Recoverable costs include costs of the arbitrators, costs of the parties, costs for the taking of evidence and fees for representation.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

An arbitral tribunal may award interest to the extent that applicable substantive law allows a claim for interest.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Any party may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of a similar nature, or to give an interpretation of specific parts of the award, or to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. Such a request shall be made within one month of receipt of the award. The arbitral tribunal shall make the correction or give the interpretation within one month and make an additional award within two months. Upon its own initiative, the arbitral tribunal may make a correction of the award (ZPO, section 1058 and DIS Rules, section 37).

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

Recourse to the German courts against an award may be made by an application for setting aside only if the award was rendered in Germany (ZPO, section 1059). An award may be set aside only if:

- the applicant shows sufficient cause that:
- a party to the arbitration agreement was under some incapacity pursuant to the law applicable to it;
- the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under German law;
- it 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 not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award that contains decisions on matters not submitted to arbitration may be set aside;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with a provision of the German arbitration law or with an admissible agreement of the parties and it can be presumed that this affected the award; or
- the court finds that:
- the subject matter of the dispute is not capable of settlement by arbitration under German law; or
- recognition or enforcement of the award leads to a result that is in conflict with public policy.

Unless the parties have agreed otherwise, an application for setting aside may not be made after three months have elapsed since the party making the application received the award.

Update and trends

In 2016, a review process for modernising the arbitration law was initiated. While no major reform of the arbitration law is envisaged, various modernisations as well as some additions have been suggested for discussion purposes. The discussions are focused on review of other modernised arbitration laws, the modernised UNCITRAL Model Law and a 'readjustment' of some of the provisions. If these discussions determine the need for reform, it is intended that new legislation will be enacted in 2018 – to coincide with the 20-year anniversary of the enactment of the arbitration law.

Additionally, a review process for modernising the DIS Rules is in full swing. The DIS is planning to enact the new DIS Rules by the summer of 2017. The DIS has formed several committees in order to ensure the involvement of the international arbitration community in the reform process. To facilitate the process, the DIS board of directors has adopted 10 guidelines, including that arbitral proceedings are to be non-bureaucratic, flexible and open to party autonomy and that the revised rules are to be suitable for the needs of domestic and international users. Since the revision of the DIS Rules comes at the end of a wave of revision for institutional rules from 2012 to 2015, the DIS drafting committee has the benefit of hindsight on some of the changes initiated in other institutional rules and can choose to enact those that have shown themselves to be beneficial. The international practitioner can therefore look forward to well-balanced, internationally attractive new DIS Rules.

According to the website set up to track investment treaty disputes with German involvement (www.german-investment-treaty-disputes.de), a total of 21 claims initiated by German investors are pending as of November 2016. Only one investment treaty dispute is pending against Germany, initiated by Vattenfall (*Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No. ARB/12/12). Interestingly, it appears that no investment treaty claim was raised by a German investor in 2016. This may be related to the continued outcry against investor-state arbitration, which culminated in the inclusion of a permanent tribunal in the Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada in February 2016.

Despite this concession to the opponents of CETA, opposition remained strong up until signing of CETA on 30 October 2016. In Germany, opponents called on the Constitutional Court to stop the signing of CETA, but the court denied the application for a preliminary injunction, allowing signing to proceed subject to conditions, including the non-applicability of the dispute resolution provisions in provisional application of CETA. The main proceedings are still pending before the Constitutional Court. It remains to be seen whether CETA ever ends up being fully ratified. Provisional application will be possible once CETA is approved by the European Parliament, which is expected by early 2017.

Discussions on the Transatlantic Trade and Investment Partnership (TTIP) with the United States remained fraught with controversy in 2016. Considering the difficulties in finalising CETA, continued strong opposition to TTIP, particularly in Germany, and the change in politics in the United States with the election of Donald Trump as president, TTIP negotiations must be considered failed.

In the arbitration between Eureko BV and the Slovak Republic (PCA Case No. 2008-13, UNCITRAL), the enforcement of the award on the merits, awarding damages in the amount of €22 million, is still pending. The Federal Court of Justice stayed the enforcement proceedings in March 2016 and requested guidance from the European Court of Justice on whether its opinion is correct that intra-EU BITs are compatible with EU law (and, therefore, whether the award should be declared enforceable).

In an important decision for sports arbitration, the Federal Court of Justice confirmed in June 2016 that the arbitration agreement concluded between speed skater Claudia Pechstein and the International Skating Union (ISU) was valid and the ISU did not abuse a market-dominating position by requiring athletes to submit to arbitration before the Court of Arbitration for Sports (CAS). In its press release on the decision, CAS expressed relief and emphasised that the judgment 'represents a ratification of the current CAS system', which it nevertheless aims to continuously improve upon.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Applications for the setting aside or enforcement of an arbitral award must be made before the competent Higher Regional Court. There is only one level of appeal with the Federal Court of Justice. Enforcement proceedings or setting aside proceedings, and the appeal, will each take anywhere between three months and one year. The costs incurred at each level depend on the amount in dispute (see question 47). The costs will generally be apportioned taking into account the outcome of the proceedings; namely, the losing party will carry the court fees and the statutory lawyer's fees of both parties.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

German courts tend to look favourably upon enforcing awards. Slightly different procedures exist for enforcement of foreign and domestic awards.

Domestic awards

Enforcement of the award takes place if it has been declared enforceable. The application for a declaration of enforceability shall be refused and the award set aside if one of the grounds for setting aside exists (see question 42). Grounds for setting aside shall not be taken into account if, at the time when the application for a declaration of enforceability is served, an application for setting aside based on such grounds has been finally rejected. Furthermore, the grounds for setting aside for the reasons listed in the first bullet point in question 42 shall not be taken into account if the relevant time limits have expired without the party opposing the application having made an application for setting aside the award. The grounds listed in the second bullet point in question 42 are to be observed *ex officio*.

Foreign awards

The recognition and enforcement of foreign arbitral awards shall be granted in accordance with the New York Convention. If there are grounds for refusing a declaration of enforceability, the court shall rule that the arbitral award is not to be recognised in Germany. If the award is set aside abroad after having been declared enforceable, an application for setting aside the declaration of enforceability may be made.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

German courts have a tendency not to enforce foreign awards set aside at the place of arbitration.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Since neither German arbitration law nor the DIS Rules provide for an emergency arbitrator, there are no specific rules on enforcement of orders by emergency arbitrators. However, such orders should be treated as arbitral interim measures (ZPO, section 1041) and are enforceable as such (see question 30).

47 Cost of enforcement

What costs are incurred in enforcing awards?

The costs incurred in enforcing awards depend on the amount in dispute according to the cost schedules for court fees and for lawyer's fees. To enforce an award of €100,000, court fees will be approximately €1,700 and the lawyer's fees approximately €3,000 for each party. These fees are to be paid by the losing party.

Other**48 Judicial system influence**

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

The German judicial system is dominated by active case management by judges and very limited document production provisions. A German arbitrator may structure domestic arbitration proceedings closer to the standards of the ZPO, but in international proceedings he or she will usually adhere to international standards.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are no specific professional or ethical rules applicable to counsel in international arbitration. Since document production and written witness statements are not common in domestic court proceedings, the

IBA Guidelines on Party Representation in International Arbitration can provide useful guidance for German counsel in international arbitration. It is assumed – but difficult to determine – that best practice in Germany does not contradict the IBA Guidelines on Party Representation in International Arbitration.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

There are no regulatory restrictions on third-party funding of arbitral claims. Third-party funding is still in its infancy, but third-party funders are slowly gaining ground with German parties, in particular for large arbitral claims.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Active judges and state officials require official permission and may only serve as sole arbitrators or chairpersons.

Gleiss Lutz

Detlef Schmidt
detlef.schmidt@gleisslutz.com

Berlin
Friedrichstrasse 71
10117 Berlin
Germany
Tel: +49 30 800 979 0
Fax: +49 30 800 979 979

David Quinke
david.quinke@gleisslutz.com

Düsseldorf
Dreischeibenhaus 1
40211 Düsseldorf
Germany
Tel: +49 211 54 061 0
Fax: +49 211 54 061 111

Stefan Rützel
stefan.ruetzel@gleisslutz.com

Frankfurt
Taunusanlage 11
60329 Frankfurt
Germany
Tel: +49 69 95514 0
Fax: +49 69 95514 198

Luidger Röckrath
luidger.roeckrath@gleisslutz.com

Munich
Karl-Scharnagl-Ring 6
80539 Munich
Germany
Tel: +49 89 21667 0
Fax: +49 89 21667 111

Stephan Wilske
stephan.wilske@gleisslutz.com
Claudia Krapfl
claudia.krapfl@gleisslutz.com

Stuttgart
Lautenschlagerstrasse 21
70173 Stuttgart
Germany
Tel: +49 711 8997 0
Fax: +49 711 855 096

Jörn Wöbke
joern.woebke@gleisslutz.com

Hamburg
Hohe Bleichen 19
20354 Hamburg
Germany
Tel: +49 40 4600 170
Fax: +49 40 4600 1728

www.gleisslutz.com

Ghana

Kimathi Kuenyehia, Sarpong Odame and Paa Kwame Larbi Asare

Kimathi & Partners, Corporate Attorneys

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Ghana is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Ghana became a party to the New York Convention on 9 April, 1968. The New York Convention came into force on the same date. No declarations or notifications were made under articles I, X and XI of the New York Convention. Ghana is also a party to the International Convention on the Settlement of Investment Disputes, which came into force on 14 October 1966. In addition, Ghana is a party to the United Nations Commission on International Trade Law (UNCITRAL).

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Yes. Ghana has entered into 27 bilateral investment treaties with other countries, most of which contain dispute resolution provisions. The most recent treaty was signed between Ghana and Turkey on 1 March 2016.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The Alternative Dispute Resolution Act 2010 (Act 798) (the ADR Act) regulates domestic arbitral proceedings. The ADR Act is divided into five parts. Part 1 is the part that provides for arbitration. The ADR Act does not regulate foreign arbitral proceedings. However, it provides the framework for the enforcement of foreign arbitral awards. Arbitration proceedings are considered foreign when they are undertaken outside the jurisdiction under a system of law other than the laws of Ghana. The party seeking to enforce a foreign award must apply to the High Court of Ghana to enforce the foreign award. The High Court will enforce the award if the following conditions are satisfied:

- the award was rendered by a competent authority under the laws of the country where the award was made;
- either a reciprocal agreement exists between Ghana and the country in which the award was made or the award was made under the New York Convention or under any other international convention on arbitration ratified by Parliament;
- the party has produced the original award or a certified copy thereof, and the agreement pursuant to which the award was made or a duly authenticated copy of the award (the authentication must be done in accordance with the law of the country where the award and agreement were made); and

- there is no appeal pending against the award in any court under the law applicable to the arbitration.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

Part 1 of the ADR Act is largely based on the UNCITRAL Model Law on International Commercial Arbitration. However, there are some differences between the ADR Act and the UNCITRAL Model Law. Some of the major differences are as follows:

- in terms of subject matter, the UNCITRAL Model Law essentially relates to commercial disputes between contracting parties at the international level. The ADR Act, on the other hand, provides an avenue for the resolution of a wide variety of disputes, including commercial disputes;
- the ADR Act provides for customary arbitration, which is unique to the Ghanaian legal system. Customary arbitration is where parties with a prior agreement to be bound by the decision of the arbitrators submit their disputes to arbitrators (who may be chiefs, heads of family or heads of clan) for the purpose of having the dispute decided informally, but on its merits; and
- the court and the Alternative Dispute Resolution Centre is a key part in the ADR Act, as opposed to the position of the conciliator in the UNCITRAL Model Law.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Generally, parties may agree on the procedure to be adopted for arbitration. They may also adopt the procedural rules of an arbitration institution. In the absence of such an agreement, the arbitral tribunal may conduct the arbitration in the manner it considers appropriate. In either case, the arbitral tribunal has the obligation to abide by the principle of equal treatment of the parties in the proceedings, and ensure that each party is given an opportunity to present its case.

The following are mandatory provisions on procedure from which parties may not deviate:

- an arbitrator is bound to give the parties notice of the date of hearing. If the arbitrator does not give notice to a party, that will be grounds for a party to challenge the arbitral award; and
- a party before the hearing shall give the arbitrator and the other party personal particulars of witnesses that the party intends calling and the substance of the testimony of each witness.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The ADR Act mandates the arbitrator to decide the dispute in accordance with the law of a country chosen by the parties (excluding the conflict of law rules of that country). The arbitrator is also required to have regard to such other considerations as are agreed by the parties or

determined by the arbitrator. Where the issue relates to a contract, the arbitrator is expected to take cognisance of the usages of the trade to which the contract relates. If the parties are unable to reach an agreement on the applicable substantive law, the arbitrator is required to determine the dispute by reference to the conflict of law rules that the arbitrator deems applicable. The Act empowers an arbitrator to grant any relief that the arbitrator considers just and equitable including specific performance.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The Ghana Arbitration Centre is the most prominent arbitral institution in Ghana. The Centre's address is as follows:

The Ghana Arbitration Centre
No. C122A/3 Farrar Avenue, Asylum Down
PO Box GP 18615, Accra
Tel. +233 302 240820 / 240924
Fax: +233 302 223227
gac@ghana.com
www.ghanaarbitration.org

In addition, the ADR Act has made provision for the establishment of the Alternative Dispute Resolution Centre. It is envisaged that the Centre, when established, will have a permanent existence with the object of facilitating the practice of alternative dispute resolution in Ghana. The law provides a great deal of flexibility in terms of the choice of law, place of arbitration, selection of arbitrators and the language of proceedings. In each of these areas, the parties are given the priority to make a choice. The arbitral tribunal is vested with the power to decide on any of the matters when the parties are unable to reach a consensus on the issue in question. With respect to the fees for arbitrators, there must first be an agreement between the parties and the arbitrator as to the amount payable. In calculating the amount payable, regard must also be given to the value of the subject matter, the complexity of the case and the agreed hourly fee rate.

The National Labour Commission, as established by the Labour Act, 2003 (Act 651) is another important arbitral institution in Ghana. The National Labour Commission's mandate is to facilitate and settle industrial disputes through negotiation, mediation and arbitration. Currently, the National Labour Commission is usually the first point of call in the resolution of industrial disputes in Ghana.

The Ghana Investment Promotion Centre Act, 2013 (Act 865) and the Minerals and Mining Act, 2006 (Act 703) allow for parties (investors and the government) to resort to arbitration as one of the options for dispute resolution. These laws further provide that parties may refer the dispute to arbitration in accordance with UNCITRAL rules or within the framework of a bilateral agreement between Ghana and the investor's country.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Section 1 of the ADR Act expressly states that matters involving the following are not arbitrable:

- the national or public interest;
- the environment;
- the enforcement and interpretation of the Constitution; and
- other matters that by law cannot be settled by an alternative dispute resolution method (including criminal action and abuse of human rights).

The general rule is that only matters that can be subjected to compromise and settlement are to be referred to arbitration. Although the ADR Act does not expressly mention disputes in the areas of intellectual property, antitrust, competition law, securities transactions and intra-company disputes, such disputes may be settled through arbitration.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The ADR Act provides that an arbitration agreement must be in writing. In order to satisfy the requirement of writing, the law stipulates that the arbitration agreement may be in the form of an exchange of letters, telex, fax, email or other means of communication providing a record of the agreement. An arbitration agreement is valid even where it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other, or when reference is made in a contract to any document containing an arbitration clause.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement may not be enforceable if waived by the parties or if the parties decide to submit the matter to the jurisdiction of the courts, or if declared null and void by the arbitral tribunal.

However, an arbitration agreement is not rendered unenforceable by reason of the death, merger or dissolution of a party to the agreement. The obligations of a party under an arbitration agreement may be transferred to their successors, personal representatives or liquidator on the death, merger or dissolution of such a party. In addition, a party to an arbitration agreement who is not notified of an arbitral proceeding may apply to the High Court to set aside the arbitration agreement.

Arbitration agreements that form part of a contract are generally deemed to be independent of the other terms of the contract. Thus, the invalidity or unenforceability of the underlying contract does not affect the arbitration agreement or clause.

11 Third parties - bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

In principle, arbitration agreements cannot be extended to third parties who are not signatories to the arbitration agreement. The ADR Act does not make any express provision for the imposition of liability arising from an arbitration agreement on account of assignment, agency or insolvency. However, the assignment of the underlying contract may be presumed to include the acceptance of any arbitration agreements contained in or incorporated into the underlying contract. Similarly, a principal may be bound by an arbitration agreement entered into by an agent. Under the ADR Act, the occurrence of death does not discharge a party to an arbitration agreement from liability. The implication is that a successor-in-title will be required to discharge the liabilities arising from the arbitration agreement entered into by the deceased. This may also be presumed for situations of insolvency.

12 Third parties - participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The ADR Act does not contain any provisions with respect to third-party participation in arbitration. However, third parties may participate where the arbitration agreement in a main contract entered into by the parties extends to ancillary contracts that one of the parties to the main contract executes with a different party, or where the parties agree to the joinder of a third party.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Under the principle of separate legal personality, companies in the same group will not be bound by an arbitration agreement entered into

by a parent company or subsidiary company, or another company in the same group, unless the corporate veil is lifted.

The ADR Act provides that parties who submit a matter for arbitration must have an agreement between them. This implies that the arbitrator, or the tribunal as the case may be, shall not have the mandate to extend any arbitral proceedings to another party that was not a party to the agreement.

The law does not grant any exemption to companies in this regard, and hence the 'group of companies' doctrine may not be applicable in Ghana, unless the corporate veil is lifted.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

There is no express provision relating to multiparty arbitration agreements under the ADR Act. Thus, the requirements for a valid bilateral agreement would in principle be the same as those set out for the validity of a multiparty arbitration agreement. Additionally, whenever an issue regarding the composition of the arbitral tribunal arises, the appointing authority shall decide on it based on the principles of equal treatment and due process of law.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The general principle is that an arbitrator is required to have the relevant experience and competence. However, parties are given the power to appoint any persons to act as arbitrators, regardless of their experience or nationality. Even though the Ghana Arbitration Centre or Alternative Dispute Centre and the National Labour Commission are mandated to keep a list of qualified mediators and arbitrators, there is nothing in the law that suggests that parties to an arbitration dispute cannot appoint arbitrators outside that list.

In order to guarantee a fair award, the factors outlined below, among others, are to be taken into account in the appointment of an arbitrator:

- the relationship of the arbitrator to a party or counsel of a party to the arbitration;
- the nationality of the parties; and
- the personal, proprietary, fiduciary or financial interest of the arbitrator.

The ADR Act provides in relevant parts that, in appointing an arbitrator, the parties, the person or the appointing institution shall have regard to the 'nationalities of the parties and other relevant considerations'. Once the parties agree on the arbitrators, the courts recognise those arbitrators irrespective of a requirement for nationality, religion or gender.

Parties are at liberty to challenge the appointment of any arbitrator whose appointment does not satisfy the foregoing requirements. It is also worth noting that the law does not impose any express restrictions on the appointment of judges (active or retired) as arbitrators. The ADR Act provides that parties to an arbitration can request a list of arbitrators from any of the arbitral institutions in Ghana.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

The ADR Act permits parties to agree on the procedure for appointing an arbitrator. In the event that the parties are unable to agree on the appointment procedure, the default rules for the appointment of arbitrators are triggered. With respect to a sole arbitrator, the default rule is that the appointment shall be made by the appointing authority upon a request by one party if both parties cannot agree on an arbitrator within 14 days of one party receiving a request for arbitration from the other. Where the parties fail to agree on the number of arbitrators, the default number of arbitrators is three, with two being party-appointed

arbitrators. Where the arbitral tribunal is made up of three arbitrators and the two party-appointed arbitrators are unable to agree on a third arbitrator, either party can request that the appointment of the third arbitrator be made by an appointing authority.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

The ADR Act provides that a person appointed as an arbitrator shall make a full disclosure of material facts involving any proprietary or financial stake that may give reasonable cause to doubt his or her independence and impartiality.

The appointment of an arbitrator may be challenged if it emerges that the arbitrator does not possess the qualifications agreed upon by the parties or circumstances exist that give rise to justifiable doubt as to the arbitrator's independence or impartiality. According to the ADR Act, a party may not challenge an arbitrator he or she has appointed, or whose appointment he or she participated in, except for reasons that the party becomes aware of after the appointment.

With respect to the procedure for challenging the appointment of an arbitrator, the law gives parties the right to make that determination. Where the parties are unable to agree on a procedure, the party mounting the challenge is required to submit a written statement to the arbitral tribunal or the arbitrator, within 15 days of becoming aware of the composition of the tribunal or the grounds justifying the challenge of a sole arbitrator. The party challenging the appointment of the arbitrator can also apply to the High Court for the revocation of the arbitrator's authority on notice to the other party. The arbitrator's authority will also be revoked on his or her death. The High Court may remove an arbitrator where there is sufficient reason to doubt the impartiality of the arbitrator. If the arbitrator is physically or mentally incapable, or there is justifiable doubt as to the arbitrator's capability to conduct proceedings, he or she may also be removed by the High Court. Additionally, if the arbitrator has refused or failed to conduct the arbitral proceedings properly, or to use reasonable despatch in conducting the proceedings or making an award and substantial injustice has or will be caused to the applicant, the High Court may remove that arbitrator. If the arbitrator's authority is revoked, the law permits the parties to decide on how the vacancy will be filled.

If the parties fail to reach agreement on the replacement arbitrator, an appointing authority shall, on application by a party, appoint another arbitrator in accordance with the law. Where an arbitrator has been successfully challenged, or that arbitrator's mandate is terminated due to an agreement between the parties, or a situation has made it impossible for the arbitrator to act, or the arbitrator has resigned, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

There is nothing in the law that prohibits an arbitral tribunal or arbitrator from seeking guidance from the IBA or any other body, should it deem this necessary.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Arbitrators, whether appointed by the parties or by the appointing institution, or otherwise, are required to be independent, and to act fairly and impartially. Arbitrators are not agents or representatives of the parties in the dispute. Thus, in order to guarantee a fair award, the law imposes a strict obligation on an arbitrator to disclose all material facts that will impinge on the delivery of his or her award.

The parties are also required to bear the expenses and remuneration of the arbitrator or the tribunal. Where the High Court removes an arbitrator on an application by a party, it may make any orders that it considers appropriate for payment of fees and expenses of the

arbitrator, or the payment by the arbitrator of any fees or expenses already paid to the arbitration.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The ADR Act provides immunity to arbitrators in the performance of their functions and explicitly regulates their liability. An arbitrator will be liable for the consequences of deliberate wrongdoing arising from the performance of his or her duties. Section 23(1) of the ADR Act states that 'an arbitrator is not liable for any act or omission in the discharge of the arbitrator's functions as an arbitrator unless the arbitrator is shown to have acted in bad faith'.

It must also be noted that section 23(1) also applies to an employee or an agent of the arbitrator.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

The ADR Act gives priority to an arbitrator or a tribunal to determine matters bordering on jurisdiction. Consequently, a party who intends to raise any jurisdictional question is first required to do so before the arbitrator or the tribunal immediately after the matter alleged to be beyond the jurisdiction of the arbitrator or the tribunal is raised. The arbitrator or the tribunal is required to make a determination on the jurisdictional challenge mounted by a party to an agreement. If a party is not satisfied with the determination of the jurisdictional question, he or she is entitled to apply to the High Court within seven days after the ruling indicating his or her reasons for such application.

The intervention of the High Court is not meant to supplant the powers of the arbitrator or the tribunal. This is because the application to the High Court does not automatically lead to a stay of proceedings, unless it is otherwise agreed to by the parties. Moreover, if a party institutes court proceedings in spite of an arbitration agreement, the other party may make an application to the court to stay its proceedings and refer the parties to arbitration. Where such an application is made, the court is mandated by the ADR Act to refer the parties to arbitration when the court finds that there is an arbitration agreement in respect of the dispute.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Once constituted, the arbitral tribunal is competent to rule on its own jurisdiction. A party making a jurisdictional challenge before the arbitral tribunal must raise the motion before taking the first step in the proceedings to contest the case on its merits. Parties are not precluded from raising an objection to the jurisdiction of the arbitral tribunal or arbitrator because they have appointed or participated in the appointment of an arbitrator. A motion that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority arises during the arbitral proceedings. The arbitral tribunal may address the issue of jurisdiction in a preliminary award before ruling on the merits of the case. The award rendered may only be challenged through an annulment action at the High Court or to the appointing authority. The initiation of an annulment action does not suspend the ongoing arbitral proceedings. The arbitrator may entertain an objection made later than the prescribed time if the arbitrator considers that there is sufficient justification to do so.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

The ADR Act provides that where the parties are unable to agree on the place of arbitration, it shall be determined by the arbitrator or the arbitral tribunal, taking into consideration the circumstances of the case and the convenience of the parties. The law also confers power on the arbitral tribunal to determine the language to be used for the arbitral proceedings if the parties are unable to agree on this issue. The arbitrator may direct that any documentary evidence should be accompanied with a translation into a language agreed on by the parties.

23 Commencement of arbitration

How are arbitral proceedings initiated?

An arbitration proceeding is initiated when a party to a dispute in respect of which there is an arbitration agreement refers the dispute to an arbitrator or an institution for arbitration, or to the Alternative Dispute Resolution Centre. The party initiating the arbitral proceedings is required to notify the other party of the commencement of the proceeding. A party to an agreement who is not notified of an arbitration proceeding arising under that agreement may apply to the High Court to set aside any arbitral award. Apart from resorting to a sole arbitrator or a tribunal, the parties to an arbitration agreement have the option of settling their dispute under the auspices of the Alternative Dispute Resolution Centre. The rules for the conduct of the arbitral proceedings by the Centre are set out in the Third Schedule of the ADR Act. According to the rules of the Centre, notice to a party is satisfied by telephone, fax, email or other mode of electronic communication. Where the claim or counterclaim by a party to the dispute does not exceed US\$100,000 or its equivalent in local currency, the Centre shall, upon the submission of the dispute, appoint a sole arbitrator from the register of arbitrators.

24 Hearing

Is a hearing required and what rules apply?

Subject to the agreement of the parties, the arbitrator may dispense with the requirement for a hearing. In lieu of a hearing, the arbitrator may request the parties to make their respective cases through the submission of documents and other materials. However, if the parties desire to be heard, there are a number of procedures that must be satisfied. The parties are required to give the arbitrator the particulars of any witnesses who will be called. The ADR Act further requires that the hearing shall be held in private, unless the parties agree to the contrary. At the commencement of the hearing, the parties are required to provide opening statements that will set down the issues to be determined. Similar rules of procedure apply where the parties elect to use the Expedited Arbitration Proceedings Rules of the Alternative Dispute Resolution Centre. In that regard, the Centre will play a facilitative role with respect to the proceedings. The Centre will be required to serve notice of the hearing date on the parties. Depending on the nature of the issue in contention, the hearing may be concluded in a day.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The taking of evidence is generally governed by the statutory rules relating to the admissibility of evidence. The ADR Act imposes an obligation on the arbitrator to ensure that evidence is taken in the presence of parties, unless a party has expressly waived that right or has refused to attend without good cause. A party is entitled to present his or her evidence by affidavit after the arbitrator has considered any objections by the opposing party. The opposing party is also entitled to cross-examine the deponent after the presentation of the affidavit evidence. At the instance of the parties, or at the request of the arbitrator, the parties may be required to submit additional documents and materials after the oral hearing to enable the issue or issues to be

settled conclusively. The law confers enormous powers on the arbitrator to regulate the procedure dealing with the calling of witnesses. The parties are obliged to provide only material evidence.

Witnesses are required to provide relevant evidence that is necessary to the determination of the issues in dispute. Subject to the rules of natural justice, the arbitrator has the prerogative of determining whether evidence given is relevant and material to the issues in contention. The ADR Act makes provision for the appointment of experts to assist in the conduct of the proceedings. The law does not give pre-eminence to either tribunal-appointed experts or party-appointed experts. It provides that the arbitrator may appoint an independent expert to report to the arbitrator or tribunal in writing on any specified issue. In such a case, the parties are required to cooperate with the expert by providing him or her with the required information and evidence. On the submission of the report of the tribunal-appointed expert, the parties are entitled to cross-examine the expert at the hearing or call their own experts to comment on the report of the tribunal-appointed expert. As part of the process of obtaining evidence, the arbitral tribunal may request that documents submitted by parties should be inspected. The arbitral tribunal is required to provide notice to the parties indicating the time and date for the inspection. On completion of the inspection, the arbitral tribunal is required to furnish the parties with copies of its report for their comments.

The rules of evidence in Ghana are quite exhaustive for the purposes of conducting arbitral proceedings. That notwithstanding, an arbitral tribunal or arbitrator may seek guidance from the IBA or any other body when it becomes necessary.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

The ADR Act does not contain any express provisions on the instances where the arbitral tribunal can request assistance from the court. The court is empowered to refer any matter brought before it to arbitration where it is satisfied that the action or part thereof can be resolved through arbitration. The court may intervene when any issues arise with regards to the appointment procedure of the arbitrator. Where the appointment procedure of the arbitrator is called into question, a party may apply to the High Court for the purposes of setting aside the appointment.

In addition, a party may apply to the High Court for the revocation of the arbitrator's authority where it is established that the arbitrator has violated the requirements of neutrality or impartiality in the discharge of his or her responsibilities. The ADR Act further provides that a party to a proceeding who is dissatisfied with an arbitrator's ruling on jurisdiction in an arbitration proceeding may apply to the High Court for the determination of the arbitrator's jurisdiction. The Court's intervention will also be triggered when a party to an agreement who has not been notified of an arbitration proceeding applies to the Court to set the proceedings aside. The Court may also intervene where a party applies to set aside an arbitral award. A party is entitled to challenge the validity of an award where the court is satisfied, inter alia, that a party to an agreement was under some form of disability, the law applicable to the arbitration agreement was not valid, or the party was not given notice of the appointment of the arbitrator or was unable to present his or her case. An arbitral award is also liable to be set aside where the Court discovers that the subject matter of the arbitration was not capable of settlement by arbitration.

With respect to evidence, the law confers considerable power on the arbitrator to regulate the process. For instance, the arbitrator determines the materiality and relevance of evidence submitted by the parties. The Court cannot intervene directly with regards to the taking of evidence. Its power to support arbitral proceedings on issues of evidence is subject to the consent of the parties.

27 Confidentiality

Is confidentiality ensured?

The ADR Act enjoins the arbitrator or the arbitral tribunal to maintain confidentiality at all stages of the proceedings. The arbitrator is required to keep any information relating to the dispute in strict confidence. For instance, the arbitrator is required to conduct the oral hearing in private

and is mandated to keep information regarding any material submitted in confidence, unless the parties request otherwise. In addition, a party who seeks to enforce an award is only required to apply to the High Court for an order. Confidentiality can still be maintained at this stage, since the Court will not go into the substantive issues that gave rise to the arbitration proceedings or the award.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

The ADR Act permits parties to request the High Court to order an interim measure before or during arbitral proceedings.

The High Court may make an interim order for the taking and preservation of evidence or assets, or on issues affecting property rights that are the subject of the proceedings, make an interim injunction or address issues regarding the appointment of a receiver.

Under section 40 of the ADR Act, the High Court may also determine any questions of law that arise in the course of the proceedings if the Court is satisfied that the question substantially affects the rights of the other party. The High Court is also entitled to make an order that any question of law arising from an arbitration proceeding be referred to it for determination. The exercise of this power is, however, subject to the agreement of the parties. In addition, the ADR Act provides that, unless the parties otherwise agree, an application to the High Court shall not serve as a stay of the arbitral proceedings.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

No, the ADR Act does not contain any provisions for an emergency arbitrator. However, the ADR Act provides that, where there is a sudden vacancy in the arbitral tribunal, the parties may agree on whether and how the vacancy should be filled.

However, with regard to the National Labour Commission, where a vacancy occurs in the number of arbitrators, the remaining arbitrators may, with the consent of the parties, act despite the vacancy; failing that, the party whose number of arbitrators is affected by the vacancy shall appoint another arbitrator to fill the vacancy immediately; failing this, the Commission shall appoint another arbitrator to fill the vacancy.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The arbitrator may, at the request of a party, grant any interim relief the arbitrator considers necessary for the protection or preservation of property. An interim relief may be in the form of an interim award, and the arbitrator may require the payment of costs for such relief. The applicant is required under the law to bear liability for the cost of granting the interim relief.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The ADR Act and the rules of the Ghana Arbitration Centre do not specifically provide for the arbitration tribunal's competence to sanction parties or counsel who use 'guerrilla tactics'. But, such competence may fall within the broad powers of the arbitrator in section 31(2) of the ADR Act that places an obligation on the arbitral tribunal, subject to the other requirements of the ADR Act, to conduct the arbitration in order to avoid unnecessary delay and expenses. This section also allows the

arbitral tribunal to adopt measures that will expedite resolution of the dispute. The ADR Act further prescribes that the arbitral tribunal has the power to decide on matters of procedure and evidence subject to the rights of the parties. Thus, the arbitral tribunal, for example, has the power to determine the manner in which witnesses are examined.

Under the rules of the Ghana Arbitration Centre, once the arbitral tribunal has adopted the rules for settling the dispute, the arbitral tribunal may proceed if a party attempts to delay the proceedings. However, this party must be notified of the proceedings that took place in its absence. Also, under the rules, the Ghana Arbitration Centre levies charges on a party who causes an adjournment of any scheduled hearing.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

The arbitrator is required to encourage the parties to resolve their differences during the proceedings. The law does not impose any requirement that the decision of the arbitrators should be unanimous in the event that the parties are unable to reach an agreement.

In rendering an award, it is sufficient if the decision of the arbitral tribunal is made by a majority. The validity of the award is not impugned by a dissenting opinion expressed by an arbitrator.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

In all cases in which a dissenting opinion is expressed by a member of an arbitral tribunal, it will not count towards the final decision of the tribunal. Where a unanimous decision cannot be reached, the decisive opinion is that expressed by the majority.

34 Form and content requirements

What form and content requirements exist for an award?

The parties have the liberty to determine the form and content of the arbitral award. In the absence of such an agreement, the award must satisfy the following requirements:

- the award should be in writing;
- the award should be signed by the arbitrator or the tribunal, as the case may be;
- the date and place where the award was made must be indicated; and
- the reasons for the award must be indicated, unless the parties otherwise agree not to.

In the case of awards granted by a tribunal, the signature of the majority shall be sufficient, provided that the reason for the omission of the signatures of some of the arbitrators is stated.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The ADR Act has not set out any specific time frame for the delivery of the award. However, it must be noted that the parties to an arbitration proceeding expect to resolve their differences as quickly as possible. Thus, the arbitration proceeding is expected to be conducted expeditiously and the award handled within a reasonable time. What amounts to a reasonable time is a question of fact to be determined on a case-by-case basis. Even though the ADR Act does not specify the time limit for the delivery of the award, it expressly prohibits the arbitrator from extending the time limit agreed by the parties for the delivery of the award. Under the rules of the Ghana Arbitration Centre, the arbitrator shall not deliver the award later than 30 days from the date of closing the hearings, or if oral hearings are waived, from the date of

transmitting the final statements and proofs to the arbitrator. The parties may, however, amend the time limit of the award.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The date of the delivery of the award and the date of its receipt by the parties are significant for a number of reasons. The date of the delivery of the award is relevant for purposes of adding to or correcting any clerical, typographical, technical or computation of error in the award. This may be effected either at the request of a party to the proceedings or at the instance of the arbitrator within a period of 28 days after the delivery of the award. The date of the receipt of the award by the parties is relevant for the purposes of challenging its validity. A party who wishes to set aside an award is required to submit his or her application to the High Court within a period of three months from the date the party received or is notified of the award.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The law provides for three main types of awards: interim relief, settlement before conclusion of arbitration and the final arbitral award.

With regard to interim relief, an arbitrator is permitted, at the request of a party, to grant any interlocutory relief that he or she considers necessary for the preservation or protection of property.

In addition, a relief in the form of an award may be granted by an arbitrator where, in the course of a proceeding, the parties settle their dispute before the arbitral award is given. An arbitrator may also deliver a final award on the conclusion of an arbitration proceeding. The ADR Act also provides that that an arbitrator may grant any relief the the arbitrator considers just and equitable (including specific performance) provided that the arbitrator acts within the scope of the arbitration agreement.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

The arbitral proceedings may be terminated if:

- the claimant withdraws the claim, unless the respondent objects thereto and the arbitral tribunal recognises a legitimate interest on the respondent's part in obtaining a final settlement of the dispute;
- the parties agree on the termination of the proceedings;
- the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible; or
- the parties have settled their dispute before the delivery of the final award. In such circumstances, the law permits the arbitrator to terminate the proceedings, and with the consent of the parties, record the settlement in the form of an arbitral award on agreed terms.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The assessment of the costs and expenses arising from an arbitration proceeding is done by the arbitrator. Parties are liable to bear equally all the administrative costs arising from the proceedings, unless they agree to the contrary. The parties are also required to pay for the services of their attorneys and any other statutory fees.

The law also provides that a party may, within 28 days after the date of the determination of the amount of fees, apply to the appointing authority or the court, upon notice to the other party and the arbitrators, for an order adjusting the amount. Any excess payment made as a result of the adjustment may be ordered to be repaid.

Update and trends

There have been no substantial developments in arbitration in Ghana. The ADR Act has not undergone any amendments since it was passed in 2010, and there have been no substantial changes to the rules of arbitration of most of the arbitration centres in Ghana.

With respect to hot topics in arbitration, on 2 May 2016, AngloGold Ashanti (Ghana Limited) initiated an action against the Republic of Ghana at the International Centre for Settlement of Investment Disputes (ICSID). The company is seeking the payment of compensation for suffering at the hands of illegal miners following the pulling out of the military from its mine sites. The case is *AngloGold Ashanti (Ghana) Ltd v Republic of Ghana*, case number ARB/16/15.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

The ADR Act makes provision for the recovery of interest on principal claims in appropriate circumstances. The mode of payment and the rate of interest on any sum are determined by the arbitrator. In the case of disputes relating to contracts, the arbitrator can grant the appropriate pre-award or post-award relief at simple or compound interest under the terms of the contract and the applicable law.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The ADR grants the arbitrator the power to correct any clerical, typographical, technical or computational error in the award, and to make an additional award in respect of a claim presented to the arbitrator but omitted from the award. Such corrections can be effected at the instance of the arbitrator or at the request of a party, within 28 days of delivering an award or such longer period as the parties may agree on, upon giving 14 days' notice to the parties. The law is quite silent with respect to the power of the tribunal to interpret the award.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

The validity of an award can be challenged on a number of grounds. Among several others, the existence of any of the factors outlined below can provide a basis for challenging the award:

- a party to the arbitration was under some form of disability or incapacity;
- the law applicable to the arbitration agreement is not valid;
- the applicant was not given notice of the appointment of the arbitrator or of the proceedings, or was unable to present the applicant's case;
- the award deals with a dispute not within the scope of the arbitration agreement or outside the agreement, except that the court shall not set aside any part of the award that falls within the agreement;
- there has been a failure to conform to the agreed procedure by the parties;
- the arbitrator has an interest in the subject matter of arbitration that the arbitrator failed to disclose;
- the subject matter of the dispute is not capable of settlement by arbitration under the laws of Ghana; or
- the award is in conflict with public policy.

A party who alleges that any of the above-stated factors have impugned the credibility of the award is required to apply to the High Court to set aside the award.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

The ADR Act does not permit the parties to appeal on the merits of the decision of an arbitrator or arbitral tribunal. However, an aggrieved party may apply to the High Court to set aside the arbitral award.

A party who wishes to set aside an arbitral award for any irregularity is required to apply to the High Court. If the party is dissatisfied with the ruling of the High Court, an appeal lies as of right to the Court of Appeal. The ADR Act is silent on the costs to be incurred and the time frame. The parties will be required to bear their own costs unless the court decides otherwise. Regarding the time frame, it is quite difficult to determine beforehand how long it will take for a challenge to be decided at each level. It will depend largely on the number of cases to be decided by the Court at each period.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

An award will generally be recognised when it satisfies the requirements of due process and natural justice. An award shall be enforced in the same manner as a judgment or order of the High Court.

In order for a foreign award to be enforceable, it must satisfy the following requirements:

- the award was rendered by a competent authority under the laws of the country where the award was made;
- a reciprocal agreement exists between Ghana and the country in which the award was made;
- the award was made under the International Convention specified in the First Schedule to the ADR Act;
- the party has produced the original award or a certified copy thereof, and the agreement pursuant to which the award was made or a duly authenticated copy; and
- there is no appeal pending against the award in any court under the law applicable to the arbitration.

An award may not be enforced where it is shown that the arbitrator lacked jurisdiction to make the award.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

The ADR Act clearly provides that a foreign arbitral award that has been annulled (and by implication set aside) in the country in which it was given cannot be enforced in Ghana, and the courts are likely to uphold this provision.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The ADR Act and the Rules of the Ghana Arbitration Centre do not provide for emergency arbitrators or the enforcement of orders made by emergency arbitrators. However, a court of competent jurisdiction, under its inherent powers, may enforce an order made by an emergency arbitrator where the court considers it fair and just to do so.

47 Cost of enforcement

What costs are incurred in enforcing awards?

The ADR Act does not have express provisions dealing with the costs of enforcing awards. However, it can be reasonably expected that the person who seeks to enforce either a domestic or foreign award shall bear the full costs associated with the enforcement.

Other**48 Judicial system influence****What dominant features of your judicial system might exert an influence on an arbitrator from your country?**

The legal system of Ghana follows the common law tradition. The various rules pertaining to this system in the area of evidence and procedure will provide the guiding framework for the conduct of arbitration in Ghana. An arbitrator will therefore be required to follow and observe the general rules of common law and equity in the discharge of his or her responsibilities.

As a general rule, parties are required to appear in person or be represented by counsel during the arbitral proceedings. This does not preclude the possibility of submitting a written statement in lieu of appearance before the arbitrator or the tribunal.

In effect, the law provides a great deal of discretion to the parties to decide the mode of submitting evidence for the consideration of the arbitrator or the tribunal.

49 Professional or ethical rules applicable to counsel**Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?**

The ADR Act does not specify any specific professional or ethical rules to be followed by counsel in international arbitration. However, generally, lawyers have an ethical duty to the court, the client and the legal profession. Under the Legal Profession (Professional Conduct and Etiquette) Rules, 1969 (LI 623), a lawyer has a duty to behave with the utmost honesty and with frankness when dealing with clients and the courts.

The ADR Act, provides in relevant part that a party may be represented by counsel or any other person chosen by the party. Also, where a party intends to be represented at the arbitration proceedings, the person is required to give at least seven days' notice to the other party before the commencement of the arbitration.

Although the ADR Act does not specifically state how a party's representative can be changed during the proceedings, largely the best practice is that it is not advisable for the parties to change their representatives once the proceedings have begun.

50 Third-party funding**Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?**

No, the ADR Act does not have any express provisions restricting third-party funding of arbitral claims in Ghana. The concept of third-party funding of arbitral claims is not a common practice in Ghana, and most parties that opt to arbitrate their claims provide the funding from their own resources.

However, considering that there is no express statutory restriction of the practice, we do not foresee any issues with respect to undertaking such a practice in Ghana. However, the full details of any such arrangement must be disclosed to the arbitrator and the other party in order for any conflict of interest checks to be carried out by all the parties to the arbitration.

51 Regulation of activities**What particularities exist in your jurisdiction that a foreign practitioner should be aware of?**

The ADR Act does not place any limitation on the participation of foreigners in an arbitration proceeding. The parties to the arbitration are at liberty to appoint a person without experience or qualifications relevant to the subject of the dispute as an arbitrator.

However, a foreign practitioner must be conversant with the common law system used in Ghana and the impact it has on arbitration practice generally.

A foreign practitioner will also be required to obtain a resident and work permit to engage in any form of employment. The practitioner is further required to pay the appropriate taxes on the income obtained from rendering professional services.

Apart from these general observations, a practitioner will not face any other legal and administrative challenges in the discharge of his or her responsibilities.

**kimathi
partners**
CORPORATE ATTORNEYS

**Kimathi Kuenyehia
Sarpong Odame
Paa Kwame Larbi Asare**

**kimathi@kimathilegal.com
sarpong@kimathilegal.com
paa@kimathilegal.com**

No. 6 Airport Road
Airport Residential Area
Cantonments, Accra
Ghana

Tel: +233 302 770447
Fax: +233 302 766870
www.kimathilegal.com

Greece

Antonios D Tsavdaridis

Rokas Law Firm

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Greece has ratified the New York Convention by Legislative Decree 4220/1961 (in force since 14 October 1962). Greece applies the reciprocity and the commercial reservation.

Greece is also a party to the following multilateral conventions relating to international commercial and investment arbitration:

- Greece has ratified the 1965 ICSID Convention (the Washington Convention) by Mandatory Law 608/1968 (in force since 21 May 1969);
- Greece has ratified the 1994 Energy Charter Treaty by Law 2476/1997 (in force since 4 September 1997). Greece is listed in Annex ID, referred to in article 26(3)(b)(i) of the Treaty;
- since 30 August 1993, Greece has been a member of the World Bank's MIGA Convention; and
- Greece is also a party to the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, but they have been effectively superseded by the New York Convention of 1958 as regards relations between Greece and the other contracting parties.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

As of 1 December 2015, Greece has entered into 39 (currently in force) bilateral investment treaties with other countries, according to a list provided on the UNCTAD website. See also a list of 34 bilateral investment agreements between Greece and non-EU countries referred to in article 4(1) of Regulation (EU) 1219/2012. Investment protection provisions are also found in other bilateral treaties Greece has entered into with other countries (eg, the 1951 Treaty of Friendship, Commerce and Navigation between Greece and the US, ratified by Greece by virtue of Law 2893/1954). Investors from EU member states enjoy protection afforded under EU legislation. A full list of investment-related instruments ratified by Greece, including its model BIT (2001), can be found on the UNCTAD website.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Greek arbitration law is divided; the statutory provisions for domestic arbitration are found in Book VII (articles 867 to 903) of the Code of Civil Procedure (CCP) – some marginal changes were effected recently by Law 4335/2015 – while the statutory provisions for international arbitration are found in Law 2735/1999 on International Commercial Arbitration (LICA), by which Greece adopted (with minor changes) the

1985 UNCITRAL Model Law on International Commercial Arbitration – as yet, Greece has not adopted the 2006 revision of the UNCITRAL Model Law. Various other provisions are found in special legislation (providing for matters such as the participation of the Greek state in arbitrations, investment arbitrations, energy arbitrations, maritime arbitrations, construction arbitrations, etc).

Greek case law, traditionally, considered domestic those arbitration proceedings that were governed by a foreign *lex arbitri*. Following the adoption of the UNCITRAL Model Law in 1999, this procedural criterion has been effectively replaced by the place of arbitration.

Recognition and enforcement of foreign awards is mainly governed by the New York Convention (ratified by Legislative Decree 4220/1961). National rules for the recognition and enforcement of foreign awards are found in LICA (article 36, which refers directly to the New York Convention) and the CCP (article 903).

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

Greece has adopted, with minor changes (by LICA), the UNCITRAL Model Law only with respect to international arbitration. Domestic arbitration is governed by the CCP.

With respect to domestic arbitration, the major differences between the CCP and UNCITRAL Model Law (as adopted by Greece) are the following:

- the tribunal lacks the power to order interim measures (articles 685 and 889(1) CCP);
- the grounds for setting aside a domestic award (article 897 CCP) are broader; the CCP also provides (in article 901) for a declaratory action regarding the non-existence of the award; and
- the CCP provides (in article 882) for a *tight ad valorem* scheme regarding arbitrators' fees; special rules on fees apply for judges acting as arbitrators in both domestic and international arbitration (article 882(2) and 882A CCP).

With respect to international arbitration, there are only minor differences between LICA (based on the UNCITRAL Model Law) and the UNCITRAL Model Law itself.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Greek arbitration law contains the following fundamental mandatory provisions relating specifically to procedure, common to domestic and international arbitration:

- the parties shall be treated equally and be given a full opportunity to present their case (article 886(2) CCP; article 18 LICA); and
- the award shall be rendered in writing (article 892(1) CCP; article 31(1) LICA).

Aside from the procedure, other mandatory rules relate to the arbitration agreement, the jurisdiction of the tribunal and the challenge to the award.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

In domestic arbitration (article 890 CPP), the tribunal applies the substantive law provisions (the application of a foreign law is not precluded), unless the parties have otherwise agreed (which includes the application of a foreign law or the resolution of the dispute *ex aequo et bono*). The parties cannot dispense with the application of Greek *ius cogens* in any event.

In international arbitration (article 28 LICA), the tribunal applies the substantive rules of law chosen by the parties (which may include non-national rules of law, such as *lex mercatoria*); such choice does not include a *renvoi*, unless the parties have agreed otherwise. Failing a choice of the parties on the law applicable to the merits, the tribunal applies the law determined as applicable by the conflict-of-law rule it deems appropriate. The tribunal can only decide *ex aequo et bono* (or as *amiable compositeur*) if the parties expressly so agreed. In any event, the tribunal always takes account of the parties' agreement and the trade usages applicable to the transaction.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The following are the best-known institutions offering their services in domestic and international arbitration in Greece:

- the Athens Chamber of Commerce and Industry (www.acci.gr);
- the Piraeus Association for Maritime Arbitration (www.mararbpiraeus.eu);
- the Hellenic Chamber of Shipping (www.nee.gr);
- the Regulatory Authority for Energy (www.rae.gr); and
- the Technical Chamber of Greece (portal.tcc.gr), dealing only with technical disputes.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The general rule under Greek law with respect to domestic arbitration is that any private law dispute, the subject matter of which can be freely disposed of by the parties, is arbitrable (article 867 CCP). Therefore, any type of dispute that cannot fulfil these requirements is not arbitrable. As a result, disputes concerning IP, antitrust, competition, securities and intracompany issues are not arbitrable to the extent they relate to matters that cannot be freely disposed of by the parties (eg, registering a trademark or patent), but in other respects they are (eg, claims for compensation). In addition, some matters are declared as non-arbitrable either expressly (labour disputes in general; articles 867 and 614.3 CCP), or implicitly (consumer disputes; article 2(7)(xxxii) of Law 2251/1994 on consumer protection considers arbitration clauses in consumer contracts as abusive). Greek case law, in applying the general rule, has held various types of disputes as non-arbitrable: tort claims related to personal (but not property) damage; claims directly related to public order; claims related to the validity of enforcement (but held arbitrable if related to the main claim, although arisen at the enforcement stage); and matters falling under the exclusive jurisdiction of adjudicating bodies (such as the exclusive jurisdiction of the administrative courts to annul state acts). There are also special statutory provisions, especially in investment incentive laws, that allow matters, which otherwise cannot be freely disposed of by the parties, to be submitted to arbitration (such as tax disputes between the state and the investor).

The general rule contained in article 867 CCP and other special rules, apply equally to international arbitration; apart from being mandatory rules that apply in relationships with domestic and foreign elements alike, article 1(4) LICA expressly provides that their scope encompasses international arbitration as well.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

In domestic arbitration (article 869(1) CCP) the arbitration agreement must fulfil the written form requirement. This requirement is met if the arbitration agreement is concluded through exchange of signed letters or facsimiles, as well as telegrams and telex.

In international arbitration (article 7 LICA) the arbitration agreement must also fulfil the written form requirement. This requirement is met if the arbitration agreement is contained in an exchange of letters, telex, telegrams and other means of communication that provide a record of the agreement. A written agreement is deemed to exist if such an agreement is alleged by one party and is not disputed by the other in an exchange of submissions. A unique feature of international arbitration is that the written form requirement is deemed to exist with respect to oral arbitration agreements that are recorded in accordance with business practice and not challenged within a reasonable period of time.

The incorporation in a contract of an arbitration clause by reference to another contract containing such clause fulfils the written form requirement, provided it is sufficient to make that clause part of the contract. In particular, the issuance of a bill of lading containing an express reference to an arbitration clause in a contract of carriage is a valid arbitration agreement. These rules are long established in case law as regards domestic arbitration and are statutorily provided as regards international arbitration (article 7(5),(6) LICA).

In both domestic and international arbitration, an electronic document may also fulfil the written form requirement (article 3(1) of Presidential Decree 150/2001, which transposed Directive 99/93/EC).

In both domestic and international arbitration, non-compliance with the written form requirement is remedied if the parties participate in the arbitral proceedings without raising any objection (article 869(1) CCP and article 7(7) LICA).

With respect to the recognition and enforcement of foreign arbitration agreements, the parties should have regard to article II(2) of the New York Convention, which has been given full effect by Greek courts.

Other than the above formal requirements, for a valid arbitration agreement (domestic and international) the consent of the parties is required. Therefore, any physical person must be capable of entering into a contract under the general legal provisions regarding capacity to act. For legal entities, the respective organ (eg, board, CEO) with the power to bind the entity may enter into an arbitration agreement without any additional requirements. If a representative other than an organ of the entity acts for the entity, he or she must be specifically authorised (in writing) to enter into an arbitration agreement. For the Greek state and state entities, additional requirements must be met for entering into an arbitration agreement as regards domestic arbitration: an opinion of the Legal Council of the State (the body of the state's legal counsel) and a (joint) decision by the Minister of Finance and any other competent minister; these additional requirements do not apply as regards international arbitration.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The 'doctrine of separability' is well established in Greek arbitration law, both in doctrine and case law (also recognised statutorily in international arbitration; article 16(1) LICA). As a result, the arbitration agreement is independent of the underlying contract and matters affecting the latter's validity have no influence on the validity of the arbitration agreement. However, in practice, it is not unusual that the same defect may hit both agreements.

In general, as an independent contract, an arbitration agreement is subject to the general provisions regarding events that may affect the enforceability of a contract, such as rescission (before acceptance by the other party), vices of consent (error, fraud, duress or threat), termination with cause, etc, but not death or legal incapacity. In particular (with respect to domestic arbitration; article 885 CCP), and subject to a contrary stipulation in the agreement itself, an arbitration agreement may become unenforceable if:

- the parties agree, in writing, to terminate it;
- the arbitrators appointed did not accept their appointment, and replacement arbitrators have not been appointed nor has the method for their replacement been determined. The same applies if the arbitrators have died;
- the time period fixed for the validity of the arbitration agreement or the issuance of the award has expired; or
- the time period set by the court for the issuance of the award (in case of delay) has expired.

An arbitration agreement shall also cease to have effect upon the issuance of the award with respect to the particular dispute that was dealt with.

As regards insolvency, long-standing Greek case law (with some recent deviations) holds that an arbitration agreement is no longer enforceable for disputes or differences related to the bankruptcy estate, as the bankrupt is deprived of the management and administration of his or her entire estate. The doctrine has criticised this position suggesting that the administrator should have the right to initiate or continue the arbitration proceedings.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Arbitration is primarily a contractual method for the settlement of disputes and in principle only signatories are bound by an arbitration agreement. Nevertheless, third parties may also be bound having regard to the nature of their relationship with the signatories. Instances where third parties are bound by an arbitration agreement include succession of a natural person, merger of a company, assignment, assumption of debt, guarantee, subrogation of insurer, lifting of corporate veil.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

Greek arbitration law does not expressly provide for third-party participation. However, it follows from the contractual nature of arbitration that third parties (such as a manufacturer, a sub-contractor, a freight-forwarder, etc) may join the arbitral proceedings provided the parties and the tribunal consent. Such a consent by the parties to the arbitral proceedings is not required if the third party is also a signatory.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the ‘group of companies’ doctrine?

A non-signatory parent or subsidiary company of a signatory company may be bound by the arbitration agreement, depending on the circumstances and in particular its involvement.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

Greek law does not contain specific provisions regarding multiparty arbitration. The matter has been addressed only in case law. The courts have held that in arbitration involving multiple parties it is possible for each party to appoint an arbitrator provided such party has conflicting and not common interests with other parties. If multiple parties have common interests, then they have to agree on a joint nomination. In such cases it is advisable for the parties to select a neutral appointing authority. Consolidation of separate arbitrations cannot be forced by a court or tribunal; it can be achieved only through the agreement of the parties (but a relevant provision contained in the agreed arbitration rules that empowers the tribunals to order consolidation is tantamount to an agreement in this respect).

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

There are no restrictions in law as to who may act as an arbitrator, apart from the general requirements that any such person must have the capacity to enter into a contract and not to have been deprived of his or her civic rights following a criminal conviction (article 871 CCP). Judges, either active or retired, may act as arbitrators, but active judges may be appointed only on the basis of a rotation system applied in each court (article 871A CCP) and are subject to fees restrictions (articles 882(2) and 882A CCP). With respect to arbitrations where the state is a party, the state may appoint as arbitrators only members of the Legal Council of the State, judges, law professors or lawyers qualified to appear before the Supreme Court.

On the other hand, parties are free to restrict the choice of eligible arbitrators in an arbitration agreement (especially in terms of their qualifications) having regard to the specific nature of the dispute. Restrictions on nationality usually relate to the choice of the presiding arbitrator in international arbitration as a means to achieve neutrality. Contractual stipulations based on such sensitive criteria as religion and gender have not been addressed in case law as yet. Nevertheless, as they may interfere with such principles as equality and non-discrimination, they should be avoided unless they are directly related to and justified by the nature of the dispute.

The list system for the selection of arbitrators is usually followed by courts when they act as an appointing authority (each competent court maintains its own list of arbitrators; article 879 CCP). Arbitral institutions also maintain lists (either open or closed).

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

In domestic arbitration (articles 872 to 880 CCP), failing prior agreement of the parties, each party appoints one arbitrator; the arbitrators so appointed appoint a presiding arbitrator. The diligent party, after appointing an arbitrator, may give a minimum eight-day notice to the other party to appoint the second arbitrator; the two appointed arbitrators shall appoint the presiding arbitrator within a further 15-day period. For the appointment of a replacement presiding arbitrator or co-arbitrator, an eight-day notice or a minimum eight-day notice respectively must be given. In case an appointing authority is involved, the diligent party must give a minimum of eight days notice in any event. If a party or an appointing authority or the arbitrators do not proceed to a timely appointment, the appointment (and any replacement thereof) is made by the single-member first instance court upon the application of any party or arbitrator.

In international arbitration (articles 10 and 11 LICA), failing prior agreement of the parties, the tribunal shall be tripartite; each party shall appoint one arbitrator and the two appointed shall appoint the presiding arbitrator. If a party fails to appoint an arbitrator within a 30-day notice by the other party or the two arbitrators fail to appoint the presiding arbitrator within another 30 days since their appointment, or the parties fail to appoint a sole arbitrator or an appointing authority fails to make an appointment, any party may ask the single-member first instance court to make the appointment.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

In domestic arbitration (articles 883 and 884 CCP), arbitrators may be challenged by the parties in the arbitration agreement if they cannot be arbitrators (lack of capacity to enter into a contract, etc) or for one of the grounds a judge can be challenged (these grounds include

dependence from a party, relationship with a party, having acted as counsel or witness in the same case, suspicion of partiality, etc). For arbitrators appointed by a party, the challenge can be made only for a ground that arose or became known to the applicant after the appointment of the arbitrator. If not resolved, the challenge is raised before the single-member first instance court, which decides immediately and on the balance of probabilities, while the arbitration is suspended. Other than challenged, an arbitrator can be replaced by agreement of the parties, for death, incapacity (eg, illness) or unwillingness to act; if disputed, the need for replacement is decided by the single-member first instance court.

In international arbitration (articles 12 to 15 LICA), arbitrators may be challenged for lack of the qualifications agreed to by the parties or if circumstances exist that give rise to justifiable doubts as to their impartiality or independence. Arbitrators have a duty to disclose without delay such circumstances and a party may challenge an arbitrator only on the basis of circumstances of which he or she became aware after the appointment had been made. A party may file an application for challenge before the tribunal within 15 days (from the constitution of the tribunal or from being aware of the circumstances giving rise to challenge). The tribunal must decide within 30 days from the filing of the application. If the application is dismissed or a decision is not rendered within the 30-day period, the party that applied may request within a further 30-day period that the single-member first instance court decides. Pending this procedure, the arbitration is not suspended unless the parties agreed otherwise. Other than being challenged, an arbitrator can be replaced by agreement of the parties, following a resignation or a decision of the single-member first instance court, only for failure or (actual or legal) impossibility to act within a reasonable time.

International arbitral tribunals sitting in Greece rarely, if ever, appear to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

The relationship between parties and arbitrators is contractual. Although there is no express provision on the matter, it is accepted that the *receptum arbitri* combines a mandate, a contract for services and a contract for work. A party-appointed arbitrator is neutral, having a duty to be and remain independent and impartial towards all parties, and deliver an award; he or she is not an arbitrator-advocate.

In domestic arbitration, arbitrators' fees are calculated on the basis of a *tight ad valorem* scheme provided by the law (articles 882 and 882A CCP); half of the tribunal's fees are advanced by the claimant. Fees may be reduced (up to 50 per cent) by the tribunal in appropriate circumstances, they are subject to a 20 per cent contribution to a special fund and capped at €44,000 per arbitrator. If the claim is not pecuniary, a reasonable fee is determined by the tribunal. In international arbitration, parties and arbitrators have considerable flexibility in determining arbitrators' fees (although fees are usually dealt with in the selected institutional arbitration rules). Specific caps and contributions are provided by the law for judges acting as arbitrators in both domestic and international arbitration.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The liability of arbitrators is limited to gross negligence and intentional acts (article 881 CCP) and is similar to the liability of judges. A malpractice action must be filed within six months since the act or omission (article 73(5) of the Introductory Law of CCP). An arbitrator may also face criminal liability for bribery (article 237 Penal Code).

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

The court proceedings are stayed and the parties are referred to arbitration, provided the respondent raises the respective jurisdictional objection at the hearing in the pleadings; a delayed jurisdictional objection is inadmissible (articles 263b, 264, 870 CCP; article 8 LICA). In deciding whether to stay its proceedings the court shall proceed to a preliminary determination of the validity of the arbitration agreement. Its judgment is subject to appeal. Alternatively, a party may file a declaratory action before a state court with respect to the existence of the tribunal's jurisdiction.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The jurisdiction of the tribunal to rule on its own jurisdiction (*Kompetenz-Kompetenz*) is expressly recognised in both domestic and international arbitration (articles 887(2) CCP; article 16(1) LICA). In international arbitration the matter should be raised in the answer to the Request for Arbitration. The issue of the tribunal's jurisdiction may run in parallel before the state courts and the tribunal, without the arbitral proceedings being subject to a stay. An award of the tribunal ruling against its own jurisdiction cannot be set aside and is binding for state courts. However, an award of the tribunal ruling in favour of its own jurisdiction is subject to setting aside proceedings and is not binding for state courts; a court ruling to the contrary shall prevail. It has been suggested, however, that the parties may specifically submit to arbitration the issue relating to the jurisdiction of the tribunal, in which case the tribunal's award would prevail.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

In domestic arbitration the tribunal may in its discretion fix the place and the arbitral procedure, which covers also the language of arbitration (article 886(1) CCP).

In international arbitration the place is determined by the tribunal having regard to the circumstances of the case, including the convenience of the parties, but in any event the tribunal may meet at any place it considers appropriate for consultation, hearings and inspections (article 20 LICA). The tribunal may also determine the language of the arbitral proceedings, which shall include communications, written statements, hearings and awards (article 22 LICA).

23 Commencement of arbitration

How are arbitral proceedings initiated?

In domestic arbitration there is no express provision with respect to the commencement of arbitration. The matter is dealt with on an *ad hoc* basis having regard to the specific issue to be addressed (eg, calculation of time limit for the issuance of the award, interruption of limitation period, interest accrual). With regards to the interruption of limitation period, which is of significant practical importance, the arbitration is deemed to have been commenced as soon as the request for arbitration and the appointment of the claimant's arbitrator have been notified to the other party or parties. In practice, such notification takes place in a formal way (for evidentiary purposes), through service of a signed document by a process server. One copy per party is sufficient, subject to contrary stipulation by any applicable institutional arbitration rules.

In international arbitration (article 21 LICA) the arbitral proceedings commence on the date on which the request for arbitration is received by the respondent. No particular form is required, but, as with

domestic arbitration, notification (one per party) through a process server is preferred in practice for evidentiary purposes. The parties are free to agree otherwise, which includes a stipulation by any applicable institutional arbitration rules. In the latter case it is common that the arbitration commences on the date the request for arbitration is received by the arbitral institution.

24 Hearing

Is a hearing required and what rules apply?

In domestic arbitration (article 886(1) CCP) the arbitration procedure (including oral hearings) is freely determined by the tribunal if there is no agreement by the parties. Case law accepts that arbitrators may deviate from the procedure followed by state courts and are free to determine a tailor-made procedure and dispense with formalities, including an oral hearing (documents-only arbitration). However, the tribunal should always ensure that the parties are treated equally and are given a full opportunity to present their case.

In international arbitration (article 24 LICA), unless the parties agreed otherwise, the tribunal may determine whether an oral hearing will take place or the arbitration will be conducted as documents-only. Nevertheless, if the parties have not agreed to dispense with an oral hearing, the tribunal shall hold an oral hearing in case a party so requests. Greek arbitration law does not contain detailed provisions regarding the conduct of hearings. This is left to the parties and the tribunal to decide, in practice following a procedural meeting and the issuance of an appropriate procedural order.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Greek arbitration law does not contain detailed rules on evidence. Subject to a contrary agreement of the parties, the tribunal may freely determine the evidentiary procedure. In practice, such rules (including production of documents) derive either from the general provisions applicable on evidence before the state courts (in domestic arbitration) or from specialised sets of rules (in international arbitration), such as the 2010 IBA Rules on the Taking of Evidence in International Arbitration, which increasingly are either applied or used as guiding principles by tribunals. In domestic arbitration, such matters as burden and standard of proof are determined by the type of evidentiary procedure to be followed by the tribunal. With respect to witnesses and experts, the civil law tradition is followed, that is, parties cannot testify as witnesses (only limited weight is given to their examination) and experts are appointed by the tribunal. All means of evidence listed in the CCP with respect to court proceedings are also available to arbitration (confession, inspection, expert reports, witness testimony, examination of parties, party-oath, documentary evidence and presumptions). In international arbitration, the default rules provide that the tribunal shall determine the admissibility, relevance, materiality and weight of any evidence (article 19(2) LICA). Under the same default rules (article 26 LICA), experts are tribunal-appointed.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

In both domestic and international arbitration (articles 888(1),(3) CCP; article 27 LICA) the tribunal may request the assistance of the magistrates' court in matters of evidence. In international arbitration such assistance may be requested also by a party with the approval of the tribunal. Such assistance may involve the taking of evidence, the imposition of penalties and the employment of means of coercion for obtaining evidence. For interim measures, see question 28.

27 Confidentiality

Is confidentiality ensured?

Confidentiality, although considered as an advantage and an inherent feature of arbitration, is not expressly protected in Greek arbitration law. Therefore, a specific agreement of the parties or a stipulation in the applicable institutional arbitration rules is required to ensure

compliance. Confidentiality may well extend to the details of the dispute itself, the arbitral proceedings and the material submitted and information disclosed in their course. However, both the award, which is subject to registration and setting aside proceedings before state courts, and any subsequent enforcement proceedings are exposed to publicity as the respective proceedings take place under the rules applicable to the state court system.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

The power of state courts to order interim measures is not affected by the agreement of the parties to arbitrate their disputes. Under Greek procedural law interim measures relate to the preservation of the status quo ante.

In domestic arbitration, only state courts may order interim measures, either before (article 889(2) CCP) or after the commencement of arbitration.

In international arbitration, state courts may again order interim measures, either before or after the commencement of arbitration, but their power after the constitution of the tribunal is concurrent with the tribunal's power to order interim measures (articles 9 and 17 LICA). State courts are also competent to enforce an interim measure ordered by the tribunal.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Neither Greek arbitration rules (for domestic or international arbitration) nor the existing Greek institutional arbitration rules provide for an emergency arbitrator. Nevertheless, the application of a set of institutional rules that provide for an emergency arbitrator (such as the 2012 ICC Arbitration Rules) in an international arbitration conducted in Greece (as arbitrators may order interim measures only in an international arbitration), appears to be consonant with mandatory rules of Greek arbitration law.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

In domestic arbitration, the tribunal does not have the power to order interim measures (articles 685 and 889(1) CCP).

In international arbitration, subject to a contrary agreement by the parties, the tribunal, after its constitution, is expressly empowered to order any interim measure it considers necessary (even unknown under Greek law) with respect to the subject matter of the dispute, including the payment of a security (article 17 LICA). The tribunal's power is not exclusive but concurrent with the power of state courts to order interim measures. State courts are also competent to enforce an interim measure ordered by the tribunal.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The tribunal does not have the power to sanction any behaviour of the parties or their counsel termed as 'guerrilla tactics' (which usually involves harassment of witnesses, delaying tactics and any other method aiming at obstructing or endangering the integrity of the arbitral proceedings). If such behaviour targets the evidentiary procedure, the magistrates' court following the tribunal's request may impose penalties and employ means of coercion for obtaining evidence. Other

than that, the tribunal only indirectly may sanction 'guerrilla tactics' in international arbitration, by taking such behaviour into account when allocating the costs (article 32(4) LICA). Counsel engaged in 'guerrilla tactics' may also be subject to disciplinary action by the Bar Association, but not by the arbitral tribunal or arbitral institutions; extreme 'guerrilla tactics' may even constitute a criminal offence.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

The default provisions in both domestic and international arbitration (article 891 CCP; article 29 LICA) do not require unanimous vote with respect to decisions of arbitration panels; decisions shall be made by a majority of all the members of the panel. Lacking a majority, the presiding arbitrator has the casting vote. Parties may agree otherwise. There are no consequences for the award if an arbitrator dissents.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

There is no specific provision on dissenting opinions in Greek arbitration law. In practice, dissenting opinions may only assist parties in substantiating grounds for the setting-aside or the refusal of recognition and enforcement of an award.

34 Form and content requirements

What form and content requirements exist for an award?

In domestic arbitration (article 892 CCP), awards must be in writing and hand-signed by the arbitrators. If an arbitrator refuses or is unable to sign, this must be ascertained on the face of the award, together with the fact that the arbitrator participated in the arbitral proceedings and the deliberations. In case the award is rendered on the basis of the casting vote of the presiding arbitrator, the latter's signature will suffice. The parties may agree that the award shall be hand-signed only by the presiding arbitrator or by the presiding arbitrator and one of the co-arbitrators. An award must contain the names and surnames of all arbitrators, the place and date of issuance, the names and surnames of those who participated in the arbitral proceedings, the arbitration agreement, reasons and the decision. The parties may agree that the award shall contain only the arbitration agreement and the operative part of the decision.

In international arbitration (article 29 LICA) awards must be in writing and signed by the arbitrators. The signatures of the arbitrators forming the majority suffice, provided reasons are given for the omitted signatures. An award must contain the reasons upon which it is based, its date and the place of arbitration. Reasons are omitted if the parties so agree or the award is on agreed terms.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

Greek arbitration law does not provide for any time limit for rendering an award, although the parties may agree that the award should be rendered within a specific time limit.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

In both domestic and international arbitration, the date of the award is decisive for the accrual of its *res judicata* effect (articles 896 CCP; article 35(2) LICA). With respect to the correction and interpretation of the award, the date of the delivery of the award is decisive when the request is made by the parties (article 33(1) LICA; 30 days) and

the date of the award is decisive when the correction of the award is made on the tribunal's initiative (article 33(2) LICA; 30 days). There is no time limit in domestic arbitration (article 894 CCP). The date of the delivery of the award is also decisive for the setting aside of the award (article 899(2) CCP and article 34(3) LICA; three months). For a challenge of a decision on costs the date of the registration of the award with the state court is decisive (article 882(6) CCP).

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

Greek arbitration law does not classify awards. In practice, usually depending on the applicable arbitration rules, various types of awards exist: award on jurisdiction; interim award; partial award; final award; award on agreed terms; award on costs (only in international arbitration; article 32(4) LICA); correction award; and additional award. Only final awards are subject to a motion to set aside or to a declaratory action on the non-existence of an award (the latter in domestic arbitration); an award on agreed terms is considered as a final award (article 30(2) LICA). An act of the tribunal terminating the arbitral proceedings is not an award. Orders of the tribunal with respect to interim measures do not qualify as awards.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

In domestic arbitration, the law makes reference to 'termination of the arbitration agreement' (article 885 CCP), which takes place, subject to a contrary agreement of the parties, if:

- the appointment of replacement arbitrators in case of a truncated tribunal is not possible;
- the time limit related to the validity of the arbitration agreement or the issuance of the award has expired; and
- the parties agree in writing to terminate the arbitration agreement.

Termination of the arbitration agreement is a ground for setting aside an award issued following such termination (article 897.2 CCP).

In international arbitration, in case of a settlement, arbitral proceedings can be terminated with an award on agreed terms, issued upon request of the parties (article 30(1) LICA). In all other respects, arbitral proceedings can be terminated with an act of the tribunal, and in particular if:

- the claimant withdraws its claim, unless the respondent objects and the tribunal recognises a legitimate interest on its part in obtaining a final award resolving the dispute;
- the parties agree on the termination of the proceedings; and
- the tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible (article 32 LICA).

The latter includes the case of the claimant's failure to communicate its claim in sufficient detail (article 25(a) LICA) and the case of a settlement without an award on agreed terms.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

In domestic arbitration, the allocation of costs shall be made by the final award (article 882(3) CCP).

In international arbitration, the allocation of costs shall be made either by the final award or by a separate award on costs (article 32(4) LICA).

In both domestic and international arbitration, tribunals apply the rule 'costs follow the event', which also applies in domestic court proceedings. Recoverable costs include administrative fees (in case of institutional arbitration), tribunal (arbitrators and secretary) fees and expenses, counsel fees and expenses (usually to the extent reasonable), but not the parties' management cost. The parties may challenge the tribunal's decision on costs (article 882(6) CCP).

Update and trends

Commercial arbitration (domestic)

The Greek Supreme Court (Judgment 14/2015 in full plenary) recently settled a longstanding debate over public policy relating to domestic arbitration. The Court held that the concept of public policy as grounds to set aside domestic arbitral awards is the 'international' concept of public policy that serves the public interest, not simply individual public policy provisions that serve private interests, thus abandoning a long line of prevailing case law that has held the opposite since 1979. This ruling enhances the finality of domestic arbitral awards and strengthens the pro-arbitration stance of Greek courts.

International investment arbitration

Greece has been involved only recently as the respondent in three ICSID arbitration cases. The first, based on the Greece–Cyprus (1992) and Greece–Czech Republic (1991) BITs, related to claims of foreign (Czech and Cypriot) holders of Greek state bonds that suffered losses following the country's debt restructuring programme in 2012. The request was registered on 20 May 2013, and the claim was dismissed on grounds of

jurisdiction (award issued on 9 April 2015); an application for partial annulment of the award was dismissed on 29 September 2016 by the ad hoc Committee (*Poštová banka as and Istrokapital SE v Hellenic Republic*, ICSID Case No. ARB/13/8, available on the ICSID website). The second, based on the Greece–Cyprus BIT (1992), relates to claims of Cyprus Popular Bank involving losses on Greek state bonds following the 2012 debt restructuring programme and losses because the bank was excluded from the Emergency Liquidity Assistance (ELA) facility for Greek banks. The request was registered on 16 July 2014 and the case is still pending (*Cyprus Popular Bank Public Co Ltd v Hellenic Republic*, ICSID Case No. ARB/14/16, available on the ICSID website). The third, based on the Greece–Lebanon (1997) BIT, relates to claims of Iskandar and Akram Safa who invested in a state-owned shipyard. The request was registered on 5 July 2016 and the case is still pending (*Iskandar Safa, Akram Safa v Hellenic Republic*, ICSID Case No. ARB/16/20, available on the ICSID website). Although Greece has been involved in a number of other non-ICSID investment-related arbitrations, an accurate account is not feasible because of the confidential nature of the proceedings followed.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Whether interest can be awarded and at what rate, are issues determined by the applicable substantive law and the underlying contract.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

In domestic arbitration, the tribunal has the power to correct or interpret an award upon request of any party; the request must also be notified to the other party (article 894 CCP). There is no time limit for requesting the correction or interpretation of an award.

In international arbitration, the tribunal has the power to correct or interpret an award either upon request of any party or (to correct) on the tribunal's own initiative. If the request is made by a party, there is a 30-day time limit starting from the date of delivery of the award. If the correction of the award is made on the tribunal's initiative, there is a 30-day time limit starting from the date of the award.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

In both domestic and international arbitration, a motion to set aside an award rendered in Greece should be filed before the Court of Appeal (of the place of issuance of the award) within three months from the date of delivery of the award (articles 898 and 899(2) CCP; articles 6(2) and 34(3) LICA). In domestic arbitration, a declaratory action regarding the non-existence of an award rendered in Greece is also available, which should also be filed before the Court of Appeal (of the place of issuance of the award), without any time limit (article 901 CCP). A motion to set aside an award or a declaratory action regarding the non-existence of the award does not automatically stay enforcement proceedings (articles 899(3) and 901(3) CCP; article 35(3) LICA).

In domestic arbitration, the grounds for setting aside an award are the following (article 897 CCP):

- the arbitration agreement is null and void;
- the award was rendered after the arbitration agreement ceased to have effect;
- the arbitrators were appointed in violation of the arbitration agreement or the law, or they were revoked by the parties, or they decided despite a successful challenge against them;
- the arbitrators acted in excess of the power conferred to them by the arbitration agreement or the law;
- there was a violation of the provisions relating to the principles of equality and contradiction between the parties, and the issuance and content of the award;

- the award is contrary to rules of public policy and bonos mores;
- the award is incomprehensible or contains contradictory rulings; and
- all grounds relating to the extraordinary appeal of article 544 CCP in state courts proceedings (contradictory awards; invalid representation; forged award; false or forged evidence; decisive newly discovered evidence; bribery et al). The time limit for this ground is 60 days (if the applicant is resident of Greece) or 120 days (if resident abroad) and has a variety of starting points depending on the ground of article 544 CCP (articles 899 (2) and 545 CCP).

In domestic arbitration, the grounds for declaring that an award is inconsistent are the following (article 901 CCP):

- the arbitration agreement was not concluded;
- the award relates to a non-arbitrable matter (objective arbitrability); and
- the arbitration relates to a non-existent respondent.

In international arbitration (article 34(2) LICA), the grounds for setting aside an award are identical to the grounds for refusing recognition and enforcement contained in article V of the New York Convention, with the exception of the ground of its article V(1)(e).

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

As both the motion to set aside an award and the declaratory action regarding the non-existence of an award (the latter only with respect to domestic arbitration) are filed before the competent court of appeal, a level of appeal is skipped, and following the judgment of the court of appeal there remains only one level of appeal (annulment with limited grounds) before the Supreme Court. Setting aside proceedings before the court of appeal and annulment proceedings before the Supreme Court, take approximately between one to two years each, depending on the backlog of the courts. Costs involve court and process server costs (both moderate) and counsel costs (which depend on the case). In general, the rule 'costs follow the event' applies in the apportionment of the costs between the parties.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Greek courts favour arbitration as a method for dispute settlement. Greece has ratified the New York Convention, which is applied consistently by the Greek courts.

With respect to Greek arbitration law provisions, as far as international arbitration is concerned there is a direct reference to the

provisions of the New York Convention (article 36 LICA); as far as domestic arbitration is concerned, the following requirements should be met (article 903 CCP):

- the arbitration agreement is valid according to the law governing it;
- the award was rendered on a matter that is arbitrable under Greek law;
- the award is not subject to any appeal or means of recourse;
- the losing party was not deprived of the right of defence in the arbitral proceedings;
- the award is not contrary to a Greek court judgment rendered in the same case and constituting *res judicata* for the same parties; and
- the award is not contrary to public policy or *bonos mores*.

The above provisions of article 903 CCP are mostly superseded by the provision of article 36 LICA, as they both relate to foreign awards, because the latter is more favourable to recognition and enforcement.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

There is no reported case law related to a foreign award that has been declared enforceable in Greece, even if it had been annulled by the state courts of the country in which it was rendered.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

There is no specific provision regarding enforcement of an order issued by an emergency arbitrator. As this is a type of interim measures order, the relevant provisions on international arbitration shall apply and such order may be declared enforceable by a state court upon petition of any party (article 17(2) LICA).

47 Cost of enforcement

What costs are incurred in enforcing awards?

Although the procedure for declaring an award enforceable involves only moderate court and process server costs and counsel costs that depend on the case, the procedure for the actual enforcement involves, in addition, stamp duty at 2.4 per cent (for commercial disputes) or 3.6 per cent (for non-commercial contractual disputes) on the entire amount (principal and interest). All these costs are advanced by the enforcing party, but are recoverable through enforcement.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Court proceedings in Greece follow the inquisitorial system. This and many other features, characteristic of the Greek judicial system (such as the lack of US-style discovery, the lack of witness statements and cross-examination as known in common law systems, the non-examination of party representatives as witnesses) influence domestic arbitration in particular and especially when judges are appointed as arbitrators. Such an influence, if any, is less discernible in international arbitration.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Greek counsel are bound to observe the Code of Conduct for Advocacy and are subject to disciplinary measures by the competent Bar Association for any violation thereof. Although no specific rules exist with respect to arbitration conducted in Greece, practice shows that the conduct of counsel and parties' representatives reflect to a great extent the 2013 IBA Guidelines on Party Representation in International Arbitration.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding is virtually unknown in Greek arbitral practice. As a result there is no existing regulatory framework (eg, a Code of Conduct). Nevertheless, the principle of freedom of contract (article 361 of the Civil Code) would be the basis for such an arrangement, as well as the application by analogy of the provisions regulating contingency fee agreements (based on lawyer funding).

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Foreign practitioners are not prevented from participating as counsel or arbitrators in an international arbitration in Greece; entry and residence requirements are the same as for any other citizen of their country of origin. Whether counsel or arbitrators are subject to VAT, and at what rate, for their services provided in Greece is a matter governed by the tax legislation of the country in which they are tax residents. For those who are tax residents in Greece, VAT at 23 per cent applies.



Rokas

International Law Firm

Antonios D Tsavdaridis

a.tsavdaridis@rokas.com

25, Boukourestiou Str
106 71 Athens
Greece

Tel: +30 210 36 16 816
Fax: +30 210 36 15 425
www.rokas.com

Hong Kong

Simon Powell and Desmond Gan

Latham & Watkins

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

While Hong Kong is not technically a contracting state to the New York Convention, the New York Convention has effect in Hong Kong. Prior to the 1997 handover of sovereignty from the UK to China, the New York Convention applied in Hong Kong. It continued to apply following the handover as China extended its application to Hong Kong, pursuant to the provisions of the Basic Law of Hong Kong. China originally acceded to the Convention in 1987 (subject to the reciprocity and commercial reservations).

The relevant conventions to which China is a party include the Convention Establishing the Multilateral Investment Guarantee Agency, the International Centre for Settlement of Investment Disputes (ICSID) Convention and the 2004 Convention on Jurisdictional Immunities of States and Their Property (though the latter has not yet entered into force). In addition, China is an observer to the Energy Charter Conference, but neither China nor Hong Kong is a party to the Energy Charter Treaty.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

In accordance with the provisions of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Hong Kong may conclude agreements on its own with foreign states in relation to matters dealt with in bilateral investment treaties. There are currently 18 bilateral investment treaties in force in Hong Kong, signed with the following countries and organisations: Australia, Austria, the Belgo-Luxembourg Economic Union, Canada, Denmark, Finland, France, Germany, Italy, Japan, the Republic of Korea, Kuwait, the Netherlands, New Zealand, Sweden, Switzerland, Thailand and the United Kingdom. The full texts of these treaties are available at the website of the Hong Kong Department of Justice (doj.gov.hk).

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary source of law in Hong Kong relating to domestic and foreign arbitral proceedings is the Arbitration Ordinance (Cap 609) (the Ordinance), which entered into force in June 2011. Its provisions apply equally to domestic and international arbitration without any distinction. It should be noted, however, that the previous Arbitration Ordinance (Cap 341) did maintain a distinction between domestic and international arbitration. In respect of all arbitrations commenced on or after 1 June 2011, the new provisions apply without distinction

between domestic and international arbitration. In respect of arbitrations commenced before that date, the old regime applies.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The UNCITRAL Model Law (Model Law), including the 2006 amendments, is incorporated into the Ordinance. The principal differences, as in many other jurisdictions, lie in the additional provisions that govern issues not addressed by the Model Law. Notable additional provisions include closed court proceedings in arbitration matters, the ability of an arbitrator to act as mediator with the parties' consent and such person's power to continue to act as arbitrator subsequently to the mediation. Of critical importance is the provision that an order or direction made by an arbitral tribunal is generally enforceable in the same manner as an order or direction of the Hong Kong courts.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Specific mandatory provisions on arbitration procedure as such are few. The Ordinance provides generally that the parties to the arbitration are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to a number of Model Law provisions given effect by the Ordinance. Among other things, the parties must be treated with equality, the arbitral tribunal is required to be independent and to act fairly and impartially as between the parties, the parties are to be given a reasonable opportunity to present their cases and to deal with the cases of their opponents, and the arbitral tribunal is required to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute to which the arbitral proceedings relate.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

As per the Model Law, choice of substantive law is a matter for the parties to the arbitration to agree upon. In the absence of such agreement, the substantive law is to be determined by the arbitral tribunal applying the conflict of laws rules it considers applicable.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

Prominent arbitral institutions situated in Hong Kong include the Hong Kong International Arbitration Centre (the HKIAC), the International Chamber of Commerce (the ICC), the China International Economic and Trade Arbitration Commission (the CIETAC) and the China Maritime Arbitration Commission (the CMAC):

HKCIAC
38th Floor Two Exchange Square
8 Connaught Place
Central Hong Kong
www.hkiac.org

Secretariat of the International Court of Arbitration of the International Chamber of Commerce Asia Office
Suite 2
12/F, Fairmont House
8 Cotton Tree Drive
Central Hong Kong
www.iccwbo.org

CIETAC Hong Kong Arbitration Center (and CMAC)
4705 Far East Finance Centre
16 Harcourt Road
Admiralty Hong Kong
www.cietachk.org

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Hong Kong follows the general principle of arbitration that matters affecting the rights of third parties or rights enforceable against the world at large are non-arbitrable; these include, for example, matters of personal status and criminal liability, or those relating to administrative law, such as taxation and immigration. So, for example, in the case of *Paquito Lima Buton* (2008) 11 HKCFAR 464, [2008] 4 HKC 14, employees' statutory compensation rights were held to be non-arbitrable. However, an arbitration agreement covering employment matters otherwise within the Labour Tribunal's jurisdiction may be upheld if there is no compelling reason why it should not be. Subject to exceptions, an agreement to submit future disputes to arbitration cannot be enforced against a consumer. However, the Consumer Council of Hong Kong has proposed to establish a dispute resolution centre, which will employ arbitration as a means of resolving consumer disputes. Nonetheless, the Hong Kong courts generally take a pro-arbitration approach and are likely to permit a matter to be resolved by arbitration unless it is clearly not in the public interest to do so.

Whether a matter is arbitrable should be distinguished from the relief that an arbitral tribunal may award; in *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd & Another* [2014] HKCU 1750 (a dispute under a shareholders' agreement), the arbitrator was held to be competent to decide the underlying basis on which a joint venture was to end but he or she could not order a winding up of the company; the arbitrator's decision could instead be used as the basis for a winding-up petition on just and equitable grounds in court. There are proposals to amend the Ordinance to make it clear that enforcement of an arbitral award under the Ordinance will not be refused in Hong Kong either under arbitrability or public policy grounds merely because the award involves intellectual property rights.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The Ordinance defines an arbitration agreement as 'an agreement by the parties to submit to arbitration all or certain disputes that have arisen or that may arise between them in respect of a defined legal relationship, whether contractual or not'. As per the Ordinance, incorporating the Model Law, the arbitration agreement is required to be 'in writing', though it need not be signed.

The arbitration agreement may be in the form of an arbitration clause in a contract or in a separate agreement. The 'in writing' requirement is deemed to be met, inter alia, if the arbitration agreement is contained in an exchange of statements of claim and defence in which its existence is not denied.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The death of a party does not discharge an arbitration agreement, and it may be enforced by or against the party's personal representatives. An award is final and binding both on the parties and 'any person claiming through or under any of the parties', which can cover, inter alia, insolvency and assignment situations. As provided by the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32), when a winding-up order has been made against a company, no proceeding (including arbitrations) shall be proceeded with or commenced against the company without leave of the court.

The balance of convenience is a significant factor in the court's deliberations as to whether to allow an arbitration to proceed; where arbitration is the most convenient means of resolution, especially where the dispute presents complex legal and factual issues, the court is likely to allow it to move forward. Within the context of a winding-up petition filed on insolvency grounds arising from an alleged debt, the existence of an arbitration agreement is generally not an impediment to the court allowing the winding-up petition to proceed unless there exists a bona fide dispute as to the existence of the debt (though it should be noted that any order for winding-up proceedings to continue is not determinative of the issue of the existence of the debt).

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Generally, third parties or non-signatories are not bound by an arbitration agreement. However, where a contract that contains an arbitration agreement is assigned to a third party, the third party will likely be bound by that arbitration agreement under Hong Kong law. Further, the legal doctrine of privity of contract has been relaxed somewhat within the Hong Kong law context following the entering into force of the Contracts (Rights of Third Parties) Ordinance (Cap 623); a third party is now able to enforce a term in a contract where the contract expressly provides that he or she may do so, or where the term purports to confer a benefit on that third party. A third party will generally be treated as a party to the arbitration agreement in the contract where he or she seeks to enforce a terms of that contract in a dispute.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

A third party may only participate in an arbitration with the agreement of the parties to the arbitration. The Ordinance contains provisions which parties can opt into empowering the court to order consolidation of arbitrations where:

- a common question of law or fact arises in all of the cases in question;
- the rights to relief claimed in the cases are in respect of or arise out of the same transaction or series of transactions; or
- the court deems that it is desirable to make such an order.

In some Hong Kong construction cases (generally of no concern to foreign parties), these provisions apply without express agreement. In addition, the 2013 HKIAC Rules contain provisions enabling the joinder of additional parties to arbitrations and the consolidation of arbitrations.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Where the issue is governed by Hong Kong law, save possibly where fraud or bad faith are involved, Hong Kong courts and arbitral tribunals are unlikely to extend an arbitration agreement to a non-signatory parent or to subsidiary companies of a signatory company,

which would require a piercing of the corporate veil. Where the arbitration agreement is governed by a foreign law that recognises the 'group of companies' doctrine, that doctrine will, however, likely be recognised in a Hong Kong arbitration in an appropriate case.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

Multiparty arbitration agreements are recognised in Hong Kong. The Ordinance does not restrict the number of parties to an agreement to arbitrate. No specific requirements are needed for the formation of a valid multiparty arbitration agreement. Multiparty arbitrations by way of joinder or consolidation are also expressly recognised under the 2013 HKIAC Rules.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

There are generally no restrictions on who may act as an arbitrator. Under the Ordinance, unless the parties otherwise agree, no person may be precluded from acting as an arbitrator by reason of their nationality. The parties may also agree that an arbitrator is required to possess certain qualifications. Except where the courts deem it is contrary to the public interest, an agreement between the parties as to a religion or gender restriction or requirement would likely be upheld. While employment discrimination is unlawful in Hong Kong (and might therefore lead to situations similar to the English case of *Jivraj v Hashwani* [2011] UKSC 40), it is unlikely that an arbitrator would be considered an employee within the employment discrimination context. A requirement placed upon an arbitrator may also be justified where the requirement is a genuine occupational necessity. Where any restriction or requirement is found unlawful, the question would then be whether the arbitration agreement should be deemed invalid, or the offensive requirement simply severed.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Under the Ordinance, in an arbitration with three arbitrators, the default mechanism is that each party appoints one arbitrator, and the two arbitrators thus appointed appoint the third. In an arbitration under the HKIAC Rules, if either party or the two appointed arbitrators fail to appoint an arbitrator, or the parties do not agree on a sole arbitrator, the appointment is made by the HKIAC. In doing so, the appointment will be made by the HKIAC giving due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, as well as the advisability of appointing an arbitrator of a nationality other than those of the parties. The appointment by the HKIAC is not subject to appeal. The Ordinance also provides rules for arbitrations with an even number of arbitrators or an uneven number greater than three, and for the appointment of umpires in arbitrations with an even number of arbitrators.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Under the Ordinance, an arbitrator can be challenged and replaced on justifiable doubts as to their impartiality or independence, or if they lack the qualifications agreed upon by the parties. Absent an agreed

procedure, a challenge is made to and decided by the tribunal. Where such a challenge is unsuccessful, the aggrieved party may lodge an appeal to the Court of First Instance (CFI), whose decision is final and not subject to appeal. If an arbitrator, because of, for example, illness, is unable to perform or fails to act without undue delay, the CFI may, upon any of the parties' request, terminate the arbitrator's mandate, subject to no appeal. An arbitrator's mandate also terminates on their death. Where an arbitrator's mandate has been terminated for any of the above reasons, a substitute arbitrator is appointed in accordance with the rules applicable to the previous appointment. Counsel, the tribunal and the court are likely to seek support or take guidance from the IBA Guidelines. Where an allegation of bias has been made, the test to be applied is as stated by the CFI in *Jung Science Information Technology Co Ltd v ZTE Corporation* [2008] 4 HKLRD 776, namely whether an objective, fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Within the context of an ad hoc Hong Kong arbitration with a tribunal consisting of three arbitrators, it is for the appointing party and respective party-appointed arbitrators to agree terms as to fees, expenses, cancellation fees and other matters. The chairperson of a three-arbitrator tribunal or sole arbitrator normally agrees such terms with both parties. The Ordinance provides that the parties are jointly and severally liable to pay reasonable fees and expenses to the tribunal that are appropriate in the circumstances. The 2013 HKIAC Rules ask that arbitrators accept the standard terms of appointment of the HKIAC; where hourly fees are applicable, these are capped at a rate set by the HKIAC. Fees payable to a co-arbitrator are agreed between that arbitrator and the nominating party; fees payable to a sole or presiding arbitrator are agreed between that arbitrator and both parties. In the absence of such agreement, the HKIAC determines the rates to be paid. Every arbitrator (whether party-nominated or otherwise) is imposed with a duty of independence and to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents. Further, the Ordinance empowers arbitral tribunals to perform certain functions that may be considered atypical in other jurisdictions, such as the administering of oaths or taking affirmations of witnesses; arbitrators have been described by the Hong Kong courts as exercising quasi-judicial functions.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

An arbitral tribunal is liable in law for an act done or omitted to be done by the tribunal or an employee or agent of the tribunal only if it is proved that the act was done or omitted to be done dishonestly, and only if the act itself was in relation to the exercise or performance of the tribunal's arbitral functions.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Under the Ordinance, the court will refer parties to arbitration where a party so requests no later than when submitting its first statement on the substance of the dispute, unless the court deems the arbitration agreement null and void, inoperative or incapable of being performed. The deciding factor is whether the dispute in question falls within the ambit of a binding arbitration agreement. In practice, the Hong Kong courts do not conduct an in-depth inquiry into the matter and, where

there exists a prima facie or good arguable case that the arbitration agreement covers the dispute, the parties will be referred to arbitration and court proceedings stayed. Where the court decides not to refer the parties to arbitration, the decision may be appealed, with leave; a decision to refer the parties to arbitration is, however, not subject to appeal.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The Ordinance provides that the arbitral tribunal may rule on its own jurisdiction, including upon any objections with respect to the existence or validity of the arbitration agreement. Unless a delay is justified, a plea that the tribunal lacks jurisdiction must be raised at the latest when the statement of defence is submitted and a party must raise a plea that the tribunal is exceeding its jurisdiction as soon as the matter alleged to be beyond the jurisdiction is raised. The tribunal may rule on the issue either as a preliminary question or in an award on the merits. If the tribunal rules as a preliminary question that it has jurisdiction, any party may request the CFI to decide the issue within 30 days of having received notice of that preliminary ruling. The Ordinance expressly provides that a tribunal's decision to decline jurisdiction is subject to no appeal and that the court must then hear the dispute if it has jurisdiction (which requires a relevant connection with Hong Kong).

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Under the Ordinance, failing prior agreement, the tribunal will determine the seat of the arbitration having regard to the circumstances of the case, including the convenience of the parties. Under the 2013 HKIAC Rules, where the parties are unable to agree as to the seat of the arbitration, the seat shall be Hong Kong, unless the arbitral tribunal determines that another seat is more appropriate. The language of the arbitration is also determined by the tribunal.

23 Commencement of arbitration

How are arbitral proceedings initiated?

An arbitration commences when the respondent receives the request for the dispute to be referred to arbitration. That request must be in writing, including electronic communication. In HKIAC arbitrations, the notice of arbitration must also be submitted to the HKIAC, and that notice must contain certain particulars, as outlined in the HKIAC Rules.

24 Hearing

Is a hearing required and what rules apply?

Unless the parties have agreed not to have hearings, the tribunal must hold hearings when appropriate, if requested by a party. The parties must be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspecting goods, other property or documents. Where a party fails to appear at a hearing, the tribunal may nonetheless continue with the proceedings and make an award on the evidence before it. Where the HKIAC's expedited procedure is adopted, the dispute can be decided on the basis of documentary evidence only, unless the tribunal decides that hearings are appropriate.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Under the HKIAC Rules, the arbitral tribunal determines the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence. In the absence of a contrary agreement between the parties, the tribunal may itself opt to take the initiative in ascertaining the legal and factual issues pertinent to the

dispute. In all cases, the parties are entitled to be given an opportunity to comment and adduce evidence on anything that results from such tribunal initiative. The Ordinance empowers tribunals to, inter alia, direct discovery of documents, delivery of interrogatories, evidence to be given by affidavit, and inspection of property. The tribunal may also direct witnesses to appear before it, and examine witnesses and parties on oath or affirmation. It may also appoint experts where appropriate. Written witness statements are common in Hong Kong arbitrations, and the IBA Rules on the Taking of Evidence in International Arbitration are often relied upon as a source of guidance in this regard.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Under the Ordinance, the arbitral tribunal or a party (with the tribunal's approval) may request assistance from the court in the taking of evidence; the court may provide its assistance regardless of whether the tribunal in question possesses similar powers. Where the matter is subject to ongoing arbitral proceedings, the court may decline to assist if it deems that it is more appropriate for the tribunal to deal with it. Alternatively, the court may grant the request for assistance in accordance with its own rules on the taking of evidence. The decision of the court (whether to provide assistance or otherwise) is not subject to appeal.

27 Confidentiality

Is confidentiality ensured?

The Ordinance expressly provides that no party may disclose any information relating to the arbitral proceedings or an award. There are, however, exceptions to this duty of confidentiality; inter alia, disclosures may be made in order to pursue a legal right or to enforce or challenge an award. As mandated by the Ordinance, court proceedings in arbitration matters, such as setting aside proceedings, are generally not open to the public, unless any party makes an application to that effect or if the court deems that the proceedings ought to be heard in open court. There are also restrictions on the publication of information relating to such court cases. The HKIAC Rules impose obligations of confidentiality upon the parties, tribunals, emergency arbitrators, experts, witnesses, tribunal secretaries and the HKIAC.

Interim measures and sanctioning powers

28 Interim measures by the courts

A party may request, before or during arbitral proceedings, an interim measure of protection from the CFI and the court may grant such measure. This is not seen as incompatible with the agreement to arbitrate, but a case of the court coming to the aid of the parties to the arbitration. The CFI may grant interim measures, including those that a tribunal may grant, in relation to arbitrations that are to or have been commenced, whether in or outside Hong Kong. The court may decline to grant a measure if the interim measure sought is currently the subject of arbitral proceedings or if the court considers that it is more appropriate for the tribunal to deal with it.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The Ordinance provides for an 'emergency arbitrator', defined as an emergency arbitrator appointed under the arbitration rules, including rules of a permanent arbitral institution, agreed to by the parties to deal with the parties' applications for emergency relief before a tribunal is constituted. Emergency relief granted by an emergency arbitrator is, with the leave of the court, enforceable in the same manner as an order or direction of the court that has the same effect. Under the 2013 HKIAC Rules, the application for emergency relief must be made concurrently with or following a request for arbitration and prior to the constitution of the tribunal. The 2012 ICC Rules and the 2015 CIETAC Rules also contain provisions for obtaining relief from an emergency

arbitrator. Arbitrations administered by the CIETAC Hong Kong Arbitration Center are generally intended to be seated in Hong Kong and thus governed by the Ordinance.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The interim measures (including *ex parte* preliminary orders) that a tribunal may order and the test for granting such measures mirror the 2006 Model Law amendments. In essence, under the Ordinance, the arbitral tribunal may grant interim measures that are defined as temporary measures, whether in the form of an award or otherwise, at any time prior to the issuance of the final award, ordering a party to:

- maintain or restore the status quo pending resolution of the dispute;
- take action or refrain from taking action so as to avoid harm or prejudice to the arbitral process;
- provide a means of preserving assets that may be used to satisfy a subsequent award; or
- preserve evidence that may be relevant and material to the resolution of the dispute.

The Ordinance provides that the tribunal may order the claimant to give appropriate security for costs and non-compliance may be followed by an award dismissing the claim (with prejudice) or a stay. In practice, several factors are balanced when tribunal considers applications for security.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use ‘guerrilla tactics’ in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

A tribunal may issue an order, as an interim measure, to require a party to cease conduct that the tribunal deems to threaten the integrity of the proceedings on the basis that it is likely to cause prejudice to the arbitral process. Where a party engages in delaying tactics – such as a failure to communicate its statement of defence, appear at a hearing or produce documentary evidence – a tribunal is empowered to proceed with an arbitration. The Ordinance also empowers the tribunal to make peremptory orders where a party has previously failed to comply with an order to the same effect. Non-compliance with the peremptory order may result in a tribunal direction drawing adverse inferences justifiable from the non-compliance, and may lead to negative cost consequences for the non-compliant party. Moreover, the Ordinance imposes a duty upon a party making a claim to pursue that claim without unreasonable delay; failure to do so empowers the tribunal to make an award dismissing a party’s claim and an order prohibiting the party from commencing further arbitral proceedings in respect of the claim, if the tribunal deems that the delay is likely to give rise to a substantial risk that the issues in the claim will not be resolved fairly or likely causes serious prejudice to the other party. Under the Ordinance, the tribunal may generally conduct the arbitration in the manner it considers appropriate. However, the Ordinance is silent as to tribunal-ordered sanctions against counsel, so it is unclear whether such a power exists.

The HKIAC Rules impose a duty upon the parties to do everything necessary to ensure the fair and efficient conduct of the arbitration, and the parties’ right to be represented by persons of their choice is expressly subject to this provision. Furthermore, in all matters not expressly provided for in the HKIAC Rules, parties are expressly obliged to act in the spirit of the Rules; the 2015 CIETAC Rules provide that arbitration participants shall proceed with the arbitration in good faith. The HKIAC and CIETAC Rules are silent with regard to sanctions against counsel.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Arbitral decisions are made as a matter of majority, although awards are commonly unanimous. The fact one arbitrator dissents generally has no consequences for the parties.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

The Ordinance does not address dissenting opinions.

34 Form and content requirements

What form and content requirements exist for an award?

An arbitral award is required to be in writing and signed by a majority of the arbitrators, or, in the case of the sole arbitrator, the sole arbitrator. A reason for any omitted signature must also be provided. The award should also contain the reasons upon which it is based unless the parties have agreed otherwise. Further, the award must also state its date and the place of arbitration.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The Ordinance does not impose any specific time limits for an award to be rendered. Where the HKIAC’s expedited procedure is adopted an award must be rendered within six months of the date when the HKIAC transmits the file to the tribunal, unless there are exceptional circumstances that justify the HKIAC extending the time limit.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Under the Ordinance, the date of receipt of notice of the ruling to be challenged is decisive in terms of the time limit for lodging that challenge where a party wishes to request the court to review a positive ruling on jurisdiction. In the context of a request that the tribunal correct or interpret an award, or for an application to the court to set aside the award, the date of receipt of the award is decisive. The date of the award is decisive in relation to the tribunal’s correction of the award on its own initiative and the tribunal’s review of an award on costs.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

A tribunal can issue final awards, partial awards, interim awards and consent orders under Hong Kong law. The ‘final award’ is generally the definitive determination of the dispute submitted to arbitration, but is not necessarily the only award as substantive issues may have been decided in ‘partial’ or ‘interim awards’ rendered ahead of the final award. Where the parties agree to settle, this may be recorded as an ‘award on agreed terms’. A tribunal may order the same relief as if the dispute had been the subject of civil proceedings before a court, except specific performance of a contract relating to land or any interest in land.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Apart from by a final award, arbitral proceedings may also be terminated by an order of the tribunal upon the default of a party or

settlement. There are no formal requirements for such orders but it is generally advisable to follow the formal requirements for an award to the extent possible when drafting such an order.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The arbitral tribunal decides the issue of costs having regard to all relevant circumstances, including, if appropriate, any written offers of settlement. Costs may also be ordered to be paid at an earlier stage of proceedings in respect of rulings and interim measures. The general rule is that costs follow the event. Where written settlement offers have been made 'without prejudice save as to costs' (or using other words to similar effect), the winning party may not recover its costs incurred subsequent to its rejection of that offer if the amount it is ultimately awarded is less than the amount of the settlement offer; it may also have to pay the losing party's costs incurred from that time.

The tribunal may review an award on costs within 30 days of the date of the award, if it was not aware of any information relating to costs that it should have taken into account, including any settlement offer. The tribunal must generally also assess the amount of costs, though it is not required to follow the scales and practices employed by the court. Recoverable costs must be reasonable. The HKIAC Rules empower the arbitral tribunal to apportion costs between the parties in a manner that it considers reasonable, taking into account the circumstances of the case.

A tribunal may direct that the parties' recoverable costs be limited to a specified amount in advance of the costs being incurred, but this is uncommon. An agreement between parties that they must pay their own costs is void unless it forms part of an arbitration agreement concluded in respect of an already existing dispute.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Interest is payable on all claims, including claims for costs and amounts payable as a consequence of an award. Unless the tribunal decides otherwise, interest is payable at the judgment rate (currently 8 per cent) from the date of the award or order.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

An arbitral tribunal may correct an award on its own initiative or at the request of a party. Where the tribunal is making the correction on its own initiative, this should be done within 30 days of the date of the award. Where a party requests a correction, that request must be made within 30 days of receipt of the award, after which the tribunal must generally make the correction, where appropriate, within 30 days of receipt of the request.

A party may request an interpretation of a specific point or part of the award, following which the tribunal may do so within 30 days of the date of receipt of that request. Any interpretation issued by the tribunal as a consequence of such a request forms part of the award.

Where the tribunal has omitted to make an award in respect of any claims presented in the arbitral proceedings, a party may request that the tribunal make an additional award in respect of those claims. If the tribunal considers the request to be justified, the additional award must be made within 60 days of the receipt of the request.

Where necessary, the tribunal may extend the time limits within which it is required to make a correction, interpretation or additional award.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

A party seeking to set aside an arbitral award must make an application to the CFI. Further, where the court has upheld a challenge against an arbitrator, it may also set aside an award made by the arbitral tribunal that includes the challenged arbitrator.

Under the Ordinance, an arbitral award may be set aside only where the party making the application proves:

- a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law to which the parties have subjected it to;
- 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;
- the award deals with a difference not contemplated by or falling within the terms 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 if the court finds that:
 - the subject matter of the dispute is not capable of settlement by arbitration under Hong Kong law; or
 - the award is in conflict with the public policy of Hong Kong.

Schedule 2 of the Ordinance provides for an additional avenue by which an award may be challenged. A challenge under Schedule 2 of the Ordinance is available only where the arbitration agreement provides expressly that its provisions are to apply, or where they automatically apply in certain cases, namely where: (i) the arbitration agreement is entered into before or within six years after 1 June 2011 and that provides for domestic arbitration; or (ii) the arbitration agreement is contained in a subcontract, and where the main contract is a construction contract with an arbitration agreement, and situation (i) above applies, provided that the subcontract in question has the defined linkage to Hong Kong. Under Schedule 2, an arbitral award can be challenged on the ground of serious irregularity affecting the tribunal, the arbitral proceedings, or the award. The Ordinance lists out nine factors that the court will consider when deciding whether there is a serious irregularity that will cause, or has already caused, substantial injustice to the applicant. These include, inter alia, failure by the tribunal to conduct the arbitral proceedings in accordance with the procedure agreed by the parties, failure by the tribunal to deal with all the issues that were put to it, the arbitral tribunal exceeding its powers, failure to comply with the requirements as to the form of the award, and the award being obtained by fraud, or being contrary to public policy.

If serious irregularity is shown, the court may remit the award to the arbitral tribunal for reconsideration, set aside the award, or declare the award to be of no effect, in whole or in part.

An application to challenge an arbitral award on such a ground must be made within 30 days after the award is delivered.

Schedule 2, Sections 5 and 7 further provide for the appeal against an arbitral award on a point of law, as well as other supplementary provisions on the challenge to or appeal against an arbitral award.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level?

Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Appeals may be made to the CFI, and, to the Court of Appeal (CA) and subsequently the Court of Final Appeal (CFA), subject to the granting of leave by the court to do so. Proceedings in the CFI normally take about a year or a little less, while CA and CFA proceedings can take longer.

The apportionment of costs is determined at the discretion of the courts, with costs normally following the event and taxed (ie, assessed by the court) on a party and party basis, where all costs necessary or proper for the attainment of justice or enforcing or defending rights are payable. In appropriate cases, the court can order taxation on the more generous indemnity basis, where all costs are allowed except where they are unreasonably large or unreasonably incurred, with any doubts as to reasonableness resolved in favour of the party being

Update and trends

Challenges to Awards by the Hong Kong Courts because of serious breaches of natural justice

While Hong Kong courts will generally respect the finality of arbitral awards whenever possible, they are ready to intervene in the event of serious breaches of natural justice. In *China Property Development (Holdings) Ltd v Mandecly Ltd* [2016] HKEC 1151, the CA affirmed the decision of the CFI, where an arbitral award was set aside because of a serious breach of due process, on the ground that the plaintiff was not able to present its case.

The dispute arose between China Property Development (Holdings) Ltd (CPDH) (as purchasers) and the sellers in relation to a share sale agreement, upon which CPDH would acquire a PRC entity (BPP). CPDH and BPP commenced arbitration proceedings against the sellers. In relation to one of the issues to be determined by the tribunal, the sellers expressly confirmed that their arguments were only directed against BPP. As a result, CPDH made no submissions in relation to that issue. However, the tribunal made a ruling against CPDH on that issue, and ordered it to pay the sellers 10 million yuan. CPDH sought clarification from the tribunal as to whether there was any typographical error, but was told there were none. The tribunal came to its ruling by relying on the seller's argument on a different issue. CPDH therefore applied to set aside the relevant parts of the award pursuant to article 34 of the Model Law primarily on the basis that it had been denied the opportunity to present its case on the arguments on which the tribunal relied.

The CFI held that CPDH had been denied an opportunity to present its case on arguments the tribunal might have based its decision on, and considered this to be a 'sufficient serious breach of due process'. It therefore allowed the relevant part of the award to be set aside. While the CFI emphasised that the role of the court is to consider the structural integrity of arbitration proceedings, rather than decide on the substantive merits of the case when reaching its decision, the CFI nonetheless considered it necessary to review the pleaded cases of the parties, given the factual complexity of the issues in this case.

The CA upheld the CFI's findings on appeal, further noting that, where there are serious irregularities, the court has a residual discretion to decide whether to set aside an award, after having considered the circumstances of the case and the nature of the irregularity – some applications to set aside an arbitral award may be refused despite the establishment of irregularity, while others may be set aside because the irregularities are so fundamental and because of the serious damage allowing the award to stand might cause to the structural integrity of the arbitration proceedings. Upon considering the nature of the irregularity in this case, the CA regarded it as 'falling under the serious end' of the spectrum, and therefore the CA upheld the CFI's decision to set aside the award.

This case also illustrates the pro-arbitration stance taken by the Hong Kong courts, and its efforts to ensure integrity of arbitration proceedings – namely by allowing due process, an opportunity to present one's case, and the importance of a party's right to be heard.

Similarly, in *Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd* [2016] HKEC 2128, the CFI set aside a Hong Kong-seated HKIAC arbitration award, on the basis that the respondent was not given proper notice of the arbitration, nor the opportunity to present his case. The court also allowed the respondent to make the set aside application out of time. Although it is rare for Hong Kong courts to set aside arbitral awards, circumstances here were exceptional, as the respondent in this case had no proper notice of the commencement of the arbitral proceedings against him, as he was detained and held in custody.

Third-party funding

Following a consultation process, on 12 October 2016, the Law Reform Commission of Hong Kong released a report recommending that the law should be amended to clarify the law so as to permit

third-party funding of arbitrations and associated proceedings under the Arbitration Ordinance. In May 2016, the CIETAC Hong Kong Arbitration Centre issued draft guidelines for third-party funding for public consultation.

The Draft CIETAC HKAC Third Party Funding Guidelines (the Guidelines) set out 'certain principles of practice and conduct which CIETAC HKAC encourages parties and arbitrators to observe in respect of actual or anticipated arbitration proceedings in which there is or may be an element of third party funding'. The Guidelines are voluntary and non-binding, and provide various reminders to parties seeking funding arrangements, as well as setting out key issues of which arbitrators should be aware when their cases concern third-party funding in arbitration. These include the capital adequacy of the funder, confidentiality issues, conflict of interest issues, funder's control of proceedings, and the disclosure of funding to the arbitration tribunal.

Investment Treaty Arbitration

The recently published *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia* (UNCITRAL, PCA Case No. 2012-12) award concerns an investment treaty dispute, in which Philip Morris challenged Australia's tobacco plain packaging legislation (Plain Packaging Measures), which required tobacco companies marketing cigarettes in Australia to sell them only in logo-free, dark brown packaging.

Philip Morris Asia Limited (Hong Kong) (the Claimant) brought a claim against the Commonwealth of Australia (the Respondent) under the provisions of Australia's 1993 Investment Promotion and Protection Agreement with Hong Kong – a bilateral treaty between Australia and Hong Kong (BIT). The Claimant asserted that the Plain Packaging Measures 'bar[red] the use of intellectual property on tobacco products and packaging, transforming [the Claimant's subsidiary in Australia] from a manufacturer of branded products to a manufacturer of commoditized products with the consequential effect of substantially diminishing the value of [the Claimant's] investments in Australia', for which it sought declaratory relief and compensation. While the Respondent was considering the introduction of the Plain Packaging Measures in 2011, the Claimant undertook a corporate restructuring, and formally acquired shares in Philip Morris (Australia) Limited, thus becoming the sole shareholder of its Australian entities. This restructuring also gave the Claimant prima facie standing to bring its claim under the investor-state dispute settlement provisions of the BIT.

Australia objected to the tribunal's jurisdiction on the grounds that the tribunal was barred from considering the Claimant's claim, since the dispute was foreseeable when the Claimant obtained the BIT protection through its restructuring, and as such, the resort to arbitration constituted an abuse of right.

In its award, the tribunal concluded that when an investor changes its corporate structure to gain the protection of an investment treaty at a point in time where a dispute was foreseeable, the commencement of the arbitration would constitute an abuse of right (or abuse of process). Although a corporate restructuring in itself would not have been seen as an abuse of process if the restructuring could be justified independently and part of a broader, group-wide process, the tribunal was of the view that the Claimant's restructuring was solely motivated by the desire to obtain treaty protection through the use of a Hong Kong entity, as the Claimant was unable to provide evidence showing that tax or other business reasons were determinative for the restructuring. The tribunal further held that the Respondent's intention to introduce Plain Packaging Measures was not only foreseeable, but was also foreseen by the Claimant when it chose to change its corporate structure.

As a result, the tribunal concluded that the initiation of the arbitration constituted an abuse of right, and held the claim inadmissible and that the tribunal was precluded from exercising jurisdiction over the dispute.

compensated. In the absence of special circumstances, unsuccessful challenges tend to result in indemnity cost orders, as stated in *Gao Haiyan v Keeneye Holdings Ltd (No. 2)* (2012) 1 HKC 491 and recently affirmed in *Chimbusco International Petroleum (Singapore) Pte Ltd v Fully Best Trading Ltd* [2016] 1 HKC 149.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

The original arbitral award and arbitration agreement, or a certified copy thereof, must be produced in order for a court to order enforcement. If either document is not in English or Chinese, a certified translation in either of these languages is also required. With leave, the CFI may enter judgment in terms of all awards. New York Convention awards, mainland China awards and Macao awards are also enforceable by action in

the court. The Ordinance provides that enforcement may be refused where any of the following is proved:

- that a party to the arbitration agreement was under some incapacity;
- the arbitration agreement was invalid;
- the person against whom enforcement is sought was not given proper notice of the arbitration or was otherwise unable to present his case;
- the award deals with a difference not falling within the terms of the submission to arbitration;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or 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 the award was made.

The provisions on enforcement also govern the recognition of awards. The Hong Kong courts generally maintain a pro-enforcement stance in relation to arbitral awards, as reflected in a recent CFI decision in *KB v S* [2015] HKEC 2042 and affirmed in *China Solar Power (Holdings) Ltd v Ulvac, Inc* [2015] HKEC 2559.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Where one party is seeking to enforce a foreign award that has been set aside at the place of arbitration, in absence of Hong Kong jurisprudence on the issue, the Hong Kong courts are likely to take guidance from the English case of *Yukos Capital SARL v OJCS Rosneft Oil Company* [2013] 3 WRL 1329 (Court of Appeal) and assess whether the court that set aside the award was impartial and independent, and whether the court was involved in conduct contrary to the public policy of Hong Kong. There have been instances where the Hong Kong courts have allowed enforcement of an award that was refused enforcement elsewhere, as in the case of *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2015] HKEC 330. In that case, the Hong Kong court found that the party against whom enforcement was sought had acted in breach of the principle of good faith applicable under Hong Kong law in enforcement proceedings, and as a result was not permitted to resist enforcement.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The Ordinance provides that orders made by an emergency arbitrator appointed under the arbitration rules to which the parties have agreed are enforceable in the same manner as a court order, with the CFI's leave. This is true whether the relief granted is within or outside of Hong Kong, but the court may refuse leave to enforce emergency relief

granted outside Hong Kong if the enforcing party cannot demonstrate that the relief achieves one of a number of objectives, including maintaining or restoring the status quo pending the determination of the dispute or prevention of harm or prejudice to the arbitral process.

47 Cost of enforcement

What costs are incurred in enforcing awards?

Costs associated with award enforcement are generally relatively modest unless the respondent opposes the application.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

In addition to the laws of Hong Kong, the courts often make reference to legal precedents of other common law jurisdictions, in particular England and Wales, and the CFA invites judges from other common law jurisdictions to sit on its bench. In addition, the Ordinance also provides that its interpretation is to be done with regard to the Model Law's international origin and the need to promote uniformity in its application and the observance of good faith, and so authorities from other Model Law jurisdictions may also be relevant to the interpretation. Nonetheless, as many arbitrators reside in Hong Kong tend to have a common law background, many would naturally be more familiar with the common law approach, than other approaches found in Model Law jurisdictions.

Insofar as discovery of documents goes, the Ordinance provides that unless otherwise agreed by the parties, the arbitral tribunal may make orders relating to discovery. The Ordinance further states that a person is not required to produce any document or evidence in arbitral proceedings that he or she could not be required to produce in civil proceedings before a court. The use of witness statements in arbitral proceedings are a common practice in Hong Kong.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Solicitors and barristers of Hong Kong are bound by their respective professional codes of conduct. Many of these individuals are also members of various other optional professional bodies and organisations, some of which provide their own codes of ethics. Best practice in Hong Kong would reflect the IBA Guidelines on Party Representation in International Arbitration.

LATHAM & WATKINS

Simon Powell
Desmond Gan

simon.powell@lw.com
desmond.gan@lw.com

18th floor, One Exchange Square
8 Connaught Place
Hong Kong

www.lw.com/offices/hongkong
Tel: +852 2912 2500
Fax: +852 2912 2600

50 Third-party funding**Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?**

As it currently stands third-party funding of arbitrations is not expressly permitted in Hong Kong. In October 2016, the Law Reform Commission of Hong Kong released a report recommending that the law should be amended to make it clear that third party funding of arbitrations taking place in Hong Kong is permissible.

51 Regulation of activities**What particularities exist in your jurisdiction that a foreign practitioner should be aware of?**

Foreign counsel, arbitrators, witnesses and other individuals involved in arbitration proceedings may require an appropriate visa in order to enter and, for counsel arbitrators, experts and the like, to work in Hong Kong.

Hungary

Chrysta Bán*

Bán, S Szabó & Partners

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Hungary is a contracting state to the New York Convention, which has been in force in Hungary since 3 June 1962. Hungary applies the Convention only to recognition and enforcement of awards made in the territory of another contracting state and only to disputes that qualify as commercial relationships, whether contractual or not, under the national law.

Hungary is also a party to the following multilateral conventions:

- the European Convention on International Commercial Arbitration of 1961;
- the International Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965;
- Convention on Conciliation and Arbitration within the Organization for Security and Co-operation in Europe of 1992; and
- the Energy Charter Treaty of 1994.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

As of 28 November 2016, Hungary has signed 58 bilateral investment treaties (BITs).

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary source of law relating to arbitral proceedings is Act LXXI of 1994 on Arbitration (the Arbitration Act). The Hungarian and English texts of the Arbitration Act can be found at www.mkik.hu/index.php?id=53. The Arbitration Act should be applied for all domestic and international arbitration proceedings before an ad hoc arbitration or arbitral tribunal seated in Hungary. Recognition and enforcement of foreign judgments and arbitral awards are also regulated by the Law Decree No. 13 of 1979 on International Private Law (the Conflicts Code), and the rules of the New York Convention. The law on enforcement of arbitration awards is the same as enforcement for final and binding court judgments.

Based on the Arbitration Act, an arbitration proceeding qualifies as international if:

- the registered offices or places of business of the parties are in different states; or
- the place of the arbitration determined by the parties in the arbitration agreement, or the place where a substantial part of the obligation of the parties has to be performed, or the subject matter of

the dispute is situated outside the state where the registered office (place of business) of the parties is situated.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The Arbitration Act is based on the UNCITRAL Model Law, with some minor differences. For example:

- a case may only be subject to arbitration if the parties may dispose freely over the subject matter of the proceedings;
- the number of the chosen arbitrators can only be odd;
- the presiding arbitrator has a privileged role as he or she is entitled to decide on the merit of the case in lack of majority opinion;
- arbitral proceedings are confidential unless the parties agree otherwise; and
- in international cases the arbitration court of the Hungarian Chamber of Commerce and Industry (HCCI), as a standing arbitral tribunal, shall function exclusively in Hungary, unless the law stipulates another standing arbitration court as exclusive jurisdiction.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

There are very few mandatory provisions under Hungarian law. They are mostly related to the minimum standards of due process and equal treatment of the parties, the right to request interim measures and procedural assistance from the regular courts and rules on denial of recognition and enforcement of the awards. Certain domestic matters, if arbitrated, have to be delegated to different standing arbitral tribunals organised in Hungary.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Pursuant to section 49 of the Arbitration Act, in the case of international arbitration proceedings the arbitral tribunal should decide the dispute in accordance with the substantive law that has been chosen by the parties for the dispute. If no such substantive law has been chosen by the parties, the applicable law shall be determined by the arbitral tribunal. According to the HCCI Rules, failing stipulation by the parties, the arbitral tribunal shall apply the law that it considers to be applicable according to international treaties, or in the lack of such a treaty, according to the rules of Hungarian private international law (conflicts rules). The Conflicts Code renders to apply Regulation (EC) 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations. When such a regulation does not apply, the conflicts rules of sections 25 and 26 of the Conflicts Code are applicable. In the event that the law cannot be identified under such rules, the law that has the closest connection with the case shall apply, taking into consideration the most characteristic elements of the case.

Generally, an arbitral tribunal shall adopt its decision in accordance with the terms of the contract as well as by taking into account the trade practices applicable to the transaction. An arbitration panel may render its decision on the basis of equity (*ex aequo at bono*) or as an amiable compositeur only, if it has been expressly authorised to do so by the parties.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The Arbitration Court attached to the Hungarian Chamber of Commerce and Industry:

Szabadság tér 7
1054 Budapest
Hungary
Tel: +36 1 474 5100
Fax: +36 1 474 5105
mkik@mkik.hu
www.mkik.hu

This standing arbitral tribunal may be selected for any domestic or foreign arbitration proceedings. The list of arbitrators is only indicative, the parties may elect persons not on the list as arbitrators.

The Money and Capital Markets Arbitration Court:

Markó utca 25
1055 Budapest
Hungary
Tel/Fax: +36 1 354 6213
valasztottbirosag@t-online.hu
www.valasztottbirosag.hu

This standing arbitral tribunal may, in certain circumstances, be elected (or has to be elected if arbitration is desired by the parties) in connection with money and capital market issues and related agreements. The arbitrator has to be selected from among the persons included on the list of arbitrators issued by the court.

The Energy Arbitration Court:

II János Pál Pápa tér 7
1081 Budapest
Hungary
Tel: +36 1 459 7769
titkarsag@aevb.hu
www.aevb.hu

Legal disputes that may be delegated to this arbitral tribunal are where at least one of the parties is a natural or legal person professionally engaged in business activities, possessing a licence issued by the Hungarian Energy Office or a similar foreign authority, and the dispute is related to its activities. Arbitrators do not have to be selected from the recommended list of arbitrators, as long as the person that is selected has the legal, economic and energy related skills required to arbitrate the given dispute.

Arbitration Court of the Hungarian Chamber of Agriculture:

Fehérvári út 89-95
1119 Budapest
Hungary
Tel: +36-1-802-6100
www.info.nak.hu

Title issues and land use rights related to agricultural land, if arbitrated, can be arbitrated only at the Arbitration Court of the Hungarian Chamber of Agriculture.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Pursuant to section 3 of the Arbitration Act, arbitration proceedings may take place, if the following conditions are met:

- at least one of the parties is a person dealing professionally with economic activity, and the legal dispute is in connection with this activity;
- the parties may dispose freely of the subject matter of the proceedings; and
- the arbitration was stipulated in an arbitration agreement.

However, there are some disputes that are not arbitrable, as listed in Chapters XV to XXIII of the Civil Procedure Act. These disputes mostly involve family law and civil status matters, such as matrimonial proceedings, other actions for the establishment of paternity and origin, termination of parental custody, or placement under guardianship or conservatorship, divorce proceedings, etc. Furthermore, administrative actions, challenging administrative decisions, actions for media remedy, liquidation proceedings, actions relating to employment and payment order procedures are not arbitrable.

In competition law matters, decisions of the antitrust authority on prohibition of unfair competition, and prohibition of abuse of dominant position, are not arbitrable. Private enforcement and related damage claims deriving from such acts are arbitrable. Theoretically, disputes between the parties relating to IP rights and infringement thereof may be conferred to arbitration if the parties have free disposal over the subject matter of the proceeding. Intracompany disputes are arbitrable.

From 13 June 2012, issues related to real property located in Hungary (eg, title issues, rental or use, usufruct or other rights in rem) between parties with a registered abode or other locations exclusively in Hungary, if arbitrated, can only be arbitrated by Hungarian arbitration courts, if the governing law of the issues is Hungarian law.

Title issues and land use rights related to agricultural land, if arbitrated, can be arbitrated only at the Arbitration Court of the Hungarian Chamber of Agriculture.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Requirements for an enforceable arbitration agreement are as follows:

- the arbitration agreement has to be in written form. Exchange of letters and telegrams through telex or any other means of exchanging messages between the parties that is capable of producing a permanent record of the messages are considered as written form;
- an arbitration agreement can be concluded either as part of another contract or as a separate agreement;
- moreover, if one of the parties states in his or her statement of claim that an arbitration agreement was in fact concluded between them, and the other party does not deny it in his or her defence, it should be considered that an arbitration agreement has been validly concluded between them;
- reference to a document containing an arbitration clause in a contract concluded in writing qualifies as an arbitration agreement, provided that a specific acceptance of the arbitration clause is made; and
- failure to raise an objection against the jurisdiction of the arbitral tribunal cures any problem deriving from lack of formalities.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

Typically the avoidance of a contract should not affect the enforceability of the arbitration clause. Avoidance of the agreement itself does not deprive the arbitral tribunal from deciding on its jurisdiction. Within this, the tribunal can decide about the validity of the arbitration agreement as well (see question 21). Rescission or other unilateral termination rights would not make the arbitration clause unenforceable. In the event of mutual termination of the parties, their termination agreement would be decisive to evaluate whether the termination also affects the arbitration clause of the terminated agreement.

Legal incapacity makes the arbitration agreement unenforceable if such a capacity problem existed at the time of entering into the arbitration agreement. Losing legal capacity later would not affect the validity of the arbitral agreement.

The death of a party typically would not make the arbitration clause unenforceable as the legal successor of the contractual position of the deceased party would be bound by the arbitration commitment as well.

Following the commencement of liquidation proceedings, any claim against the company under liquidation can be initiated exclusively at the liquidation court. On the other hand, liquidation proceedings do not affect the jurisdiction of the arbitral tribunal or other courts where a proceedings is already in progress.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Third parties may be bound by the arbitration agreement of others in the event of assignment of the entire contract and legal succession between companies, or succession of a contractual position because of the death of a person.

In the case of insolvency, the bankruptcy trustee is bound by the contracts previously concluded by the company in the event the arbitration proceedings have already been pending, or in the event the bankruptcy trustee initiates a claim as a plaintiff under a contract that has an arbitration clause.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The jurisdiction of the arbitration court cannot be extended to third parties, unless the third party accepts the jurisdiction of the arbitration court and each party agrees to the joinder. Generally, third parties who have an interest in the outcome of the arbitration may join the proceedings in order to support the position of one of the parties, provided that all original parties to the arbitration agreement, as well as the arbitration court approve such a joinder. The rules of the Money and Capital Markets Arbitration Court exclude the possibility of joinders.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the ‘group of companies’ doctrine?

The group of companies doctrine is not recognised in Hungary; consequently the jurisdiction of the arbitration cannot be extended to non-signatory parent and subsidiary companies.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

Multiparty arbitration agreements are not excluded by the Arbitration Act or the relevant rules of the different standing arbitral tribunals. It is advisable that the parties settle in their arbitration clause the rules of election of the arbitrators in the event there are more than two parties. According to the HCCI Rules, in the event that there are several claimants or defendants, the group of claimants and the group of defendants, respectively, may jointly designate one arbitrator each.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The following persons may not act as arbitrators:

- persons under 24 years of age;
- persons barred from public affairs by a final court judgment;

- persons placed under guardianship or conservatorship by a final court decision;
- persons sentenced to imprisonment by a final court verdict, until exonerated from the detrimental consequences of having a criminal record; and
- active judges.

Generally, the parties may freely select arbitrators: they do not need to choose from the list of arbitrators as this only serves the purpose of recommendation and providing information. At the arbitral tribunal of the Money and Capital Markets Arbitration Court, the parties may select exclusively from the list of the arbitration court. Parties are free to agree in advance to any qualification or special feature of the arbitrators, including their nationality, profession or special expertise. There is no statutory limitation against agreement on gender or religion and we are unaware of any actual decision or dispute either for or against such a choice in this respect.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

The general rule is contained in the Arbitration Act. According to this, in connection with arbitral tribunals containing three members, each party has the right to appoint one arbitrator, and the two arbitrators thus appointed shall designate the third arbitrator. When either party fails to appoint its own arbitrator within 30 days from the date of receipt of the other party’s request to do so, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the arbitrator shall be appointed, upon the request of any of the parties – unless the parties authorised a third independent person or authority for this function, or if such an independent authority fails to act in due time – by the court of law with jurisdiction under the Arbitration Act.

In the case of HCCI arbitration, the missing arbitrator is appointed by the chairman of the Arbitration Court. Similar rules apply in the case of other standing arbitral tribunals.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

The appointment of an arbitrator may terminate only upon his or her resignation, by a successful challenge procedure or by the mutual agreement of the parties in those cases where the Arbitration Act makes it possible.

A challenge may be exercised for the disqualification of an arbitrator only under those circumstances that are likely to give rise to justifiable doubts as to his or her lack of prejudice, independence or impartiality, or if he or she does not have the qualification agreed upon by the parties. The parties may agree in the procedure of challenging an arbitrator. In the absence of such an agreement, the party who intends to challenge an arbitrator has to send a statement in writing to the arbitral tribunal containing the reason for the challenge within 15 days of being informed about the composition of the arbitral tribunal, or learning information about the circumstances that have given reason for the challenge. If the challenged arbitrator refuses to resign or the other party does not agree to the challenge, then the arbitral tribunal will decide about the challenge. In the event that the arbitral tribunal rejects the challenge, the challenging party may, within 30 days, request the court of law to adjudge the challenge. The challenge proceedings at the court of law do not prevent the arbitral tribunal from continuing with its proceedings and from passing a decision, and do not stop the challenged arbitrator from participating in the proceedings and in the decision-making process.

If an arbitrator fails to comply with the statutory conditions to be an arbitrator owing to a reason arising after the acceptance of the appointment, or in the event the arbitrator de facto becomes unable to perform his or her functions or he or she fails to act in due time for any reason,

he or she may resign his or her office or the parties may agree on the termination of his or her appointment.

In HCCI arbitration the tribunal seeks guidance from the relevant IBA Guidelines.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Hungarian law does not identify specifically the type of legal relationship between an arbitrator and the party who nominated the arbitrator. Nevertheless, it derives from the Arbitration Act and the rules of other arbitration courts that arbitrators are independent and impartial and are not considered, and cannot act, as representatives of the parties. An arbitrator cannot accept any instructions from the party nominating him or her (or from any third person) in his or her official capacity.

The amount of the fees is determined by the rules of each arbitration court.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

There are no special statutory regulations on this issue. The HCCI Rules stipulate that the arbitrators, the HCCI Arbitration Court and its employees shall not be liable to any person, for any act or omission in connection with the arbitration.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Where an action is filed in connection with a matter that is subject to an arbitration agreement, the court has to reject the statement of claim without issuing any summons or has to dismiss the action upon the request of either party, unless it declares that the arbitration agreement is null and void, inoperative or inadmissible. The respondent has to submit its dismissal request, at the latest, upon filing its counterclaim on the merits of the case. The submission of the request for dismissal and the counterclaim on the merits does not impede the opening or the continuation of the arbitration proceedings and shall not impede the arbitral tribunal from the adoption of its award or decision while the issue is pending at the court.

In the event the court rejects the jurisdictional challenge and issues a decision on its jurisdiction or incorporates such a decision into its judgment on the merits, the respondent may challenge such a decision in the same manner and at each level of appeal and an extraordinary judicial review process is available for challenging court decisions under Hungarian law.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Primarily, the arbitral tribunal makes its own decision concerning its jurisdiction, including any objection in respect of the existence or validity of the arbitration agreement. Any objection with respect of the jurisdiction of the arbitral tribunal has to be made at the time of submission of the statement of defence. A plea claiming that the arbitral tribunal exceeded its jurisdiction has to be lodged without delay when the alleged excess of the jurisdiction was made. The arbitral tribunal may admit a later plea as well, in the event it finds the delay justified.

The arbitral tribunal may rule on the jurisdictional objection either when the objection was made, or in its decision on the merits of the case. In the event the arbitral tribunal rules that it has jurisdiction, either party may request, within 30 days from the date of receiving

such a ruling, the court of law to adjudge the jurisdiction of the arbitral tribunal. The arbitral tribunal may continue the proceedings and may adopt its award or other decision while the court proceeding regarding the jurisdiction issue is pending. The final and binding decision of the regular courts will ultimately settle the jurisdictional dispute.

As a last resort, either party, or any person who is affected by the award may file for action at regular court of law to have the arbitral award set aside if the arbitration agreement was not valid under the law to which the parties subjected the arbitration agreement, or in lack of such an indication, under Hungarian law; or the subject matter of the dispute is not capable of settlement by arbitration, or the arbitral tribunal exceeded the scope of the arbitration agreement.

Generally parties are precluded from raising jurisdictional objections at a later stage of the proceedings unless they did so within the time frames specified above.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Failing agreement of the parties, the place of arbitration should be determined by the arbitral tribunal in due consideration of the circumstances of the case. In the case of a standing arbitral tribunal, the place of arbitration should be the place registered in the charter documents as its seat. In addition, the arbitral tribunal may, unless otherwise agreed by the parties, convene at any place for consultation among its members, for hearing the parties, witnesses or experts, as well as for the inspection of physical evidence and documents. According to the HCCI Rules the place of the hearings is in Budapest, at the courtrooms of the HCCI Arbitration Court.

Failing agreement of the parties the Hungarian language should be used in the domestic proceedings, while in international proceedings the arbitral tribunal will define the applicable language and may order the translation of any evidence to the language of the proceedings.

23 Commencement of arbitration

How are arbitral proceedings initiated?

Unless otherwise agreed by the parties, in the case of an ad hoc arbitration the claimant can initiate arbitral proceedings by sending a notice of arbitration to the respondent. The proceedings of the tribunal shall open on the day on which the other party receives the notice of arbitration. In the case of a standing arbitral tribunal, proceedings can be initiated by sending a statement of claim to the arbitral tribunal.

In accordance with the HCCI Rules, all documents shall be submitted in a number of copies sufficient to provide one copy for each arbitrator, for each party and the secretariat. As far as possible, the documents shall also be submitted in electronic format. In the case of HCCI arbitration the statement of claim has to indicate:

- the exact names and addresses of the parties;
- the data establishing the jurisdiction of the HCCI Arbitration Court;
- the claim of the claimant;
- the legal grounds of the claim, the facts and reference to evidence supporting it;
- the amount in dispute;
- the name of the arbitrator appointed or a request for the appointment of an arbitrator by the HCCI Arbitration Court;
- a list of the documents attached to the statement of claim; and
- the proper signature of the claimant or the signature of his or her counsel with certified authorisation.

The parties have to send all documents submitted to the HCCI Arbitration Court simultaneously to the other parties as well, proving the delivery (eg, with notice of receipt). The claimant has to transfer the registration fee and submit the bank certificate thereof to the secretariat of the HCCI Arbitration Court. After submitting the statement of claim, the claimant shall also transfer the advance payment as communicated by the secretariat to the bank account of the HCCI Arbitration Court. The effectuation of the aforementioned payments is a precondition to the initiation of the proceedings.

24 Hearing

Is a hearing required and what rules apply?

Subject to the rules of the Arbitration Act the parties may freely agree upon the rules of procedure, or they may stipulate the use of the rules of procedure of a standing arbitral tribunal. In the lack of such an agreement the arbitral tribunal may determine the rules of procedure at its own discretion within the framework of the Arbitration Act.

Unless otherwise agreed by the parties, the arbitral tribunal holds a hearing and gives the parties the opportunity to submit their petitions. The arbitral tribunal hears the witnesses and experts present. The parties shall be given sufficient advance notice of any hearing and of any action of the arbitral tribunal undertaken for the purpose of inspection of physical evidence or documents.

All statements submitted to the arbitral tribunal by one party shall be communicated to the other party. Furthermore, any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Minutes shall be prepared of the arbitration proceedings, and one copy thereof shall be served upon each of the parties.

Unless otherwise agreed by the parties, arbitration proceedings are not public.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The Arbitration Act stipulates that the parties may submit, together with their statements and pleadings, all other documents that they consider relevant for the case, or may refer to any document or other evidence that they plan to submit. The arbitral tribunal may order that any written evidence should be translated in the language of the procedure.

The arbitral tribunal shall hear the witnesses and experts present voluntarily, however, it may not impose a fine or apply any means of coercion. Upon request of the arbitral tribunal the local court shall provide legal assistance in the form of conducting the procedure for the presentment of evidence, or by application of coercive measures (see question 26).

Unless otherwise agreed by the parties, the arbitral tribunal may appoint experts if any special expertise is required for the establishment or judgment of any relevant fact or other circumstance that the arbitral tribunal is lacking. The arbitral tribunal may also appoint one or more experts to provide an opinion on issues specified by the tribunal, and may order either party to provide information to the expert or access to any relevant documents or objects to the expert for inspection.

According to the HCCI Rules, each party must prove the circumstances on which he or she bases a claim or a defence. The arbitral tribunal may also instruct a party to submit further evidence, order the presentation of expert opinion, obtain evidence from third persons and order the hearing of witnesses. The parties shall submit the original written evidence or a copy thereof, in such a number of copies that enables each party to be provided with one copy and the HCCI Arbitration Court with four copies. If the party fails to submit the required evidence, the arbitral tribunal may make its decision on the basis of the available information and evidence.

The manner of taking evidence is to be determined by the arbitral tribunal and the arbitrators evaluate the evidence according to their inner conviction.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

The general rule is that in arbitration proceedings the court may intervene or proceed only if it is specifically allowed by the Arbitration Act. The Arbitration Act stipulates that it is not incompatible with the arbitration proceedings if either party requests a court for provisional measures and the court grants such measures even before or during the proceedings. Moreover, the court may order protective measures in a case pending before an arbitral tribunal. As already mentioned in question 25, if the presentment of evidence before the tribunal is likely to entail considerable difficulties or unreasonable extra costs, upon the

request of the arbitral tribunal the local court shall provide legal assistance in the form of conducting the procedure for the presentment of evidence, or will apply coercive measures, if necessary, in the procedure if conducted by the arbitration court.

The arbitral tribunal shall approach the local court on whose territory the presentment of evidence may be conducted most efficiently. In Budapest, the Pest Central District Court has jurisdiction in such cases.

Following the issuance of the arbitral award, the court may suspend the enforcement of the award or may overturn (set aside) the award upon the request of a party under certain circumstances (see question 42).

27 Confidentiality

Is confidentiality ensured?

According to the Arbitration Act, the hearings are not public and the arbitrators are fully committed to confidentiality with regard to all information they have received when discharging their responsibilities, including after the termination of the proceedings.

According to the HCCI Rules, the confidential nature of the proceedings shall be respected by every person who is involved in whatever capacity. Information on the proceedings to third persons can only be given upon agreement of the parties and the conciliator or mediator. The HCCI hearings are not public; only the presiding arbitrator, the members of the arbitral tribunal, the parties, the recorder, the interpreter, the experts, the witnesses and the president of the HCCI Arbitration Court may be present at the hearings, or any other persons whose presence has been consented to by the arbitral tribunal and all parties. Further, the HCCI Arbitration Court may not give any information on pending proceedings and on its decisions, or the contents thereof. The decision of the tribunal may be published in legal journals or special publications only with the permission of the president of the Arbitration Court and only in such a way that the interests of the parties will not suffer any harm. Even then, the names of the parties, their countries of residence, the nature and counter-value of the subject matter can only be included in a publication with the express consent of the parties. By stipulation of the HCCI Arbitration Court, the parties undertake that they shall also comply with these rules and shall ensure that others do so.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Either party may submit a request before or during the arbitration proceedings to an ordinary court requesting the imposition of interim or provisional measures, and the court may grant such measures. The court may order protective measures in a case pending before an arbitral tribunal, if the party requesting such a measure can produce an authentic instrument or a private document with full probative force in proof of the inception, quantity, and expiry of his or her claim. The party filing for such intervention has to inform the arbitral tribunal on his or her request as well as on the decision of the court.

Coercive force cannot be applied by the arbitral tribunal, only by the ordinary court.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

No emergency arbitrators are used in Hungarian arbitration proceedings.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The general rule is that the arbitral tribunal may, upon request, order either party to implement provisional measures to the extent that the

Update and trends

No legal reform in the field of arbitration is expected. The Code on Civil Procedure is under major revision, but it is unlikely that it will modify the rules relevant to arbitration.

Hungary is currently a party to five ICSID investment arbitration proceedings.

In April 2015, the ICSID arbitration court ruled in case No. ARB/12/3 (Accession Mezzanine Capital (British) and Danubius Kereskedőház Zrt (Hungarian) as claimants and Hungary as defendant) that the ICSID arbitration court had no jurisdiction in the case presented to the court, since there were no assets affected by the action of the Hungarian state.

tribunal deems necessary, and may require either party to provide appropriate security in connection with such a measure. In the event the party does not obey voluntarily with such a measure, only regular courts can order enforcement of the measure. This would take considerable time and would present the possibility of different appeals available to the obligor within the regular court system.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Neither the Arbitration Act nor the individual arbitration rules of the different arbitration institutions authorise the arbitrators to order sanctions against the parties or their counsels.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Unless otherwise agreed by the parties, decisions on the merit of the case shall be passed by a majority of votes of the arbitrators. In the absence of a majority decision the presiding arbitrator shall have the decisive vote. Procedural questions shall be decided by the presiding arbitrator if so authorised by the parties or by all other arbitrators.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

If the dissenting arbitrator does not sign the award, this fact has to be indicated in the award. The dissenting arbitrator may incorporate into writing his or her opinion, taking into account the secrecy rules.

34 Form and content requirements

What form and content requirements exist for an award?

The arbitral award and the ruling for the termination of the proceedings has to be made in writing and has to contain (unless it is an award incorporating the settlement agreement of the parties) the reasons for the decision. It also has to include the date of the award, the place of the arbitration and the costs of the proceedings, including the fee of the arbitrators and the manner of satisfaction. The award has to be signed by the arbitrators and the standing arbitration. In the case of a multi-member tribunal, the signatures of the majority of the arbitrators is sufficient, provided that the reason for any omitted signature is stated.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The Arbitration Act does not contain any general rule on the time frame of the proceedings. Under the HCCI Rules the award has to be passed within six months from the setting up of the tribunal 'whenever it is possible', except under the expedited proceedings, in which case the proceedings have to be completed within 100 days from the filing of the claim 'whenever it is possible'.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Time limits for filing a request with the arbitral tribunal for a correction, the issuance of a supplementary award or provision of interpretation, as well as the time limit for filing a court claim for the setting aside of the award, commence on the date of delivery of the award.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The arbitral tribunal may pass a final, a partial or an interim award on the merits of the case, or may terminate the proceedings. The tribunal, at the request of the parties, incorporates the settlement agreement of the parties in the form of an award, provided that it finds the settlement in compliance with the law.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

The arbitral tribunal terminates the proceedings, if:

- the claimant fails to present its statement of claim;
- the claimant withdraws its claim, unless the respondent objects thereto and the tribunal finds that the respondent has a legitimate interest in the final settlement of the dispute;
- the parties agree to the termination of the proceedings;
- the parties reach a settlement; or
- the tribunal finds that the continuation of the proceedings has, for any other reason, become unnecessary or impossible.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Typically, arbitration decisions follow the local rules of costs allocation, according to which the losing party has to cover or reimburse all costs and expenses of the winning party.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Interest may be awarded in accordance with the relevant rules of law applicable to the merit of the case.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The arbitral tribunal may correct any errors of names (including misspellings), any errors in numbers or calculations or any other typing errors on its own initiative or on the request of either party if found justified. If so agreed by the parties, either party may request the arbitral tribunal to provide an interpretation of a specific part or point of the award. The arbitral tribunal may issue such an interpretation if it finds

the request justified. The interpretation shall comprise a part of the disposition of the award. Either party may file a request for correction or interpretation within 30 days from receipt of the award and the tribunal has 30 days from receipt of such a request to respond.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

Arbitration awards cannot be appealed at courts.

The party or any person who is affected by the award, may file, within 60 days from delivery of the award, a request with the court of law for setting aside the award if:

- the party concluding the arbitration contract lacked legal capacity or competence;
- the arbitration agreement is not valid under the law to which the parties have subjected it, or in the lack of such an indication, under Hungarian law;
- the party was not given proper notice about the proceedings or was unable to present his or her case because of other reasons;
- the award was made in a legal dispute that was not covered by the arbitration agreement;
- the composition of the tribunal or the procedure did not comply with the agreement of the parties (unless such an agreement was in violation of the Arbitration Act), or in the absence of such an agreement, was in violation of the Arbitration Act;
- the subject matter of the dispute is not capable of settlement by arbitration under Hungarian law; or
- the award is contrary to Hungarian public policy.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level?

Approximately what costs are incurred at each level? How are costs apportioned among the parties?

The judgment of the court issued on the challenge issue cannot be appealed at court but an extraordinary review can be requested at the Supreme Court of Hungary. Decision on the challenge issue may take about one year on each level. Under Hungarian law, costs of the proceedings, including reasonable attorneys fees, are typically borne by the losing party.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

An arbitration award has the same effect as that of a binding court decision. The court refuses to enforce the arbitration award if:

- the subject matter of the dispute is not subject to arbitration under Hungarian law; or
- the award is contrary to Hungarian public policy.

In respect of foreign arbitration awards, Hungary is a party to the 1958 New York Convention, and Council Regulation (EC) 44/2001 and Regulation 805/2004 of the European Parliament, and the Council Regulation has also been implemented in Hungary.

Recognition of foreign awards does not require a separate procedure. The party who wishes to enforce an arbitral award has to supply the original or a certified copy thereof with the court of law. In the event the award is not in the Hungarian language, the party has to furnish a certified Hungarian translation as well.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

With regard to recognition and enforcement of foreign awards, the courts are bound by the rules discussed above. We are unaware of published decisions that relate specifically to this particular topic.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

There are no specific rules regarding the enforcement of the decisions of emergency arbitrators. Consequently, if the decision and the arbitral proceedings meet the requirements set by the New York Convention, the decision may be subject to enforcement proceedings.

47 Cost of enforcement

What costs are incurred in enforcing awards?

A procedural fee of 1 per cent of the claimed amount (with a minimum 5,000 forint and maximum 350,000 forint) and 50 per cent of the service fee of the executor (in the amount of 0.5 to 3 per cent progressively defined) and 50 per cent of that latter fee for the expenses of the court executor has to be advanced by the claimant. There might be additional procedural expenses (eg, registration of the execution right in the land registry, etc). In the event the execution is successful, the court executor is entitled to a certain percentage of the collected amount (5 to 10 per cent progressively defined). The attorney's fees in international cases are typically agreed upon in the retainer contract.

Bán, S. Szabó & Partners

Chrysta Bán

cban@bansszabo.hu

József nádor tér 5 – 6
1051 Budapest
Hungary

Tel: +36 1 266 3522
Fax: +36 1 266 3523
www.bansszabo.hu

Other**48 Judicial system influence****What dominant features of your judicial system might exert an influence on an arbitrator from your country?**

No discovery, as it is known in the common law jurisdictions, is part of the legal system in Hungary. This means that the party who has the burden of proof or seeks to provide evidence otherwise, has a more difficult task to access and provide evidence that is in the possession of the other party. The court, in the course of the proceedings, at the request of the party, may oblige the other party to provide certain documents. Written testimonies are not used, if testimony is necessary; typically the witness has to appear at the court to testify. Party officers may be heard on behalf of the party. Their testimony will be treated as a presentation of the party and not as a testimony of an independent witness.

49 Professional or ethical rules applicable to counsel**Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?**

There are no special ethical rules in Hungary applicable to international arbitration. Some concepts of the IBA Guidelines prevail in practice.

50 Third-party funding**Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?**

No regulatory restrictions exist regarding third-party funding of arbitral claims.

51 Regulation of activities**What particularities exist in your jurisdiction that a foreign practitioner should be aware of?**

Active Hungarian judges, judges of the Constitutional Court and high-ranking state administration officials may not act as arbitrators.

* *The author would like to thank Kinga László-Bölcskei for her assistance in the preparation of this chapter.*

India

Shreyas Jayasimha, Mysore Prasanna, Mihir Naniwadekar, Rajashree Rastogi and
Pinaz Mehta

Aarna Law

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

India is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed by India on 10 June 1958 and ratified on 13 July 1960. The Foreign Awards (Recognition and Enforcement) Act, 1961 was enacted to give effect to the New York Convention. The Convention has been in force in India since 11 October 1960.

Under article I of the Convention, India has declared that the Convention applies only to recognition and enforcement of awards made in the territory of another contracting state under the Convention and only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under Indian law.

India is also a contracting party to the Geneva Convention of 1927. However, this Convention ceased to apply to those awards to which the New York Convention applies.

Until 1996, three enactments governed the law of enforcement of arbitration awards in India. The Arbitration and Conciliation Act, 1940 for the enforcement of domestic awards, the Arbitration (Protocol and Convention) Act, 1937 to give effect to the Geneva Convention awards, and the Foreign Awards (Recognition and Enforcement) Act, 1961 to give effect to the New York Convention awards.

The enactment of the Arbitration and Conciliation Act, 1996 (the Arbitration Act) in August 1996 repealed all of the above statutes. The Arbitration Act contains two parts. Part I deals with any arbitration conducted in India and the enforcement of awards thereunder and Part II deals with the enforcement of foreign awards to which the New York Convention or the Geneva Convention applies.

Through the Arbitration and Conciliation (Amendment) Ordinance 2015, notable changes were brought about to the Arbitration Act. The Ordinance was thereafter passed by the two houses of parliament, the Lok Sabha and the Rajya Sabha, on 17 December 2015 and 23 December 2015. The Arbitration and Conciliation (Amendment) Act 2015 (the Amendment Act), received the assent of the Hon'ble President of India on 31 December 2015 and has deemed to have come into force on 23 October 2015. The Amendment Act was notified in the Official Gazette of India on 1 January 2016.

The 246th Law Commission Report (LCR) had proposed amendments to various provisions of the Arbitration Act, of which only certain select recommendations have been included into the Amendment Act.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Yes, bilateral investment treaties exist with other countries. As on August 2016, India is a signatory to 82 bilateral investment promotion and protection agreements (BIPAs). However, with the adoption of the

New Model BIPA on 28 December 2015, the government has decided to terminate all the BIPAs (47 BIPAs) that are up for termination so that new BIPAs, on the lines of the New Model BIT, may be adopted. With respect to the remaining 25 BITs that are not yet up for termination (ie, where the initial duration for which the BIT was signed for has not expired), the government has decided to issue a Joint Interpretative Statement interpreting the standards and application of various terms of the BIT.

India is also a signatory to several multilateral treaties on investments including the SAFTA (2004), BIMSTEC Framework Agreement (2004), ASEAN-India Framework Agreement (2004), India-MERCOSUR Framework Agreement (2003), EC-India Cooperation Agreement (1993), GCC-India Framework Agreement (2004) and ASEAN-India Investment Agreement (2014) among several other CECA, CEPA, FTA, EPA and Framework Agreements. India is signatory to a total of 14 multilateral agreements.

India has recently, on 28 December 2015, adopted the New Model BIT that incorporates several key changes in investor-state protection.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

In India, the primary domestic source of law relating to domestic and foreign arbitral proceedings and recognition and enforcement of awards is the Arbitration Act. The Arbitration Act lays down guidelines for domestic arbitration, international commercial arbitration, conciliation and enforcement of domestic and foreign awards. Part I of the Arbitration Act provides general provisions, applicable to all arbitral proceedings in India, and Part II provides guidelines for the enforcement of certain foreign awards. Chapter I of Part II covers awards under the New York Convention, while Chapter II of Part II covers awards under the Geneva Convention. Section 36 of the Arbitration Act provides for enforcement of the arbitral award under the Code of Civil Procedure in the same manner as if it were a decree of a court.

Sections 44 and 53 of the Arbitration Act define a 'foreign award' as an arbitral award on differences arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India. The award should be in pursuance of an agreement in writing for arbitration and the award made in a country that has been identified as having a reciprocating jurisdiction.

The term 'commercial' has not been defined by the Arbitration Act, however Indian courts have propounded a wide interpretation of the term. In *Union of India and Ors v Lief Hoegh Co* (Norway), a 1984 case, the concept of a commercial relationship was taken to mean those arising out of, or incidental or ancillary to, business dealings. Guidance can also be taken from the UNCITRAL Model Law, which considers 'consulting' and 'commercial representation or agency' to fall under this category as well.

The application of the provisions of sections 9, 27 and clause (a) of subsection (1) and subsection (3) of section 37 of Part I of the Arbitration Act shall, per the Amendment Act, also apply to an international commercial arbitration, even if the place of arbitration is outside India, unless parties contract to the contrary. An arbitral award made or to be made in such place would be enforceable and recognised under the

provisions of Part II of the Arbitration Act. Section 9 pertains to interim measures sought from a court, Section 27 refers to court assistance in taking evidence, Section 37(1)(a) relates to right to appeal against the refusal of a court to refer the parties to a suit to arbitration where there is an arbitration agreement between such parties, and section 37(3) states that no second appeal shall lie from an order passed in appeal under section 37 except to the Supreme Court of India.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The Arbitration Act is divided into four parts. Parts I and II contain extensive provisions relating to arbitration agreements, the composition of an arbitral tribunal, the jurisdiction of arbitral tribunals, the conduct of arbitration proceedings, interim measures by the court, recourse against arbitral awards and enforcement of arbitral awards. Part III deals with conciliation proceedings, the procedure for appointment and conduct of conciliation proceedings. The role of the conciliator is sufficiently elucidated in this Part. Part IV provides 'Supplemental Provisions' to remove any procedural difficulty or ambiguity.

Part I is largely based on the original 1985 version of the UNCITRAL Model Law (the Model Law). Part II mostly deals with enforcement of foreign awards governed by the New York Convention Awards and the Geneva Convention Awards.

The key differences between the Arbitration Act and the Model Law are outlined below:

- the Arbitration Act states that the number of arbitrators shall not be an even number, but the Model Law has no such restriction;
- if the parties fail to determine the number of arbitrators, the arbitral tribunal, according to the Arbitration Act, shall consist of a sole arbitrator, compared to three arbitrators under the Model Law;
- the power of appointment of an arbitrator under the Arbitration Act is vested with the chief justice of the concerned High Court or any person or institution designated by him or her, and in the case of international commercial arbitrations, with the Chief Justice of India or the person or institution designated by him;
- according to the Arbitration Act, an appeal can be filed against a decision on the appointment of an arbitrator made by a chief justice as against no appeal under the Model Law;
- article 8 of the UNCITRAL Model Law enabled a court to decline to refer parties to arbitration if it is found that the arbitration agreement is null and void, inoperative or incapable of being performed. Section 8 of the Arbitration Act uses the expansive expression 'judicial authority' rather than 'court' and the words 'unless it finds that the agreement is null and void, inoperative and incapable of being performed' do not find place in section 8;
- an award can also be challenged on the ground that it is in conflict with the public policy of India under the Arbitration Act;
- if any person is found guilty of any contempt of the arbitral tribunal, then according to the Arbitration Act he or she shall be subject to penalties or punishments similar to those incurred for like offences in suits tried before a court;
- unlike the Model Law, interim measures also include measures for securing the amounts in dispute in the arbitration;
- the court has the power to grant interim measures even after the making of the arbitral award but before it is enforced. Under the Model Law, the court can grant interim measures only before or during arbitral proceedings;
- the Arbitration Act provides for a period for challenging the constitution of an arbitral tribunal before the court; and
- any controversy concerning the failure or impossibility of an arbitrator to act and the termination of the mandate of the arbitrator by the court is subject to appeal, as against the Model Law that specifically provides that such decision of the court shall not be subject to an appeal.

The Arbitration Act also provides for the following additional provisions that do not form part of the Model Law:

- awards of interest (section 31);
- costs of arbitration (section 31);

- the award will be enforced as a decree of the court if it is not challenged within the period provided under section 34 or the challenge made has been rejected by the court (sections 35 and 36);
- appeals against (section 37):
 - refusal to refer parties to arbitration under section 8;
 - grant or refusal of an interim measure by the court or the arbitral tribunal;
 - acceptance or refusal of a challenge to set aside an award; and
 - acceptance of a plea that the arbitral tribunal does not have jurisdiction or that the arbitral tribunal has exceeded its scope of authority;
- the deposit of an amount or a supplementary deposit as an advance for the costs of arbitration (section 38);
- arbitration tribunals shall have a lien on the arbitral award for any unpaid costs of arbitration and recourse to the courts by a party in respect thereof (section 39);
- arbitration agreements are not discharged on the death of a party (section 40); and
- provisions in case of insolvency (section 41).

The Amendment Act has brought about the following changes that are not present in the Model Law:

- the tribunal has to decide and make an award within a period of 12 months, which is extendable by a maximum of six months with the consent of both parties. If the award is not made within such a time period, the mandate of the arbitrators stands terminated (section 29A);
- a fast-track procedure has been introduced for resolution of disputes within six months where proceedings are carried on without oral submissions (section 29B);
- applications for the appointment of arbitrators by the courts shall be endeavoured to be disposed of within 60 days (section 11);
- the text of the IBA Guidelines on the Conflict of Interest in International Arbitrations has been incorporated (section 12 read with the Fifth and Seventh Schedules);
- the court has the power to grant interim relief in arbitrations seated outside India (section 9); and
- costs will follow an arbitral award (section 31A).

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The parties are free to make agreements in certain matters such as determining the number of arbitrators, the procedure for appointing an arbitrator, the seat and venue of arbitration and determining the law that governs the arbitration proceedings.

However, in the case of arbitrations with a seat in India, certain provisions on procedure contained in Part I of the Arbitration Act are mandatory and parties are not allowed to depart from the same. The following is an indicative list of such provisions:

- the arbitration agreement must be in writing (section 7);
- the power of a court to refer parties to arbitration (section 8);
- the court's power to grant interim measures (section 9) (per the Amendment Act, this power is now extended to international commercial arbitrations even if not seated in India unless the parties agree to the contrary);
- the number of arbitrators shall not be an even number (section 10);
- the procedure and period for appointment of arbitrator by the court, failing an agreement between the parties (section 11);
- the procedure for challenge to the appointment of an arbitrator, the grounds and time available for the same (section 12 and 13) by the parties;
- the procedure in the event of failure or impossibility of an arbitrator to act (sections 14 and 15);
- the procedure upon a plea taken by a party that the arbitral tribunal does not have jurisdiction to entertain the dispute and the rights of the parties thereof (section 16);
- the equal treatment of parties (section 18);
- the submission of statements of claim and defence (section 23);
- an arbitration with a seat in India (other than an international commercial arbitration), shall be conducted in accordance with the Arbitration Act (section 28);

- the form and contents of an arbitral award (section 31);
- the termination of arbitral proceedings upon final arbitral award or withdrawal of claim by a claimant or the mutual agreement of parties or for any other reason (section 32);
- correction, interpretation and addition to an award in the time period provided therein (section 33);
- setting aside of an arbitral award and grounds thereof (section 34);
- enforcement of an arbitral award (sections 35 and 36);
- appeals against certain orders of the court or arbitral tribunal (section 37) (certain provisions of section 37 shall also apply to international commercial arbitrations seated outside India unless the parties agree to the contrary under the Amendment Act);
- provisions for deposits and liens on arbitral awards (sections 38 and 39);
- provisions in respect of death of a party and insolvency (sections 40 and 41); and
- provisions relating to jurisdiction and limitation (sections 42 and 43).

The Amendment Act has also inserted the following mandatory provisions:

- provisions for mandatory time period for deciding and making an award by the tribunal (section 29A); and
- provisions with respect to the cost regime (section 31A).

The Delhi High Court, on 5 December 2016 in *Virgoz Oils & Fats Pvt Ltd v National Agricultural Co-Operative Marketing Federation of India* declined to enforce an award passed in relation to an arbitration agreement that arose from a contract that had not been concluded. The Court held that the Arbitration Act mandates arbitration agreements to be in writing and in this case, since the contracts had not been signed, there was no concluding enforceable contract between the parties and the entailing invocation of the arbitration clause.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

For domestic arbitrations in India (ie, arbitrations, other than international commercial arbitration, with a seat in India), the applicable law is the substantive law of India in force at the time (ie, the Arbitration Act). This is a mandatory provision contained in section 28(1)(a) of the Arbitration Act and cannot be contracted by the parties.

For international commercial arbitrations, the arbitral tribunal shall decide the disputes in accordance with the rules of law designated by the parties as applicable to the substance of the dispute. This is a mandatory provision contained in section 28(1)(b)(i) of the Arbitration Act and cannot be contracted by the parties. If the parties fail to designate the law, the arbitral tribunal shall apply rules of law it considers to be appropriate in the circumstances of the case. This provision is contained in section 28(1)(b)(iii) of the Arbitration Act and cannot be contracted by the parties. The law applied is generally the law with which the contract is most closely connected. Factors such as the nationality of the parties, the place of performance of the contract, the place the contract was entered into, and the place of payment under the contract can be examined to ascertain the intention of the parties.

The designation of the law of any country by the party is construed to mean the substantive law of the country in question, unless there is an express designation by the parties to the contrary. The arbitral tribunal shall decide *ex aequo et bono* or as amiable compositeur only if the parties have expressly authorised it to do so.

The Amendment Act also now provides that in any event and in all cases, the arbitral tribunal shall take into account the terms of the contract and trade usages applicable to the transaction; a relaxation of the earlier provision that mandated that the terms of the contract must be strictly adhered to while deciding and making an award (section 28(3)).

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The most prominent arbitral institutions in India are:

The Indian Council of Arbitration (ICA)
Room 112, Federation House
Tansen Marg
New Delhi 110001
India
Tel: +91 11 2371 9103 / 2331 9760 / 2373 8760 70
Fax: +91 11 2332 0714 / 2372 1504
ica@touchtelindia.net
www.icaindia.co.in

The International Centre for Alternative Dispute Resolution (ICADR)
Plot No. 6
Vasant Kunj Institutional Area, Phase-II
New Delhi 110070
India
Tel: +91 11 2613 9704 / 2613 9706, 6593 1884, 6593 1886
Fax: +91 11 2613 9707
icadr@nic.in
http://icadr.nic.in

The Delhi Arbitration Centre (DAC)
Delhi High Court Campus
Shershah Road
New Delhi 110 003
India
Tel: +91 11 2338 6492
Fax: +91 11 2338 6493
delhiarbitrationcentre@gmail.com
www.dacdelhi.org

The Arbitration Centre – Karnataka
Arbitration Centre – Karnataka (Domestic and International)
'Khanija Bhavana', No. 49, 3rd Floor, East Wing
Racecourse Road
Bangalore 560 001
Karnataka
India
Tel: +91 80 2295 4571 / 2295 4572 / 2295 4573
Fax: +91 80 2295 4572
arbkarblr@gmail.com
www.arbitrationcentreblr.org

Nani Palkhivala Arbitration Centre,
New No. 22, Karpagambal Nagar,
Mylapore, Chennai – 600 004
Tel: +91 44 6513 0808 / 6565 1329 / 6565 1330
Fax: +91 44 24986697
www.nparbitration.in/

FICCI Arbitration and Conciliation Tribunal (FACT)
Federation House
Tansen Marg
New Delhi 110 001
India
Tel: +91 11 2331 9849 / 2373 8760 70
Fax: +91 11 2332 0714 / 2372 1504
arbitration@ficci.com
www.ficci-arbitration.com

Indian Institute of Arbitration & Mediation
G-254, Panampilly Nagar, Cochin 682 036
Kerala
India
Tel: +91 484 4017731 / 6570101
info@arbitrationindia.com
cochin@arbitrationindia.com
www.arbitrationindia.org/index.html

The Mumbai Centre for International Arbitration
20th Floor, Express Towers, Ramnath Goenka Marg
Nariman Point, Mumbai
Maharashtra 400021
India
Tel: +91 22 6105 8888
contact@mcia.org.in
http://mcia.org.in/

Of these, the Indian Council of Arbitration (ICA) is the most recognised and widely used institution and is governed by Rules of Arbitration and Conciliation (as amended on and with effect from 8 May 2012) for domestic arbitration. The ICA now also provides for Rules of International Commercial Arbitration (with effect on and from 1 January 2014).

The Mumbai Centre for International Arbitration (MCIA), which was formally launched in Mumbai, India on 8 October, 2016, is a first-of-its-kind arbitral institution in India, established in a joint initiative between the government of Maharashtra and the domestic and international business and legal communities. The MCIA aims to be India's premier forum for commercial dispute resolution and provides its own rules for the conduct of arbitration. The MCIA Rules have come into effect from 15 June 2016. The administration fees and the arbitrator's fee schedules have been reproduced below.

Sum in dispute (rupees)	Administration fees (rupees)	
	Fixed	Variable
0 – 1,000,000	50,000	0.000 per cent
1,000,001 – 5,000,000	50,000	4.375 per cent
5,000,001 – 10,000,000	225,000	3.500 per cent
10,000,001 – 50,000,000	400,000	2.000 per cent
50,000,001 – 100,000,000	1,200,000	1.300 per cent
100,000,001 – 500,000,000	1,850,000	0.319 per cent
500,000,001 – 1,000,000,000	3,125,000	0.250 per cent
1,000,000,001 – 5,000,000,000	4,375,000	0.062 per cent
5,000,000,001 – 10,000,000,000	6,850,000	0.020 per cent
10,000,000,001 –	7,850,000	

Sum in dispute (rupees)	Arbitrator's fees (rupees)	
	Fixed	Variable
0 – 1,000,000	100,000	0.000 per cent
1,000,001 – 5,000,000	100,000	3.750 per cent
5,000,001 – 10,000,000	250,000	3.000 per cent
10,000,001 – 50,000,000	400,000	1.438 per cent
50,000,001 – 100,000,000	975,000	0.900 per cent
100,000,001 – 500,000,000	1,425,000	0.463 per cent
500,000,001 – 1,000,000,000	3,275,000	0.115 per cent
1,000,000,001 – 5,000,000,000	3,850,000	0.104 per cent
5,000,000,001 – 10,000,000,000	8,025,000	0.053 per cent
10,000,000,001 –	10,650,000	

In relation to the ICA, the arbitrator's fee (for each arbitrator) and ICA administrative charges in international commercial arbitrations (in US Dollars) are fixed separately with regard to the amount in dispute including a determined interest in each case, as follows:

Amount of claim and counterclaim	Arbitrator's fee for each arbitrator	ICA administrative charges
Up to 50,000	4,000	2,000
From 50,001 to 1,00,000	4,000 plus 4 per cent of amount over and above 50,000	2,000 plus 2 per cent of amount over and above 50,000
From 1,00,001 to 5,00,000	6,000 plus 2 per cent of amount over and above 1,00,000	3,000 plus 0.5 per cent of amount over and above 1,00,000
5,00,001 to 10,00,000	14,000 plus 1.5 per cent of amount over and above 5,00,000	11,000 plus 0.4 per cent of amount over and above 5,00,000
Over 10,00,000	21,500 plus 1 per cent of amount over and above 10,00,000	13,000 plus 0.3 per cent of amount over and above 10,00,000

The fees of an Arbitrator in a domestic arbitration ranges from 60,000 rupees for a claim up to 500,000 rupees to a maximum of 3 million rupees for claims over 100 million rupees. Administrative charges are separately payable as per the amount of claim in the arbitration.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

There are certain disputes that are not arbitrable in India, although the Arbitration Act does not expressly exclude any dispute as non-arbitrable. However, courts can set aside the award if the substance of the dispute is such that settlement by arbitration is not possible under the laws in force, or if the award conflicts with the public policy of India.

In general, disputes that can be decided by a civil court that involve rights in personam can be referred to arbitration.

However, the following matters may not be referred to arbitration:

- matrimonial;
- testamentary;
- guardianship of a minor or disabled person;
- insolvency;
- criminal proceedings;
- winding up or dissolution of a company;
- matters arising out of a trust deed or the Indian Trusts Act;
- matters relating to competition law; and
- matters relating to eviction or tenancy governed by special statutes, enforcement of mortgage, matters under the securitisation laws and in general matters for which the jurisdiction lies with the Debt Recovery Tribunal.

In *Shri Vimal Kishor & Ors V Mr. Jayesh Dinesh Shah & Ors* decided on 17 August 2016, the Supreme Court held that cases arising out of a trust deed cannot be the subject matter of arbitration.

In *Booz Allen and Hamilton Inc v SBI Home Finance Ltd & Ors* (AIR 2011 SC 2507), the Supreme Court ruled that a suit for enforcement of a mortgage by sale of the mortgaged asset is non-arbitrable, as it involved a right in rem.

In a recent judgment of the Bombay High Court in *Eros International Media Ltd v Telemax Links India Pvt Ltd* (decided on 12 April 2016) copy-right disputes were held to be arbitrable.

In *N Radhakrishnan v Maestro Engineers and Ors* (2010) 1 SCC 72, the Supreme Court held that when the seat of arbitration is in India, issues involving criminality, serious fraud and financial malpractices can only be resolved by a court. However, this decision of the Supreme Court has been held to be per incuriam in *Swiss Timing v Organising Committee, Commonwealth Games 2010* (2014) 6 SCC 677.

In *World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore) Pte Ltd* (AIR 2014 SC 968), the Supreme Court held that 'in the case of such arbitrations covered by the New York Convention, the Court can decline to make a reference of a dispute covered by the arbitration agreement only if it comes to the conclusion that the arbitration agreement is null and void, inoperative or incapable of being performed, and not on the ground that allegations of fraud or misrepresentation have to be inquired into while deciding the disputes between the parties.'

The Supreme Court further held that section 45 of the Arbitration Act does not provide that the court will not refer the parties to arbitration if the allegations of fraud have to be inquired into. Section 45 provides that only if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed, it will decline to refer the parties to arbitration.

Pursuant to the Amendment Act, it was clarified (both under section 34 (challenge to domestic awards) and section 48 (enforcement of foreign awards)) that an award is in conflict with the public policy of India, if the making of the award was induced or affected by fraud or corruption.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The Arbitration Act provides that all arbitration agreements must be in writing. Section 7 of the Arbitration Act states that an arbitration agreement:

1. *May be in the form of an arbitration clause in a contract or in the form of a separate agreement;*
2. *Is in writing if it is contained in*
 - (a) *a document signed by the parties;*
 - (b) *an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or*
 - (c) *an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.*
3. *Can also be a reference in a contract to a document containing an arbitration clause if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.*

The Amendment Act under section 7(4)(b) permits creation of arbitration agreements through electronic communication. Such agreements made through electronic communication shall also be regarded to fulfil the requirements of section 7.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement is not enforceable in the following circumstances:

- if the party to the arbitration was under some incapacity and cannot be bound by the arbitration agreement;
- the arbitration agreement is not valid under the law for the time it is in force;
- the subject matter of the dispute is not capable of settlement by arbitration under the law for the time it is in force;
- if the agreement is void or otherwise not valid on account of incapacity or disqualification of one of the parties to the contract; or
- in a contract wherein one of the contracting parties is an insolvent and a dispute arises, the arbitration agreement cannot be enforced unless the receiver seeks permission from the judicial authority for an order directing that the matter in question shall be submitted to arbitration.

In *The Branch Manager, Magma Leasing and Finance Limited and Anr v Potluri Madhavilata and Anr* (AIR 2010 SC 488), the Supreme Court observed that an arbitration clause in a contract is a collateral term that relates to dispute resolution, and even if the contract itself cannot be performed owing to repudiation, breach of contract or frustration, the arbitration agreement would survive for the purposes of dispute resolution for disputes arising from or connected to the contract.

In relation to partnership deeds containing arbitration agreements, in *Ananthesh Bhakta Represented By Mother Usha A Bhakta & Ors v Nayana S Bhakta & Ors*, decided on 15 November 2016, the Supreme Court held that the petitioners have not been able to show any statutory provision either in the Arbitration Act or in any other statute from which it can be said that dispute concerning unregistered partnership deed cannot be referred to arbitration. The Court held that when the

partners have agreed to resolve their dispute through arbitration, it is not open for one party to contend that arbitration cannot be preferred on account of the partnership being unregistered as per Indian law.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

The Arbitration Act does not provide for third parties or non-signatories to be bound by an arbitration agreement. An arbitration agreement remains valid even if the underlying contract has been assigned to a third party. In India, principals are generally bound by an agreement entered into by an agent according to the Indian Contract Act. Undisclosed principals and apparent agency relationships are recognised by the law on agency in India. Consequently, a principal would be bound by an arbitration agreement entered into by an agent.

Section 37 of the Indian Contract Act provides that a contract may be performed by a person's legal heirs on his or her death unless a contrary intention is evident from the contract. The same principle would apply to arbitration agreements as well. In the case of insolvency, as stated above, the receiver may adopt the contract to be enforceable by or against him or her.

The above position was reiterated in *Chloro Controls (I) P Ltd v Severn Trent Water Purification Inc and Ors* (2013) 1 SCC 641 wherein the Supreme Court observed that any person claiming through or under a party to the arbitration agreement could also initiate arbitration.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The Arbitration Act does not provide for third-party participation in arbitration.

In *Sukanya Holdings Pvt Ltd v Jayesh H Pandya and Anr* (AIR 2003 SC 2252), the Supreme Court held that parties who were not signatories to the agreement cannot be added to the proceedings by the Court. Similarly, in *Indowind Energy Limited v Wescare (India) Ltd & Anr* (2010) 5 SCC 306, the Supreme Court held that a company that was not party to an arbitration agreement could not be joined as a party to the proceedings.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The groups of companies doctrine, used to extend the scope of a tribunal's jurisdiction to companies that are not signatory to the agreement itself but are part of the corporate group that the signatory company is a part of, was until recently not recognised in India.

However, in *Chloro Controls*, the Supreme Court held that where there are multiple transactions between parties involving several composite agreements which may have a collective bearing on a dispute, the courts will have the power to direct even a non-signatory to be joined as a party to the arbitration. However, this would be applicable in exceptional cases only, depending on the commonality of the subject matter and whether the various agreements formed a composite transaction, where the performance of the main agreement would not be possible or feasible without the execution of the other agreements.

In *Ananthesh Bhakta*, the Supreme Court concurred with the view taken by the lower court that it cannot be said that merely because one of the defendants was not party to the arbitration agreement, the dispute between the parties, which essentially relates to the benefits arising out of the retirement deed and partnership deed, cannot be referred.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The Arbitration Act does not particularly stipulate any special requirements for a valid multiparty arbitration agreement. The requirements contained in section 7 of the Arbitration Act for single arbitration agreements shall apply to multiparty arbitration agreements.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Though there are no specific restrictions on who may act as an arbitrator, pursuant to the Amendment Act, when a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose in writing circumstances such as the existence either direct or indirect, of any past or present relationship with, or interest in, any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or another kind, which is likely to give rise to justifiable doubts as to his or her independence or impartiality or which are likely to affect his or her ability to devote sufficient time to the arbitration and in particular his or her ability to complete the entire arbitration within a period of 12 months. The Amendment Act has introduced the grounds (under the Fifth Schedule) that may determine whether circumstances exist that give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

The Amendment Act also introduces the categories (under the Seventh Schedule) in relation to an arbitrator's relationship with the parties or counsel or the subject matter of the dispute, under which a person shall be ineligible to be appointed as an arbitrator. Some instances of these categories include a person who is an employee, consultant, advisor or has any other past or present business relationship with a party; currently represents or advises one of the parties or an affiliate of one of the parties; represents the lawyer or law firm acting as counsel for one of the parties; or is a lawyer in the same law firm that is representing one of the parties.

Section 11(1) of the Arbitration Act states that a person of any nationality may be an arbitrator, unless otherwise agreed by the parties. In cases where the parties fail to appoint an arbitrator or in an arbitration tribunal of three arbitrators, the two arbitrators fail to appoint the presiding arbitrator within 30 days of the dispute, recourse is to the High Court or any designated person or institution for appointment of the arbitrator or presiding arbitrator as the case may be (section 11(6)). In international commercial arbitration, recourse is available only with the Supreme Court or any designated person or institution, as reflected in the Amendment Act.

In a dispute between *Assignia-VIL JV and Rail Vikas Nigam* decided on 29 April 2016, the Delhi High Court observed that if the arbitrator and the parties enjoy any of the relationships mentioned in the Seventh Schedule to the Arbitration Act, then the arbitrator cannot be appointed. One of these relationships is that of employer-employee.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Section 11 of the Arbitration Act, as amended by the Amendment Act, prescribes the default mechanism in the event of absence of prior agreement between the parties on a procedure for appointing an arbitrator or arbitrators, as follows:

- failing any agreement between the parties, in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator (section 11(3));
- in the event a party fails to appoint an arbitrator within 30 days from the receipt of a request to do so from the other party or the two appointed arbitrators fail to agree on the third arbitrator within 30 days from the date of their appointment, the appointment shall be made, upon the request of a party, by the Supreme Court or, as

the case may be, the High Court, or any person or institution designated by such court (section 11(4));

- failing any agreement between the parties, in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within 30 days from receipt of a request by one party from the other party to agree, the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court, or any person or institution designated by such court (section 11(5)).

The power of appointment of arbitrators is distributed between the Supreme Court of India and the High Courts. For international commercial arbitrations, the Supreme Court of India or a designated appointing authority shall have the power to appoint the arbitrator. In domestic arbitrations, the power of appointment of arbitrators has been conferred upon the High Courts or such designated appointing authorities.

In *Northern Railway Administration, Ministry of Railway, New Delhi v Patel Engineering Company Limited* (2008) 10 SCC 240, the Supreme Court affirmed that a court cannot intervene in the appointment of an arbitrator when the parties have specified a procedure in the agreement, unless fraud, disqualification or legal misconduct of the arbitrator has been both pleaded and proven.

Arbitral institutions in India such as the Indian Council of Arbitration have their own panel of arbitrators. Rule 4 of the ICA Rules clearly stipulates that the Council shall not be bound to process the case if the parties have agreed upon a different procedure for the appointment of arbitrator and choose not to follow the procedure laid down by the Council.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Section 12 of the Arbitration Act as amended by the Amendment Act provides that the an arbitrator is required to disclose, in writing, any circumstances that give rise to justifiable doubts as to his or her independence or impartiality, or which are likely to affect his or her ability to complete the arbitration within a period of 12 months.

The Amendment Act has incorporated the text of the IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines), under two new Schedules - the Fifth Schedule and the Seventh Schedule - to be read with section 12. The Fifth Schedule lists out the grounds that give rise to justifiable doubts as to the independence or impartiality of the arbitrators, and contains categories specified in the Non-Waivable Red List, the Waivable Red List and the Orange List, as provided under the IBA Guidelines. A party may challenge their own appointment, or in whose appointment they participated, only for reasons that they become aware of after the appointment has been made.

The Seventh Schedule lists out the grounds under which an individual is ineligible for appointment as arbitrator. The categories under the Waivable and Non-Waivable Red Lists have been included under the Seventh Schedule. All grounds under this Schedule can be waived by the parties by express agreement in writing.

Section 13 of the Arbitration Act provides that the arbitral tribunal shall decide on the challenge raised by a party under section 12, and then proceed with arbitration. The challenging party may only approach the court once to challenge the award passed by the arbitral tribunal under section 34 of the Arbitration Act. When the court in such an application sets aside the award, then the court may decide whether the challenged arbitrator is entitled to any fees.

It is not common practice for courts to refer to the IBA Guidelines on Conflicts of Interest in International Arbitration, although the Delhi High Court in *Shakti Bhog Foods Ltd v Kola Shipping Ltd & Anr* 193 (2012) DLT 421 did refer to these Guidelines.

Additionally, section 12(1) of the Arbitration Act casts a duty on the person, who is approached to be appointed as an arbitrator, to disclose in writing any circumstances likely to give rise to justifiable doubts as to his or her independence or impartiality.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

The principles of natural justice and of impartiality and a fair trial guide the proceedings of the arbitral tribunal. Fairness, impartiality, independence and neutrality are, therefore, the indispensable qualities of an arbitrator. An arbitral tribunal is not a court and therefore the arbitrators are not judges, but the relationship between an arbitrator and the parties to the dispute is analogous to the relationship between a judge and parties to court proceedings.

An arbitrator's remuneration is fixed prior to his or her entering the arbitration and can be performed by an agreement between the parties or by an order of the court or the tribunal. The parties may also increase the fee of the arbitrator.

The Supreme Court held that 'The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes in *Indian Oil Corp Ltd & Ors v M/s Raja Transport (P) Ltd* 2009 (8) SCC 520.

The Amendment Act has inserted the Fourth Schedule into the Arbitration Act providing for a model fee structure of the arbitrators in domestic arbitrations (section 11(14)). This section shall, however, not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) in the event parties have agreed for determination of fees as per the rules of an arbitral institution.

Sum in dispute (in rupees)	Model fee (in rupees)
Up to 500,000	45,000
Above 500,000 and up to 2 million	45,000 plus 3.5 per cent of the claim amount over and above 500,000
Above 2 million and up to 10 million	97,500 plus 3 per cent of the claim amount over and above 2 million
Above 10 million and up to 100 million	337,500 plus 1 per cent of the claim amount over and above 10 million
Above 100 million and up to 200 million	1,237,500 plus 0.75 per cent of the claim amount over and above 100 million
Above 200 million	1,987,500 plus 0.5 per cent of the claim amount over and above 200 million with a ceiling of 3 million

The Amendment Act under section 11(14) states that the High Courts of India may frame rules for determining the fees of arbitrators after taking the above model fee structure into account.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

There are no reported cases of personal liability of the arbitrators either for negligence or intentional breach of duty, although there is no specific immunity provided in this regard. It is unlikely that the Indian courts would hold arbitrators liable for negligence. In contrast, civil court judges are bound by clear rules of conduct.

Section 29A, brought in by the Amendment Act, adheres to a very stringent deadline, whereby arbitrators have to decide and make an award within 12 months, extendable by a further six months, failing which their mandate is terminated. Section 29A(4) contains a proviso to the effect that where the delay is attributable to the tribunal, the courts may reduce the arbitrators' fees.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Section 8 of the Arbitration Act makes provisions in relation to power of a judicial authority to refer parties to arbitration when there is an arbitration agreement. It provides that when an action is brought before a judicial authority in a matter that is the subject of an arbitration agreement, the judicial authority shall refer the parties to arbitration upon an application being made by a party to the dispute requesting that the dispute be referred to arbitration, unless the judicial authority finds that prima facie no valid agreement subsists. The application to refer to arbitration must be accompanied by the original arbitration agreement or a certified copy of the arbitration agreement and must be made to the judicial authority not later than the date of submitting the first statement on the substance of the dispute. The section also provides that in case the original arbitration agreement or the certified copy thereof is not available to the party applying to the judicial authority and the same is retained by the other party to the arbitration agreement, then the party applying shall have the right to apply to the judicial authority to call upon the other party to produce the original agreement.

Section 45 (in Part II of the Arbitration Act, which makes provisions in relation to enforcement of certain foreign awards) provides that a judicial authority shall at the request of one of the parties who have executed an arbitration agreement refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

In *Ananthesh Bhakta* the Supreme Court of India held that the filing of the application without the original or certified copy of the arbitration agreement, but bringing original arbitration agreement on record at the time when the Court is considering the application shall not entail rejection of the application under section 8(2).

The Supreme Court, in *Fair Air Engineers (P) Ltd v NK Modi* (1996) 6 SCC 385, held that consumer forums are at liberty to proceed with the matters in accordance with the provisions of the Consumer Protection Act, 1986 rather than relegating the parties to an arbitration proceedings pursuant to a contract entered into between the parties. The reason is that the Consumer Protection Act intends to relieve the consumers of the cumbersome arbitration proceedings or civil action, unless the forums on their own, and on the peculiar facts and circumstances of particular case, come to the conclusion that the appropriate forum for adjudication of the disputes would be other than those given in the said Act.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The tribunal may rule upon its own jurisdiction, including upon the validity of the arbitration agreement under section 16 of the Arbitration Act. A plea that the arbitral tribunal lacks jurisdiction must be raised at a time not later than the submission of the statement of defence. The section further provides that a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope is raised during the arbitral proceedings. However, the tribunal has the power to admit a later plea if it considers delay in raising the plea justified. If the tribunal rejects the plea that it lacks the requisite jurisdiction to adjudicate the dispute, it shall continue with the proceedings and make an arbitral award. The party aggrieved by the ruling may make an application to the court under section 34(2)(iv) of the Arbitration Act for setting aside the award on the ground that the arbitral award deals with a dispute not falling within the terms of the contemplated arbitration or that the award contains decisions on matters beyond the scope of the submission to arbitration. This application must be made within three months from the date on which the aggrieved party received the arbitral award. However, the court may entertain the application to set aside the award for a further

30 days if the applicant is able to satisfy the court that the delay was with sufficient cause.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Section 20(2) of the Arbitration Act provides that, failing any agreement between the parties on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. Furthermore, section 22(2) of the Arbitration Act provides that, failing any agreement on the language to be used in the arbitral proceedings, the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.

23 Commencement of arbitration

How are arbitral proceedings initiated?

Section 21 of the Arbitration Act provides that in the absence of an agreement between the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request for that dispute to be referred to arbitration (notice of arbitration) is received by the other party.

The communication by a party of the recourse to arbitration and a requirement that the other party should do something on its part in that regard will in general suffice to define the commencement of arbitration. There are no formal requirements for a notice or request prescribed under the Arbitration Act. The communication should make it clear that the arbitration proceedings are commenced, and not merely indicate the intention of initiating arbitral proceedings.

The commencement of the arbitration proceedings will depend on the nature of the arbitration being ad hoc or institutional. In the case of an institutional arbitration, the rules of the institution will govern the initiation of the arbitration and in case of an ad hoc arbitration, the arbitral tribunal will determine the procedure of filing the pleadings, etc.

24 Hearing

Is a hearing required and what rules apply?

Section 19 of the Arbitration Act provides that the parties are free to adopt their choice of procedure governing the arbitral tribunal. The Code of Civil Procedure and the Indian Evidence Act, 1872 are not applicable to arbitration proceedings, unless otherwise agreed by the parties.

Section 24(1) of the Arbitration Act states that the arbitral tribunal shall decide whether to hold oral hearings for presentation of evidence or oral arguments, or whether the proceedings can be conducted on the basis of documents and other materials. The section further provides that the tribunal shall hold oral hearings in the event a party requests it unless the parties have agreed that no oral hearings will be held. In order to complete the arbitration in an efficient manner, the section also provides that as far as possible, the arbitral tribunal shall hold oral hearings for the presentation of evidence on a day-to-day basis and not grant any adjournments unless sufficient cause is made out and the tribunal is empowered to impose exemplary costs on the party seeking such adjournment without sufficient cause.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The Indian Evidence Act, 1872 is not applicable to arbitration proceedings, unless otherwise agreed by the parties. Parties and tribunals are free to seek guidance from the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

Section 26 of the Arbitration Act authorises the arbitral tribunal to appoint an expert subject to an agreement between the parties. When authorising the tribunal to appoint an expert the parties may also

stipulate that the appointment should be made with their consent. It will be open to a party or to the arbitral tribunal to require the expert, after delivery of his or her report, to participate in an oral hearing where the parties would have an opportunity to put questions to him or her. Section 24(3) of the Arbitration Act mandates the arbitral tribunal to communicate to the parties any expert report or evidentiary document on which the arbitral tribunal is relying on.

Witnesses appearing before an arbitral tribunal can be sworn in by the tribunal and be required to state the truth on oath before any person authorised to administer oaths. A party to a dispute may agree to be bound by the special oath of the other party and have the evidence taken after administration of a reasonable form of oath. However, arbitrators can force unwilling witnesses to appear before the arbitral tribunal only with the court's assistance as provided under section 27 of the Arbitration Act. Section 27 of the Arbitration Act prescribes that the application must specify the name and address of any person to be heard as a witness or expert witness, a statement of the subject matter of the testimony required and a description of any document to be produced or property to be inspected.

Any person failing to attend in accordance with any process, making any other default, refusing to give evidence or being guilty of any contempt of the arbitral tribunal shall be subject to the same penalties and punishment as he or she would incur for the same offences in suits tried before a court.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Section 27 of the Arbitration Act provides that the powers of the court in an arbitration matter, upon an application made by the arbitral tribunal or a party with the approval of the arbitral tribunal, includes the power to issue summonses, issue commissions, compel attendance, compel the production of documents, and perform the inspection and discovery of documents. The court may intervene upon the failure of such witnesses to attend or if they refuse to give evidence or are guilty of any contempt of the arbitral tribunal during arbitral proceedings, and the court may subject such persons to penalties or punishments, after representations from the arbitral tribunal, similar to what they would incur for such offences if they occurred in court.

27 Confidentiality

Is confidentiality ensured?

There is no statutory provision regarding confidentiality in the Arbitration Act. However, arbitration is by its nature a private process between the arbitrator and the parties unlike other proceeding that are held in open court, thus offering confidentiality to arbitration proceedings. No person other than the parties and their legal representatives can attend the proceedings unless with the permission of the parties. An arbitral tribunal has an implied duty to keep the subject matter of the arbitration proceedings private and confidential except when required by the law to disclose it. This also extends to documents disclosed in the arbitration, but not to an arbitration award.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Section 9 of the Arbitration Act provides a party a right to approach a court before or during arbitral proceedings or before enforcement of the arbitral award, to seek interim relief in the nature of appointment of a guardian for a minor or a person of unsound mind, preservation, interim custody or sale of any goods that are the subject matter of an arbitration agreement, to secure the amount in dispute in the arbitration, or the detention, preservation or inspection of property or the subject matter of arbitration, or the appointment of a receiver in respect of such goods. The court may also pass any other order necessary to protect the interests of the parties insofar as it does not impede the arbitration proceedings.

Section 9 further provides that in case an order is passed by a court before the commencement of the arbitral proceedings, the arbitral

proceedings shall be commenced within a period of 90 days from the date of such order or such further time as the court may determine.

In addition to section 9, pursuant to which a party may apply to a court for interim relief, section 17 of the Arbitration Act gives a party a right to approach the arbitral tribunal itself for seeking interim relief of the aforesaid nature either during the arbitration proceedings or after the making of the award (but before it is enforced). Pursuant to the Amendment Act, once the arbitral tribunal has been constituted, the court shall not entertain an application for interim measures, unless the court finds that circumstances exist that may not render the remedy provided under section 17 efficacious.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

There are no provisions for the appointment of emergency arbitrators under the Arbitration Act. The ICA Rules for domestic and international arbitrations on the other hand, which have been amended with effect from 1 April 2016, include provisions for the appointment of an emergency arbitrator. However, institutional rules of arbitration such as the International Chamber of Commerce Rules on Arbitration (ICC Rules) and the Singapore International Arbitration Centre Rules, which are popularly used as the procedural rules for conducting arbitration proceedings, even if the seat is in India, contain provisions for the appointment of emergency arbitrators by parties to obtain interim measures. Further, the LCIA Arbitration Rules contain provisions for the expedited formation of an arbitral tribunal, emergency arbitrator and the expedited appointment of a replacement arbitrator. The MCIA Rules also make available the services of an emergency arbitrator to determine urgent applications for interim relief before the main arbitral tribunal is appointed.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

As stated above, pursuant to section 17 of the Arbitration Act the arbitral tribunal now has the same powers as that of a court in respect of interim measures. The arbitral tribunal may require a party to provide appropriate security as an interim measure, if it is considered a necessary measure to safeguard the right of the applicant seeking the interim measure.

Section 38 of the Arbitration Act allows the arbitral tribunal to fix an amount of the deposit or supplementary deposit as an advance for costs it expects will be incurred in respect of the claims submitted to it. This provision also provides for a separate amount of deposit to be paid for counterclaims. This deposit is to be payable in equal shares by the parties but if one of the parties fails to pay its share, then it may be deposited by the other party. If this deposit is not paid by either party, then the arbitral tribunal may suspend the proceedings with respect to the claims or counterclaims with regard to which the deposits have not been paid. Pursuant to section 39 of the Arbitration Act, the arbitral tribunal will have a lien on the award for any unpaid costs of the arbitration.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

'Guerrilla tactics' in arbitration proceedings are perceived to be unconventional means that tend to undermine the dispute resolution mechanism's envisioned mode of operation. There is no express provision under the Arbitration Act empowering the arbitral tribunal to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration. However, generally, it is seen that the arbitral tribunals

do impose exemplary or punitive costs on a party for obvious delaying tactics, unjustified challenges, absence from proceedings or even withholding of evidence. The courts even impose costs on a party for a challenge which has been noticeably used to delay the arbitration proceedings. Section 35A of the Code of Civil Procedure, 1908 deals with compensatory costs in respect of false and vexatious claims. Section 35B deals with costs for causing delays.

The Amendment Act introduces section 31A, which expressly deals with the regime of costs in arbitration proceedings. Subsection (1) of this section strictly deals with costs relating to the proceedings of the arbitral tribunal, namely: (i) fee and expenses of the arbitrators, courts and witnesses; (ii) legal fees and expenses; (iii) administration fees for the institution supervising the arbitration; and (iv) any other expenses incurred in connection with the arbitral or court proceedings and the arbitral award. The factors determining the imposition of costs as above include the conduct of parties among other aspects.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Section 29(1) of the Arbitration Act provides that in the absence of an agreement to the contrary, any decision of an arbitral tribunal consisting of more than one arbitrator shall be made by a majority of all the members of the tribunal. The Arbitration Act does not require a unanimous verdict of the arbitral tribunal to declare an award.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Courts have held that a dissenting arbitrator may sign the award with his or her dissenting opinion. Alternatively, he or she may not sign the award at all. However, such actions will not affect the validity of an award. An arbitrator refusing to take part in a vote or sign the award will also not impair the award.

34 Form and content requirements

What form and content requirements exist for an award?

The form and content requirement for an award are provided for in section 31 of the Arbitration Act, as follows:

- the award should be made in writing;
- the award should be signed by the majority of the members of the arbitral tribunal provided that the reason for the omitted signature is stated;
- the award should be a reasoned award unless the parties have agreed that no reasons are to be given or it is an award on agreed terms under section 30; and
- the award shall include the date and place and be delivered to each party to the arbitration.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

Section 29A of the Arbitration Act provides for a time limit of 12 months for the arbitral tribunal to decide and make an award. This time period can only be extended by a maximum time period of six months upon agreement by the parties. If the award is not made within the stipulated time period, then the mandate of the arbitrators stands terminated. Section 29A also states that where the award is made within a period of six months, arbitrators shall be entitled to claim additional fees from the parties. However, the proviso to section 29A(4) states that if there is any delay beyond the agreed upon or specified extension of time and if such delay can be attributed to the arbitral tribunal, the fee of the arbitrators will be reduced by up to 5 per cent of the original fee, for each month of such delay.

The ICADR Rules provide for a specified time for making an award after the conclusion of proceedings in case of a fast-track arbitration. The ICA Rules and FACT Rules provide that the arbitral tribunal shall render the award preferably within six months and subject to a maximum period of two years from the date of reference. Article 30 of the ICC Rules states that the arbitral tribunal must render its final award within six months from the date of the last signature by the arbitral tribunal or from the date of the terms of reference of the dispute as set out under the ICC Rules. However, this time limit can be extended at the request of the parties or of the arbitral tribunal by the court of international arbitration under the ICC Rules.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Section 34(3) of the Arbitration Act provides that an award becomes final after three months from the date of the award unless one of the parties files an application for setting aside the award. However, if the applicant shows sufficient cause, the court can extend the time limit of three months by a further 30 days. Section 33(1)(a) of the Arbitration Act permits any party to request the arbitral tribunal to correct any computational, clerical or typographical errors or other errors of a similar nature within 30 days from the receipt of the arbitral award unless another time period has been agreed upon by the parties.

Section 36 of the Arbitration Act provides that the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the court upon the expiration of the time limit for filing an application for setting aside the award (provided under section 34(3)) has expired or such application has been refused.

In *Northern Railway v M/s Pioneer Publicity Corp Pvt Ltd*, decided on 1 September 2015, the Supreme Court observed that section 34(3) of the Arbitration Act has no application in the refiling of a petition but only applies to the initial filing of the objections under section 34 of the Arbitration Act.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The arbitral tribunal may grant interim, partial or final awards. An interim award may be passed by the arbitral tribunal subject to the final determination of the dispute. A final award is an award which finally determines all the issues in dispute between the parties which have been referred to arbitration. A partial award may be given by the arbitral tribunal on part of the claims or issues brought before the arbitral tribunal. The parties may continue to arbitrate on the remaining issues.

Under section 30 of the Arbitration Act, if the parties to the dispute arrive at a settlement, the arbitral tribunal may terminate the proceedings and record the settlement in the form of an arbitral award.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Section 32 of the Arbitration Act provides that the arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal in the following circumstances:

1. *The claimant withdraws the claim unless the respondent objects to the order and the arbitral tribunal concurs with such objection;*
2. *By mutual agreement of the parties;*
3. *The arbitral tribunal finds that the continuation of the proceedings has, for any reason, become unnecessary or impossible.*

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Section 31(8) of the Arbitration Act provides the costs of the arbitration shall be fixed by the arbitral tribunal. Section 31A of the Arbitration Act sets out the regime for costs. The following costs are recoverable:

- fees and expenses of arbitrators, courts, and witnesses;
- legal fees and expenses;
- administrative fees of the institution supervising the arbitration (where applicable); and
- other expenses incurred in connection with the arbitral or court proceedings and the arbitral award.

The general rule is that costs shall follow the award (ie, the unsuccessful party will have to bear the costs of the successful party, unless the tribunal, for reasons recorded in writing, decides otherwise). The conduct of the parties and the outcome of the case will have a bearing on costs, although settlement offers will also be taken into account. Any agreement between the parties as to costs shall have effect only if the agreement is made after the dispute has arisen.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Section 31(7)(a) of the Arbitration Act provides that an arbitral tribunal can award interest for the period between the date on which the cause of action arose and the date on which the award is made, and from the date of the award to the date of payment.

Section 31(7)(b) states that unless the award otherwise directs, the sum directed to be paid by an arbitral award shall carry interest at the rate of 2 per cent higher than the current rate of interest prevalent on the award, from the date of the award to the date of payment.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Section 33 of the Arbitration Act provides that the arbitral tribunal may:

1. *At the request of a party, with notice to the other party, correct computational, clerical, typographical or other errors that have arisen by accident or by omission within 30 days from the receipt of such request;*
2. *At the request of a party, with notice to the other party, give interpretation of a specific point or part of the award within 30 days from the receipt of such request;*
3. *Suo moto make a correction of the kind mentioned in (1) above within 30 days from the date of the arbitral award.*

The arbitral tribunal may also, at the request of a party and with notice to the other party, make an additional award on claims presented in the arbitral proceedings but omitted from the arbitral award within 60 days of the receipt of such request. Additionally, the arbitral tribunal may extend the period of time within which it shall make a correction, give an interpretation or make an additional award if necessary.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

Under section 34 of the Arbitration Act, the arbitral award can be challenged only by an application to the court for setting aside the award on the following grounds:

- incapacity of a party;
- the arbitration agreement being invalid under the law;
- improper notice of the appointment of an arbitrator or of the arbitral proceedings to the applicant or the applicant was unable to present his or her case;
- the arbitral award has decided on a dispute beyond the scope of the reference to arbitration or contains decisions beyond the scope of the submission to arbitration;
- the procedure for the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- the subject matter of the dispute is incapable of being settled by arbitration under the law at the time; or

- the arbitral award is in conflict with public policy (this includes awards:
 - affected by fraud or corruption;
 - in contravention with fundamental policy of Indian law or basic notions of morality or justice; and
 - those in violation of confidentiality and admissibility of evidence provisions in the Act.

An application for setting aside an award must be made before the expiry of three months from the date on which the applicant received the arbitral award, unless it is extended by the court for a further period of 30 days if the applicant shows sufficient cause for delay.

In light of the decision of the Supreme Court in the case of *Bharat Aluminium Company v Kaiser Aluminium Technical Service Inc* 2012 (8) SCALE 333 (the *BALCO* judgment), parties to a foreign-seated arbitration no longer had recourse to any Indian courts for relief. Courts in India had also granted a wide meaning to public policy and had interpreted that even an illegality under Indian law would be against public policy. The recourse to setting aside an award under section 34 is also no longer available to any party to a foreign-seated arbitration, which was earlier extended by the courts through judicial interpretation. All parties to any such foreign arbitration upon receipt of an award of a foreign tribunal, if required to be enforced in India, would need to present such an award for enforcement under section 48 of the Arbitration Act. An Indian court can review the foreign award to the limited extent provided under section 48 to examine whether it should be enforced. *BALCO* applies to all agreements that have been executed after 6 September 2012 for foreign-seated arbitrations.

The Amendment Act has clarified the reversal of position in the *BALCO* judgment, by way of insertion of a proviso to section 2(2). The proviso states that section 9 (interim relief by courts), section 27 (court assistance in taking evidence), section 37(1)(a) (appeals in respect of interim relief by the courts) and section 37(3) (appeals to the Supreme Court of India) will also be made applicable to international commercial arbitrations, even where the seat of arbitration is outside India, and an award of the said arbitration will be enforceable and recognised under Part II of the Arbitration Act.

In another significant ruling in the case of *Shri Lal Mahal v Progetto Grano Spa* decided on 3 July 2013, the Supreme Court not only restricted the interpretation of 'public policy' as under section 48(2)(b), but also distinguished between enforcement challenges on the ground of public policy in the case of a domestic award as envisaged in section 34 as opposed to foreign awards in section 48(2)(b).

Through the introduction of section 34(2A) by the Amendment Act, an application for setting aside the award on the ground of 'patent illegality' as a violation of public policy shall only be applicable to awards in domestic arbitrations. Furthermore, an award shall no longer be liable to be set aside merely on the ground of erroneous application of law or re-appreciation of evidence.

As per the amendment to section 36 of the Arbitration Act, mere filing of a challenge to an award under section 34 does not render the award unenforceable unless an application is made by the challenging party, upon which the court may grant a stay on the enforcement of the award. In other words, filing of an application under section 34 does not automatically operate as a stay on enforcement proceedings. A separate application for stay will have to be applied for.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level?

Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Section 37 of the Arbitration Act provides that the following orders shall be appealable to the court authorised to hear such appeals from original decrees of the court passing the order:

- refusal to refer the parties to arbitration under section 8 of the Act;
- a grant or refusal to grant an interim measure under section 9 of the Act;
- setting aside or refusing to set aside an arbitral award under section 34 of the Act;
- a grant of the plea of a party by the arbitral tribunal that it does not have jurisdiction;

- a grant of the plea of a party by the arbitral tribunal that it is exceeding the scope of its authority; and
- a grant or refusal to grant an interim measure by the arbitral tribunal under section 17 of the Act.

However, nothing shall affect or remove any right of a party to appeal to the Supreme Court. There is no set procedure or timeline for decisions on the challenge; the actual time generally varies from six months to three years. The costs involved at each level are that of the fees of the attorneys' and other legal expenses. Courts usually grant costs to the successful party; however, these costs are generally notional and not commensurate to the actual costs.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

A foreign award may be enforced in India under the multilateral international conventions or the New York Convention if the conventions apply to the relevant arbitration, the award was made in a country that is a party to the above conventions and the award was made in a country that is notified as a reciprocating territory.

The countries notified as reciprocating territories include Australia, Austria, Belgium, Botswana, Bulgaria, the Central African Republic, Chile, Cuba, Czechoslovak Socialist Republic, Denmark, Ecuador, Egypt, Finland, France, Germany, Ghana, Greece, Hungary, Ireland, Italy, Japan, Republic of Korea, Kuwait, Malagasy Republic, Malaysia, Mauritius, Mexico, Morocco, the Netherlands, Nigeria, Norway, People's Republic of China (including the Special Administrative Regions of Hong Kong and Macao), the Philippines, Poland, Romania, San Marino, Singapore, Spain, Sweden, Switzerland, Syrian Arab Republic, United Republic of Tanzania, Thailand, Trinidad and Tobago, Tunisia, the United Kingdom, the United States and Ukraine.

It has been held by the courts in India that if a state has been notified as a reciprocating territory for the purposes of recognition and enforcement of awards, then all territories forming part of that state would be covered under such notification. Where such state thereafter separates into different territories, as long as the new territory is also a signatory to the New York Convention, no separate notification would be required for each new territory for the purpose of recognition and enforcement of awards.

Under section 48 of the Arbitration Act, enforcement of a foreign award may be refused, at the request of a party against whom it is invoked, only if that party furnishes to the court proof that:

- the parties to the agreement were under some incapacity;
- the arbitration agreement is not valid under the law to which the parties have subjected themselves;
- the party against whom the award has been invoked 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 arbitral award deals with a difference not contemplated by or not falling within the terms of submission to arbitration or it contains decisions beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, and failing such agreement, was not in accordance with the law of the country where the arbitration took place;
- the award has not yet become binding on the parties;
- the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made;
- the subject matter of the dispute is incapable of being settled by arbitration under the laws of India; or
- the enforcement of the arbitral award would be contrary to public policy.

The scope of public policy has been curtailed post the *Shri Lal Mahal* judgment.

Update and trends

In a recent landmark judgment of the Supreme Court of India, in the case of *M/s Centrotrade Minerals & Metal Inc v Hindustan Copper Ltd*, decided on 15 December 2016, the Apex Court held that an arbitration agreement between the parties that provides for a second instance arbitration does not violate the fundamental or public policy of India. The Apex Court held that there is nothing in the Arbitration Act that prohibits contracting parties from agreeing upon a second instance or appellate arbitration either explicitly or implicitly. In this case, the parties had agreed to arbitrate their disputes under the Rules of Arbitration of the ICA in India and if either party were in disagreement with the arbitration result in India, either party would have the right to appeal to a second arbitration under the Rules of Conciliation and Arbitration of the ICC in London, UK.

Some recent cases have been more welcoming to acknowledging arbitration as an effective form of alternative dispute resolution by widening the arbitrability of subject matters. For instance, the recent judgment of the Bombay High Court in *Eros International* held copyright disputes to be arbitrable. Although the distinction between rights in rem and rights in personam as deliberated upon by the Court can be open to more scrutiny, the fact that recourse to arbitration is creeping into most realms of laws cannot be disputed.

The arbitrability of fraud has also been examined by the courts in recent times. The Supreme Court in *A Ayyasamy v A Paramasivam & Ors*, decided on 4 October 2016, made a distinction between simplicitor fraud and serious fraud. In the facts of this case, the Court held that the allegations of purported fraud were not so serious that they could not have been taken care of by the arbitrator. The Court further held that mere allegation of fraud simplicitor may not be a ground to nullify the effect of an arbitration agreement between the parties. It is only in those cases where the Court, while dealing with section 8 of the Arbitration Act, may find that there are very serious allegations of fraud that make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by civil court on the appreciation of the voluminous evidence that needs to be produced. The Court can sidetrack the agreement by dismissing application under section 8 and proceeding with the suit on merits. The Supreme Court, in this judgment, opined that a fresh line must be drawn to ensure the fulfilment of the intent of Parliament in enacting the Act of 1996 and towards supporting commercial understandings grounded in the faith in arbitration. In *Meguín GmbH & Co v Nandan Petrochem Ltd* 2007 (5) RAJ 239 (SC), in the context of an application filed under section 11, the Supreme Court had appointed an arbitrator even though issues of fraud were involved.

On the retrospective application of the Amendment Act, the Delhi High Court in the case of *Raffles Design International India Private Limited and Ors v Educomp Professional Education Limited and Ors*, decided on 7 October 2016, observed that the amendments to section 36 of the Arbitration Act, although affecting the rights of parties, cannot be read as being retrospective law and, therefore, were interpreted as inapplicable for enforcement of awards rendered in relation to arbitral proceedings commenced before 23 October 2015. The Delhi High Court in *Ministry of Defence v Cenrex SP*, decided on 8 December 2015, held that the Amendment Act will not apply in view of section 6 of the General Clauses Act, 1897, which provides that an Act does not have retrospective operation unless so provided. The Calcutta High Court in *Electrosteel Castings Limited v Reacon Engineers (India) Private Ltd*,

decided on 14 January 2016, opined that the repeal and savings clause of the Amendment Act of 2015 did not make applicable the Amendment Act in the case of arbitrations commenced before its enactment. In *Sri Tufan Chatterjee v Sri Rangan Dhar*, decided on 2 March 2016, the Calcutta High Court held that the Amendment Act of 2015, which came into force with effect from 23 October 2015, would apply to arbitral proceedings that commenced after 23 October 2015 but not to arbitral proceedings that commenced before 23 October 2015. The Amendment Act of 2015 would apply to all court proceedings on and from 23 October 2015. In *New Tirupur Area Development v Hindustan Construction Co Limited*, Madras High Court, decided on 27 January 2016 and *Rendezvous Sports World v BCCI*, Bombay High Court, decided on 30 June 2016, it was held that the Amendment Act will be applicable to all court proceedings pending on 23 October 2015 or filed after 23 October 2015 in relation to arbitration proceedings initiated prior to the enforcement date of the Amendment Act. This issue of retrospective application of the Amended Arbitration Act is pending before the Supreme Court of India in the matter of *The Board of Control for Cricket in India v Rendezvous Sports World*. The applicability of the Amendment Act is governed by section 26, which states the Amendment Act will not apply to pending arbitration proceedings in accordance with the provisions of section 21 of the Arbitration Act unless the parties otherwise agree. The issue before the Apex Court is with respect to the applicability of amendments to post award proceedings pending before courts before the Amendment Act came into force on 23 October 2015.

Another important question that came up before the courts was whether two Indian parties can choose a foreign seat. In 2015, the Bombay High Court in *Addhar Mercantile Private Limited v Shree Jagdamba Agrico Exports Pvt Ltd*, Arbitration Application 197/2014, held that Indian parties cannot be allowed to derogate from Indian law as it would be against public policy. This was widely interpreted to mean that two Indian parties could not opt for a foreign arbitral seat. A challenge to this judgment was made to the Supreme Court, which, however, did not succeed. However, the Madhya Pradesh High Court, in *Sasan Power Limited v North American Coal Corporation*, decided on 11 September 2015, took a completely different stand and held that two Indian parties could choose a foreign arbitral seat. On appeal, the Supreme Court on 24 August 2016 observed that in the facts of the *Sasan Power* case, one of the parties was an American company and, hence, it was a dispute between three parties with a foreign element (ie, rights and obligations of the American company). Hence, it held that the stipulation regarding the governing law cannot be said to be an agreement between only two Indian companies and these parties could choose foreign law as governing their contract. Thus, this question of law as to whether two Indian parties could choose a foreign governing law still remains unanswered.

The establishment of the Mumbai Centre for International Arbitration (the MCIA) is a robust step not only in the direction of institutional arbitration in India but can also be seen as extending a business-friendly arm to parties interested in doing business in India. With an increased emphasis on the fundamentals of arbitration, such as efficiency and speedier resolution, it has generated a lot of positive attention in the commercial ecosystem. Ad hoc arbitration, however, continues to be a preferred mode of dispute resolution in India on account of lower costs and flexibility to decide upon the procedure. Ad hoc arbitration is also generally adopted in matters concerning smaller claims.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Under section 48 of the Arbitration Act, enforcement of a foreign award may be refused, at the request of a party against whom it is invoked, only if that party furnishes to the court proof that:

- the parties to the agreement were under some incapacity;
- the arbitration agreement is not valid under the law to which the parties have subjected themselves;
- the party against whom the award has been invoked 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 arbitral award deals with a difference not contemplated or not falling within the terms of submission to arbitration or it contains decisions beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties and failing such agreement, was not in accordance with the law of the country where the arbitration took place;
- the award has not yet become binding on the parties;
- the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made;
- the subject matter of the dispute is incapable of being settled by arbitration under the laws of India; or
- the enforcement of the arbitral award would be contrary to public policy.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The concept of emergency arbitrators does not yet exist under the Arbitration Act or the new Amendment Act. Hence, enforcement of orders by emergency arbitrators is also not yet provided under the law. However, through the introduction of section 29B, the Amendment Act has introduced the concept of fast-track procedure whereby the award shall be made within six months from the date the arbitral tribunal entered upon the reference.

47 Cost of enforcement

What costs are incurred in enforcing awards?

The costs incurred in the enforcement of an arbitral award are the costs of an attorney and court fees.

Other**48 Judicial system influence**

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Section 26 of the Arbitration Act provides that the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, section 27 provides that the arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the court for assistance in taking evidence and the court may execute the request by ordering that the evidence be provided directly to the arbitral tribunal. In such cases, the court may issue the same processes to witnesses as it may issue in suits tried before it.

There is no tendency towards US-style discovery. Written witness statements are common, followed by cross-examination. Party officers may testify.

The newly introduced time limit for conducting arbitrations is expected to have a significant impact on the arbitration process and the arbitrators, whose fees may be subject to reduction if the delays are attributable to them. Arbitrators will have to adapt to a more truncated procedure to meet the deadlines.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Currently, there are no rules that regulate the professional or ethical conduct of counsel in international arbitrations in India. However, as per the recommendations of the LCR, the Arbitration Act has been amended to incorporate the IBA Guidelines on the Conflict of Interest in international arbitrations.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

The practice of third-party funding of arbitral claims is not permitted in India. Rule 20 under Section II of the Bar Council of India Rules prohibits an advocate from stipulating a fee contingent on the results of litigation or agreeing to share the proceeds thereof.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

In *AK Balaji v The Government of India and Others* (AIR 2012 Mad 124), the Madras High Court held that foreign law firms or foreign lawyers cannot practise law in India, either on the litigation or non-litigation side, unless they fulfil the requirement of the Advocates Act, 1961 and the Bar Council of India Rules. In a challenge to this judgment before the Supreme Court of India, the Apex Court has passed an interim order permitting foreign practitioners to 'fly-in-fly-out' and advise on foreign law. The Bar Council of India has proposed draft rules by which it seeks to maintain a separate roll for foreign law firms that will also be governed by a set of practice rules framed specifically for them. These proposed practice rules, if ratified, would set out practice eligibility conditions for foreign lawyers in India.



**Shreyas Jayasimha
Mysore Prasanna
Mihir Naniwadekar
Rajashree Rastogi
Pinaz Mehta**

**shreyas.jayasimha@aarnalaw.com
mysore.prasanna@aarnalaw.com
mihir.c.naniwadekar@aarnalaw.com
rajashree.rastogi@aarnalaw.com
pinaz.mehta@aarnalaw.com**

No. 5, 2nd Main Road
Vyalikaval
Bangalore 560 003
India

Tel: +91 80 2356 6792 / 2336 8494
Fax: +91 80 4168 7456
www.aarnalaw.com

Indonesia

Pheo M Hutabarat, Asido M Panjaitan and Yeremia L T Paat

Hutabarat, Halim & Rekan

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Through Presidential Decree No. 34 of 1981, dated 5 August 1981, Indonesia ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. In addition, Indonesia also signed (on 16 February 1968) and ratified, as the 27th member state (on 28 September 1968), the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (the ICSID Convention).

Under Indonesian law, international arbitral awards will only be recognised and may only be enforced within the jurisdiction of Indonesia if they fulfil the following requirements:

- the foreign arbitral award is rendered by an arbitration body or an individual arbitrator in a country that is bilaterally bound to Indonesia or jointly with Indonesia to an international convention regarding the recognition and enforcement of foreign arbitration awards. The enforcement thereof is based on the principle of reciprocity;
- the foreign arbitral awards are only limited to awards that, according to Indonesian law, fall within the definition of commercial law;
- the foreign arbitral awards are not in contravention of public order under Indonesian law;
- the foreign arbitral awards may be enforced in Indonesia only after the Chairman of the Central Jakarta District Court has issued an order of execution (exequatur);
- if the Republic of Indonesia is a party to the foreign arbitration award, this award may be enforced in Indonesia only after the Supreme Court of the Republic of Indonesia has issued an exequatur; and
- the application for the enforcement of the foreign arbitral awards must be accompanied by:
 - the original or duplicate of the foreign arbitration award, authenticated pursuant to the provisions regarding authentication of foreign documents, and an official translation thereof, pursuant to the legal provisions in force in Indonesia;
 - the original or duplicate of the agreement, as the basis for the foreign arbitration award, authenticated in accordance with the provisions regarding authentication of foreign documents, and the official translation thereof, pursuant to legal provisions in force in Indonesia; and
 - a statement from the Indonesian diplomatic representative in the country where the foreign arbitration award was rendered, stating that such country is bilaterally bound to Indonesia or jointly bound with Indonesia in an international convention regarding the recognition and enforcement of a foreign arbitration award.

The Law Number 30 of 1999 dated 12 August 1999 (the Law) stipulates that arbitral awards shall be a final, binding and enforceable decision against the disputing parties; therefore, there is no possibility to appeal an arbitration award. The enforcement of a foreign (international) arbitral award relating to legal persons in Indonesia (other than the government of Indonesia) can only be implemented after having obtained an exequatur issued by the Central District Court of Jakarta. The granting of the exequatur by the Central District Court of Jakarta is not subject to an appeal. However, if the Central District Court of Jakarta refuses to issue the exequatur, this rejection is subject to an appeal to the Supreme Court. The enforcement of a foreign arbitral award in which the Republic of Indonesia is a party can only be implemented in Indonesia after having an exequatur from the Supreme Court of the Republic of Indonesia, and this is not subject to an appeal.

The Law also stipulates that, in the event that the parties have agreed that disputes between them will be settled through arbitration and the parties have given the authorisation, the arbitrator is competent to rule on his or her own jurisdiction, and the Indonesian courts do not have the jurisdiction to adjudicate a dispute where the parties to the contract are bound to an arbitration agreement, since any arbitration agreement concluded in writing by the parties will preclude any right of the parties in the future to submit the dispute to the district court. Therefore, the Indonesian courts must reject, and should not be involved in, any dispute agreed to be under the arbitration proceedings.

Although the above non-involvement of the Indonesian courts in arbitration matters is clearly stipulated in the Law, legal practice in Indonesia shows that some jurisprudence decided by the Supreme Court has justified the non-applicability of the arbitration awards.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Regarding bilateral treaties, Indonesia until 2016 had signed 47 bilateral investment treaties with several countries. Most of these BITs have been entered into force. The arbitration mechanism under the ICSID Convention has mostly been stipulated in these BITs. No standard terms or model languages have been adopted in the BITs to which Indonesia is a party. However, the BITs mostly contain similar provisions in promoting and protecting investment bilaterally.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Domestic arbitration and foreign arbitration are embodied and governed within one law, which is the Law.

The Law generally governs matters relating to domestic and international arbitration proceedings. The Law mostly governs the provisions in relation to all arbitration proceedings commencement and conduct in Indonesia, and the arbitration awards that are rendered in Indonesia, regardless of the nationality of the parties, location of the subject of the dispute, governing law, etc. This is defined in the law as domestic arbitration. These provisions on domestic arbitration relate to, among others:

- the legal requirements of the domestic arbitration award;
- the time period for rendering and enforcing the domestic arbitration awards; and
- the requirement to register the domestic arbitration awards with the relevant district court, as these issues will be further explained below.

For the arbitration proceedings held outside of Indonesia, the Law has categorised these arbitration proceedings as international arbitration, and the Law further stipulates the general procedures for the enforcement of international arbitration awards in Indonesia. There are different procedures to be applied in relation to the enforcement of domestic arbitration awards and international arbitration awards under the Law. They relate to, among others, the different courts for enforcing domestic arbitration awards (ie, through the district court in which the respondent has its legal domicile) and international arbitration awards (ie, through the Central District Court of Jakarta).

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The Law is not based on the UNCITRAL Model Law, and Indonesia cannot be qualified as a Model Law country, since the Law does not contain a number of provisions modelled along the lines of the UNCITRAL Model Law.

The following are, to name a few, the differences between the two:

- the Law differentiates between domestic arbitration awards, in which the arbitration awards are rendered in Indonesia, and international arbitration awards, which are rendered outside of Indonesia;
- the procedures for enforcement and the refusal of the arbitral awards pursuant to the Law differ with those stated in UNCITRAL Model Law, in which the Law provides more limited grounds to challenge arbitral awards than those contained in the UNCITRAL Model Law. Based on the Law, the arbitral awards can be set aside based on the grounds of the award being based on forged documents, the opposing party having concealed important documents and the award being a result of fraud;
- the Law stipulates that the language of the arbitration process will be the Indonesian language, unless otherwise determined by the parties or the tribunal; and
- the Law basically requires the principle that the case is decided based on the submission of documents, unless the parties agree otherwise, whereas the UNCITRAL Model Law requires that the case is decided based on hearings, unless the parties agree otherwise.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

As explained in questions 1 and 3, domestic arbitration law is governed by the Law. Other than the Law, one of the arbitration institutions that is commonly used in Indonesia is *Badan Arbitrase Nasional Indonesia* (the Indonesian National Board of Arbitration), known by its acronym, BANI. This also provides an Arbitral Procedure (the BANI Rules).

Nevertheless, article 4(2) of the BANI Rules stipulates that the arbitrators are allowed to apply any other arbitration procedures other than BANI Rules (Indonesian Civil Code (the ICC), UNCITRAL, etc) as long as such applicable procedure has been agreed upon by the parties in dispute.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

See question 5.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

In 1977, BANI (www.baniarbitration.org) was established in Jakarta by the Indonesian Chamber of Commerce and Industry (KADIN) by the Decision Number SKEP/152/DPN/1977 as a private arbitration institution in Indonesia. Although BANI is closely related to KADIN, in its work it is completely independent and free from the intervention of any other body or authority. It is also important to note that quite recently another arbitration institution came into being under the name of *Badan Arbitrasi Muamalat Islam Indonesia* (the Indonesian Islamic Muamalat Board of Arbitration (BAMUI)).

BANI is an arbitration institution in Indonesia with the purpose of providing an equitable, fair and quick settlement of commercial disputes arising in the fields of trade, industry and finance at the national as well as the international level. At present, BANI has its head office in Jakarta and branches in Padang, Medan, Surabaya and Ujung Pandang.

See question 23 in conjunction with question 39 for further information as to the arbitration rules of BANI and fee structure for arbitrators.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Under article 5(1) of the Law, which stipulates that only disputes that are commercial in nature or those concerning rights that according to the laws and regulations are fully under the control of the parties in dispute, may be settled through arbitration. Furthermore, article 5(2) further states that disputes that according to the Indonesian laws cannot be settled amicably cannot be submitted to arbitration.

In practice, disputes that cannot be submitted to arbitration are, among others:

- criminal cases;
- industrial relationship cases (manpower);
- administrative cases;
- bankruptcy cases; and
- other related family matters (divorce and adoption).

As an example, it is worth mentioning a decision of the Supreme Court of the Republic of Indonesia under number No. 013PK/N/1999 in relation to the bankruptcy case between *PT Putra Putri Fortuna Windu, et al (as applicant) v PT Environmental Network Indonesia, et al*. In this case, although the parties had agreed that all disputes including those relating to bankruptcy must be settled through arbitration, the Supreme Court refused and set aside the applicability of the arbitration agreement, the reason being that the Indonesian Bankruptcy Law has given a specific authorisation to the Commercial Court to have absolute jurisdiction over bankruptcy issues in Indonesia.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The Law stipulates that an agreement to arbitrate must be made in writing either before or after the dispute arises. The parties to the contracts are free to determine the applicable procedural rules in a written arbitration clause before the dispute arises or a separate arbitration agreement after the dispute has arisen.

In concluding a separate arbitration agreement before the dispute arises, the Law does not specifically provide requirements as to the format and the substance of this arbitration agreement. The parties are free to determine the applicable procedural rules in a written arbitration clause in a commercial transaction before the dispute arises. From article 1(2) of the Law, it can also be concluded that the parties to the arbitration agreement are the legal persons, both entities and individual persons, in accordance with civil law and public law. Based on the Law, not only an individual person but also a government body or a state-owned company in Indonesia could be a party to the arbitration agreement, and there is no special requirement or formality required for them to enter into an arbitration agreement in the framework of a commercial transaction.

The following should be taken in consideration when concluding the arbitration clause (before the dispute arises):

- the rules of the arbitration institution that will govern the arbitration proceedings, unless they are modified by the parties. If the parties have not determined the rules of the arbitration institution, and have only appointed the arbitrator or arbitration institution, the arbitrator or the arbitration institution will determine these applicable rules;
- in the event that the parties disagree with the appointment of an arbitrator or in the absence of any provision to determine the procedures for the appointment of the arbitrators, the chair of the district court will appoint one arbitrator or arbitrators;
- if the parties have agreed the rules of arbitration, the parties must also agree on the venue and the period of time for the arbitration process, failing which the arbitrator or the arbitration institution will determine these matters. Based on article 48 of the Law, the arbitration process or the hearings must be completed within a time limit of 180 days from the constitution of the tribunal, unless the tribunal, with the approval of the parties, waives such time limitation;
- the parties are entitled to determine that the arbitrators will decide the matter based on the applicable substantive law (governing law) or based on *ex aequo et bono*. If the parties agree to choose *ex aequo et bono*, the arbitrators can set aside the applicable law in determining the award, provided that in certain circumstances the mandatory laws of the *dwingend recht* (applicable laws) must be implemented and cannot be set aside by the arbitrators. If the parties do not stipulate the governing law, the chosen law will be the law of the venue where the arbitration is to be conducted (see article 56, paragraph 2 of the Law);
- article 28 of the Law stipulates that the language of the arbitration process will be the Indonesian language, unless otherwise determined by the parties and the tribunal; and
- article 27 of the Law only stipulates that all hearings will be closed to the public. The parties may further stipulate the degree of confidentiality of any other process or document involved in the arbitration process.

If the agreement to arbitrate is agreed by the parties after the dispute has arisen, article 9 of the Law requires that a separate arbitration agreement must at least contain the following requirements:

- the subject matter of the dispute;
- the full names and addresses of the parties;
- the full name and addresses of the arbitrator or arbitral tribunal;
- the place where the arbitrator or arbitration panel will make the decision;
- the full name of the secretary;
- the period in which the dispute will be resolved;
- a statement of acceptance by the arbitrator or arbitrators; and
- a statement of acceptance of the disputing parties that they will bear all costs necessary for the resolution of the dispute through arbitration.

Failing to comply with the above formal requirements will mean that the separate arbitration agreement (after the dispute has arisen) will be null and void. It should be addressed that the validity of an agreement is subject to the decision of Indonesia's civil court.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

See question 9.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Article 30 of the Law stipulates a general provision that third parties may participate or join an arbitration proceeding if:

- there exists an interest of such third parties in relation to the relevant case; and

- the involvement of such third party is agreed by the disputing parties and approved by the tribunal.

If one of the disputing parties rejects any third parties joining the arbitration, these third parties may not be involved in the arbitration process. This is in line with the principle adopted in the Law of 'no contract no arbitration'.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

See question 11.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

See question 11.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

See question 11.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

There is no restriction or limit to the parties' autonomy to select arbitrators. The Law guarantees the party autonomy to select the arbitrators. With regard to the required qualifications for arbitrators in domestic arbitration, article 12 of the Law stipulates that the arbitrators must meet the following requirements:

- be capable of performing legal actions;
- be at least 35 years of age;
- have no family relationship by blood or marriage, up to the third degree, with either one of the disputing parties;
- have no financial or other interest in the arbitration award; and
- have at least 15 years' experience in a certain field.

Furthermore, the Law clearly prohibits judges, prosecutors, clerks of courts, and other government or court officials from being appointed as the arbitrators.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

There are certain default procedures in relation to the selection of the arbitrators to be applied in Domestic Arbitration set forth in the Law, which are as follows.

- In the event that the parties disagree with the appointment of an arbitrator or in the absence of any provision to determine the procedures for the appointment of the arbitrators in the arbitration agreement, based on article 13 of the Law, the chairman of the district court will appoint one arbitrator or arbitrators.
- If there is disagreement between the parties to appoint one or more arbitrators in ad hoc arbitration, each of the parties can submit an application to the chair of the district court in order to appoint an arbitrator or the arbitrators to settle the dispute.

- If the parties have agreed to appoint a single arbitrator, but they fail to reach the consensus to appoint the appointed arbitrator, the chairman of the district court will appoint such single arbitrator.
- If the two arbitrators have been appointed by the parties, but these two arbitrators fail to appoint the third arbitrator as the chair of the arbitrators, then the chair of the district court will appoint the third arbitrator, and this decision made by the district court cannot be set aside.

The chair of the district court referred to the above is the chairman of the district court in which the respondent is domiciled.

The above default procedures stipulated by the Law are for the avoidance of any possible deadlock situation in appointing arbitrators and where the separate arbitration agreement before the dispute arises is silent on stipulating this provision in detail. However, note that the above default procedures would not be applied in the event that the parties to the arbitration agreement have clearly designated for an arbitral institution to administer the arbitration or have otherwise determined specific rules of procedure to govern the arbitration proceedings, and if the designated rules of procedure or arbitration institution set out another method of selection or default selection, the provision of these rules or institution will prevail.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

In order to preserve the independence of the arbitrators in domestic arbitration, article 18 of the Law obliges the arbitrators to inform the parties of any matters that could influence independence or could affect impartiality in rendering the award.

Furthermore, article 22 of the Law also provides the right of refusal for the parties to refuse the arbitrators if there is found to be sufficient reason and ample evidence to create the doubt that the arbitrators would not have the independence to perform their duties and would not be neutral in rendering the awards. For example, if it can be proven that the arbitrator has a family, financial or working relationship with one of the parties or their proxies, one of the parties could implement the above right of refusal.

Whereas article 75(3) of the Law stipulates that in the event that an arbitrator passes away, the parties are obligated to appoint a new arbitrator. The newly appointed arbitrator must continue the arbitration proceedings following the existing process that has been agreed previously.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

As defined by the Law, the arbitrator is a person who has been appointed, either by the parties, the district court or by an arbitration institution, to make a decision in an arbitration dispute. See also question 17.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The Law does not specifically regulate the matter of liable negligence or intentional breach of duty. However, the Law clearly stipulates under article 21 that no arbitrator is to bear any legal liability for any actions he or she conducted while performing his or her duty as an arbitrator, unless, it can be proven that there is *itikad tidak baik* (bad faith) from his or her actions.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Article 3 of the Law clearly stipulates that the Indonesian courts do not have the jurisdiction to adjudicate a dispute where the parties to the contract are bound to an arbitration agreement. Furthermore, article 11 of the Law has also clearly stated that any arbitration agreement concluded in writing by the parties will preclude any right of the parties in the future to submit the dispute to the district court. Therefore, the Indonesian district court will not have any jurisdiction to adjudicate the dispute that has been agreed by the parties to be brought to the arbitral tribunal.

In general, the courts in Indonesia have honoured the above principle, and this has been shown by the permanent jurisprudence decided by the Supreme Court in several cases, and these decisions have been followed in many instances by the lower courts in Indonesia. However, in practice, some jurisprudence has justified the non-applicability of the arbitration agreements in the event that the cases are not related to the breach of contract of agreements per se, but related to the tort or illegal action. In these cases, the plaintiffs have proved that the cases are relating to the tort claim, which is outside of the applicability of the arbitration agreements agreed by the parties. The plaintiffs argued that arbitration agreements only cover any disputes arising out of the implementation or breach of contract of the agreements between the parties.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The Law and other prevailing laws in Indonesia do not specifically stipulate that the arbitrators are competent to rule on their own jurisdiction. However, from article 4(1) of the Law, it can implicitly be concluded that the arbitrator is permitted to rule on the question of his or her own jurisdiction. Article 4(1) stipulates that in the event that the parties have agreed that disputes between them will be settled through arbitration and the parties have given the authorisation, the arbitrator is competent to rule on his or her own jurisdiction to adjudicate the dispute.

However, it is worth noting that from one of the landmark case in Indonesia (*Lippo Group v Astro Group*), the Indonesian court has refused an international arbitration award that orders the Indonesian courts to discontinue the trial process in Indonesia related to the disputed parties bound to the arbitration clause (anti-suit jurisdiction arbitration award). Based on a decision issued by the chair of the district court of Central Jakarta on 28 October 2009, it has ordered to set-aside and declare that an anti-suit jurisdiction award issued by Singapore International Arbitration Centre (SIAC) is non-enforceable (non-exequatur) international arbitration award in Indonesia, and therefore this award can not be enforced in the territory of Indonesia. This SIAC award among others contain orders to Lippo Group to discontinue the Indonesian legal proceedings of a tort case and prohibit Lippo Group from bringing any further proceeding in Indonesia against Astro Group and its related parties. This decision has been confirmed and upheld by the Indonesian Supreme Court through its decision No. 01 K/Pdt Sus/2010 dated 24 February 2010, which confirms that any anti-suit jurisdiction award ordering the Indonesian courts to discontinue the court proceedings in Indonesia violates the principle of sovereignty of the Republic of Indonesia and public order in Indonesia, and there is no any foreign power that can interfere in any existing legal process in Indonesia.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Based on the Law, if the parties have already agreed to choose a specific forum to conduct the arbitral proceedings, the parties are, therefore, obligated to commence the arbitration in the said and agreed place.

Article 28 of the Law provides that the language of the arbitration proceedings will be in the Indonesian language, unless otherwise determined by the parties and the tribunal. Pursuant to Chapter V, article 14 of the BANI Rules, the using of another language other than Bahasa Indonesia is allowed; however, an award should be written in the Indonesian language. However, upon a request from a party or opinion of the arbitrator, the award may be written in English or any other language. In the event that the award will be written not in Bahasa Indonesia, an Indonesian sworn translation of such award must be made for registration purposes.

23 Commencement of arbitration

How are arbitral proceedings initiated?

The procedure of arbitration is primarily governed under Chapter IV of the Law; under articles 27 to 51, these provisions only apply for domestic arbitration (ie, all arbitration proceedings that are conducted and held in Indonesia).

There is no specific provision on the rules governing the procedure of international arbitration stipulated in the Law. The Law only stipulates the issues relating to the procedures for enforcement of international arbitral awards in Indonesia.

The summary of arbitration procedure under the Law is as follows.

Registration and pre-tribunal stage

- (i) The appointment of arbitrators and registering the request for arbitration (the claim) consists of lodging: the name and address of the parties involved and a summary of the dispute along with attaching the evidence and also a clear demand (relief).
- (ii) The claim will then be provided to the respondent by the arbitrators. The respondent has up to 14 days to submit a written response to the arbitrators. Once the response is received by the arbitrators, it is immediately to be provided and obtained by the applicant/claimant.
- (iii) Subsequently, the arbitrators will summon the disputing parties to attend and appear before the arbitration hearing, which will be commenced at the latest 14 days from the issuance of the summons.

If the respondent fails to submit a response within 14 days as mentioned in point (ii) above, the arbitrators will summon the respondent by way as mentioned in point (iii) above.

In the event that the applicant/claimant fails to appear at the arbitration hearing, as mentioned in point (iii) above, even though having been properly summoned, his or her claim is, therefore, declared to be lost and the arbitrators' work is deemed to have been completed.

In the event that the respondent fails to appear at the arbitration hearing, as mentioned in point (iii) above, the arbitrator will conduct a second summons. Should the respondent still not attend the arbitration hearing within 10 days of the second summons, the arbitration proceeding will continue to be conducted and the entire claim shall be awarded to the applicant, unless the claim is unreasonable or is baseless.

The tribunal session stage

- (i) Once the disputing parties have attended the said arbitration hearing, the arbitrators will first provide an opportunity for the parties to settle amicably.
- (ii) If the parties fail to reach an amicable settlement, the arbitrator will conduct or start the examination of the merits. At this stage, the parties are given a last opportunity to submit in writing their arguments along with evidence to the arbitrators. The arbitrators will determine the date for the parties to submit the said final arguments. At this stage, parties are allowed to also submit witnesses and expert witnesses.

- (iii) The examination process is to be completed at the latest 180 days from when the arbitrators have been appointed.

The awarding/judgment stage

- (i) The award shall be announced at the latest 30 days after the examination is completed. Within 14 days of the declaration of the award, parties may submit an application to the arbitrators to conduct correction against an administration error and/or to add or decrease a claim.
- (ii) Within the latest of 30 days from the date the award was announced, the arbitrator shall hand over the award and register it with the bailiff of the district court.

The post-award stage

- (i) In the event that the disputing parties do not undertake the award by arbitrators, by the request of one of the disputing parties, the award shall be conducted based on the order of the chair of the district court.
- (ii) The above order of the chair of the district court, shall be issued at the latest 30 days after the application of enforcement is registered with the bailiff of the district court.

The above procedures are the most common procedures conducted by disputing parties that have not established or agreed on the procedures for proceedings in their arbitration agreement.

24 Hearing

Is a hearing required and what rules apply?

Article 27 of the Law only stipulates that all hearings will be closed to the public.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The Law stipulates certain provisions in relation to the rules of evidence and the procedure for the examination of witnesses. However, in a large part, the Law does acknowledge the applicability of the Indonesian civil procedural laws to domestic arbitral proceedings in Indonesia.

The following are, among others, certain provisions relating to the rules of evidence as stated in the Law:

- article 36 of the Law stipulates that the arbitration case is decided on documents, unless the parties or the arbitrators wish to have hearings;
- article 46(2) of Law provides that the parties will be given a last opportunity to explain their respective positions in writing and to submit evidence deemed necessary to support their positions; and
- articles 49 and 50 stipulate procedures for the summoning and using of witnesses, both expert and factual.

Other than the above, article 37(3) of the Law further stipulates that the procedures for the examination of witnesses in domestic arbitration shall also be implemented in accordance with the provisions of the Indonesian civil procedural laws, although in practice an arbitral tribunal will have more flexibility in applying these than those in the courts.

There are no uniform rules of civil procedure in Indonesia. During the colonial period, the Dutch established plural court civil procedure laws in Indonesia that are still applicable to date. In the courts of Java and Madura islands, the *Het Herziene Indonesisch Reglement* of 1847 (or Revised Indonesian Regulation) (the HIR) is applied, and in the other islands in Indonesia outside Java and Madura, the *Rechtstreglement Buitengewesten* (the RBG) is applied. The RBG essentially follows the HIR but provides for longer terms of notice, service and limitation period. When the HIR or RBG is silent on a particular matter, the courts turn to *Het Reglement of de Burgelijke Rechtsvordering voor de Rad van Justitie op Java en het Hoogerechtshof van Nederlandsh - Indie*, also known as the *Reglement op de Rechtsvordering* (the RV) (*Staatsblad* 1847 No. 52 as amended). In some cases, the rules of evidence are also regulated in Book IV of the ICC.

The following are a summary of relevant provisions on the rules of evidence contained in the Indonesian civil procedural laws:

- in general civil proceedings, the general principle of onus of proof would be applied, which stipulates that any party asserting any claim has the burden of proving its existence. This burden of proof is particularly relevant, since Indonesian civil procedure does not allow for any form or disclosure of discovery. This onus of proof stipulated in article 1865 ICC and article 163 HIR; and
- article 1866 ICC and article 164 HIR define that evidence consists of written evidence, testimony of witnesses, inference, acknowledgements and oath.

Article 1867 ICC distinguishes between authentic written evidence and privately made written documents. The authentic written evidence in the form as prescribed by the laws and made before a government official is considered as the strongest evidence (*prima facie* evidence).

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Insofar as it is related to domestic arbitration, the local court will have jurisdiction to deal with:

- the default procedure for the appointment of the arbitrators;
- the enforcement of interim measures of relief granted by the arbitral tribunal;
- the enforcement of the arbitral awards (including the refusal and rejection of the arbitral awards); and
- the enforcement of the injunctive relief to be implemented after the rendering of the final awards.

Other than that the local courts do not have jurisdiction to deal with procedural issues arising during the arbitration process (see article 3 in conjunction with article 11 of the Law).

27 Confidentiality

Is confidentiality ensured?

The Law is silent on the degree of confidentiality of any other process or document involved in the arbitration process. Article 27 of the Law only stipulates that all hearings will be closed to the public. In practice, the parties may further stipulate the degree of confidentiality of any other process or document involved in the arbitration process. In general practice, arbitration proceedings are subject to the basis of confidentiality. However, since the Law does not provide any legal consequences or sanctions for breaching confidentiality, such matter is easily breached in practice without any consequence.

The Law only stipulates that the hearings are closed to the public. However, since the Law does not provide any legal consequences or sanctions for breaching the confidentiality as referred above, the proceedings are not fully protected by confidentiality.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Articles 3 and 11 of the Law clearly stipulate that the Indonesian district court does not have the jurisdiction to interfere in, or adjudicate, a dispute where the parties to the contract have agreed to an arbitration agreement, the reason being that any arbitration agreement concluded in writing by the parties will preclude any right of the parties in the future to submit the dispute to the district court. The restriction of this court intervention will also be relevant for any application to grant preliminary or interim relief in proceedings subject to arbitration. Therefore, no preliminary or interim relief should be available to the court where the dispute is to be resolved by arbitration.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The Law does not provide for, nor governs, the above matters specifically, other than the issues that have been explained in question 28.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Based on Article 32, paragraph (1) of the Law, upon the request of one of the parties, the arbitrator or arbitral tribunal may decide on a provisional award or other interlocutory decision in order to uphold the proper examination of the dispute, including the decision on the attachment for security purposes, ordering the deposit of goods with third parties or the sale of perishable goods.

Pursuant to the Law, the implementation of the above powers by the arbitrators or arbitral tribunal does not require court intervention. However, since there are no sanctions provided by the Law for the non-compliance with these interlocutory arbitration awards, in practice this may lead to difficulty in implementing this interlocutory arbitration award.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The Law is silent concerning such matters. However, according to the BANI Rules, the arbitrator is allowed to stipulate sanctions against parties who refuse to obey the code of conduct or any action that will result in delay to the arbitral proceedings.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

The Law does not specifically stipulate any provision in relation to this matter, but refers this matter to the rules of arbitration chosen by the parties. In the case of BANI Rules, it is stipulated that in the event that more than one arbitrator is appointed, an arbitration award must first be made on the basis of a consensus among the arbitrators, failing which the award will be made by a majority vote among the arbitrators. Any dissenting opinion from the arbitrator must be recorded in the written arbitration award.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Based on article 27 of the BANI Rules, it stipulates that in the event the arbitrators have not found any common grounds in granting the award or if there exists any different opinion among the arbitrators, the decision of the chair of the arbitrators shall prevail, with the requirement that the dissenting opinions among the arbitrators must be noted in the award.

34 Form and content requirements

What form and content requirements exist for an award?

With regard to domestic arbitration awards, article 54 of the Law has set forth the following legal requirements to be fulfilled in making domestic arbitration awards:

- the heading of the award states the following words 'For the Sake of Justice Based on Belief in the Almighty God' (*Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa*);
- the full name and addresses of the disputing parties;
- a brief description of the matter in dispute;
- the respective position of each of the parties;
- the full names and addresses of the arbitrators;
- the considerations and conclusions made by the arbitrator or arbitral tribunal concerning the dispute as a whole;
- the opinion of each arbitrator in the event that there is any dissenting opinion in the arbitral tribunal;
- the order of the award;
- the place and date of the award; and
- the signature(s) of the arbitrator or arbitral tribunal.

In addition to the above, the following are further legal requirements relating to domestic arbitration awards:

- the tribunal must determine the time period for the enforcement of the award;
- the award must be rendered and read no later than 30 days from the close of the hearings; and
- no later than 30 days as from the date the arbitration award is rendered by the tribunal, the arbitration award must be registered by the tribunal or its attorney in the relevant district court in which the respondent is domiciled.

The Law does not stipulate the requirements to be made for international arbitration awards, except for the procedures of the enforcement of international arbitration awards in Indonesia.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

Based on article 54(4) of the Law, it is only mentioned that an award (domestic) should stipulate the time line of when the award should be conducted. In the event that one of the disputing parties does not follow it, one of the disputing parties may request the chair of the district court to issue an order to implement the said award. Pursuant to the Law, the chair of the district court is to deliver an order within 30 days of the registration of the application of execution (implementation) to the district court. This order is deemed to be final, binding and enforceable on the parties.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The Law is silent on that matter but only sets out that the matter in relation to a time limit must be stated in the award. See question 35.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The Law does not specifically dealt with this issue. The Law only stipulates that the final award may include sanctions, penalties and interest in the event that the losing party neglects to conduct (implement) the award.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

The Law is silent on the issue of termination of the proceedings, other than an award. Based on the BANI Rules, as long as the tribunal has

not taken a decision, the claimant can revoke his or her claim and, therefore, the proceeding will be terminated, but if the defendant has already given his or her answer, the claim can only be revoked with the defendant's prior consent. The withdrawal must be decided through an award issued by the arbitrators. See also question 23.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Under the Law, the arbitrator will determine the cost of the arbitration, which includes the following

- honorarium of the arbitrator;
- accommodation of the arbitrator;
- witness and expert witness costs;
- an administration fee; and
- other expenses and costs arising out of, or in connection to, the proceeding.

With regard to the administration fee and registration fee, this is set out in the BANI Rules. All above costs are to be borne by the losing party. However, in the event that the claim is only partially granted, the arbitration expenses shall be charged to the parties in equal proportions.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Based on Indonesian laws, the parties can agree in writing on the amount of interest to be applied between them. However, in the absence of any agreement between the parties, the statutory interest stipulated in the usury law will be applicable. Indonesia has a usury Law of 1983 (*Woeker Ordonantie* as contained in the State Gazette 1938 Bo, 524) that restricts the imposition of excessive or extraordinary interest rates, if the parties have not previously agreed on the provision of the interest. The statutory interest of 6 per cent per annum will be applicable.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The Law is silent on the issue. In practice, after the granting of the award, the arbiters upon request from one of the disputing parties may issue an explanatory note to the award, insofar as this note shall not be contrary to or inconsistent with the petitions made in the award.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

The Indonesian Arbitration Law clearly stipulates that arbitral awards shall be a final, binding and enforceable decision against the parties, therefore there is no possibility to appeal an arbitration award. If one of the parties refuses to enforce the domestic arbitral award, the enforcement would be implemented based on the order of the chair of the district court based on the request of one of the disputed parties. The decision of the chair to reject or accept the application for the execution of the arbitral award cannot be appealed. The enforcement of a foreign (international) arbitral award relating to legal persons in Indonesia (other than the government) can only be implemented after obtaining an order of execution (exequatur) issued by the Central District Court of Jakarta. The granting of the exequatur by the Central District Court of Jakarta is not subject to an appeal. However, if the Central District Court of Jakarta refuses to issue the exequatur, this rejection is subject to the appeal to the Supreme Court. The enforcement of a foreign arbitral award in which the Republic of Indonesia is a party can only be implemented in Indonesia after having an exequatur from the Supreme Court of the Republic of Indonesia, and this is not subject to an appeal.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

See question 42.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

See questions 1 and 42.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

It should be noted that in practice the District Court of Central Jakarta, as the court having the jurisdiction to grant or not to grant the exequatur for the enforcement of a foreign (international) arbitral award, has not always or automatically granted the decision on the exequatur. The examination on the application of exequatur by the District Court of Central Jakarta is on a case-by-case basis. There are some cases in which the court has rejected granting the exequatur, for example, the *Lippo Group v Astro Group* case as explained in question 21.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

There exists no regulation or case law in Indonesia in relation to this issue.

47 Cost of enforcement

What costs are incurred in enforcing awards?

The relevant district court, the High Court and the Supreme Court each has its own official rate as to the administrative court costs applicable to the enforcement of domestic and international arbitration awards, the amount of which is not substantial.

Other**48 Judicial system influence**

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Indonesian procedural law follows the tradition of a civil law system, and it does not commonly acknowledge the disclosure of documents and other disclosure or discovery. There is no mechanism to enforce any order relating to disclosure or discovery in the Indonesian courts.

Under civil procedural laws, the roles of the presiding judges in a trial process are generally passive, which means that principally the judges' authority to adjudicate the dispute is limited only to claims and evidence submitted by disputing parties. This is different from the common law (adversarial) system. In Indonesia, the judges are not allowed to take any initiative or ask the party to submit or add additional evidence during the proceeding. Therefore, in practice, the scope of the dispute matters to be examined by the presiding judges will principally be determined by the disputing parties and not by the presiding judges.

In addition to the above, the civil procedural laws require that the party or plaintiff who asserts any claim has the burden of proving its existence in front of the court, and therefore the pleading must be proved by the plaintiff or claimant (onus of proof or burden of proof principle). There are no clear standards that determine when the burden has been satisfied in a case. However, in practice, the plaintiffs should meet the following three fundamental key tests in asserting their claim in the court:

- the course of action of the defendants can be proven by the plaintiffs in court and that these actions have breached the relevant contract (in a breach of contract case) or violated the prevailing laws, customary laws or prudential principles or the right of the plaintiffs (in a tort case); and
- the plaintiffs must be able to prove that as a consequence of these actions conducted directly or indirectly by the defendants, the plaintiffs have suffered damages.

The civil procedural laws do not recognise the concept of pretrial discovery procedure. Parties are expected to prove their cases by giving upfront disclosure, that is, as of the commencement of the proceeding and thereafter during the trial, and to list in their initial pleadings all documents upon which they base their argument or case. In the proceedings, the disputing party does not have any right to request the other disputing party to disclose documents or additional documents, and judges do not have the authority to request the disputing parties to submit evidence.

Even though there is no pretrial discovery process in Indonesian proceedings, the civil procedural laws have applicable procedures that enable a party to obtain evidence that is in the possession of an opposing party or a third party. Pursuant to article 137 of HIR and in conjunction with article 1886 of the ICC, a party may file a request with the court to order the opposing party to submit or present specific

HHR
LAWYERS

Pheo M Hutabarat
Asido M Panjaitan
Yeremia L T Paat

pheo.hutabarat@hhrlawyers.com
asidopanjaitan@hhrlawyers.com
yeremialouis@hhrlawyers.com

DBS Bank Tower, 20th floor
Ciputra World 1
Jl. Prof. DR. Satrio Kav. 3-5
12940 Jakarta
Indonesia

Tel: +62 21 2988 5988
Fax: +62 21 2988 5989
www.hhrlawyers.com

documents and evidence owned and controlled by it that are related to the case, and if the other party refuses to disclose such documents, the presiding judges may draw whatever inference they deem appropriate from such non-disclosure and may draw the conclusion that such evidence is not favourable to the party that refused to produce it.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

The laws of Indonesia do not provide any specific professional or ethical rules applicable to counsel in domestic as well as international arbitration, including there being no rules follow or reflect the IBA Guidelines on Party Representation in International Arbitration. Generally, Indonesian lawyers (advocates) and foreign lawyers who practice in Indonesian territory must adhere to the Code of Ethics 2003 and the Indonesian Advocate Law (Law No. 18 of 2003). Any foreign lawyers who practice in Indonesia must pass the Indonesian examination and shall be required to obtain their licences from the Minister of Law and Human Rights of Indonesia. Therefore, in view of these regulations, only licensed foreign lawyers can act as counsel in domestic arbitration proceedings in Indonesia. Indonesian law does not touch on any issue in relation to the lawyers' (including foreign lawyers) representation in international arbitration proceedings.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

No specific stipulation under the laws of Indonesia exists on this particular matter. Based on the Indonesian Advocate Act and the Indonesian Lawyers Code of Ethics 2002, the parties are free to agree on the legal fee arrangements to be paid by the client to its lawyers (freedom of contract), including contingency fee. This agreement for the provision of the legal fees can be made either verbally or in writing. The Indonesian Advocate Act only requires that the amount of the legal fee must be agreed based on the fairness principle, which means that the determination of the legal fees should consider the risk, time, capability and interest of the client. Article 4 of the Indonesian Lawyers Code of Ethics 2002 only stipulates that in determining the legal fee, lawyers must consider the client's ability to pay, and lawyers cannot impose unnecessary expenses on their clients.

In practice, advocates (barristers) usually charge a fixed flat fee for each level of litigation with or without a combination of the success fee. In some cases, it not uncommon that a contingency fee arrangement is also offered by Indonesian barristers. For large and complex litigation cases, a reputable law firm in Indonesia commonly charges based on a hourly billing arrangement. It is not uncommon in practice for litigation funding to be facilitated by a disinterested third party. However, there are no specific prohibitions on how parties conclude funding or financing for litigation cases.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

See the answer to question 49.

Italy

Cecilia Carrara

Legance – Avvocati Associati

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Italy is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The New York Convention has been in force in Italy since 1 May 1969. Italy has not made any declaration or reservation under articles I, X and XI of the New York Convention.

Italy is a party to many other multilateral conventions relating to international and commercial arbitration. They include, inter alia: the Geneva Protocol on Arbitration Clauses (in force in Italy since 27 August 1924), the Geneva Convention on the Enforcement of Foreign Arbitral Awards (in force in Italy since 12 February 1931), the European Convention on International Commercial Arbitration (in force in Italy since 1 November 1970), the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (in force in Italy since 28 April 1971). Italy was also a party to the Energy Charter Treaty (in force in Italy since 16 April 1998), but withdrew in January 2015. The withdrawal will become effective from January 2016. However, according to the ‘sunset clause’ contained in the Energy Charter Treaty, the Convention shall continue to apply for a further 20 years from the date of effective withdrawal for investments made before January 2016.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Italy is a party to a total of 104 bilateral investment treaties, 14 of which have been terminated, and 14 have been signed but are not yet in force or are still in the negotiation phase. More information and full texts are available at <http://investmentpolicyhub.unctad.org/IIA/CountryBits/103#iiaInnerMenu>.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Within the Italian legal system the primary domestic source of law relating to arbitration is the Code of Civil Procedure (the Code) regulating both domestic arbitration and recognition and enforcement of foreign arbitral awards.

Arbitration proceedings that have their seat outside the Italian territory are considered as foreign.

Special rules on arbitration in corporate matters were enacted in 2003 and arbitration proceedings in the field of public procurement law are governed by specific rules set forth in the Italian Public Procurement Code of 2006, recently amended.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

Italian law on domestic arbitration is not expressly based on the UNCITRAL Model Law; however, most of its principles are acknowledged by Italian arbitration law.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The mandatory domestic arbitration law provisions on procedure concern:

- arbitrability of disputes;
- requirements of validity of arbitration agreements;
- odd number of arbitrators;
- appointment and replacement of arbitrators;
- requirements of capacity to act as arbitrator;
- liability of arbitrators;
- grounds for challenging arbitrators;
- due process principle;
- multiparty arbitration and joinder by third parties;
- party’s capacity to enter into arbitration agreements;
- prohibition for arbitrators to order provisional or urgent measures;
- time limit for issuing the arbitral award;
- effects and enforceability of arbitral awards; and
- grounds for correction and setting-aside of arbitral awards.

Except for the above provisions, rules on procedure may be freely agreed upon by the parties or, failing an agreement, decided upon by the arbitrators.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Arbitrators shall decide the merits of the dispute by applying the law, except if the parties have agreed that the arbitrators will decide *ex aequo et bono*. The parties are free to choose the law applicable to the dispute; failing such choice, the arbitrators shall decide on the law applicable to the merits either by applying the conflict of laws rules of the seat, or by establishing directly the applicable law without having recourse to international private law.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The most prominent arbitral institutions in Italy are as follows:

- National and International Chamber of Arbitration of Milan (CAM) having its seat in Milan, Via Meravigli, 7 (www.camera-arbitrale.it) is the leading arbitral institution in Italy in terms of caseload and international exposure. According to CAM’s rules, arbitrators’ fees

are calculated on the basis of the amount in dispute (the Schedule of Fees has been recently amended); and

- the Italian Association of Arbitration (AIA), with its seat in Rome, Via Barnaba Oriani, 34 (www.arbitratoaia.org) is another well-established arbitral institution that administers both national and international arbitration proceedings. According to AIA arbitration rules, arbitrators' fees are calculated on the basis of the amount in dispute.

Moreover, several Italian Chambers of Commerce (eg, Rome, Venice, Florence, Bologna) have branches in charge of administering arbitration proceedings according to their own sets of rules.

All arbitration institutions with a seat in Italy usually calculate arbitrators' fees on the basis of the value of the dispute and not on the basis of the time spent or on hourly rates.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

All contractual disputes are arbitrable, except for disputes concerning non-disposable rights (rights relating to citizenship, parenthood, nationality), and disputes that cannot be deferred to arbitration by operation of law (eg, limitations that apply to employment disputes and tenancy agreements, as well as consumer disputes).

By specific agreement in writing, the parties may also establish that future disputes concerning one or more specific non-contractual relations be referred to arbitration.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Arbitration agreements have to be in writing and identify the subject matter of the dispute. The written form requirement is also met when the parties express their will to arbitrate by means of electronic devices. In order to be valid the arbitration agreement must express the parties' will to arbitrate in a clear and definitive manner.

Arbitration agreements concerning future non-contractual disputes must also specifically identify the non-contractual relationships giving rise to the dispute.

Under Italian law arbitration clauses contained in general terms and conditions are considered as unfair clauses and therefore have to be specifically approved in writing in order to be valid. However this formal requirement is not applicable to foreign awards under the regime of the New York Convention, or if the foreign substantive law applicable to the contract provides for less stringent formal requirements.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The validity of the arbitration agreement is not affected by the validity of the underlying contract. Consequently avoidance, rescission and termination of the underlying contract do not extend to the arbitration agreement. One exception to the above rule is set forth under the Italian bankruptcy law, which provides that, in case of termination of an agreement containing an arbitration clause as a consequence of bankruptcy, if there are any pending arbitration proceedings they shall be stayed. On the contrary, the opening of a composition with creditors procedure does not affect existing arbitration agreements or pending arbitration proceedings.

The legal capacity to enter into a contract includes the capacity to enter into the arbitration agreement; if the parties lose their capacity during the arbitration the arbitrators shall adopt all measures to ensure the respect of the parties' right to due process and could, ultimately, stay the proceedings.

Moreover, should both parties fail to pay the advance on costs requested by the arbitrators, they cease to be bound by the arbitration agreement; on the contrary, the conclusion of the arbitral proceedings without any decision on the merits does not affect the arbitration agreement's enforceability.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

The Italian legal system follows a strict approach: third parties that have not accepted an arbitration agreement in writing, not even by a clear reference in writing, are not considered bound by it. Theories based on the agency principle, or piercing of the corporate veil or alter ego, are not recognised in Italy.

In case of legal succession into a contract the successor continues to be bound by the arbitration agreement. The assignment of a contract also entails the assignment of the arbitration agreement.

In the context of insolvency proceedings, if the receiver opts in a pending contract he shall be bound also by the arbitration agreement included therein.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

Third parties may voluntarily appear in or be joined to arbitral proceedings only with the consent of all parties and arbitrators. Nevertheless, Italian law grants to any third party the right to join arbitral proceedings when the joinder is aimed at supporting the position of one of the parties or is required by the law (mandatory *litis consortium*).

Third parties whose rights are affected by an arbitral award may challenge the award. The arbitral award can also be challenged by a third party who is a successor in title or a creditor of one of the parties if the award has been issued with malice or collusion against him or her.

Special rules on joinder and third-party notice are also provided for in case of corporate arbitration, allowing the participation of all shareholders in the arbitration proceedings.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The 'group of companies' doctrine is not recognised under Italian law. As a consequence, arbitral tribunals in Italy are not allowed to extend an arbitration agreement to a non-signatory parent or any subsidiary companies of a signatory company.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

Multiparty arbitration is expressly regulated under Italian arbitration law. In cases of multiparty arbitration, arbitrators have to be appointed either by a third independent party, or jointly by the parties; otherwise, the arbitration proceedings shall be split into as many proceedings as the number of the defendants.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Any person having legal capacity to act may act as an arbitrator.

Active judges may not act as arbitrators unless, in exceptional cases, they are specifically authorised to do so, whereas retired judges do not encounter such limitations.

The parties are free to choose the arbitrators and determine their requirements, provided that this shall not affect the independence and impartiality of the arbitrators. Moreover, requirements based on nationality, religion or gender may be challenged if they amount to a

violation of the public policy principle of non-discrimination (ie, unless they are reasoned and functional to the decision of the dispute).

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Failing the parties' agreement, the appointment of arbitrators is made by the president of the court of the seat of the arbitral proceedings. If the parties have not yet established the seat, the arbitrators are appointed by the president of the court of the place where the arbitration agreement was entered into or, if this place is located abroad, by the president of the court of Rome.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

An arbitrator may be challenged if he or she:

- lacks the requirements expressly agreed upon by the parties;
- has a direct or indirect interest in the case;
- is a relative, up to the fourth degree, or lives with one of the parties, their legal representatives or any of their counsel;
- is party to a pending proceeding against, or has a serious hostility with, one of the parties, their legal representatives or their counsel;
- is linked to any of the parties, to a company owned by any of the parties, to its controlling entity, or to a company subject to a common control, by an employment, continuative consultancy or other relationship of a patrimonial or associative nature;
- is guardian or tutor of one of the parties; or
- has advised, assisted or defended one of the parties on the same case or has rendered statements as witness.

Replacement of arbitrators follows the same rules of arbitrators' appointment. Failing the parties' agreement on the appointment mechanism, the subsidiary appointment by the president of the state court at the seat of arbitration shall apply.

Arbitrators can also be substituted if they omit or delay the performance of an activity relating to their functions.

IBA Guidelines on Conflicts of Interest in International Arbitration, even if not binding, are considered as an important instrument of guidance to assess the independence and impartiality of arbitrators. The leading Italian arbitral institutions make reference to the IBA Guidelines or similar standards and require declarations of independence by the arbitrators prior to their appointment.

Arbitrators shall also conform to the disciplinary code of conduct of their profession (eg, lawyers, engineers, etc).

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

The relationship between parties and arbitrators has a contractual nature and is qualified as a mandate. In Italy, it is seldom the case that the parties and the arbitrators enter into specific terms of engagement, but these may be inferred from the acts of the arbitral proceedings.

All arbitrators, including party-appointed arbitrators, are required to be independent and impartial.

Arbitrators are entitled to obtain reimbursement of expenses and the payment of arbitration fees unless they waive such right in writing, or they incur into some kind of liability. The parties are liable jointly and severally towards the arbitrators for the payment of the arbitrators' fees and expenses.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators are not immune from liability for their conduct in the course of the arbitration.

Arbitrators shall be liable for damages caused to the parties if with malice or gross negligence they have: omitted or delayed due acts and have been substituted for this reason; waived their mandate without a justified reason; or omitted or prevented the issuance of the arbitral award within the due time limit.

According to certain Italian scholars, arbitrators can be held liable only for malice or gross negligence within the limits provided by Law No. 117/1988 governing ordinary court judges' liability towards the parties.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If court proceedings are initiated despite an existing arbitration agreement, the defendant shall raise a jurisdictional objection within its first statement of defence. Failing a timely objection, the courts may decide the dispute on the merits.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

If the validity, content, scope of the arbitration agreement or the regular appointment of the arbitrators are challenged during the arbitration proceedings, the arbitrators shall rule on their own jurisdiction in application of the Kompetenz-Kompetenz principle. The party who does not object to the arbitral jurisdiction in its first defence following the arbitrator's acceptance cannot, for this reason, challenge the arbitral award, except if the dispute was not arbitrable.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

If the parties fail to select the seat of the arbitral proceedings, the arbitrators shall choose the seat. Lacking any choice by the parties or the arbitrators, the seat is at the place where the arbitration agreement was entered into or, if abroad, in Rome. Hearings may be held at the seat of arbitration or in any other place, unless the arbitration agreement provides otherwise.

The language of the proceedings is freely chosen by the parties; otherwise, it is chosen by the arbitrators.

23 Commencement of arbitration

How are arbitral proceedings initiated?

Arbitral proceedings are initiated by the service upon the counterparty of the request of arbitration. In institutional arbitrations, the request of arbitration is served upon the arbitral institution that serves it upon the defendant.

The request for arbitration must be in writing, must identify the parties, the subject matter of the dispute and the applicable arbitration agreement, and has to be signed by the party or by its duly authorised attorneys. The request for arbitration also contains the appointment of the arbitrator or proposals for the appointment thereof, or the request to the arbitral institution to appoint the arbitrator.

24 Hearing**Is a hearing required and what rules apply?**

Hearings are not required but they are usually held. There are no specific rules that govern the conduct of hearings: the arbitrators, together with the parties, are free to choose how to administer the proceedings, provided that the principle of due process is respected. The rules governing court proceedings are not applicable, unless the parties or the arbitrators refer to them in the absence of any other specific agreement or procedural order.

25 Evidence**By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?**

The rules applying to the taking of evidence may be chosen by the parties within the arbitration agreement or at a later stage (eg, by referring to the IBA Rules on the Taking of Evidence). Failing any parties' choice, the arbitrators shall decide which rules to apply.

In domestic arbitrations it is common that the parties and the arbitrators apply the ordinary rules on evidence applicable in court proceedings. This would imply that each party communicates in advance to the other party and to the arbitrators the names of the witnesses and the list of questions to be asked, and the questions are posed directly by the arbitrators with no use of cross-examination and witnesses have to be unrelated to the parties. In domestic arbitrations it is also more common that arbitral tribunals directly appoint third-party experts. Vice versa, in international arbitration proceedings with a seat in Italy, there is a tendency to refer to the IBA Rules on the Taking of Evidence and cross-examination is more commonly used.

Discovery is usually not admitted under Italian law. Limited discovery, in the meaning of the IBA Rules on the Taking of Evidence, may be held admissible also in international arbitration proceedings seated in Italy. However, this occurs extremely rarely, and there is no specific case law on the point.

Arbitrators do not have compelling powers to force a witness to appear before them. Nevertheless, arbitrators can resort to the president of the state court of the seat of arbitration seeking an order to appear against the witness.

26 Court involvement**In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?**

Arbitrators can resort to state courts to compel a witness to appear before them to render its testimony. Furthermore, state courts' involvement is required for issuing provisional or urgent measures pending the arbitration proceedings.

27 Confidentiality**Is confidentiality ensured?**

There are no legislative provisions on confidentiality of arbitral proceedings or of the award. The prevailing view is that confidentiality is not inherent to arbitration and therefore if the parties wish to ensure confidentiality of the proceedings or of the award, they should agree on a confidentiality agreement, insert a specific provision to this purpose in the arbitration clause or seek a procedural order in this respect from the arbitral tribunal. In case of institutional arbitration specific provisions may be included in the rules of the relevant arbitral institution (eg, article 8 of the Chamber of Arbitration of Milan Rules).

Interim measures and sanctioning powers**28 Interim measures by the courts****What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?**

As a rule, under Italian law, state courts hold exclusive jurisdiction to grant interim measures both before and after the arbitration proceedings have been initiated (there is an exception with regard to corporate and IP matters). State courts may grant both typical interim measures (such as seizures) and urgent measures that can be tailored to the

parties' needs on a case-by-case basis. Arbitral tribunals may grant atypical interim measures, which are not per se enforceable but may be complied with spontaneously by the parties.

29 Interim measures by an emergency arbitrator**Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?**

Italian arbitration law does not provide for an emergency arbitrator prior to the constitution of the arbitral tribunal. A similar institution though is provided for by the AIA Rules, even though its decisions would not be enforceable and there is no public case law available on the point. Currently, it is unlikely that decisions rendered by emergency arbitrators issued abroad would be enforceable in Italy, unless they qualify as awards in the meaning of the New York Convention.

30 Interim measures by the arbitral tribunal**What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?**

Arbitrators involved in arbitrations having their seat within the Italian territory cannot grant any kind of interim or urgent measures, including security for costs, unless otherwise provided by the law (the most important exception is in corporate disputes, where arbitrators may stay the effects of a corporation resolution challenged in front of them).

Nevertheless, arbitral tribunals may grant interim measures, including security for costs, as procedural orders that are not enforceable but may be complied with spontaneously by the parties (in such cases, a lack of spontaneous compliance may be considered by the arbitrators in determining the allocation of costs and in evaluating the overall conduct of the parties during the proceedings).

31 Sanctioning powers of the arbitral tribunal**Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?**

Under Italian arbitration law, there are no specific provisions granting powers to the arbitrators to order sanctions against the parties and their counsel. In particular, sanctions directed to counsel would only be applicable by the courts or by the relevant bars at the end of disciplinary proceedings, which could be initiated, *inter alia*, following a notice issued by the arbitral tribunal or by the relevant domestic arbitral institutions. However, guerrilla tactics may be taken into account by the arbitrators while determining the costs allocation.

Awards**32 Decisions by the arbitral tribunal****Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?**

Decisions by the arbitral tribunal are validly taken with the positive vote of the majority of the members of the arbitrators. The award is validly rendered with the signature of the majority of the arbitrators, provided that the award states that it was rendered with the participation of all arbitrators and that the dissenting arbitrator was unable, or decided not to sign.

33 Dissenting opinions**How does your domestic arbitration law deal with dissenting opinions?**

No express provisions exist under Italian law dealing with dissenting opinions. However, in practice, dissenting arbitrators render dissenting

opinions that are either contained in, or attached, as separated documents to the relevant order or award.

34 Form and content requirements

What form and content requirements exist for an award?

As well as being in written form, under Italian law an arbitral award shall contain:

- the name of the arbitrators and the parties;
- reference to the seat of arbitration;
- the arbitration agreement and the conclusions raised by the parties;
- a brief reasoning of the decision;
- the ruling; and
- the arbitrators' signatures and the relevant dates.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

Failing any different agreement, either expressly stated in the arbitration clause or by reference to arbitration rules containing different time limits, an award has to be rendered within 240 days from the acceptance of the arbitrators' appointment. This time limit may be extended (before its expiration) if requested in writing by all parties, or by the president of the court of the seat of the proceedings.

Moreover, the said time limit is extended, only once, by a further 180-day term in each of the following cases:

- if evidence is to be taken;
- if a partial or a non-definitive award is issued;
- if an expert is appointed by the arbitral tribunal; or
- if the arbitral tribunal, in full or in part (or the sole arbitrator) is replaced.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The arbitrators shall communicate the award to each party by delivering one original, or a certified copy, of the award, also by registered mail, within 10 days from the last signature. However, the arbitral award is effective as from the date of its last signature.

A request for correction of the award may be filed within one year from the date of communication of the award to the parties.

A request for setting aside the award has to be filed within 90 days from the service of the award upon the other party and, in any event, a challenge is precluded after one year from the date of the last signature of the award.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

Under Italian law arbitrators can issue final, partial and interim awards. Final awards are those deciding upon all the claims raised in the arbitration in a definitive manner. Partial awards decide in a definitive manner only part of the claims and may be immediately challenged by the parties. Interim awards resolve some of the issues but not in a conclusive manner and may be subsequently amended. Interim awards may be challenged only together with the final award.

Awards by consent are possible under Italian law, although they are neither specifically regulated by the Code nor widespread in practice.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Arbitration proceedings are terminated if, after the proceedings are stayed, none of the parties files a motion for prosecution within the term fixed by the arbitrators or, at the latest, within one year after the cause of the stay ceased its effects.

If a preliminary issue arises concerning a non-arbitrable matter, arbitral proceedings are stayed and subsequently terminated if none of

the parties file with the arbitrators a certified copy of the motion to submit the preliminary issue to the state court within 90 days.

The arbitral proceedings may be terminated also due to termination of the mandate of the arbitrators, inactivity of the parties or withdrawal to their claims, death or incapacity of the arbitrator that cannot be replaced, and waiver to the mandate by the arbitrator that cannot be replaced.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Costs are usually allocated on the basis of the principle that costs follow the event. The decision on the allocation of costs shall be reasoned, usually very briefly. Recoverable costs include administrative fees, attorneys' fees (most commonly only within the limits of the applicable official tariffs) and documented expenses. In-house fees, as a rule, are not recoverable, though there is some debate as to whether they may be at least partially awarded under certain circumstances.

Arbitrators may request to the parties an advance on costs, which is usually shared on a 50/50 basis.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Interests are usually claimed and awarded. If a contractual interest rate is not provided for in the agreement, the legal interest rate provided for under the Italian Civil Code shall apply (currently 1 per cent). A recent reform passed in 2014 introduced a new rule whereby the higher interest rate applicable to default payments in commercial transactions, approximately equal to 9 per cent, always applies in case of disputes as from the date of service of the writ of summons before state courts. It is not expressly clarified whether such rule should also apply to arbitral proceedings but a positive interpretation seems to be consistent with the general aims of the reform. Compound interest is only admissible in very limited circumstances.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Within one year of the communication of the award each party can request from the arbitrators:

- the correction of any omission, clerical error or calculation mistake, even when such mistakes have determined a divergence among the various originals of the award, and also if they relate to the signature of the arbitrators; and
- to integrate the award with one of the following elements: the name of the arbitrators or of the parties, the seat, the arbitration agreement and the final conclusion of the parties.

In the above-mentioned cases the arbitrators shall decide within 60 days. Lacking the arbitrators' decision, the motion for correction may be filed with the state court of the seat.

If the award has already been filed with the state court for its declaration of enforceability, such court also has jurisdiction on the request of correction.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

Italian law provides for three available tools for challenging an arbitral award: setting aside proceedings for nullity (motion for new trial) and third-party opposition.

The motion for setting aside an arbitral award has to be filed with the court of appeal of the seat exclusively on the following grounds:

- lack of validity of the arbitration agreement;

Update and trends

A recent reform, enacted in Italy in November 2014, that aimed to simplify and accelerate civil court proceedings, introduced the possibility for the parties to pending disputes to jointly decide to ‘migrate’ to domestic arbitration. However, this law has produced a paucity of new arbitration cases so far, mostly because of procedural and costs reasons. There are ongoing discussions on the need to reform the Italian rules on arbitration, to align arbitration more to international standards and promote the its use (for instance, abolishing the prohibition on the arbitrators rendering interim measures). In particular, there are several draft bills of law focusing on the reform of the special rules applicable to arbitration of corporate disputes. A legislative commission was constituted in 2016 and is expected to produce its recommendations to Parliament in early 2017.

The rules of the Italian Association of Arbitration were revised in 2016.

As a consequence of reforms cutting state incentives in the photovoltaic sector, in February 2014 ICSID arbitration proceedings were

commenced against Italy by foreign investors that filed claims against Italy under the Energy Charter Treaty (*Busun SA, Jean-Pierre Lecorcier and Michael Stein v Italian Republic* – ICSID Case No. ARB/14/3). Subsequently, other ICSID arbitration proceedings were started against Italy on a similar basis, namely in August 2015 (*Silver Ridge Power BV v Italian Republic* – ICSID Case No. ARB/15/37), in September 2015 (*Belenergia SA v Italian Republic* – ICSID Case No. ARB/15/40), in December 2015 (*Eskosol SpA in liquidazione v Italian Republic* – ICSID Case No. ARB/15/50), in March 2016 (*ESPF Beteiligungs GmbH, ESPF No. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co KG v Italian Republic* – ICSID Case No. ARB/16/5), and in December 2016 (*VC Holding II Sarl and others v Italian Republic* – ICSID Case No. ARB/16/39). As previously mentioned, Italy gave notice of its withdrawal from the Energy Charter Treaty in January 2015, effective from January 2016.

- breach of the rules for the appointment of the arbitrators (provided that the relevant objection was raised in the arbitration proceedings);
- lack of eligibility requirements of the arbitrators;
- the award exceeds the scope of the arbitration agreement;
- the award decided on the merits when it could not be decided;
- brief reasoning, ruling or arbitrators’ signature are missing;
- the award was rendered after the time limit expired;
- the arbitrators breached the formalities prescribed in the arbitration agreement under sanction of nullity;
- the award is contrary to a previous final and binding award or judgment;
- breach of the due process principle;
- the award failed to decide on the merits when it should have;
- the award contains contradictory statements; and
- the award has not decided on some of the parties’ claims or defences.

The award can be challenged for breach of substantive provisions of law, only if so provided by the parties or by the law. Any arbitral award may be challenged if it is in contrast with public policy.

The decision of the court of appeal granting the setting aside declares the nullity of the award and new arbitration proceedings will have to be initiated (the court of appeal may decide directly on the merits in lieu of the arbitrators only in domestic arbitrations).

Motions for a new trial are allowed in a very limited number of cases: if the award is rendered on the basis of forged documents or evidence, if it is based on fraud, or if new documents have been discovered after the award was issued.

Third-party oppositions may be made by any third parties alleging that their rights are affected by the award.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Any decision of the court of appeal is subject to review by the court of cassation only on grounds of lack of jurisdiction, errors in law or lack of, insufficient or contradictory reasoning. The proceedings before the court of cassation may last one to two years. The relevant costs are usually allocated by the court according to the costs-follow-the-event principle.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

The domestic arbitral award has, from the date of its signing, the same effects as a decision issued by a state court.

The party wishing to enforce a domestic award in Italy has to file a request in front of the court of the seat producing an original or a certified copy of the award, as well as the original or a certified copy of the arbitration agreement. The court, after a formal review of the award, declares the same enforceable by decree.

As to recognition and enforcement of foreign awards the Code reflects the provisions of the New York Convention. Domestic courts tend to look favourably upon recognising and enforcing foreign awards in Italy and apply the principles of the New York Convention consistently with international standards and practice.

The party wishing to enforce a foreign award in Italy has to file a petition with the president of the court of appeal of the place of domicile of the other party or of the Court of Appeal of Rome if the other party has no domicile in Italy. Opposition proceedings against the decree of recognition may be commenced before the same court of appeal within 30 days of service of the decree.

The decree of recognition is not considered to be provisionally enforceable, but, in limited cases, provisional enforceability can be granted during the opposition proceedings.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Recognition and enforcement in Italy is refused if the foreign arbitral award has been set aside or stayed in the state of origin. If setting aside or stay has been requested in the state of origin but no decision has been rendered yet, Italian courts may grant the recognition and may suspend the opposition proceedings awaiting the decision of the courts of the state of origin.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Pursuant to Italian law, emergency arbitrators are not regulated and, generally, arbitrators do not have the power to issue interim measures. It is understood that no case concerning the recognition and enforcement of orders rendered by emergency arbitrators in the context of foreign arbitration proceedings has existed thus far. However, should these orders not be qualified as awards in the meaning of the New York Convention, it appears unlikely that they would be enforceable in Italy.

47 Cost of enforcement

What costs are incurred in enforcing awards?

The costs for enforcing awards may vary considerably on a case-by-case basis, depending on the assets that may be attached and on the complexities of the case, including the kind of agreement on legal fees between the parties and counsels. Therefore an agreement on costs

should be reached beforehand with local counsel, depending on the specifics of the case.

Costs for applying for recognition of foreign arbitral awards in Italy include court costs, costs for translation into Italian of the award and of the arbitration agreement and certification thereof, and costs for legal assistance in filing the application.

Costs for the opposition proceedings, which are full-trial ordinary proceedings, have to be evaluated on a case-by-case basis depending on several factors, such as the amount in dispute, the nature and contents of the arbitral award.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

The experience of court litigation before Italian courts that could influence Italian arbitrators is characterised by the preference for written pleadings rather than for oral pleadings, an inquisitorial approach in the taking-of-evidence phase and a certain reluctance to conduct cross-examinations of witnesses and experts, the absence of US-style discovery, a formalistic approach and a tendency to give more importance to legal reasoning than to understanding the facts.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Lawyers are bound to comply with the professional code of conduct issued by the National Bar Council. As a general rule, according to the code of conduct, Italian lawyers should refrain from having contact with witnesses outside of the hearing. However, in international arbitration with a seat in Italy this does not represent the standard. In the field of international arbitration, best practice in Italy generally reflects the IBA Guidelines on Party Representation, except for the Rules on Information Exchange and Disclosure, which seem to be more typical of common law systems (guidelines 12–17).

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Currently there are no specific regulatory restrictions in Italy for third-party funding of arbitral claims; however lending is, generally, a regulated activity reserved to authorised banks (or operating under an EU passport) and other financial intermediaries licensed under article 106 of the Italian Banking Law. Under certain conditions, even Italian insurance companies, investment funds and securitisation companies may be authorised to carry out lending activity in Italy, albeit only in favour of entities other than consumers and micro-enterprises. In the near future, the Bank of Italy should enact new regulatory provisions allowing also EU investment funds to carry out direct lending activity in Italy.

There is no developed practice yet of third-party funding in Italy, also in light of the fact that in general terms the costs of court litigation in Italy are quite modest, and that the length and traditional inefficiency of litigation in Italy in front of the Italian courts, combined with the low percentage of legal interest rate, made the market less attractive for funders. Only more recently, with the improvement of the efficiency of court litigation and the increase of the legal interest rates, with the development of collective redress proceedings in certain sectors, as well as more specifically for international arbitration cases of medium or high value, has third-party funding (though foreign funders) become increasingly attractive in the Italian market.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Foreign attorneys can assist their clients in arbitration proceedings pending in Italy provided that they are allowed to practise in their country and that they assist their clients together with an Italian lawyer. VAT (22 per cent) is due on arbitrators' and counsels' fees for activities rendered in Italy. Arbitrators and counsels are also entitled to receive social security contributions at the rate of 4 per cent of their fees. Foreign attorneys practising in Italy shall comply with all Italian laws and regulations, as well as with the lawyers' code of conduct issued by the National Bar Council.

Legance
AVVOCATI ASSOCIATI

Cecilia Carrara

ccarrara@legance.it

Via di San Nicola da Tolentino, 67
00187 Rome
Italy

Tel: +39 06 931 8271
Fax: +39 06 931 827403
www.legance.it

Japan

Shinji Kusakabe

Anderson Mōri & Tomotsune

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Japan acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 20 June 1961, which took effect on 18 September 1961. A declaration was made under article I of the Convention, such that Japan, on the basis of reciprocity, will only apply the Convention to the recognition and enforcement of awards made in the territory of another contracting state.

Other multilateral conventions relating to international commercial and investment arbitration to which Japan is a party are:

- the Protocol on Arbitration Clauses, Geneva, 24 September 1923 (ratified by Japan in 1928);
- the Convention on the Execution of Foreign Arbitral Awards, Geneva, 26 September 1927 (ratified by Japan in 1952);
- the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 18 March 1965 (ratified by Japan in 1967); and
- the Energy Charter Treaty, Lisbon, 17 December 1994 (ratified by Japan in 2002).

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Japan is a party to 28 bilateral investment treaties as follows:

Country	Signed	Entry into force
Bangladesh	10 November 1998	25 August 1999
Cambodia	14 June 2007	31 July 2008
China*	27 August 1988	14 May 1989
Colombia	12 September 2011	11 September 2015
Egypt	28 January 1977	14 January 1978
Hong Kong	15 May 1997	18 June 1997
Iraq	7 June 2012	25 February 2014
Iran	5 February 2016	TBD
Kazakhstan	23 October 2014	25 October 2015
Kenya	28 August 2016	TBD
Korea*	22 March 2002	1 January 2003
Kuwait	22 March 2012	24 January 2014
Laos	16 January 2008	3 August 2008
Mongolia	15 February 2001	24 March 2002

Country	Signed	Entry into force
Mozambique	1 June 2013	29 August 2014
Myanmar	15 December 2013	7 August 2014
Oman	19 June 2015	TBD
Pakistan	10 March 1998	29 May 2002
Papua New Guinea	26 April 2011	17 January 2014
Peru	21 November 2008	10 December 2009
Russia	13 November 1998	27 May 2000
Saudi Arabia	30 April 2013	TBD
Sri Lanka	1 March 1982	4 August 1982
Turkey	12 February 1992	12 March 1993
Ukraine	5 February 2015	26 November 2015
Uruguay	26 January 2015	TBD
Uzbekistan	15 August 2008	24 September 2009
Vietnam	14 November 2003	19 December 2004

* Japan, China and Korea entered into a trilateral investment treaty on 13 May 2012, which took effect on 17 May 2014.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary domestic source of law relating to domestic and foreign arbitral proceedings and recognition and enforcement of awards in Japan is the Arbitration Law (Law No. 138 of 2003) (English translation at <http://japan.kantei.go.jp/policy/sihou/arbitrationlaw.pdf>). Although the Arbitration Law governs both domestic and international arbitral proceedings in Japan, the scope of its application (except for the recognition and enforcement of foreign arbitral awards in Japan) is generally limited to arbitration taking place in the territory of Japan (article 3(1)).

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

Japan's Arbitration Law is based on the UNCITRAL Model Law (original 1985 version: the 1985 Model Law). Although many of the provisions of the Arbitration Law are nearly identical to the 1985 Model Law, there are some differences such as article 13(4) of the Arbitration Law, which allows for arbitration agreements to be made by way of electromagnetic record (ie, email), in contrast to the 1985 Model Law, which allows for agreements by facsimile but not electromagnetic record. Some of the other differences between Japan's Arbitration Law and the 1985 Model Law are described in subsequent questions.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The mandatory Arbitration Law provisions on procedures from which parties may not deviate include article 5, which outlines the jurisdiction of courts, article 13(2), which describes that arbitration agreements must be in written form and article 25, which stipulates the equal treatment of all parties.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The parties to an arbitration may freely decide on the substantive law applicable to the case (Arbitration Law, article 36(1)). If the parties designate the laws of a given state as the law to be applied by an arbitral tribunal, unless otherwise expressed, this is construed as referring to substantive law rather than conflict of laws rules. However, if the parties fail to agree on the substantive law to be applied to the case, the arbitral tribunal will apply the substantive law of the state with which the civil dispute subject to the arbitral proceedings is most closely connected (Arbitration Law, article 36(2)). This rule differs from that under the 1985 Model Law, in which the arbitral tribunal applies the law determined by the conflict of law rules that it considers applicable.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The Japan Commercial Arbitration Association (JCAA) is the most prominent arbitration institution in Japan (www.jcaa.or.jp/e/index.html). The JCAA has its own arbitration rules (JCAA Rules), the latest amendments to which took effect on 10 December 2015. The JCAA also has a list of arbitrators that can be accessed by parties; however, parties are not required to select arbitrators from the list provided. Parties may also elect to use the International Chamber of Commerce (ICC) to arbitrate a dispute. In addition, Japan has several bar associations that maintain their own arbitration systems and may be used by parties.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The scope of disputes that are considered to qualify for arbitration include all civil disputes where there exists a possibility of settlement between the parties, excluding those relating to divorce or separation (article 13(1)). Arbitration is not permitted for actions relating to personal status, such as cases requesting confirmation of paternity, or confirmation that a patent is invalid, as these cases are not generally capable of settlement. In addition, an arbitration agreement between a consumer and a business for future civil disputes can be cancelled by the consumer (article 3 of the supplementary provisions to the Arbitration Law). Furthermore, an arbitration agreement between an individual worker and his or her employer for future labour disputes is null and void (article 4 of the supplementary provisions to the Arbitration Law).

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The Arbitration Law stipulates that an arbitration agreement must be in writing and may be in the form of a document signed by all parties, letters or telegrams sent between the parties, including facsimile, or other written instrument (article 13(2)). It is not necessary that the document is 'a document signed by all parties', and to fulfil the requirement that the arbitration agreement is documented, it is considered sufficient if there is some type of evidence subsequent to the document recording

the arbitration agreement (eg, a bill of lading). In addition, an arbitration agreement may be made by way of an electromagnetic record (eg, email) (article 13(4)), which distinguishes the Arbitration Law from the 1985 Model Law.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The circumstances in which an arbitration agreement is no longer enforceable are generally the same as those under contract law. Termination or cancellation of the arbitration agreement itself and legal incapacity or death of a party to the arbitration agreement (although in the case of death there is the possibility of succession) are the most common circumstances in which an arbitration agreement may become unenforceable.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

The general contract law dictates the cases in which a third party can be bound by an arbitration agreement. For example, third parties or non-signatories can be bound by an arbitration agreement in cases of succession and assignment. In addition, some commentators opine that when a legal person, such as a stock corporation, is a party to an arbitration agreement, the legal representatives and other executive officers of such legal person should also be bound by the arbitration agreement if the arbitration agreement would otherwise not make any sense in resolving a dispute.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The Arbitration Law does not make any provisions with respect to third-party participation in arbitration. This issue is open for debate and is, in practice, resolved through consultation and agreement among the existing parties, the arbitrators and the third party in question on a case-by-case basis, unless the applicable arbitration rules that the parties have agreed to stipulate otherwise.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Where Japanese law governs an arbitration agreement, neither a parent company nor subsidiary companies of a signatory company can be bound by the arbitration agreement, regardless of whether they were involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine. However, it could be possible that the parent company or subsidiary companies of a signatory company be construed as the real signatory company that should be bound by the arbitration agreement depending on the specific circumstances surrounding the case under the doctrine of 'piercing the corporate veil' or otherwise.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The Arbitration Law does not exclude the possibility of multiparty arbitration agreements. There are no special requirements for multiparty arbitration agreements to be valid.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

An arbitrator must be an impartial and independent party, possessing the qualifications agreed upon by the parties involved in the arbitration (article 18(1)). In the case where a sole or third arbitrator is appointed by the court, due regard must be had for whether or not it would be appropriate to appoint an arbitrator of a different nationality from the parties (article 17(6)(iii)). Retired judges may act as arbitrators. Arbitrators need not be selected from a list of arbitrators unless otherwise agreed upon by the parties to arbitration. It is highly likely that courts in Japan will recognise any contractually stipulated requirements for arbitrators based on nationality, religion or gender as a matter of autonomy, although the validity and enforceability of these types of requirements have yet to be judicially tested in Japan.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Under the Arbitration Law, when there are two parties and no agreement has been reached as to the number of arbitrators, the arbitral tribunal will be a panel of three arbitrators (article 16(2)). In the case of multiparty arbitration where the number of arbitrators has not been agreed upon between the parties, upon request, the court will determine the number (article 16(3)). In addition, when the parties fail to agree on the procedure of appointing the arbitrators, and there are two parties in arbitration with three arbitrators, each party may appoint an arbitrator, and the two appointed arbitrators will appoint the third (article 17(2)). If there are two parties and a sole arbitrator and the appointment of such arbitrator cannot be decided between the parties, the court will appoint an arbitrator upon the request of a party (article 17(3)). When the appointment of an arbitrator cannot be decided in multiparty arbitration, the court will appoint the arbitrator upon the request of a party (article 17(4)).

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

The Arbitration Law sets out two grounds on which an arbitrator can be challenged: the arbitrator does not possess qualifications agreed to by the parties; or circumstances exist that give rise to justifiable doubt as to the impartiality or independence of the arbitrator (article 18(1)). In addition, when a party appoints or makes recommendations regarding the appointment of an arbitrator, it may challenge the arbitrator only for reasons that it became aware of after the appointment (article 18(2)).

The parties may decide on the procedure for challenging an arbitrator (article 19(1)); failing an agreement, the arbitral tribunal will decide (article 19(2)). When there is no agreement on the procedure for challenge, the challenging party must request an arbitral tribunal for challenge within 15 days of the later of either the day on which it became aware of the constitution of the arbitral tribunal or the day on which it became aware of the existence of any of the circumstances constituting grounds for challenge. In addition, the party must submit a written request describing the reasons for the challenge to the arbitral tribunal (article 19(3)). If a challenge is denied, the challenging party may request a judicial review of the decision within 30 days of receipt of notice of the decision (article 19(4)). While a review of the challenge decision is pending before the court, the arbitral tribunal may commence or continue the proceedings and make an arbitral award (article 19(5)).

The removal of an arbitrator may be requested of the court on the grounds of the arbitrator's de jure or de facto inability or undue delay in performing its duties (article 20).

An arbitrator's mandate is terminated upon their death or resignation, the removal of the arbitrator upon agreement by the parties, a decision ruling that grounds for challenge exist or a decision to remove an arbitrator (article 21(1)).

There is a tendency for practitioners of arbitration who deal with international arbitration in Japan to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Each arbitrator is considered to have entered into an entrustment contract with all the parties, whether such arbitrator is party-appointed or not. Accordingly party-appointed arbitrators are also required to be neutral in performing their duties.

The arbitrators are compensated in accordance with the agreement of the parties; however, failing an agreement between the parties, the arbitral tribunal will determine appropriate compensation (article 47).

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

There are no provisions in the Arbitration Law for the civil liability of arbitrators. Accordingly, pursuant to the general rules of contract law of Japan, an arbitrator may theoretically be liable to pay damages to parties if the arbitrator wilfully or negligently breaches his or her duties under the entrustment contract with the parties, unless otherwise agreed upon by the parties. However, rule 13 of the JCAA Rules stipulates that arbitrators will not be liable for an act or omission related to the arbitration unless such an act or omission can be shown to constitute wilful or gross negligence.

Any arbitrator who accepts or demands bribes, or any party that offers a bribe, will face criminal penalties (articles 50 to 54). Most of these provisions apply even if the crimes are committed outside Japan (article 55).

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If an arbitration agreement exists, but court proceedings are initiated despite this, the court proceedings may be dismissed by request of the defendant (Arbitration Law, article 14(1)). The request for dismissal may not be filed with the court after the defendant pleads on the substance of the dispute (article 14(1)(iii)). This contrasts with the 1985 Model Law, which prescribes that the court shall refer the parties to arbitration in the case of a party arguing the existence of an arbitration agreement. Even when an action is pending in court, an arbitral tribunal may commence or continue proceedings and make an arbitral award (article 14(2)).

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

An arbitral tribunal may rule on the existence or validity of an arbitration agreement or its own jurisdiction (article 23(1)). A plea that the arbitral tribunal does not have jurisdiction must be raised early, in most cases before the time at which the first written statement on the substance of the dispute is submitted to the tribunal (article 23(2)). If the arbitral tribunal decides that it has jurisdiction, a party may ask a court

for judicial review within 30 days of receipt of notice of the decision (article 23(5)).

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

If there is no agreement between the parties regarding the place (article 28(2)) or language (article 30(2)) of the arbitration, it will be decided by the arbitral tribunal. When deciding the place, the arbitral tribunal will consider the circumstances of the case, including the convenience of the parties.

23 Commencement of arbitration

How are arbitral proceedings initiated?

Under the Arbitration Law, the arbitral proceedings commence by one party giving the other party notice to refer their dispute to the arbitral proceedings (article 29(1)). The claimant must, within the time limit prescribed by the arbitral tribunal, state the relief or remedy sought, the facts supporting its claim and the points at issue. The claimant may submit all documentary evidence it considers to be relevant or may add a reference to the documentary evidence or other evidence it will submit (article 31(1)). The respondent shall follow the same rule as applicable to the claimant (article 31(2)). Each party may make amendments or additions to their statements during the course of arbitral proceedings. However, the arbitral tribunal may refuse to allow the amendments or additions if they are made after the permitted time period (article 31(3)). These submissions may be made orally or in writing.

However, the JCAA Rules require that the claimant submit a written request for arbitration to commence arbitral proceedings to the JCAA, setting forth, in addition to the items required by the Arbitration Law, a reference to the arbitration agreement that is invoked (including any agreement about the number of arbitrators, the procedure for appointing arbitrators, the place of arbitration, and the language or languages of the arbitral proceedings), the contact information of the claimant or its agent and other items (rule 14(1)). The written request for arbitration also may set forth: the name, street address and other contact details of an arbitrator appointed by the claimant, if the parties have agreed that the number of arbitrators is three; a statement about the number of arbitrators, the procedure for appointing arbitrators, the place of arbitration, or the language or languages of arbitration; or a statement about the governing law applicable to the substance of the dispute (rule 14(2)). A signature is not required for this filing. The number of copies of the written request to be filed is the number of arbitrators (three if not yet determined) and the other party or parties plus one (rule 22(1)). However, this requirement does not apply to a submission by email, facsimile or any other electronic communication method (rule 22(2)).

24 Hearing

Is a hearing required and what rules apply?

The arbitral tribunal may (or if a party requests, must) hold oral hearings unless otherwise agreed by the parties. An oral hearing may be held for the presentation of evidence or for oral argument by the parties, provided that: these are carried out at an appropriate stage of the arbitral proceedings; sufficient advance notice of the time and place of hearings is given to the parties; a party supplying evidence to the tribunal has ensured that the other party is aware of the contents; and the tribunal has ensured that all parties are aware of the contents of any expert report or other evidence (article 32).

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Under the Arbitration Law, each party is ensured equality and given a full opportunity to present its case in the arbitral proceedings

(article 25). The JCAA Rules further require that written statements setting forth each party's case on the law and facts be submitted (rule 47). In addition, the arbitral tribunal, on its own motion, may examine evidence that a party has not applied to present, which may take place other than at a hearing. Further, the arbitral tribunal, at the written request of a party or on its own motion, may order any party to produce documents in its possession that the arbitral tribunal considers necessary to examine after giving the party in possession an opportunity to comment, unless the arbitral tribunal finds reasonable grounds for the party in possession to refuse the production (rule 50). One or more experts may be appointed by the arbitral tribunal to advise on any necessary issues; if requested, parties will have the opportunity to put the questions to an expert in a hearing (rule 51). There is a tendency for arbitrators or parties who are familiar with international arbitration practice to apply or seek guidance from the IBA Rules on the Taking of Evidence in International Arbitration.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

An application may be made by the arbitral tribunal or a party for a court to assist in taking evidence by any means considered necessary by the arbitral tribunal. The taking of evidence can relate to entrustment of investigation, examination of witnesses, expert testimony, investigation of documentary evidence or inspection (article 35). The court may assist with serving notice (article 12), appointment of an arbitrator (article 17), challenge of an arbitrator (article 19), removal of an arbitrator (article 20) and jurisdiction of the arbitral tribunal (article 23). A party may also apply to a court to set aside (article 44) or enforce (article 45) an arbitral award.

27 Confidentiality

Is confidentiality ensured?

Arbitral proceedings are generally not disclosed, but it depends on the agreement between the parties. The Arbitration Law does not have any express provisions prohibiting the disclosure of information related to arbitral proceedings, although it is interpreted that an arbitrator has a confidentiality duty to the parties of arbitral proceedings. The JCAA Rules, however, expressly stipulate that arbitral proceedings and records are to be closed to the public and arbitrators, officers and staff of the JCAA, the parties and their representatives, and other persons involved in the arbitral proceedings may not disclose facts related to arbitration cases except where disclosure is required by law or court proceedings, or based on any other justifiable grounds (rule 38).

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Before or during an arbitral proceeding, a party may request from a court an interim measure of protection in respect of a civil dispute that is the subject of the arbitration agreement (article 15). The types of interim measures that can be ordered by courts are the same as those permitted by the Civil Preservation Law (Law No. 91 of 1989) that applies to any types of disputes. These measures include orders of preliminary attachment or preliminary injunction.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The Arbitration Law does not provide for an emergency arbitrator prior to the constitution of the arbitral tribunal. However, the JCAA Rules set out detailed rules for an emergency arbitrator (rules 70 to 74). Under these rules, the JCAA shall use reasonable efforts to appoint an emergency arbitrator within two business days from its receipt of an application for emergency measures (rule 71(4)) and the emergency

arbitrator shall make a decision on the emergency measures within two weeks from his or her appointment (rule 72(4)). The claimant cannot obtain an order of emergency measures from the emergency arbitrator ex parte because the application for emergency measures must be notified to the respondent (rule 70(6), rule 16(1)). The applicant must submit a written request for arbitration within 10 days from the date of the application (rule 70(7)). The types of emergency measures that the emergency arbitrator may order are the same as the interim measures that may be granted by the arbitral tribunal (rule 72(1)). The emergency measures shall be deemed to be interim measures granted by the arbitral tribunal when it is constituted (rule 72(5)). However, no determination on emergency measures shall be binding on the arbitral tribunal and the arbitral tribunal may approve, modify, suspend or terminate the emergency measures in whole or in part (rule 73).

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The Arbitration Law stipulates that at the request of a party, the arbitral tribunal may order any party to take an interim measure of protection as the arbitral tribunal may consider it necessary in respect of the subject matter of the dispute and may order any party to provide appropriate security in connection with the interim measure ordered (article 24). The JCAA Rules include more detailed provisions for interim measures by the arbitral tribunal (rules 66 to 69). Under these rules, the arbitral tribunal may grant, for example, orders to: maintain or restore the status quo; take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral proceedings themselves; provide a means of preserving assets out of which a subsequent arbitral award may be satisfied; or preserve evidence that may be relevant and material to the resolution of the dispute (rule 66(1)).

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use ‘guerrilla tactics’ in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The Arbitration Law stipulates that the claimant shall state the relief or remedy sought, the facts supporting its claim and the points at issue within the period of time determined by the arbitral tribunal (article 31(1)). If the claimant fails to comply with this, the arbitral tribunal shall make a ruling to terminate the arbitral proceedings, unless there is sufficient cause for such failure or unless otherwise agreed by the parties (article 33(1)(4)). If any party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may make the arbitral award on the evidence before it that has been collected up until such time, unless there is sufficient cause for such failure or unless otherwise agreed by the parties (article 33(3)(4)). However, the Arbitration Law does not provide the arbitral tribunal with any power to order sanctions against parties or their counsel who use ‘guerrilla tactics’ in arbitration or commit gross violations of integrity of the arbitral proceedings.

The JCAA Rules provide that if one or both parties fails to appear, a hearing may be held in its or their absence (rule 46(2)). If one party, without sufficient cause, fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the arbitral proceedings and make the arbitral award based on the evidence before it (rule 48(2)). However, the JCAA Rules also do not provide for any sanctioning powers of the arbitral tribunal against ‘guerrilla tactics’ or gross violations of integrity.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Failing party agreement, any decision of the arbitral tribunal may be made by a majority of its members (article 37(2)). If an arbitrator refuses to take part in a vote or sign an arbitral award, the reason for any such omission must be stated in the award (article 39(1), rule 61(6)).

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

The Arbitration Law does not make any provisions relating to dissenting opinions. It seems that even if an arbitral award refers to dissenting opinions, this will not violate the Arbitration Law.

34 Form and content requirements

What form and content requirements exist for an award?

The arbitral award must be made in writing and include the signatures of the arbitrators who made the award, the reasons for such award and the date and place of the arbitration (article 39). The JCAA Rules also prescribe that if the parties have agreed that no reasons are to be given, or if the arbitral tribunal records a settlement in the form of an arbitral award on agreed terms, the reasons shall be omitted (rule 61(3)) and that the arbitral award must set out the total amount and allocation of the administrative fee, the arbitrators’ remuneration and expenses, and other reasonable expenses incurred with respect to the arbitral proceedings (rule 61(4), rule 83(1)).

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

No time limit is stipulated for an award to be rendered under the Arbitration Law. However, the JCAA Rules stipulate that the arbitral tribunal shall use reasonable efforts to render an arbitral award within six months of the date when it is constituted (rule 39(1)). For this purpose, the arbitral tribunal shall consult with the parties, and make a schedule of the arbitral proceedings in writing to the extent necessary and feasible as early as practicable (rule 39(2)).

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

A party may not apply to set aside the arbitral award if more than three months have elapsed since the party received notice of the award or after an enforcement decision (article 46) has become final and conclusive (article 44(2)). A party may request the arbitral tribunal to correct any errors in computation, clerical or typographical errors, or errors of a similar nature generally within 30 days of receipt of notice of the award (article 41(2)). The JCAA Rules amend this time limit from 30 days to four weeks (rule 63(2)).

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

There are no specific restrictions applicable to the types of awards or relief to be granted by the arbitral tribunal, provided they are derived from the applicable substantive law. However, the arbitral tribunal may decide ex aequo et bono if the parties have expressly authorised it to do so (article 36(3)). Partial and interim awards are possible. Additionally, a party may request the arbitral tribunal to make an additional arbitral award in relation to claims presented in the arbitral proceedings but omitted from the award within 30 days of receipt of notice of the award

Update and trends

Domestic arbitration regulation in Japan is stable and there is no specific movement to revise any domestic regulation at the present time. However, the JCAA Rules were comprehensively amended as of 1 February 2014 (followed by some minor amendments as of 10 December 2015). The new JCAA Rules reflect the most advanced international arbitration practices and make the JCAA a more attractive international arbitration centre in the South-East and East Asia regions. The latest JCAA Rules are available on its website (www.jcaa.or.jp/e/arbitration/Arbitration_Rules_2015e.pdf).

The Japanese government is very active in negotiating and concluding bilateral investment treaties and economic partnership agreements, which often contain provisions relating to arbitration for state-to-state disputes and state-to-investor disputes. In particular, on 5 October 2015, government representatives from 12 countries, including Japan, reached an agreement on the terms and conditions for the expansion of

the Trans-Pacific Strategic Economic Partnership Agreement (TPP). In addition to the original four countries of the TPP (ie, Brunei, Chile, New Zealand and Singapore), eight countries (ie, Australia, Canada, Japan, Malaysia, Mexico, Peru, the United States and Vietnam) were expected to join the TPP. As the expanded TPP contained a set of investor-state dispute settlement (ISDS) provisions, it was expected that arbitration would be actively used as a means for dispute settlement under the TPP. However, as Mr Donald Trump, President of the United States, has expressed his objection to the TPP, and as ratification by the United States is necessary to bring the TPP into force, it is now very doubtful that the TPP will take effect in the future. Nevertheless, the recent increase in bilateral investment treaties and economic partnership agreements could lead to a significant increase in investment arbitration cases between Japanese investors and foreign countries, although Japan has not been a party to any international investment arbitrations yet.

(article 43(1), article 41(2)). The JCAA Rules amend this time limit from 30 days to four weeks (rule 65).

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Arbitral proceedings can be terminated by a ruling to terminate the proceedings where the claimant withdraws its claim (unless the respondent objects to the withdrawal and the tribunal agrees to such objection), the parties agree to terminate the proceedings, a settlement is reached on the dispute that is the subject of the arbitral proceedings or the arbitral tribunal finds that the continuation of the arbitral proceedings has become unnecessary or impossible (article 40). If parties reach a settlement during the arbitral proceedings, the tribunal may make a ruling on agreed terms, in which case the ruling has the same effect as an arbitral award (article 38).

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Parties may agree on the way in which costs for the proceedings are apportioned between them. Failing an agreement, each party must bear the costs it has disbursed in relation to the proceedings. The parties may agree for the tribunal, in the award or in an independent ruling to determine the apportionment between the parties of the costs disbursed during the course of the proceedings (article 49). The JCAA Rules include more detailed provisions regarding cost allocation in arbitral proceedings (rule 61(4)(5) and rule 83). The costs of the arbitration to be apportioned between the parties include their legal fees and expenses to the extent the arbitral tribunal determines that they are reasonable (rule 83(1)).

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

If Japanese substantive law applies, interest may be awarded at a rate of 5 per cent per annum for claims to which the Civil Code (Law No. 89 of 1896) was applied and 6 per cent per annum for claims to which the Commercial Code (Law No. 48 of 1899) was applied, unless other rates are agreed to by the parties.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The arbitral tribunal may correct an award on its own initiative or upon request by a party (article 41, rule 63(1)). The arbitral tribunal may also interpret an award upon request by a party (article 42, rule 64). If a party requests the correction or interpretation of an award, the request

must generally be made within 30 days (article 41(2), article 42(3)) or four weeks (rule 63(2), rule 64) of the receipt of notice of the arbitral award. However, there is no time limit for an award corrected upon the initiative of the tribunal, which distinguishes the Arbitration Law from the 1985 Model Law.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

If an arbitral award is rendered with the place of arbitration being within the territory of Japan, such an award may be challenged and set aside under the Arbitration Law (article 3(1) and 44). There are limited grounds on which to set aside or challenge arbitral awards, which include:

- an invalid arbitration agreement;
- required notice to appoint arbitrators was not given to a party;
- a party was unable to present its case;
- the award relates to matters beyond the scope of the arbitration agreement or claims of the arbitration;
- the composition of the tribunal or proceeding was not in accordance with the parties' agreement;
- the award was based on a dispute not qualifying as a subject for arbitration; or
- the award is in conflict with public policy (article 44(1)).

These grounds are substantially identical to those stipulated by article 34(2) of the 1985 Model Law. A challenge may not be made if more than three months has elapsed from the date on which the challenging party received notice of the award or after an enforcement decision (article 46) has become final and conclusive (article 44(2)).

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

As a general rule, a court decision on a petition for setting aside or challenging arbitral awards can be appealed only once (article 44(8)). Such an appeal must be filed within two weeks of receipt of the decision (article 7). The challenge proceedings at the first instance usually take six months to one year, and the appeal proceedings usually take up to six months. Court fees for these processes are nominal (in many cases less than US\$100) and shall be paid by the parties (as a general rule by a losing party). The parties also have to bear their respective attorneys' fees.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Domestic and foreign awards have the same effect as a final judgment (article 45) and are enforced in a Japanese court (article 46). A party

seeking enforcement based on the arbitral award should apply to a court for an enforcement decision. The grounds for refusing to recognise or enforce domestic and foreign awards are the same as those of article 36(1) of the 1985 Model Law or article V of the New York Convention. Even if an award is granted in a state that has not signed or ratified the Convention, these recognition and enforcement rules apply. In that sense, the location of the arbitration is not an issue in the recognition or enforcement of awards. It is generally considered that Japanese courts look favourably upon recognising and enforcing awards.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

The languages employed in the relevant provisions in the Arbitration Law seem to be inconsistent. Article 45 seems to stipulate that foreign awards set aside by the courts at the place of arbitration shall not be recognised or enforced (article 45(1) and (2)(vii)). However, article 46 seems to stipulate that an enforcement decision may be issued for such foreign awards at the discretion of the courts (article 46(8)). Government officers in charge of drafting these provisions have explained that the provisions should be interpreted to mean that courts shall have discretion as to whether such awards will be recognised and enforced, regardless of the language in the provisions. Accordingly, one can say that Japanese courts have discretion to recognise and enforce foreign awards set aside by the courts at the place of arbitration. There has been no court precedent that discusses this issue under the Arbitration Law as yet.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The Arbitration Law does not provide for the enforcement of orders by emergency arbitrators. No case law seems to have been established for this issue. Under the JCAA Rules, parties shall be bound by, and carry out, the emergency measures ordered by emergency arbitrators, which shall be deemed to be interim measures granted by the arbitral tribunal when it is constituted (rule 72(5)). However, no determination on emergency measures shall be binding on the arbitral tribunal and the arbitral tribunal may approve, modify, suspend or terminate the emergency measures in whole or in part (rule 73). Neither the interim measures granted by the arbitral tribunal nor the emergency measures ordered by emergency arbitrators may be enforced with an enforcement decision granted by a Japanese court.

47 Cost of enforcement

What costs are incurred in enforcing awards?

To enforce an award that has been granted by an arbitral tribunal, but has not been performed voluntarily, a party generally has to file a petition for the enforcement decision with the court. The enforcement decision once rendered can be used for compulsory enforcement with the assistance of a judicial authority. The costs required for these procedures are generally borne by the party seeking enforcement of the award.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

There is no US-style discovery in Japan. Rather, the court may allow a limited exchange of documents and evidence. Written witness statements are common before testifying, and party officers may testify. Japanese legal practitioners are familiar with an adversarial witness examination (ie, direct and cross-examination). These features are often reflected in arbitration proceedings conducted in Japan.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are no specific professional or ethical rules that are applicable to counsel in international arbitration in Japan. However, arbitration practitioners in Japan generally agree that the best practice of party representation reflects the IBA Guidelines on Party Representation in International Arbitration.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding of arbitral claims is not subject to any restrictions under Japanese laws at present. However, it may be regulated in the future, particularly for investment treaty arbitration under bilateral investment treaties or economic partnership agreements to which Japan is a signatory.

ANDERSON MŌRI & TOMOTSUNE

Shinji Kusakabe

shinji.kusakabe@amt-law.com

Akasaka K-Tower
2-7, Motoakasaka 1-chome
Minato-ku
Tokyo 107-0051
Japan

Tel: +81 3 6888 1000
www.amt-law.com

51 Regulation of activities**What particularities exist in your jurisdiction that a foreign practitioner should be aware of?**

The Practising Attorney Law (Law No. 205 of 1949) stipulates that any person who is not a practising attorney (which in this context means a licensed Japanese attorney or *bengoshi*), or a special legal entity established by practising attorneys, is prohibited from, for a fee and as an occupation, becoming involved in legal problems by giving legal advice, providing legal representation, arbitrating, etc (article 72).

However, the Special Measures Law concerning the Handling of Legal Business by Foreign Lawyers (Law No. 66 of 1986) provides that a foreign-qualified lawyer registered in Japan may perform representation in regard to the procedures for an international arbitration case (article 5-3), which is defined as a case of civil arbitration conducted in Japan with all or part of the parties composed of persons who have addresses or main offices in foreign countries (article 2-11). In addition, foreign lawyers engaged in legal business in a foreign country (excluding a person who is employed and is providing services in Japan based on his or her knowledge of foreign law) may perform representation in regard to the procedures for an international arbitration case (article 58-2).

Kenya

John Miles and Leah Njoroje-Kibe

JMiles & Co

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

The New York Convention came into force in Kenya on 11 May 1989. The government of Kenya declared, it would apply the Convention to arbitral awards made only in the territory of another contracting state pursuant to article 1(3). Kenya ratified the UNCITRAL Model law in 1989 and became a contracting state of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) in 1967.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Kenya has signed bilateral investment treaties (BITs) with France, Germany, Italy, the Netherlands, Switzerland and the UK, which are in force. BITs with Turkey, Slovakia, Mauritius, Libya, Kuwait, Korea, Japan, Iran, Finland, China and Burundi have been signed but are not in force.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Arbitration in Kenya is governed by the Constitution of Kenya 2010, the Arbitration Act 1995 (Chapter 49 Laws of Kenya) (the Act) and the Nairobi Centre for International Arbitration Act of 2013. The Act applies to both domestic and international/foreign arbitration, governing proceedings and enforcement of the awards. The New York Convention governs the enforcement of international arbitral awards in the country and is incorporated into the Arbitration Act.

An arbitration is considered international under section 3(3) of the Act if:

- the parties' places of business were in different states at the time of conclusion of the agreement;
- the juridical seat of the arbitration and any place where a substantial part of the obligations of the commercial relationship is to be performed or the place most closely connected to the subject matter of the dispute are outside the state; and
- the parties expressly agreed that the subject matter of the arbitration agreement relates to multiple states.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The Act, as amended in 2010, is based entirely on the UNCITRAL Model Law. Initially, it was a mirror copy of the Model Law, but with the 2010 amendments, the Act now encompasses recent developments in arbitration practice and procedure. Sections such as 16(A) and (B), 19(A), and 32(A), (B) and (C), were amended to be reflective of the realities of both domestic and international arbitrations.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The Act contains several mandatory provisions:

- waiver of the right to object, stay of legal proceedings, interim measures by court and death of a party (sections 5-8);
- extent of court intervention (section 10);
- grounds for challenge (section 13);
- failure to act and substitution of an arbitrator (section 15 and 16(1));
- withdrawal of an arbitrator (section 16a);
- competence of arbitral tribunal to rule on its jurisdiction (section 17);
- equal treatment of and general duties of the parties (sections 19 and 19a);
- rules applicable to substance of dispute (section 29); and
- settlement, form and contents of arbitral award, effect of award, costs and expenses, interest and termination of arbitral proceedings (sections 31-33).

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Parties have freedom to choose the substantive law governing the dispute. Failing this, the tribunal determines the matter applying the rules of law it considers to be appropriate given all the circumstances of the dispute, and according to considerations of justice and fairness without being bound by the rules of law, if the parties so authorised. In all cases, the tribunal decides according to the terms of the contract, taking into account the usages of the trade applicable to the particular transaction (section 29).

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The Nairobi Centre for International Arbitration (the NCIA) was established by the NCIA Act No. 26 of 2013. The NCIA is located at:

Co-operative Bank House, 7th floor
Haile Selassie Avenue
www.ncia.or.ke

The Act under section 21 establishes an arbitral court with exclusive original and appellate jurisdiction to hear matters referred to it under the Act. The NCIA (Arbitration) Rules 2015 apply to arbitrations under the Rules.

The Chartered Institute of Arbitrators (the CIArb) was established in Kenya in 1984 and registered under the Societies Act Cap 108, Laws of Kenya. It runs a secretariat with physical facilities in Kenya for alternative dispute resolution located at:

Kindaruma Lane
Nicholson Drive, Off Ngong Road
Nairobi
www.ciarbkenya.org

The institution published the CIArb Arbitration Rules in 2015.

The Centre for Alternative Dispute Resolution Limited (the CADR) was incorporated under the Companies Act (Cap 486 of the Laws of Kenya) as a not-for-profit company limited by guarantee. The founding members of the Company are all members of CIArb Kenya, which sponsors CADR. Its website is www.cadr.or.ke.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

There is no statutory law that limits the use of arbitration to a particular subject matter. Article 159 of the Constitution provides that in promoting ADR methods, the ends of justice must be met, giving the appearance that it allows the application of arbitration to any dispute. The article is, however, clear that such an application must not be repugnant to justice and morality. Section 37 of the Act sets out grounds for the courts to refuse to enforce an award where the subject matter is 'not capable of settlement by arbitration'. In practice, arbitration is not applied to criminal, land, insolvency, bankruptcy, divorce and tax matters.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Section 4 of the Act deals with the formal requirements of an agreement. It can be in the form of an arbitration clause in a contract or as a separate agreement. It is a mandatory requirement that the agreement be in writing. An agreement is considered to be in writing if it contains:

- a written document by the parties;
- an exchange of letters, telex, or other means of telecommunications; and
- an exchange of statements of claims and defence in which the existence of the agreement is alleged by one party and not denied by the other.

An agreement can exist where there is a reference to a document containing an arbitration clause as long as the contract is in writing and the reference is such that it makes the clause part of the contract. Under the Act, parties cannot waive formal requirements.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The doctrine of separability applies in Kenya. Arbitration agreements are treated as separate from the underlying contract, that is, independent of the other provisions of the host contract by virtue of section 17 of the Act. This position is reflected in case law including *Nedermar Technology Ltd v Kenya Anti-Corruption Commission & Another* [2006] eKLR where the court stated that an arbitration agreement survives the termination of the contract. Since an arbitration agreement is treated as a contract, it is unenforceable if any of the factors that render a contract null and void are proved. This includes lack of intention to create legal relations, legal incapacity, lack of consensus and termination of the agreement. These must directly impeach the agreement.

Where death and insolvency occur, the agreement is not terminated. The obligations or rights under the agreement fall to the executors, administrators or personal representatives of the individuals respectively.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

The Act provides that agreements are binding on the parties to the agreement, following the privity of contract principle. One cannot be bound by a contract to which one is not party to and, therefore, cannot be enjoined to arbitral proceedings. Case law reflects this position.

Exceptions to this premise include the following:

- upon the death of a party, the Act provides that the agreement is enforceable against or by the personal representative of the deceased; and
- in the event of bankruptcy, section 38 provides that the trustee in bankruptcy adopts the contract and the terms are enforceable by or against him or her.

The Act is silent on the position of individuals such as agents and heirs in relation to the arbitration agreement. The court in *KNHA v Masosa* [2015] eKLR determined that where there are facts arising that could lead the court to conclude that the third party had authorised the parties to the contract to enjoin it to their contract, or the third party had chosen to accept the terms of the agreement, this would lead to the conclusion that the third party is bound by the agreement.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The Act is silent on joinder or participation of third parties. The court's approach has been that a party who is not a party to the agreement cannot be bound by it and cannot take part in the proceedings. Where the dispute cannot be resolved without the presence of a third party, the court in *Damaris Wanjiru Nganga v Loise Naisiae Leiyen & another* [2015] eKLR held that the arbitration agreement becomes inoperable because of the presence of the third party. This seems to be a reflection of section 6(1)(a) of the Act.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The doctrine does not have presence in Kenya. Should such a scenario arise, the parent or subsidiary non-signatory company would be treated as a third party unless the factors in *KNHA v Masosa* are applicable.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The Act neither provides for nor prohibits multiparty arbitration agreements. Where there is a binding agreement between three or more parties, they are subject to the arbitral proceedings. The claimants in such proceedings form one party and the defendants the other. Should the third party have no dispute under the agreement, it can be enjoined as an interested party.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Parties to an agreement are free to choose an arbitrator and the only binding parameters are those they set out in the agreement. The Act under section 12(1) provides for non-discrimination, stating that no person is precluded by reason of his or her nationality from acting as an arbitrator. This provision is, however, qualified: should the parties agree, a person from a specific state can be precluded from being an arbitrator. Nationality is the only basis of preclusion allowed.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Under the Act, the default number of arbitrators is one, and the parties have to agree on the arbitrator. Where the parties agree to three arbitrators, each appoints one, and the two appointees appoint the chair. Where there are two arbitrators, each appoints one. The court only intervenes when it grants an application to set aside an appointment where it is satisfied there was good cause for failure or refusal by the party in default to appoint his or her arbitrator in due time. Only upon granting such an application and consent of the parties, can the High Court appoint a sole arbitrator.

The CI Arb Rules' provisions on appointment are similar to the Act with the exception that where the parties have not appointed the arbitrators within 30 days of receipt of proposal (in case of one arbitrator) or notification of appointment (in case of three arbitrators), the parties may request the CI Arb to appoint the arbitrator. In the event that a tribunal is not constituted, any party can request the institution to constitute one.

The NCIA Rules mirror the CI Arb Rules, save that the time stipulated for appointment by the Centre is 15 days for a sole arbitrator. Where three arbitrators are involved, the third is appointed by the Centre unless the parties agree otherwise, in which case the nomination is subject to confirmation. Where there is no provision for the number of arbitrators, the Centre appoints one except where it deems it necessary to have three.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Grounds for challenging an arbitrator arise from circumstances giving rise to justifiable doubts as to his or her impartiality and independence, such as:

- not possessing the qualifications agreed upon by the parties;
- being physically or mentally incapable of conducting the proceedings; or
- doubts concerning capacity to do so.

These grounds can only be relied upon when the party challenging the appointment of the arbitrator becomes aware of them after the appointment. If he or she was aware of them before the appointment, it is taken that he or she waived the grounds and agreed to the appointment (section 13).

Generally, the parties can agree on the procedure for challenging the arbitrator. If the parties have not agreed, a party that intends to challenge sends a written statement of the reasons for the challenge to the tribunal within 15 days of becoming aware of the composition of the tribunal or of the grounds for challenge. The tribunal then decides on the challenge. If the challenge is unsuccessful, the challenging party can within 30 days of receiving the decision to reject the challenge apply to the high court to determine the matter. The decision of the

High Court is final and not subject to appeal. While the court application is pending, parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings takes effect until the application is decided. The award is void if the application is successful (section 14).

In international arbitrations, parties and the court may refer to the IBA Guidelines on Conflicts of Interest in International Arbitration in selection of arbitrators.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Domestic law is silent on the relationship with parties and neutrality of an arbitrator. In practice, parties sign an agreement providing that the arbitrator is impartial and will inform the parties of any conflict of interest as soon as it arises. It, therefore, adheres to international benchmarks set by institutions such as the LCIA and ICC, and UNCITRAL Rules.

The Act provides that the tribunal has power to determine and apportion its fees and expenses in the award or additional award. Unless the parties had agreed otherwise, each is responsible for an equal share of such fees and expenses. The tribunal has a right of lien over the award if its expenses and fees have not been paid by the parties (section 32B)

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The immunity of an arbitrator relates to things done or omitted to be done in good faith in the discharge or purported discharge of his or her duties as an arbitrator. This immunity extends to his or her servants and agents who have due authority and good faith. An arbitrator is, however, not immune from any liability incurred by reason of his or her resignation or withdrawal (section 16B).

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

The defendant makes an application for stay of the proceedings under section 6 of the Act. The application has to be no later than the time when the party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought. The court refers the parties to arbitration unless it finds that the agreement is null and void or the dispute is not covered by the agreement.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The jurisdiction of an arbitrator derives from the agreement of the parties. The preconditions for an arbitrator to have jurisdiction include the following:

- existence of a binding agreement to arbitrate;
- the arbitrator must have been validly appointed; and
- there must be a dispute that the parties had agreed to arbitrate.

The challenge to jurisdiction may take the form of an attack on the validity of the agreement, or on the jurisdiction of the tribunal over certain subject matters, among others (*Muigua*, 92-94; 119-121).

The doctrine of Kompetenz-Kompetenz applies in Kenya and is provided for under section 17. The plea for lack of jurisdiction should be raised before submitting the statement of defence. Where the issue is that the tribunal has exceeded the scope of its authority, the plea shall

be raised as soon as the matter alleged to be beyond scope is raised during the proceedings. The tribunal decides the matter either as a preliminary question or in an arbitration award on the merits. Any party aggrieved by the ruling can apply to the High Court within 30 days to decide the matter. The decision of the High Court is final and not capable of appeal.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Sections 21 and 23 of the Act provide that failure of prior agreement by parties gives the tribunal power to determine the place of arbitration and the language to be used in the proceedings.

23 Commencement of arbitration

How are arbitral proceedings initiated?

Section 22 of the Act provides that arbitral proceedings commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent unless the parties agree otherwise.

CI Arb (K) Rules provide that a party wishing to commence arbitration and have an arbitrator appointed should send to the secretary a written request for the appointment of an arbitrator. The request should include the names and addresses of all parties to the arbitration. If the arbitration agreement provided for party nomination, the request be accompanied by:

- the nominees' details and copies of the contractual documents forming the basis of the arbitration;
- a statement of the nature and circumstances of the dispute;
- an indication of the value of the subject matter;
- a statement of any consensus as to conduct of the arbitration; and
- any experience they wish the tribunal to have; a statement of compliance with the contractual machinery on appointment of the arbitrator and confirmation of service of the request to the other parties.

Under the NCIA Rules, commencement is through a request for arbitration sent to the registrar and served to the other party. It is marked as the date the registrar receives the request. Rule 5 provides that the request should contain:

- the personal details and contacts of the parties;
- a copy of the contract containing arbitration clause;
- a statement of the nature and circumstances of the dispute;
- a statement specifying the seat and language of arbitration;
- details of the party's nominee if required;
- confirmation of service of the request and supporting documents to the other parties; and
- an accompanying non-refundable registration fee.

24 Hearing

Is a hearing required and what rules apply?

Hearings are part and parcel of the proceedings. Parties can agree on oral or written submissions. In the absence of such an agreement, the tribunal decides between the two. The tribunal holds oral hearings at an appropriate stage of the proceedings, and parties are required to give sufficient notice of any hearing and any meeting of the tribunal for inspection of documents, goods or other property. All the evidence adduced by one party is communicated to the other, and expert evidence that may be relied upon by the tribunal is communicated to the parties by (section 25).

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Parties are free to agree on the arbitral procedure to be followed by the tribunal, but should they disagree, the tribunal proceeds as it deems fit. In doing so, it has power to determine the admissibility, relevance,

materiality and weight of any evidence. Evidence that is adducible includes witness evidence. Witnesses have the same privileges and immunities as those before a court (section 20). Documentary evidence may be adduced accompanied by translations into the language agreed upon by the parties (section 23(4)). Should a party fail, without showing sufficient cause, to produce documentary evidence, the tribunal can make its award on the evidence before it. The tribunal or a party with the approval of the tribunal can request the High Court's assistance in taking evidence.

Expert evidence is for the benefit of the tribunal more than the parties: they are appointed to help the tribunal reach an appropriate conclusion. They report to the tribunal on issues determined by it. After delivery of the report, the expert is required to participate in an oral hearing where the parties have an opportunity to put questions to him or her and present expert witnesses in order to testify on the points at issue. Where experts are in conflict, it will be up to the arbitrator to decide (*Muigua*; 144).

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Court intervention is allowed:

- when the tribunal requests assistance in taking of evidence;
- where parties institute procedures to challenge the appointment of an arbitrator;
- to determine the jurisdiction of the tribunal;
- to give interim orders of protection during arbitration; and
- to determine questions of law on application by the parties.

27 Confidentiality

Is confidentiality ensured?

There is no statutory provision on confidentiality of proceedings and awards, but it is understood as a core feature of arbitration and enforced to the highest degree. Generally, parties include a confidentiality clause in the arbitration agreement or it is covered by the rules they adopt for arbitration.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Under section 7 of the Act, the court can grant interim orders to maintain the status quo of the subject matter of the arbitration. This includes interim injunctions, interim custody or sale of goods among others. The High Court is also empowered to enforce the peremptory orders for protection given by the tribunal.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Interim measures are only provided by the court prior to the constitution of the tribunal (section 7). The Act has no provision for emergency arbitrators. The NCIA Rules provide for the appointment of an emergency arbitrator under rule 28 and the Second Schedule. The CI Arb (K) Rules provide for emergency arbitrators and their rules in article 26 and Appendix 1.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The Act provides that the tribunal has power to order any party to take such interim measure of protection as it considers necessary in respect of the subject matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such

Update and trends

One emerging topic is the setting up of regional arbitration centres. In 2013, the NCIA was established to provide commercial arbitration as well as alternative dispute resolution at both domestic and international level. The centre, which will be officially launched in December 2016, issued its Arbitration and Mediation Rules in 2015. This follows the establishment of KIAC in Rwanda and LCIA-MIAC in Mauritius.

In the field of investment arbitration, Kenya has had one concluded ICSID case against it, *World Duty Free Company v Republic of Kenya*, and in 2015 two new cases involving natural resources were filed, which are still pending. The cases are *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya* and *Walam Energy Inc v Republic of Kenya*.

a measure. The types of relief are not specified in the Act. It can order any party to provide security in respect of any claim or any amount in dispute; or order a claimant to provide security for costs (section 18).

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The Act does not grant tribunals sanctioning power and neither do the CI Arb and NCIA Rules. Practitioners are subject to professional ethical standards established by their respective bar associations. Under the Advocates Act (Chapter 16), only the Advocates Disciplinary Committee has sanctioning power.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Section 30 of the Act provides for majority decision-making. Questions of procedure may be decided by the chair if authorised by the parties or all the tribunal members.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Decisions made by a tribunal with more than one arbitrator are made on a majority basis. Where there is a three-member panel, the decision of the majority stands.

34 Form and content requirements

What form and content requirements exist for an award?

An award should be in writing, be dated, state juridical seat of arbitration and be signed by the arbitrators, although a majority can sign and a reason be given for why one has not signed. The award is published to the parties and should state reasons upon which it was based except where parties agree otherwise.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

There are no time limits specified within which an award should be rendered after the end of the hearing.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Parties may apply for correction of the award, an additional award or interpretation within 30 days of receipt (section 34). An application for setting-aside of the award to the High Court must be within three months of the date of receipt of the award.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The tribunal can give interim or partial awards determining some of the issues between the parties under section 32(6). It can also make a provisional award ordering a part of the claim to be paid 'on account' subject to a final decision later. The parties must confer the tribunal with such powers. Consent under section 31 incorporates the terms of the settlement negotiated by the parties. Final awards are under section 32A, and additional awards under section 34(4), the latter being upon application of the parties.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

The tribunal can give an order for termination where (section 33):

- the claimant withdraws the claim unless there is an objection from the respondent;
- the parties agree on the termination; and
- the tribunal finds that continuation of the proceedings has become unnecessary or impossible.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

An arbitrator has power to provide for costs under section 32B of the Act. This provision on award of costs is subject to party agreement on costs allocation. In the absence of such an agreement, the arbitrator determines and allocates the costs. The Act recognises costs as legal and other expenses of the parties, fees and expenses of the arbitration, and legal and other expenses of the tribunal. The award of costs can be at the award stage or after the award. In default of the award of costs and expenses, parties are equally responsible for the costs and expenses of the arbitration.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Interest is awarded at a rate and with such rests as the tribunal deems fit. This is subject to the parties having agreed otherwise. It can be simple or compound interest.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Interpretation is at the behest of the parties while correction is at the behest of the parties or the tribunal. Either party can, upon written notice to the other party, apply to the tribunal within 30 days of receiving the award. The tribunal, after giving the other party 14 days to comment, makes the correction or clarification within 30 days whether comments were supplied or not.

42 Challenge of awards**How and on what grounds can awards be challenged and set aside?**

A party makes an application to the High Court for the award to be set aside within three months of receipt of the award. The grounds one can rely on include:

- a party to the arbitration agreement was incapacitated;
- the agreement not valid under the law it is subject to;
- the applicant was not given enough notice of appointment of the arbitrator;
- the award deals with a dispute not contemplated or not falling within the terms of reference to arbitration;
- the composition of the tribunal or arbitral procedure was not in accordance with the agreement;
- the making of the award was induced or affected by fraud, bribery, undue influence or corruption;
- the subject matter is not arbitrable; or
- the award is in conflict with the public policy of Kenya.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

The recourse available to a party after the award is twofold. The party can apply for the award to be set aside in the High Court. The other party may apply for suspension of such proceedings and the court may in its discretion suspend the proceedings. The Act does not provide for further appeal beyond the High court.

On the other hand, a party can appeal on a point of law arising in the course of the arbitration or out of the award to the High Court under section 39. This is subject to the parties' agreement that such an appeal can be made. The decision of the High Court is appealable to the Court of Appeal if the parties had agreed so or if the court grants leave on the basis that the matter substantially affects the rights of the parties.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Domestic awards are recognised as binding and are enforced on application to the High Court in writing. Foreign awards are recognised and enforced under the New York Convention. The award has to, however, have been awarded in a signatory state. The party wishing to rely on an award or to enforce it produces the original award and arbitration

agreement or certified copies. The High Court can refuse to recognise and enforce the award on grounds quite similar to the grounds for setting aside an award listed above, the additional ground being that the award has not yet become binding on the parties or has been set aside or suspended by a court of the origin state.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Such an award is not recognised or enforced.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The Act has no provisions for emergency arbitrators. The CI Arb Rules provide that an emergency arbitrator can award interim measures as they have similar powers to an arbitral tribunal. The Rules do not expressly provide for enforcement of the orders. They provide that an award by the emergency tribunal may be modified or confirmed by the arbitral tribunal, and if the tribunal does neither, it automatically expires. This implies that the modified or confirmed order is then enforced as an order by the tribunal.

The NCIA Rules are silent on the enforcement of the orders, only providing that the parties who consent to arbitration under the rules undertake to carry out an order or award of an emergency arbitrator immediately and without delay (rule 28 (8)).

47 Cost of enforcement

What costs are incurred in enforcing awards?

The procedure for enforcement of awards is basically a court action, and all costs connected with such proceedings apply. These might include court filing fees, legal fees, valuator's fees (where valuation of the debtors assets is needed to enable attachment), disbursements, investigator's fees and auctioneer's fees (if ordered by court).

Other**48 Judicial system influence**

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

As Kenya is primarily a common law jurisdiction, rules on production of evidence are followed especially when it touches on discovery. Most

JMiles & Co.

Arbitration • Investigation • Consultancy

John Miles
Leah Njoroge-Kibe

jmm@jmilesarbitration.com
lnk@jmilesarbitration.com

The Oval, 5th Floor
Junction of Ring Road Parklands and Jalaram Road
Westlands
PO Box 1612-00606
Sarit Centre
Nairobi
Kenya

Tel: +254 700 000106 / +254 20 434 3159
www.jmilesarbitration.com

tribunals and the Act favour the court's approach on delivery and production of evidence.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Professional and ethical rules that apply to advocates in the national legal sphere are relevant to arbitration proceedings as well. In Kenya, standards of professional ethics were formulated by the Law Society of Kenya through the *Law Society of Kenya Code of Ethics and Conduct for Advocates* (January 2016). The Advocates Act sets out misconduct offences and establishes an enforcement and sanctions mechanism to deal with professional misconduct by advocates. These rules complement the IBA Guidelines especially with regard to fiduciary duties to the client and conflict of interest. Their applicability largely depends on the parties and the tribunal, which may agree to be bound by them in an international arbitration.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

The Advocates Act prohibits advocates from entering into agreements where they purchase any interest in a client's claim in a contentious proceeding or agree to be remunerated based on a contingency fee. This prohibition applies to both litigation and arbitration. The law prohibits champertous arrangements. It is unclear as to whether this rule applies to third parties, such as financial institutions, who may be willing to fund arbitration proceedings for a share in the proceeds of the award. Costs-of-litigation funding is recoverable under Order 33 of the Civil Procedure Rules only in relation to pauper briefs.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Under section 11 of the Advocates Act, foreign counsel require special admission to appear in court. The foreign counsel's appearance is restricted to the matter in which he or she has been instructed. For the duration of his or her admission, the foreign counsel is bound by the Advocates Act rules on professional conduct. Both CI Arb Rules and the NCIA Rules provide that a party may be represented by a representative of its choice. The Act places no restrictions on the appointment of foreign counsel or arbitrators in international or domestic arbitrations. The foreign counsel or arbitrator will be required to obtain a visa, work permit or special pass (as the case may be) from the Immigration Department depending on the duration of stay.

Korea

BC Yoon, Liz (Kyo-Hwa) Chung and Joel Richardson

Kim & Chang

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Korea signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) on 8 February 1973, and it entered into force in Korea on 9 May 1973. Korea declared that it will apply the New York Convention only to arbitral awards made in the territory of states that are also parties to the Convention, and only to disputes that would be considered 'commercial disputes' (contractual or otherwise) under Korean law.

Korea signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States on 21 February 1967, and it entered into force in Korea on 23 March 1967.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Korea has entered into more than 90 bilateral investment treaties and numerous free trade agreements that permit disputes between a contracting party and an investor of the other contracting party to be resolved by arbitration, predominantly at the International Centre for the Settlement of Investment Disputes or, alternatively, under the arbitration rules of the International Chamber of Commerce or through ad hoc arbitration under the UNCITRAL Rules.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary source of law relating to arbitral proceedings in Korea is the Arbitration Act of Korea (the Korean Arbitration Act), which is based on the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law). The Korean Arbitration Act was enacted in 1999, replacing the former Arbitration Act of 1966. The most recent major revisions to the Korean Arbitration Act were made in May 2016, primarily adopting the 2006 amendments of the Model Law (2006 UNCITRAL Model Law). The amended Korean Arbitration Act came into effect as of 30 November 2016, after a six-month grace period. The amended Korean Arbitration Act governs both domestic arbitration and international arbitration that takes place in Korea. The primary features of the amended Korean Arbitration Act include, among others:

- expansion of the scope of arbitration to non-property rights, which may be resolved by the parties' settlement;
- relaxation of the requirements regarding the written form of arbitration agreement;

- detailed provisions regarding interim measures ordered by an arbitral tribunal and the Korean court's enforcement of such tribunal-ordered interim measures;
- simplified procedures for recognition and execution of arbitration awards in Korean courts; and
- provisions regarding cooperation by the Korean courts in arbitral proceedings regarding collection of evidence.

However, the amended Korean Arbitration Act did not adopt certain features of the 2006 UNCITRAL Model Law such as the 'international origin and general principles' and 'preliminary orders'. Certain provisions of the amended Korean Arbitration Act (eg, articles 7, 8, 12, 17, 18, 18-2 to 18-8, 28) will only apply to arbitration proceedings that are initiated after 30 November 2016.

Article 39 of the Korean Arbitration Act provides that arbitral awards from foreign jurisdictions that are signatories to the New York Convention shall be recognised and enforced in accordance with the Convention. Awards from jurisdictions that are not signatories to the New York Convention shall be recognised and enforced in accordance with the provisions of Korea's Civil Procedure Act and Civil Execution Act relating to the recognition and enforcement of foreign court judgments.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The amended Korean Arbitration Act is based on the 2006 UNCITRAL Model Law, with some variations. For example, article 27(3) of the Korean Arbitration Act permits the parties to challenge experts appointed by an arbitral tribunal on the same grounds and through the same procedures used to challenge an arbitrator. The Korean Arbitration Act omits the provision in article 34(4) of the Model Law that states that, at the request of a party, a court may suspend its proceedings in a set-aside action to allow the tribunal to resume its proceedings or take other action that may eliminate the grounds for setting aside the award. Where an arbitral tribunal rules on its own jurisdiction as a preliminary matter, article 17 of the Korean Arbitration Act, in contrast with the Model Law, allows a dissatisfied party to request within 30 days that a competent Korean court rule on the jurisdiction of the arbitral tribunal; the court's decision in that event is binding and is not subject to appeal. Further, although the Korean Arbitration Act largely incorporated provisions on interim measures in the 2006 UNCITRAL Model Law, it limits enforcement of interim measures ordered by an arbitral tribunal to those issued by arbitration seated within Korea (articles 18-7 and 2(1)) and did not adopt the provisions regarding preliminary orders.

Article 35 of the Korean Arbitration Act, which applies only to awards made in Korea, provides that 'arbitral awards shall have the same effect as the final and conclusive judgment of [a Korean] court between the parties' unless the recognition or enforcement is denied under article 38 of the Act. This provision does not have an equivalent in the Model Law.

In January 2013, a District Court in Seoul construed article 35 – together with article 37(1) of the Act, which states that 'recognition or

enforcement of arbitral awards shall be made by recognition or judgment by a court' – requiring that arbitral awards made in Korea may only be enforceable if they have certain formal features of Korean court judgments. The case was appealed, and in January 2014, the Seoul High Court overturned the district court's decision and held that the award was enforceable even if in practice it could not be executed as it did not specify the exact nature and scope of the obligation of the losing party. The High Court determined that even where execution of the enforcement order would not be possible, the order enforcing the award should be granted, as it could prompt voluntary compliance of the losing party. The High Court decision was appealed to the Supreme Court, but the appellant withdrew the appeal in February 2015; thus, the High Court decision was not further challenged by the parties.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The procedural provisions of the Korean Arbitration Act are generally default provisions, applicable in the absence of an agreement between the parties. The parties have significant freedom to agree upon particular procedural rules, and arbitrators also have wide discretion to determine how the arbitration should proceed. Article 19 of the Korean Arbitration Act requires that the parties receive equal treatment and that each party shall be given a full opportunity to present its case. Article 13 of the Korean Arbitration Act requires potential arbitrators to disclose all circumstances likely to give rise to justifiable doubts as to their impartiality or independence, and the Korean Supreme Court has ruled that parties cannot waive this requirement. Article 7 of the Korean Arbitration Act confers jurisdiction on Korean courts to set aside domestic awards and to hear applications for recognition or execution of international arbitral awards.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Pursuant to article 29 of the Act, the parties are free to decide on the law applicable to the merits of the case. In the absence of agreement between the parties, the arbitral tribunal shall apply the law of the state that it considers to have the closest connection to the subject matter of the dispute.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The Korean Commercial Arbitration Board (the KCAB) is the main arbitral institution in Korea. Its contact details are as follows:

The Korean Commercial Arbitration Board
511 Yeongdongdae-ro
Gangnam-gu
Seoul 135-729
Korea
Tel: +82 2 551 2000/19
Fax: +82 2 551 2020/2113
www.kcab.or.kr

The KCAB has adopted separate rules applicable to domestic and international arbitrations, respectively. Arbitrations between Korean parties referred to the KCAB are conducted pursuant to the Domestic Arbitration Rules of the KCAB (the KCAB Domestic Rules), which were originally promulgated in 1966, absent specific agreement to the contrary. For international arbitrations, in which at least one party is not a Korean national, the International Arbitration Rules of the KCAB (the KCAB International Rules), which were originally promulgated in 2007, apply as the default rules. Both sets of rules were revised in September 2011, and the KCAB International Rules were further revised as of 1 June 2016. The revised KCAB International Rules apply to international arbitral proceedings commenced on or after 1 June 2016 unless parties agree otherwise, and the specific rules

regarding joinder of parties and emergency arbitrator proceedings (articles 21, 32(4)), which were newly adopted at that time, will only apply to arbitration agreements entered into after 1 June 2016. The KCAB Domestic Arbitration Rules were further revised as of 30 November 2016. These newly revised KCAB Domestic Arbitration Rules apply only to arbitrations commenced after 30 November 2016 unless the parties to a previously initiated arbitration agree to apply the new rules. However, the newly amended annex to the KCAB Domestic Arbitration Rules regarding arbitrator fees will come into effect as of 1 January 2017.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

To date, there is no clear Korean court precedent with respect to whether claims related to economic regulatory laws, such as antitrust, competition, securities, environmental and intellectual property regulations, are arbitrable. Korean legal commentators, however, have noted the trend in international arbitration favouring the arbitrability of disputes in such areas, and at least one Korean court has enforced a foreign arbitral award in 1995 based on a licence agreement that was alleged to violate Korean fair trade laws. As part of its reasoning, the enforcing court emphasised the need to promote international trade relations. As in most other jurisdictions, matters of criminal law, family law, and administrative law are not arbitrable in Korea. The amended Korean Arbitration Act has expanded the scope of arbitration to expressly include disputes on non-property rights that can be settled by the parties, as well as disputes on property rights. According to commentators, this expansion would allow disputes arising out of public law to be arbitrated in Korea as long as the nature of the disputes would allow the parties to settle.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

In keeping with article 7 (option I) of the 2006 UNCITRAL Model Law, article 8 of the Korean Arbitration Act requires that an arbitration agreement be in writing, either as an arbitration clause in a contract or as a separate agreement. A written arbitration agreement will be deemed to exist if such agreement is made orally or through any other means as long as the substance of the agreement is recorded in any form. An arbitration agreement may be contained in a document signed by the parties, in an exchange of written (including electronic) communications, or in an exchange of statements of claim and defence if the existence of an arbitration agreement is alleged by one party and not denied by the other. A reference in a contract to a document containing an arbitration clause constitutes a binding arbitration agreement, provided that the reference is such as to make that clause a part of the contract. An arbitration agreement may be general in its terms and may appear under the general terms and conditions of the contract.

It should be noted that the New York Convention does not permit the finding of an agreement to arbitrate on the basis of an exchange of statements of claim and defence in which the existence of an arbitration agreement is alleged by one party and not denied by the other. Therefore, the Korean Supreme Court has held that, notwithstanding the provisions of the Korean Arbitration Act, such an exchange may not be the basis for a finding that the parties have agreed to arbitration for purposes of an enforcement action under the New York Convention

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement is not enforceable when it is proven that a party to the agreement was under some incapacity under the applicable law when the agreement was executed, or that the arbitration agreement is null and void, inoperative or incapable of being performed under the applicable law. In such a case, a Korean court would not dismiss a lawsuit on grounds that the dispute is the subject of an arbitration agreement under article 9 of the Korean Arbitration Act, and would set aside an arbitral award under article 36 of the Korean Arbitration Act.

When a party to arbitration goes into court-supervised bankruptcy or reorganisation proceedings, the relevant insolvency laws of Korea apply. Under the applicable Korean laws, creditors should report their claims to the bankruptcy court to preserve such claims. Failure to report a claim within the time period designated by the court may result in the lapse of the claim. If the receiver refuses to recognise a reported claim, the claimant should file an action in the bankruptcy court seeking confirmation of the claim. If the claimant fails to seek such confirmation, or if the bankruptcy court upholds the receiver's rejection of the claim, the claim would lapse. Where there is an arbitration agreement between a creditor and a debtor that is in bankruptcy or reorganisation proceedings, there is no clear court precedent regarding whether the court or an arbitral tribunal has jurisdiction over the dispute relating to the claim. In such circumstances, it is prudent to file the claim and confirmation action at the bankruptcy or reorganisation court within the designated time period to maintain the enforceability of the arbitration agreement.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

In some cases, a third party may be bound to an arbitration agreement as a successor, for example, a contracting party's heir or assignee, or as a trustee of a contracting party that is so bound. Third parties may also be bound to an arbitration agreement by their subsequent consent, whether by affirmative consent in writing at the request of a party or failure to object to the jurisdiction of the arbitral tribunal. Pursuant to article 17 of the Korean Arbitration Act, a plea that the arbitral tribunal does not have jurisdiction over a party must be raised no later than the submission of a statement of defence on the substance of the dispute.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

There are no specific provisions in the Korean Arbitration Act that specifically preclude or permit third-party participation in arbitration in Korea. Under article 21 of the 2016 KCAB International Rules, the arbitral tribunal may allow third parties to be joined in an existing arbitration by application of a party, provided that either:

- all parties and the third party have all agreed in writing to the joinder of the third party to the arbitration; or
- the third party is a party to the same arbitration agreement with the parties and the third party has agreed in writing to be joined in the arbitration.

However, the arbitral tribunal may refuse joinder of a third party even if such requirements are satisfied where there are reasonable grounds to do so, such as delay of the arbitration proceeding. However, article 21 of the KCAB International Rules will only apply to arbitration agreements entered into by the parties after 1 June 2016.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

To date, there is no clear precedent in which the Korean courts have extended application of an arbitration agreement to a non-signatory parent or subsidiary of one of the signatory companies on the basis of the 'group of companies' doctrine.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

There are no specific provisions in the Korean Arbitration Act or the KCAB Arbitration Rules and no Korean court decisions setting out the

requirements for a valid multiparty arbitration agreement. To date, the Korean courts have not been confronted with issues involving multiparty arbitrations, consolidation of multiple arbitral proceedings or joinder or intervention by additional interested parties. Nevertheless, we are aware of prior international arbitration cases seated in Korea involving multiparty arbitration agreements. Further, the 2016 KCAB International Rules provide for joinder of third parties to existing arbitral proceedings under a multiparty arbitration agreement (see question 12).

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

There are no restrictions in the Korean Arbitration Act regarding who may serve as an arbitrator, and no specific qualifications are required. Parties are free to agree on the qualifications of the arbitrators and a procedure for selecting them. A Korean court would generally recognise and enforce the parties' agreement requiring arbitrators to meet specific qualifications. Although the KCAB maintains a roster of domestic and international arbitrators, the parties are free to choose arbitrators who are not on the roster. Under article 12 of the Act, no person may be precluded from serving as an arbitrator because of his or her nationality, unless otherwise agreed by the parties. Sitting Korean judges may not serve as arbitrators because of their judicial duty not to engage in for-profit activities, but retired judges may freely serve as arbitrators and frequently do so.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Under article 11 of the Korean Arbitration Act, the default number of arbitrators, in the absence of an agreement between the parties, is three. Under article 12, if the parties have agreed to have a sole arbitrator but cannot agree upon an arbitrator within 30 days after one of the parties initiates the procedure for the appointment of the arbitrator, the competent court (a specific local court, designated under article 7 of the Korean Arbitration Act) or an arbitral institution appointed by the court shall appoint the arbitrator at either party's request. If the parties have agreed to three arbitrators (or failed to agree a number of arbitrators) but have not agreed on a procedure for appointing the arbitrators, each party shall appoint one arbitrator, and the two arbitrators so appointed shall appoint the third arbitrator. If a party fails to appoint an arbitrator within 30 days of a request by the other party that it do so, or if the two party-appointed arbitrators fail to appoint a third arbitrator within 30 days of their appointment, the competent court or arbitral institution appointed by the court shall make the appointment at the request of either party. Finally, even if the parties have agreed on a procedure for appointment of the arbitrators, the competent court or the arbitral institution appointed by the court may intervene to appoint an arbitrator or arbitrators at the request of a party if:

- a party fails to act in accordance with such agreement;
- the parties (or party-appointed arbitrators) are unable to reach an agreement expected of them under such procedure; or
- a third party entrusted to appoint the arbitrator or arbitrators fails to do so.

Notwithstanding article 11 of the Korean Arbitration Act, article 11 of the KCAB International Rules provides that disputes 'shall be decided by a sole arbitrator' unless the parties have agreed otherwise or, absent agreement, the KCAB secretariat 'considers it appropriate' in the circumstances of the case to appoint three arbitrators. The default mechanism for appointment of arbitrators under the KCAB International Rules is in line with the rules of other major international arbitral institutions. Under article 12 of the International Rules, in case of a sole arbitrator, the KCAB secretariat will appoint the arbitrator if the parties fail to agree on an arbitrator within 30 days of the request for arbitration being received by the respondent, or if the secretariat decides to refer the dispute to a sole arbitrator within 30 days of the parties receiving

notice of such decision. Where the parties have agreed to appoint three arbitrators, each party nominates its arbitrator when filing the request for arbitration and the answer, respectively, subject to confirmation of the party-nominated arbitrators by the KCAB secretariat. Where the parties have not agreed on the number of arbitrators and the secretariat decides to refer the case to three arbitrators, each party may nominate an arbitrator within 30 days of its receipt of the notice from the secretariat or within such additional time as may be allowed by the secretariat. In either event, if the two arbitrators fail to agree on a third arbitrator – who will be the chair of the tribunal – within 30 days of the appointment of the second arbitrator, the secretariat shall appoint the chairman. The 2016 KCAB International Rules have amended article 12 so that the parties no longer appoint arbitrators, but nominate the arbitrators under the same procedures as before, and the nominated arbitrators will be deemed appointed only upon confirmation by the secretariat.

The default mechanism for appointing arbitrators under the KCAB Domestic Rules, failing prior agreement of the parties, is as follows:

- the KCAB secretariat provides the parties with a list of 10 candidates from the KCAB's roster of arbitrators;
- the parties rank the arbitrators in order of preference; and
- the secretariat appoints three arbitrators in the order of the combined ranking of the parties.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Pursuant to article 13 of the Korean Arbitration Act, an arbitrator may be challenged if there are circumstances likely to give rise to reasonable doubts as to his or her impartiality or independence, or if he or she does not possess the qualifications agreed by the parties. Parties may agree to the procedure for challenge. If there is no agreement by the parties, a party may object to the appointment of an arbitrator to the arbitral tribunal within 15 days from the constitution of the tribunal or within 15 days of the date the party became aware of the grounds for the challenge, and if the challenge is not upheld, the party may file an objection with the competent court within 30 days of the receipt of the tribunal's decision. The court's decision on the challenge is not subject to appeal. The arbitral tribunal may continue with the arbitral proceedings or render an arbitral award during a court's consideration of an application challenging one or more of the arbitrators.

Under article 23 of the KCAB Domestic Rules, a party may object to the appointment of an arbitrator by submitting a written objection to the KCAB secretariat within 15 days of the constitution of the arbitral tribunal or 15 days of the date when the party became aware of the grounds for challenge. Under article 14 of the KCAB International Rules, a party may challenge an arbitrator for 'lack of independence, impartiality or otherwise' by submitting a written objection to the secretariat within 15 days of receiving notice of the appointment of the arbitrator or 15 days of becoming aware of the grounds for challenge. The challenged arbitrator, the other arbitrators (if any), and the other party or parties may comment on the challenge within 15 days of their receipt of the challenge. The IBA Guidelines on Conflicts of Interest in International Arbitration are commonly consulted in arbitrations in Korea, but we are not aware of any court decision that has expressly applied the IBA Guidelines for the purposes of deciding a challenge of an arbitrator.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Neither the Korean Arbitration Act nor any Korean case of which we are aware directly addresses the legal nature of the relationship between the parties and the arbitrators (i.e., contractual, fiduciary, etc.). As discussed above, article 13 of the Korean Arbitration Act permits

the parties to file a challenge to an arbitrator on the basis of circumstances likely to give rise to reasonable doubts as to his or her impartiality or independence. Thus, the Korean Arbitration Act anticipates that all arbitrators, including party-appointed arbitrators, must remain independent and impartial, and the concept of neutrality of party-appointed arbitrators is generally agreed to fall within the scope of this requirement. Under the Korean Arbitration Act, the parties are free to agree to the method of determining and effecting payment of the remuneration of the arbitrators, including through submission of the arbitration to administrative rules specifying how the remuneration is to be determined and collected.

All arbitrators, including party-appointed arbitrators, should be neutral and, as noted above, an arbitrator may be challenged if there are any circumstances that give rise to a reasonable doubt as to his or her impartiality or independence. Under article 19 of the old KCAB Domestic Rules, an arbitrator could not have any legal or financial interest in the outcome of the arbitration, but the parties could waive this restriction by mutual and informed written consent. This provision was deleted in the 2016 KCAB Domestic Rules because of criticism that the concept of 'legal or financial interest' was unclear and based on the view that all arbitrators should be independent and impartial. Accordingly, article 18 of the KCAB Domestic Rules now provides that arbitrators must be impartial and independent. Article 10 of the KCAB International Rules also provide that arbitrators under the Rules shall be, and remain at all times, impartial and independent, and as noted above, arbitrators can be challenged, or precluded from serving on a case, for lack of independence or impartiality. In KCAB arbitration, there is no contractual relationship between the parties and the arbitrators. The remuneration of the arbitrators and expenses of the arbitration are paid by the KCAB out of the advance deposits paid by the parties. Under the KCAB International Rules, unless otherwise agreed, arbitrators' fees are determined according to a table appended to the Rules, based on the amount in dispute, and arbitrators are reimbursed for 'necessary expenses incurred during the proceedings'.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Liability of arbitrators is not expressly addressed in the Korean Arbitration Act. Under article 51 of the KCAB International Rules, the members of the arbitral tribunal may not be held liable to any party for any act or omission in connection with any arbitration conducted under the Rules, unless such act or omission is shown to constitute a wilful misconduct or recklessness. Article 13 of the KCAB Domestic Rules also provides the same. In case of bribery, an arbitrator may be subject to criminal penalty under the Criminal Act and will likely be found liable to the parties for damages arising from his or her wilful misconduct. To date, there is no clear Korean court precedent dealing with this matter nor do there appear to be any recent court cases in Korea that have held arbitrators liable for their conduct during the course of arbitral proceeding.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If a party initiates court proceedings despite the existence of an arbitration agreement, the Korean court, pursuant to article 9 of the Korean Arbitration Act, is required to dismiss the case if the other party asserts the existence of an arbitration agreement, unless the court finds that the alleged arbitration agreement 'is null and void, inoperative or incapable of being performed'. A party moving for dismissal on the grounds of an arbitration agreement must do so no later than its first submission to the court on the substance of the dispute. Arbitral proceedings may proceed, and an award may be rendered, while this issue is pending before the court.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Pursuant to article 17 of the Korean Arbitration Act, an arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. A challenge to the jurisdiction of the arbitral tribunal must be raised no later than the statement of defence on the substance of the dispute, except that a plea that the tribunal is exceeding the scope of its authority must be made as soon as the matter alleged to be beyond the scope arises. The arbitral tribunal may rule on a challenge to its jurisdiction as a preliminary question or in its award on the merits. If the tribunal rules as a preliminary matter on its jurisdiction, a dissatisfied party may request that the competent court decide upon the jurisdiction of the arbitral tribunal, provided that the application is submitted to the court within 30 days of receiving notice of the tribunal's ruling. Such a decision by the court is binding upon the parties and is not subject to appeal. While the KCAB Domestic Rules do not prescribe a deadline for jurisdictional challenges, under article 25 of the KCAB International Rules, a challenge to the tribunal's jurisdiction must be raised no later than the filing of the answer to the request for arbitration or, with respect to a counterclaim, the filing of the answer to the counterclaim.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Pursuant to article 21 of the Korean Arbitration Act, failing prior agreement of the parties, the arbitral tribunal shall determine the place of arbitration, having regard to the circumstances of the case including the convenience of the parties. Pursuant to article 23 of the Korean Arbitration Act, the arbitral tribunal shall determine the language of the proceedings failing prior agreement of the parties. The default language is Korean.

Under article 24 of the KCAB International Rules, failing prior agreement of the parties, the place of arbitration is Seoul, Korea, unless the arbitral tribunal determines in view of all circumstances that another place is more appropriate. The language of the arbitration, failing prior agreement of the parties, is determined by the tribunal, giving due regard to all relevant factors including the language of the contract (article 28).

Under the KCAB Domestic Rules, the place of arbitration is deemed to be Korea pursuant to the Korean Arbitration Act (article 1), and the arbitral tribunal shall determine the place of arbitration within Korea pursuant to the Act. Failing prior agreement of the parties as to the language or languages to be used in the arbitration, the default language under the Domestic Rules is Korean. The Domestic Rules also provide that the secretariat may determine Korean or English as the language for communication, and the arbitral tribunal or secretariat may request translations, and in case the award is written in both Korean and another language and there are discrepancies, the Korean version will take precedence.

23 Commencement of arbitration

How are arbitral proceedings initiated?

Article 22 of the Korean Arbitration Act provides that, unless otherwise agreed by the parties, the arbitral proceedings commence on the date when a request that the dispute be referred to arbitration is received by the respondent. The request for arbitration must identify the parties and must state the subject matter of the dispute and the details of the arbitration agreement.

A party initiates arbitral proceedings under the KCAB International Rules by submitting a request for arbitration to the KCAB secretariat and paying the filing fees specified under the Rules. The request for arbitration must contain or be accompanied by, inter alia, the arbitration agreement, the names and addresses of all parties and of the claimant's representative, a description of the claimant, a statement of the nature and circumstances of the dispute, a statement of the relief sought

and (to the extent possible) the amount claimed, and the name and address of the arbitrator nominated by the claimant if applicable under the arbitration agreement. The date on which the request is received by the secretariat is, for all purposes, the date of commencement of the arbitration. Upon receipt of the request for arbitration and the filing fees, the secretariat sends a copy of the request to the respondent.

Similarly, a party initiates arbitral proceedings under the KCAB Domestic Rules by submitting a request for arbitration to the KCAB secretariat, a document certifying the parties' agreement to arbitrate, a power of attorney if the claimant is represented by counsel and payment of the costs specified in the Rules. The request for arbitration should include the names and addresses of the parties, the name and address of the claiming party's counsel and the basis of the claim. Assuming all of these requirements have been met, the KCAB secretariat shall accept the request for arbitration, and the arbitration shall commence on the date of acceptance by the KCAB. The secretariat shall then notify and serve the respondent with a copy of the request for arbitration.

24 Hearing

Is a hearing required and what rules apply?

Under article 25 of the Korean Arbitration Act, the parties may agree to hold oral hearings or to conduct the arbitration solely on the basis of documents. In the absence of agreement between the parties, the arbitral tribunal shall determine whether to hold oral hearings or to proceed on the basis of documentary submissions. However, unless the parties have agreed that no hearings shall be held, the tribunal must hold hearings at an appropriate stage of the proceedings if so requested by a party.

Under both the KCAB Domestic and International Rules, the tribunal decides the place of the hearing and has broad control over the conduct of the hearing. At the request of either party or at the direction of the tribunal, the KCAB secretariat shall make arrangements for interpretation or translation and for audio recording or transcription of the proceedings. The KCAB International Rules provide that hearings are private in the absence of contrary provision or law or agreement of the parties. The Domestic Rules expanded the scope of confidentiality obligation to hearings and records. Under the International Rules, the arbitral tribunal may conduct a preliminary procedural conference with the parties to discuss the arbitral proceedings, and it shall prepare a procedural timetable without delay at a preliminary procedural conference or after discussion with the parties through other means.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The Korean Arbitration Act does not contain specific provisions with respect to factual evidence. Article 27 of the Korean Arbitration Act provides that, unless otherwise agreed by the parties, the arbitral tribunal 'may appoint one or more experts to consult on specific issues' (who may be required to participate in the hearing) and may require a party to provide any relevant information or produce 'any relevant documents, goods or other articles' for inspection by such experts. Parties may challenge the appointment of an expert on the same grounds and following the same procedure as when challenging the appointment of an arbitrator. Under article 28 of the Korean Arbitration Act, the arbitral tribunal may entrust the court with the taking of evidence or seek cooperation of the court. Where the court is entrusted with the taking of evidence, the parties or the arbitral tribunal may participate in the process of taking of evidence upon permission from the presiding judge, and the court shall, after taking evidence, send the records with respect to the taking of evidence, such as a certified copy of the report on witness examinations and transcripts of the report on admissibility of evidence to the arbitral tribunal without delay. In case the arbitral tribunal requests the court to cooperate with the taking of evidence, the court may order witnesses or those possessing documents to appear before the tribunal or submit necessary documents to the tribunal. The tribunal shall pay the fees for the taking of evidence by the court.

Under the KCAB International Rules, unless the parties have agreed otherwise, the arbitral tribunal may order the parties to provide documentary or other evidence at any time during the proceedings, may conduct site or property inspections, and may require the parties to provide

summaries of the evidence on which they will rely. The arbitral tribunal is empowered to determine the admissibility, relevance, materiality, and weight of evidence. The tribunal may appoint one or more experts to report to it on specific issues and may require the parties to provide evidence and information to the expert. The parties may comment on the expert's report and may examine any documents relied on by the expert. The Rules are silent as to participation by experts in the hearing, although article 27 of the Korean Arbitration Act, as noted, provides that the tribunal may require an expert to participate in the hearing.

The KCAB Domestic Rules provide that a party may produce any evidence to support its arguments and may seek the testimony of any witness or expert, but the Rules do not specify the types of evidence that may be adduced. The tribunal has full authority to determine the relevance and materiality of evidence and may refuse to consider evidence it deems irrelevant.

Under both the Domestic and the International Rules, evidence may be given by an employee or officer of a party. Evidence must be submitted and examined in the presence of all parties unless a party has waived its right to be present. There is a tendency in international arbitrations seated in Korea to seek guidance from the IBA Rules on the Taking of Evidence in International Commercial Arbitration in respect of documentary evidence, while the more limited document disclosure under the Korean Code of Civil Procedure is usually followed in domestic arbitrations. While document disclosure is permissible and not uncommon, document disclosure in arbitrations in Korea (both domestic and international) is generally less extensive than that of most common law jurisdictions.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Under article 6 of the Korean Arbitration Act, a court may not intervene in arbitral proceedings except as provided in the Act. As noted above, the arbitral tribunal may seek assistance from a court in taking evidence pursuant to article 28 of the Act. In addition, the Korean Arbitration Act permits a competent court to perform the following functions during the arbitration:

- appoint arbitrator or the appointing authority pursuant to article 12, failing agreement by the parties on a procedure for appointing arbitrators, and where the parties or party-appointed arbitrators cannot agree on the selection of the chair;
- decide on a challenge to an arbitrator pursuant to article 14 (on appeal from the decision of the arbitral tribunal);
- decide on a request to terminate the mandate of an arbitrator pursuant to article 15 (at the request of any party);
- rule on the jurisdiction of the arbitral tribunal pursuant to article 17 (on appeal from a preliminary ruling by the tribunal on jurisdiction);
- decide on a challenge to an expert appointed by the tribunal pursuant to article 27 (on appeal from the decision of the tribunal); and
- for arbitral proceedings commenced on or after 30 November 2016, recognise and enforce interim measures issued by the arbitral tribunal and order provision of security regarding enforcement of such interim measures.

27 Confidentiality

Is confidentiality ensured?

The Korean Arbitration Act does not contain any provisions expressly requiring confidentiality in arbitral proceedings. Thus, absent agreement of the parties to the contrary, for example, in the rules an administering institution or in a separate confidentiality agreement, there is no automatic requirement of confidentiality of arbitration conducted in Korea.

Under both the KCAB Domestic and International Rules, all arbitrations and all evidence and information submitted or disclosed in arbitrations are confidential. Both Rules further provide that hearings are private unless the parties provide otherwise or the law requires otherwise. The Domestic Rules provide that third parties that have an interest in the arbitration may participate in the hearing at the discretion of the tribunal. KCAB arbitral awards are regularly published, but only with any details identifying the parties, including the names of the parties, first having been redacted.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Pursuant to article 10 of the Korean Arbitration Act, a party may request interim measures of protection from a court before or during the arbitral proceedings. This provision applies irrespective of whether the seat of arbitration is inside or outside of Korea. Korean courts grant injunctive relief such as preliminary injunctions to preserve the status quo or preliminary attachments on assets subject to dispute in the arbitration. The KCAB Domestic and International Rules authorise the arbitral tribunal to order interim or conservatory measures at the request of a party. There is no exclusivity for the courts or for arbitral tribunals with respect to interim measures; parties may apply for interim measures with the court or with the tribunal at their option.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Neither the Korean Arbitration Act nor the KCAB Domestic Rules provide for an emergency arbitrator prior to the constitution of the arbitral tribunal. However, the KCAB International Rules newly introduced emergency arbitration provisions (article 32(4) and Appendix 3) with its 2016 amendment. These emergency arbitration provisions apply to arbitration agreements entered into after 1 June 2016.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Under articles 18 to 18-8 of the Korean Arbitration Act, which were largely adopted from the 2006 UNCITRAL Model Law with the recent amendment of the Korean Arbitration Act, an arbitral tribunal's powers to grant interim relief are provided in more detail. These provisions (specifically, articles 18 and 18-2 to 18-8) only apply to arbitrations commencing after 30 November 2016. Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant such interim measures of protection as it deems necessary (no longer being restricted to the 'subject matter of dispute'), and may determine an amount of security to be provided in lieu of such interim measure. The tribunal may also require the party requesting the interim measures to provide appropriate security. The scope of interim measures is specified to include measures that:

- maintain or restore status quo;
- prevent action likely to harm or prejudice arbitral process;
- preserve assets; or
- preserve evidence.

Interim measures can be granted if:

- the irreparable harm likely to occur if such measures are not ordered is greater than the harm that would be suffered by the party against whom the measures are directed; and
- there is reasonable possibility that the requesting party will succeed on the merits.

However, the tribunal may apply the above requirements as it sees appropriate for measures to preserve evidence. For arbitrations seated in Korea, the recent amendments to the Korean Arbitration Act provide that the tribunal's interim measures can be enforced through recognition or enforcement of the appropriate Korean court, but the Korean Arbitration Act does not address enforcement of interim measures ordered by tribunals seated outside of Korea. The KCAB Domestic and International Rules contain similar provisions, and the International Rules further provide that a party may apply to a competent judicial authority for interim or conservatory measures before the file is transmitted to the arbitral tribunal and in appropriate circumstances thereafter.

As a practical matter, however, interim measures by arbitral tribunals in Korea have not been common, partly because tribunals did not

have the authority to enforce such orders under Korean law, and tribunals tended to be wary of creating the impression that they have already drawn conclusions with respect to the merits of the dispute. This may now change with the amended Korean Arbitration Act.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use ‘guerrilla tactics’ in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Neither the Korean Arbitration Act nor the KCAB Domestic or International Rules expressly authorise an arbitral tribunal to order sanctions against parties or lawyers for misconduct or inappropriate tactics. Both sets of rules, however, grant arbitral tribunals broad authority with respect to the conduct of the arbitral proceedings, including with regard to the manner in which the arbitration costs are apportioned among the parties. With the exception of considering the conduct of parties and their counsel in allocating the arbitration costs, it is unclear what types of sanctions the tribunal could impose on the parties or their counsel, and how they would be enforced. The KCAB does not have authority to sanction counsel.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Pursuant to article 30 of the Korean Arbitration Act, decisions by an arbitral tribunal may be made by a majority vote, except that questions of procedure may be decided by the presiding arbitrator, if agreed by the parties or if authorised by all members of the arbitral tribunal. If an arbitrator is unable to or refuses to sign the award, the award may be signed by the majority of the arbitrators with an explanation for the failure of the other arbitrator to sign the award. The KCAB Domestic and International Rules both provide that decisions may be made by a majority. Under the International Rules, failing a majority decision of the arbitrators on an issue, the chairman of the arbitral tribunal may make a decision on that issue. Under the Domestic Rules, the chairman of the arbitral tribunal may make decisions on procedural issues if both parties have agreed to give such power to the chairman or if the arbitrators have conferred such authority on the chairman.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

The Korean Arbitration Act and the KCAB Domestic and International Rules do not expressly address dissenting opinions in an arbitral award. There have, however, been past instances of dissenting opinions issued in arbitral awards. As noted above, under both the Domestic and the International Rules, an award may be made by a majority of the arbitrators.

34 Form and content requirements

What form and content requirements exist for an award?

Article 32 of the Korean Arbitration Act requires that an award be in writing and signed by all of the arbitrators; if one of the arbitrators is unable or refuses to sign the award the other arbitrators must sign the award and explain the reasons for the absence of an arbitrator's signature. An award must state its date, the place of the arbitration, and, unless the parties have agreed otherwise or the award is a consent award based on the settlement of the parties, the reasons on which the award is based. The award may be issued in a language other than Korean, but in order to enforce any such award through a Korean court, a Korean translation of the award must be submitted to the court. The KCAB Domestic and International Rules include the same requirements. The Domestic

KCAB Rules additionally require that an award state the full names and addresses of the parties and their representatives.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The Korean Arbitration Act does not specify a time limit within which an arbitral award needs to be rendered, but the KCAB Rules do set time limits. Unless otherwise agreed by the parties, an award must be rendered no later than 30 days after the close of the hearings under the KCAB Domestic Rules, and 45 days after the close of the hearings (or 45 days after the final submissions are made, whichever is later) under the KCAB International Rules. Under the International Rules, the KCAB secretariat may extend the time limit pursuant to a reasoned request from the arbitral tribunal or on the secretariat's own initiative. Both the Domestic and International Rules have introduced expedited procedures that apply to cases where claim amounts in dispute fall below a specified threshold. Under the KCAB International Rules, the expedited procedures apply where the amount in dispute is not more than 500 million Korean won for arbitration proceedings commenced on or after 1 June 2016 (before then the threshold amount was 200 million Korean won), and under the KCAB Domestic Rules the threshold amount is 100 million won. Under both the International Rules and the Domestic Rules, the parties are free to agree to apply the expedited procedures even if the threshold amount in dispute is exceeded. Under these expedited procedures, for arbitrations under the International Rules the tribunal is required to render an award within six months of the constitution of the arbitral tribunal for arbitration proceedings commenced on or after 1 June 2016, and for arbitrations under the Domestic Rules the award must be issued within 100 days of formation of the tribunal for arbitrations commenced after 30 November 2016.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Under the Korean Arbitration Act, for purposes of a request for interpretation or correction of an arbitral award and for purposes of an application to set aside an award, the date on which the party making the request or application received a duly authenticated copy of the award is decisive.

Under article 34 of the Korean Arbitration Act, within 30 days of receiving an authenticated copy of the award, a party may submit a request that the arbitral tribunal correct any clerical or computational errors, give an interpretation of a specific point or part of the award, or make an additional award as to claims presented in the arbitral proceedings but omitted from the award. The tribunal shall decide on the first two issues within 30 days of the date of the request, and the third issue within 60 days. These provisions are implemented in both the Domestic and the International KCAB Rules.

Under article 36 of the Act, a party may submit an application to a court to set aside an arbitral award within three months after the party received an authenticated copy of the award. While the Korean Arbitration Act does not specify a limitations period in which enforcement of an arbitral award must be sought, the statute of limitations under the Korean Civil Code for claims that have been confirmed by court judgment is 10 years, and article 35 of the Korean Arbitration Act provides that an arbitration award has the same effect as a court judgment.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

Under the KCAB International Rules, an arbitral tribunal is expressly authorised to issue interim, interlocutory, or partial awards in addition to final awards. In the case of partial awards, the tribunal may make awards on different issues at different times, and such awards are individually enforceable when made unless the tribunal states otherwise. In addition, if the parties reach a settlement, the tribunal may enter a consent award if any party so requests.

Under the KCAB Domestic Rules, an arbitral tribunal is expressly authorised to issue interlocutory or partial awards in addition to final awards. The Domestic Rules also provide for consent award.

Both KCAB International and Domestic Rules do not specify the types of relief an arbitral tribunal may grant, except that the tribunal is authorised to grant interim or conservatory measures at the request of a party.

Article 29 of the Korean Arbitration Act provides that the arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Pursuant to article 31 of the Korean Arbitration Act, if the parties settle the dispute during the arbitral proceedings, the arbitral tribunal should terminate the proceedings. On request by the parties, the tribunal may record the settlement in the form of an arbitral award on agreed terms, which will have the same effect as an award on the merits of the case. Pursuant to article 33 of the Korean Arbitration Act, the tribunal may also terminate the arbitral proceedings if the claimant withdraws its claim (unless the respondent objects and the tribunal recognises a legitimate interest on the part of the respondent in obtaining a final settlement of the dispute), if the parties agree on the termination of the proceedings, or if the tribunal finds that the continuation of the proceedings has become unnecessary or impossible. The KCAB International Rules authorise the secretariat, after consultation with the arbitral tribunal, to terminate the proceedings if a party fails to make an advance payment for the arbitration upon a request by the secretariat. Under the Domestic Rules, both the secretariat and the tribunal have the authority to terminate the proceedings if a party fails to make relevant payments.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

There are no provisions in the Korean Arbitration Act with respect to the allocation of costs of the arbitral proceedings. Under the KCAB Domestic and International Rules, the costs of the arbitration are to be allocated in the award. The costs are to be borne equally by the parties unless ordered otherwise in the award.

The International Rules stipulate that the arbitration costs are in principle to be borne by the unsuccessful party. Under the International Rules, recoverable costs include administrative fees, attorney fees and costs, and costs for experts, interpreters, and witnesses. The same categories of costs are generally recoverable under the Domestic Rules including attorney fees.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

The amended Korean Arbitration Act and the revised KCAB Domestic Rules provide that the arbitral tribunal may award interest for principal claims as it deems appropriate considering all the circumstances of the case. In the absence of an agreed interest rate, Korean arbitrators normally refer to the statutory interest rates provided in the Korean Civil Code (5 per cent per annum, the general default rate) and the Korean Commercial Code (6 per cent per annum, the rate applicable to commercial transactions). The KCAB International Rules do not include specific provisions in relation to interest on awards or costs.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Under article 34 of the Korean Arbitration Act, a party may, within 30 days of receipt of the award, request that the arbitral tribunal correct any clerical or computational errors, give an interpretation of a specific point or part of the award, or make an additional award as to claims

presented in the arbitral proceedings but omitted from the award. The tribunal shall decide on the first two issues within 30 days and the third issue within 60 days. These provisions are incorporated in both the KCAB Domestic and International Rules.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

Pursuant to article 36 of the Korean Arbitration Act, recourse against an arbitral award may be made only by an application to a court to set aside the award. Any such application must be made within three months of the date on which the party making such an application received a duly authenticated copy of the award.

An arbitral award may be set aside by the court only if the party making the application provides proof that:

- a party to the arbitration agreement lacked capacity under the law applicable to such party, or the arbitration agreement is not valid under the law selected by the parties to govern the agreement (or, failing any such indication, under Korean law);
- the party making the application was not given proper notice of the appointment of the arbitrators or of the arbitral proceedings, or was otherwise unable to present its case;
- the award deals with a dispute not contemplated by or subject to the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement; or
- the composition of the arbitral tribunal or the arbitral procedure were not in accordance with the agreement of the parties or the Act.

The court may also set aside the award if it finds on its own initiative that the subject matter of the dispute is not capable of settlement by arbitration under Korean law, or that the recognition and enforcement of the award is in conflict with the good morals or other public policy of Korea. Korean courts are, however, generally open to arbitration, and it is not common for a Korean court to set aside a domestic arbitral award or refuse enforcement of an international arbitral award.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

An application to set aside an arbitral award is filed at a district court. Thereafter, an appeal of the district court's decision may be pursued at the High Court, followed by the Supreme Court. However, an enforcement order issued by the district court will generally be provisionally enforceable during the pendency of any appeals. Generally speaking, it may take approximately eight to 12 months to obtain a decision at each of the district court and High Court levels, and approximately six to 12 months at the Supreme Court. The court filing fees are set by the court, based on a fee schedule that is linked with the amount in dispute. Such costs are initially paid by the plaintiff, but may be subject to recovery by the prevailing party in the litigation. A portion of legal fees could be also recovered in accordance with a statutory schedule.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Under article 39 of the Act, where the New York Convention applies, recognition and enforcement of the foreign arbitral award shall be granted in accordance with the Convention. Where it does not apply, foreign arbitral awards are reviewed in the same manner as foreign court judgments, pursuant to article 217 of the Civil Procedure Act and articles 26(1) and 27 of the Civil Execution Act. Under those provisions, a Korean court will recognise and enforce a foreign award not subject to the New York Convention if:

- the award is final and conclusive;
- the jurisdiction of the arbitral tribunal is consistent with Korean law and treaties to which Korea is a party;

Update and trends

There have been many notable developments in 2016. First, the amended Korean Arbitration Act came into effect on 30 November 2016, adopting the 2006 UNCITRAL Model Law. Both sets of KCAB Arbitration Rules were revised in 2016: the amended KCAB International Rules came into effect on 1 June 2016 and the amended KCAB Domestic Rules came into effect on 30 November 2016. A new Arbitration Facilitation Act that aims to facilitate and promote arbitration in Korea, in particular, international arbitration, was confirmed by the National Assembly in December 2016, and it will be soon promulgated as law. The draft act provides for long-term planning and financial support by the Korean government to promote arbitration. Among other things, a comprehensive dispute resolution facility is to be established pursuant to the new act.

As to the status of international investment arbitration cases, the Korean government has been defending three cases. The ICSID

case filed by the Lone Star Funds against the Korean government is still pending (*LSF-KEB Holdings SCA and others v Republic of Korea* (ICSID Case No. ARB/12/37)), and two new cases were filed against the government in 2015 — an ICSID case filed by two Dutch companies (*Hanocal Holding BV and IPIC International BV v Republic of Korea* (ICSID Case No. ARB/15/17)) and an arbitration filed by Iranian nationals under the UNCITRAL Rules. The *Hanocal Holding BV and IPIC International BV v Republic of Korea* (ICSID Case No. ARB/15/17) case has been concluded with the claimants withdrawing their claims. As to investment treaty arbitration brought by Korean investors, an ICSID arbitration filed by Ansong Housing Co, Ltd, a real property company, against China in 2014 is pending (ICSID Case No. ARB/14/25) and Samsung Engineering Company filed an ICSID arbitration against the State of Oman in 2015 (ICSID Case No. ARB/15/30). These cases are still in the early stages and it remains to be seen how they will develop.

- the losing party received adequate notice of the arbitration and sufficient time to defend its case;
- the award is not in conflict with the good morals or other public policy of Korea; and
- the country in which the arbitral award was issued provides reciprocity to Korean judicial decisions and arbitral awards.

Generally speaking, Korean courts are considered to be friendly to arbitration. For example, they have adopted a narrow interpretation of the limits on the enforceability of arbitral awards on public policy grounds. The Korean Supreme Court has ruled that under the New York Convention, considerations of public policy must take into account not only Korea's domestic situation, but also the need for foreseeability and stability in international business transactions.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

When the New York Convention is applicable, it is unlikely that a Korean court would recognise or enforce a foreign arbitration award that has been set aside by a court at the place of the arbitration, pursuant to article V(1)(e) of the New York Convention and article 39 of the Korean Arbitration Act. In the event that such a motion to set aside has been filed at the place of arbitration, a Korean court has the discretion to suspend a pending enforcement action in Korea or to proceed despite the pendency of the motion to set aside in the foreign court. We are aware of cases in which Korean courts have enforced a foreign arbitral award while a motion to set aside such award was pending in a court at the place of the arbitration.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

For arbitration agreements entered into after 1 June 2016, the KCAB International Rules provide for emergency arbitrators, and provide that the parties are bound by the emergency arbitrator's order on emergency measures, although such orders do not bind the arbitral tribunal. The amended Korean Arbitration Act only provides for recognition and enforcement of the arbitral tribunal's interim measures (for those proceedings initiated on or after 30 November 2016), and it is silent on the enforcement of emergency measures ordered by emergency arbitrators. Since emergency arbitrators are not included in the definition of 'arbitral tribunal' under the Korean Arbitration Act, it would be difficult to enforce emergency arbitrators' interim measures in Korea. However, the KCAB International Rules provide that emergency arbitrators' orders shall be deemed to become interim measures granted by the arbitral tribunal when the tribunal is constituted. Therefore, emergency arbitrators' orders would be enforceable once the arbitral tribunal is constituted and such order is not modified by the arbitral

tribunal. See questions 28 to 30 regarding interim measures in arbitral proceedings in Korea.

47 Cost of enforcement

What costs are incurred in enforcing awards?

A plaintiff in a Korean court must pay the stamp tax and service fees associated with accessing the courts, and these costs apply to a prevailing party seeking recognition and enforcement of an arbitral award. Unlike set-aside actions, enforcement actions are now simplified under the amended Korean Arbitration Act, and the court fees would be much cheaper. However, as of the date of this publication, the Korean courts have not yet issued the amended regulation, which is expected to set the reduced fee amount. In addition, a party seeking enforcement of an arbitral award in Korea would generally require the assistance of counsel, and would incur legal fees in that regard.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Korea is a civil law jurisdiction and, therefore, Korean arbitrators are more familiar with jurisprudence and practice developed and established in civil law jurisdictions. Although an arbitral tribunal may order the disclosure of documents or examination of witnesses, and may seek the assistance of the courts in obtaining or examining such evidence, the scope of discovery in Korea is generally more limited than that of many common law jurisdictions. An arbitral tribunal has limited means to compel disclosure of documents effectively, aside from the threat of adverse inferences and cost awards. Written statements are frequently used in lieu of direct witness testimony in hearings, and there are no restrictions with respect to who may be called as a witness. Officers or other representatives of the parties to the arbitration may testify at hearings or submit written witness statements. For international arbitrations in Korea, most cases are conducted in a manner consistent with the practice in other major jurisdictions, and thus such proceedings are less inclined to be influenced by local court practice and procedures.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There is no separate guideline or ethical rule applicable to counsel in international arbitration. The Korean Bar Association applies its own ethical rules to Korean-licensed lawyers pursuant to the Lawyers Act. The IBA Guidelines on Party Representation in International Arbitration are yet to be reflected in the ethical rules of the Korean Bar Association. However, the KCAB has issued a Code of Ethics for

Arbitrators, which must be accepted by all arbitrators appointed to hear arbitration administered by the KCAB.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

There is no act or regulation that specifically prohibits third-party funding in Korea. However, because there is no express regulation allowing third-party funding either, there is uncertainty as to whether third-party funding is allowed in Korea, and if so, to what extent.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

There is no restriction on the appointment of foreign nationals (attorneys or otherwise) as counsel or arbitrators in international arbitration cases conducted in Korea. The Foreign Legal Consultants Act allows foreign-licensed lawyers (even if they are not registered as foreign legal consultants under the law) to practise as counsel in international arbitration cases conducted in Korea. However, these foreign-licensed lawyers are not permitted to reside in Korea for more than 90 days per year when working as counsel in international arbitration cases.

KIM & CHANG

BC Yoon
Liz (Kyo-Hwa) Chung
Joel Richardson

bcyoon@kimchang.com
khchung@kimchang.com
jerichardson@kimchang.com

39 Sajik-ro 8-gil
Jongno-gu
Seoul 03170
Korea

Tel: +82 2 3703 1114
Fax: +82 2 737 9091/9092
www.kimchang.com

Mexico

Adrián Magallanes Pérez and Rodrigo Barradas Muñiz

Von Wobeser y Sierra, SC

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Mexico signed the New York Convention on 14 April 1971, it entering into force on 13 July of that same year. No declaration or notification was made under articles I, X and XI of the Convention.

Regarding other multilateral treaties relating to international commercial arbitration and investment arbitration, Mexico is a party to:

- the Inter-American Convention on International Commercial Arbitration (Panama Convention), which entered into force in 1978; and
- the Inter-American Convention of Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention), which entered into force in 1987.

Mexico is not a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). However, it has included ICSID in almost all of its investment treaties. Given that ICSID arbitration is only available in the case the host state is a party to the ICSID Convention, the investor has the option to start a proceeding under the Additional Facility Rules, UNCITRAL or other applicable rules depending on the relevant treaty.

Mexico is a signatory to important treaties with investment provisions, such as NAFTA.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Currently, Mexico is state party to 33 bilateral investment treaties (BITs), out of which 30 are currently in force, and three have not entered in force but have already been signed (with Brazil, Haiti and the United Arab Emirates).

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Arbitral proceedings as well as the recognition and enforcement of awards are governed by the provisions contained in the Fourth Title, entitled 'Commercial Arbitration', of the Fifth Book, entitled 'Commercial Trials', of the Commerce Code. Those provisions apply to both domestic and international arbitrations.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The Commerce Code was amended in 1993 to incorporate, with only a few minor modifications, the United Nations Commission on International Trade Law (UNCITRAL) Model Law of 1985 as Mexico's arbitration law. In 2011, the Commerce Code was amended again to incorporate some of the 2006 amendments to the provisions of the Model Law.

There are three significant differences between the provisions of the Commerce Code and the Model Law. The first one refers to the number of arbitrators in the event there is no agreement between the parties, because the Model Law establishes three arbitrators must be appointed, while the Commerce Code requires only one arbitrator. The second one refers to interim relief requested to a court: under the Commerce Code, it is necessary to process a complete expedited bench trial to obtain interim relief from a court. However, courts have properly interpreted that preliminary protective measures may be granted when admitting the request, so that this preliminary relief is later confirmed with the judgment resulting from the expedited bench trial. The third refers to the formalities required for the arbitration agreement: contrary to the Model Law (2006), under the Commerce Code arbitration agreements must necessarily be done in writing.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

There are no mandatory domestic provisions on procedure that the parties must follow. The only limit is that parties must be treated with equality and given a full opportunity to present their case (article 1434 of the Commerce Code). Also, the limits of the parties' and the arbitral tribunal's conduct may be inferred from the provision of the Commerce Code regulating the grounds for annulment of the arbitral award, which mirror those established in the UNCITRAL Model Law.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Parties to an arbitration agreement may decide freely on the law applicable to the merits of the case. If the parties have not reached an agreement in this regard, the arbitral tribunal must determine the applicable law, taking into account the characteristics and elements of the case (article 1445 of the Commerce Code). In this determination the arbitral tribunal is not bound to apply the conflicts of law rules in force in Mexico (article 1457).

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

There are three arbitral institutions situated in Mexico.

Cámara de Comercio de la Ciudad de México (CANACO)
Morelos 67, 5to Piso
Col. Juárez, Delegación Cuauhtémoc
06600 Mexico City
Mexico
Tel: +52 55 3685 2269, extension 1309/1310
www.arbitrajecanaco.com.mx

Noteworthy particularities are:

- absent an agreement by the parties, the institution determines the number of arbitrators and the composition of the arbitral tribunal. If it determines that there will be a sole arbitrator, it will be selected from a list of arbitrators. If the institution determines that there will be three arbitrators, each party will designate one arbitrator, and the institution will designate the chairman; and
- the fee for arbitrators and the institution are determined based on the amount in dispute.

Centro de Arbitraje de México (CAM)
Calle del Puente No. 222
Edificio Aulas IV, Segundo Piso (within Tecnológico de Monterrey, Campus Ciudad de México)
Col. Ejidos de Huipulco, Delegación Tlalpan
14380 Mexico City
Mexico
Tel: +52 55 9177 8198
Fax: +52 55 9177 8199
camex@camex.com.mx
www.camex.com.mx

The Rules of this Institution are very similar to the ICC Rules. Noteworthy particularities are:

- absent an agreement by the parties regarding the designation of the arbitrators, a sole arbitrator will be appointed by the institution; and
- the fee for arbitrators and the institution are determined based on the amount in dispute.

Construction Arbitration Center (CAIC)
Montecito No. 38, Piso 11, Oficina 33
Nápoles
03810 Mexico City
Mexico
Tel: +52 55 9000 4989
Fax: +52 55 9000 4989
adelrivero@caic.com.mx

A noteworthy particularity – as inferred from its title – is that this arbitral institution specialises in disputes construction disputes. The Center was recently created.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

According to different statutes of the Mexican legal system, there are several subject matters that may not be referred to arbitration, among them the following:

- disputes arising from:
 - internal regimes of Mexican embassies and consulates and their official proceedings;
 - acts of authority or acts related to the internal regime of the state and of the federal entities;
 - land and water resources located within national territory; and
 - resources within the exclusive economic zone or resources related to any of the sovereign rights regarding such zone (article 568 of the Federal Code of Civil Procedure);

- disputes related to administrative termination of contracts executed by the National Hydrocarbons Commission (articles 20 and 21 of the Hydrocarbons Law);
- disputes regarding the lawfulness of administrative rescissions or the early termination of contracts executed between public entities and private parties (Law of Acquisitions, Leases, Services of the Public Sector and the Law of Public Works and Related Services);
- personal and commercial bankruptcy proceedings (article 1 of the Bankruptcy Law);
- criminal liability (article 1 of the National Code of Criminal Procedure);
- issues related to family law and civil status must be ruled by national courts (article 52 of the Superior Court of the Federal District Organisational Act);
- matters related to taxes (article 14 of the Tax and Administrative Federal Court Organisational Law);
- labour disputes (article 123, Section XXXI of the Constitution);
- agrarian disputes (according to article 27, Section XIX of the Mexican Constitution); and
- under article 227 of the Industrial Property Law, parties may only submit a dispute to arbitration when the controversy affects private rights exclusively. If the dispute concerns a public interest, then it is not arbitrable.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Article 1423 of the Commerce Code states that the arbitration agreement must be in writing and included in a signed document or in the exchange of letters, telex, telegram fax or any means of telecommunication that leaves record of the agreement. Under article 1834-bis of the Federal Civil Code, the use of electronic communications is permitted. The arbitration agreement can also be concluded by reference to a document that contains an arbitration agreement or, within a trial, if the claimant states the existence of the agreement in its complaint and the respondent does not deny it.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement is no longer enforceable when it is proven that:

- one of the parties was not legally capable during the conclusion of the agreement (article 1798 of the Mexican Federal Civil Code);
- the consent to the agreement was granted by mistake or under duress (article 1812 of the Mexican Federal Civil Code); or
- the subject matter of the agreement is not arbitrable.

Article 1432 of the Commerce Code states that an arbitration agreement included in a contract shall be treated as an independent agreement. Therefore, a ruling stating that a contract is null and void does not entail the invalidity of the arbitration clause. In this respect, the Commerce Code incorporates the separability of the arbitration clause principle in a very clear manner.

In the case of insolvency, the arbitration agreement remains enforceable, and parties are free to start or continue with arbitral proceedings against someone who is subject to a bankruptcy proceeding.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Under Mexican law, third parties or non-signatories can be bound by an arbitration agreement in the following cases:

- assignment of rights;
- succession;
- merger of companies; and
- acquisition of shares of simplified stock companies (under the Federal Civil Code, the Commerce Code and the General Law on Business Corporations).

There is no uniform criterion on whether non-signatories can be bound to an arbitration agreement in other situations, and Mexican courts have not ruled on the matter.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The Commerce Code does not provide specific rules on the joinder of third parties to the arbitral proceedings. In any case, it will depend on the arbitration rules chosen by the parties. There is no restriction as to which arbitration rules may the parties agree on.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the ‘group of companies’ doctrine?

Under the Commerce Code, there is no specific provision allowing the groups of companies doctrine being used to extend an arbitration agreement to non-signatory parties, and to our knowledge the subject has not been analysed by the Mexican courts. However, Mexican courts have recognised the possibility to pierce the corporate veil in some circumstances.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

Multiparty arbitration agreements are not provided for in the Commerce Code. However, it is possible for these agreements to be executed between the parties (for example, the CAM Rules of Arbitration foresee in article 16 the possibility of the existence of multiple parties and address the subject of joint nomination of arbitrators).

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Any person with full legal capacity can act as an arbitrator, provided there is no specific requirement agreed upon between the parties to the contrary, nor a situation that indicates a lack of impartiality or independence (article 1428 of the Commerce Code). However, judges and justices, their secretaries and members of the Council of the Federal Judiciary cannot be appointed as arbitrators (article 101 of the Mexican Constitution).

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Under article 1427 of the Commerce Code, if there is no agreement on the number of arbitrators, the proceedings shall be conducted with one arbitrator.

In the case of a sole arbitrator, absent an agreement between the parties, said arbitrator will be designated by the judge at the request of any of the parties. In cases with three arbitrators, each party will designate an arbitrator, and the third arbitrator will be chosen by the arbitrators appointed by the parties. If one of the parties does not designate an arbitrator within 30 days of being required to do so, or if the first two arbitrators cannot reach an agreement 30 days after they are appointed, the judge shall make the appointment.

If the judge is required to appoint an arbitrator, after hearing the opinion of the parties and requesting various arbitral institutions, colleges of public commercial notaries, chambers of commerce or

industry for information on arbitrators, the judge must make a list of possible arbitrators. This list is sent to the parties, who within 10 days will choose the candidates they consider suitable. Afterwards, the judge will appoint the members of the arbitral tribunal from the chosen candidates.

Regarding the rules of arbitration of domestic institutions, absent an agreement of the parties, the appointment of arbitrators under the Rules of CAM and CANACO is as follows.

CAM Rules

If there is no agreement on the number of arbitrators, the proceedings shall be conducted with one arbitrator. Sole arbitrators shall be appointed by the general council of the institution within 30 days of the date when the request for arbitration notified by the secretary general has been received by the respondent. On proceedings with three arbitrators, each party will designate an arbitrator, leaving the appointment of the chairman to the general council. If a party fails to designate an arbitrator, the general council shall appoint it.

CANACO Rules

If there is no agreement on the number of arbitrators, the commission of the institution shall determine it. Sole arbitrators will be appointed by the commission, discretionally determining if he or she should be appointed or not from a list. On proceedings with three arbitrators, each party will designate one, leaving the appointment of the chair to the commission, which will discretionally determine to appoint him or her from a list. If a party does not make a designation of an arbitrator, the arbitrator shall be appointed by the commission.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Challenges of arbitrators have to be based on circumstances that give rise to justifiable doubts as to their impartiality or independence, or on their lack of the qualifications agreed upon by the parties.

Parties who wish to challenge an arbitrator shall inform the arbitral tribunal within 15 days of its constitution of the circumstances giving rise to the challenge. The arbitral tribunal shall rule on the issue, unless the challenged arbitrator renounces, or the other party consents to the challenge. If the challenge is not successful, the challenging party has 30 days to bring the claim before a judge.

If an arbitrator is removed or resigns for any reason, a substitute arbitrator shall be appointed according to the same procedure used to appoint the original arbitrators.

It is common to use the IBA Guidelines on Conflicts of Interest in International Arbitration when arguing the specific circumstances for the challenge of an arbitrator.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Party-appointed arbitrators must be impartial and independent. The lack of those characteristics constitutes grounds for a challenge.

The contractual relationship between the parties and the arbitrators is understood as a professional services agreement. Under article 1454 of the Commerce Code, their remuneration and expenses are determined by the arbitral tribunal itself, on the basis of the complexity of the dispute, time spent and other relevant circumstances. It is possible for a party to ask a judge to make observations on the remuneration and expenses determined.

19 Immunity of arbitrators from liability**To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?**

Under article 1480 of the Commerce Code, an arbitral tribunal can be held liable for any damage arising from the granting of an interim measure. This liability is shared with the party that requested it. Other than this, there is no express provision in the Commerce Code regulating the liability of arbitrators regarding the rest of the arbitral proceedings.

Jurisdiction and competence of arbitral tribunal**20 Court proceedings contrary to arbitration agreements****What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?**

If a party considers that a court has no jurisdiction over a dispute because of the existence of an arbitration agreement, it may request the remittance of a dispute from court proceedings to arbitration, in order for the arbitral tribunal to determine its own jurisdiction (articles 1424 and 1464 of the Commerce Code). Said request can be done at any moment. If the judge finds grounds for this request, he or she will immediately suspend the judicial proceedings and refer the parties to arbitration. It is not possible to file an appeal against this decision; however, the opposing party could file an *amparo* (constitutional protection action).

21 Jurisdiction of arbitral tribunal**What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?**

The arbitral tribunal itself must determine whether it has jurisdiction over a dispute, including any claims against the existence or validity of an arbitration agreement (article 1432 of Commerce Code). The parties have until the answer to the statement of claim to question the jurisdiction of the arbitral tribunal. The arbitral tribunal can decide to resolve this issue either right after it has been requested, or afterwards when rendering the award. If a decision in this regard is determined before the rendering of the award, parties have 30 days to bring the matter before a judge for a final determination.

Arbitral proceedings**22 Place and language of arbitration****Falling prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?**

Falling prior agreement of the parties, the arbitral tribunal shall determine the place and language of the arbitration by taking into account the relevant circumstances of the case and the interests of the parties (articles 1436 and 1438 of the Commerce Code).

23 Commencement of arbitration**How are arbitral proceedings initiated?**

Mexico's domestic arbitration law does not regulate the request for arbitration, nor does it specify the moment in which the arbitration is considered initiated.

Regarding the Rules of Arbitration of domestic institutions, absent an agreement between the parties, the commencement of the arbitration is as follows:

- CAM: article 6 states that the date when the request for arbitration is received by the secretary general shall, for all purposes, be deemed to be the date of commencement of the arbitral proceeding; and
- CANACO: article 3 states that the arbitral proceedings are deemed to have started on the date the request for arbitration is received by the commission of the institution.

24 Hearing**Is a hearing required and what rules apply?**

The arbitral tribunal will determine if hearings for the submission of evidence or the presentation of oral arguments shall be held or not (article 1440 of the Commerce Code). There are no specific rules regarding conducting hearings.

Regarding the Rules of Arbitration of domestic institutions, there are a few relevant provisions:

- CAM Rules: absent a request from a party to hold hearings, the arbitral tribunal may decide to hold a hearing to interview the witnesses, experts appointed by the parties or any other person; and
- CANACO Rules: prior to request by any of the parties and in any moment during the proceedings, the arbitral tribunal will hold hearings for the submission of evidence or the presentation of oral arguments. If said request is not made, the tribunal can still determine if the hearings are to be held or not.

25 Evidence**By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?**

The Commerce Code states that the parties shall express all the relevant facts, disputed points and claims in their respective initial submissions. At the same time, they shall provide all documents or evidence they deem relevant to the case. The arbitral tribunal can appoint any expert it finds necessary for it to be informed on a specific subject. The tribunal may also order, if necessary, any of the parties to provide documents or information to said experts (article 1442 of the Commerce Code).

In Mexico, both arbitrators and parties tend to apply the IBA Rules on the Taking of Evidence in International Arbitration.

26 Court involvement**In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?**

The arbitral tribunal can request assistance from a judge in the following matters:

- production of evidence;
- enforcement of awards or interim measures rendered by the arbitral tribunal; and
- determination of fees.

A judge may also intervene concerning:

- provision of interim measures prior to or during the arbitral proceedings;
- ruling on the decision of the arbitral tribunal regarding the confirmation of its own jurisdiction if done before the award is rendered;
- assistance with the constitution of the arbitral tribunal; and
- assistance with the removal of an arbitrator.

27 Confidentiality**Is confidentiality ensured?**

The Commerce Code does not regulate confidentiality in arbitral proceedings. Nevertheless, in practice parties tend to agree on the confidentiality of the proceedings, either in the arbitration agreement or by means of the rules of a specific institution.

Interim measures and sanctioning powers**28 Interim measures by the courts****What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?**

At any moment before or during the arbitration proceedings, the parties have the right to request interim measures from the competent courts (article 1425 of the Commerce Code).

The court has complete discretion to grant whatever interim measures it deems appropriate for the case (article 1478 of the Commerce Code).

In the event the interim measure is granted before the arbitration proceedings have been initiated, there is no specific provision establishing that it will cease to have effect once the arbitral tribunal is constituted. In addition, there is no specific provision regulating whether the arbitral tribunal has the authority to modify or revoke the interim measures granted by the court.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Mexican law does not regulate – and neither does it prohibit – the possibility to appoint an emergency arbitrator prior to the constitution of the arbitral tribunal. Therefore, it depends on the arbitration agreement and the provisions of the applicable arbitration rules selected by the parties.

Under the rules of CANACO and CAM, it is possible to request the appointment of an emergency arbitrator.

According to the CANACO Rules of Arbitration, unless otherwise agreed by the parties, the party that seeks provisional relief can file a request before CANACO's Arbitration Commission prior to the constitution of the arbitral tribunal. Within the following business day, the Commission appoints an interim arbitrator, who will have the power to order any interim measure of protection or preliminary order deemed necessary, after giving both parties a reasonable opportunity to all parties to be heard (article 50). The Arbitration Commission is an administrative organ within CANACO.

In the same vein, according to the CAM Rules of Arbitration, the party that requires an urgent conservatory or interim measure before the constitution of the arbitral tribunal may file a motion before the secretary general. Once the motion is filed, the general council appoints an emergency arbitrator, who, after ensuring each party had a reasonable opportunity to present its case, may order any interim measure he or she deems appropriate (article 30-bis).

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Mexican law establishes that, at the request of either party, the arbitral tribunal is entitled to order any interim measures it considers necessary to preserve the subject matter of the dispute (article 1433 of the Commerce Code). However, the parties can agree to exclude this possibility in the arbitration agreement or at any moment during the proceeding.

The arbitral tribunal has a discretionary power to request the presentation of a guarantee or security that is sufficient to cover any damages arising from the enforcement of the interim measure.

Regarding court assistance, the interested party may initiate a commercial action to request the enforcement of the interim measures granted by the arbitral tribunal, which are considered binding (article 1480 of the Commerce Code).

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Under Mexican law, there is no specific authorisation for the arbitral tribunal to order sanctions against parties or their counsel. The CANACO Rules of Arbitration and the CAM Rules of Arbitration have no applicable provision.

In our opinion, if the seat of the arbitration is Mexico neither the arbitral tribunal nor the arbitral institution would have the authority to order sanctions against parties or their counsel, even for gross violations of the integrity of the arbitral proceeding.

In practice, arbitral tribunals in Mexico usually take into consideration the use of guerrilla tactics during the proceeding when assigning the costs in the final award.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Under Mexican law, unanimous votes are not required and arbitral tribunals can take decisions by a majority of votes. Furthermore, the president of the arbitral tribunal can decide procedural issues on his or her own. This, of course, is unless the parties agree otherwise (article 1446 of the Commerce Code).

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

There is no specific regulation on dissenting opinions to the award in the Commerce Code. However, considering they are not prohibited, the possibility to issue a dissenting opinion will depend on the arbitration agreement and the arbitration rules applicable to the proceedings.

34 Form and content requirements

What form and content requirements exist for an award?

First, the award must be in writing and be signed by the arbitrators, indicating the seat of the arbitration and the date on which it was signed. In the case there is more than one arbitrator, only the signature of the majority is necessary, as long as there is an indication of the reasons why the remaining arbitrators failed to sign.

Second, the award must contain the reasons for the decision, unless the parties have agreed otherwise or have reached a settlement (article 1448 of the Commerce Code).

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

There is no specific timeframe established in Mexican law for the issuance of the award. Therefore, it will depend on the provisions of the applicable arbitration rules.

The CAM Rules of Arbitration provide that the arbitral tribunal must render the award in a time limit of four months, starting from the date of the signature of the terms of reference. However, the secretary general may extend the time if necessary or if requested by the arbitral tribunal (article 31).

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

From the notice of the award to the parties, two relevant time limits start to run:

- 30 days to request the correction or interpretation of the award (article 1450 of the Commerce Code); and
- three months to file a commercial action requesting the nullity of the award (article 1458 of the Commerce Code).

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

Under Mexican law, there are no different types of awards. Any ruling issued by an arbitral tribunal must meet the same requirements (articles 1446, 1447 and 1448 of the Commerce Code). The arbitral tribunal may award any kind of relief requested by the parties, as long as it is within the scope of the arbitration agreement and its powers.

Update and trends

In the past year, there were three important developments related to arbitration:

First, the Mexican Supreme Court of Justice issued a ruling in the constitutional protection action 71/2014 filed by the Federal Electricity Commission against the decision of a court refusing to set aside an arbitral award. The decision is paradigmatic because it recognises the right to choose arbitration to solve a dispute as a constitutional right and not simply as a consequence of contractual freedom. Also, the Supreme Court expressly stated that a judge cannot examine the merits of the award and must limit analysis to the specific issues established in the Commerce Code. Finally, the judgment provides that public policy is understood as basic ideas and essential principles of Mexican law, and, therefore, the standard to set aside an award because of breaches to public policy is very high.

The second development was that in March 2016, the General Law of Business Corporations was amended to include a new type of corporation: the simplified stock company. It was established that disputes between shareholders must preferably be resolved through alternative means of conflict resolution, including arbitration. This is an important change in Mexican law because the enforceability of a clause establishing binding arbitration in a corporation's by-laws was not clear.

Finally, the third development was that in April 2016 the president filed a bill before Congress to amend the Constitution and grant Federal Congress the authority to issue a general law on alternative means of conflict resolution.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Arbitration proceedings can be terminated by means different from an award. For example, the arbitral tribunal can issue an order ending the proceedings in the event the claimant withdraws its claims, both parties reach an agreement or the tribunal considers that it is not necessary or possible to continue with the proceedings (article 1449 of the Commerce Code)

In addition, if the parties execute a settlement agreement, they can request the arbitral tribunal to issue an award containing that agreement (article 1447 of the Commerce Code).

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The general rule is that the costs of arbitration must be paid by the unsuccessful party. However, if it considers it appropriate because of the specific circumstances of the case, the arbitral tribunal may divide the costs between the parties (article 1455 of the Commerce Code).

Recoverable costs include the fees of the arbitrators, travel expenses incurred by them, fees charged by experts, travel expenses incurred by witnesses, the fees of the managing institution and, if approved by the arbitral tribunal, the costs and legal fees of the prevailing party (article 1416 of the Commerce Code).

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

In case the parties include interest and costs as part of their claims, the arbitral tribunal may award them. If no applicable rate has been agreed upon between the parties, Mexican law provides an annual mandatory interest rate of six per cent (article 362 of the Commerce Code). However, this mandatory interest rate will only apply if the rules governing the substance of the dispute is Mexican law.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Under Mexican law, within the 30 days following the notice of the award to the parties, the parties may request the correction of calculations and typographical or other formal mistakes. If the arbitral tribunal identifies the mistake on its own, it can make the correction on its own initiative.

Also, the parties may request an interpretation of a specific point or section of the award. In the case the arbitral tribunal considers the request is justified, it will issue the interpretation within 30 days following the request. Such interpretation is considered part of the award (article 1450 of the Commerce Code).

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

An award can be challenged and set aside only if the interested party proves one of the following situations:

- one of the parties to the arbitration agreement was not legally capable, or the agreement was not valid under the law to which the parties have subjected it or Mexican law;
- the party was not given proper notice of the appointment of an arbitrator or the arbitral proceedings, or was unable to defend its rights;
- the award deals with issues not included or falling outside of the scope of the arbitration agreement;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement between the parties; and
- the award can be set aside if the court *ex officio* determines that:
 - the subject matter of the proceedings was not arbitrable; and
 - the award breaches public policy.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level?

Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Under Mexican law, arbitral awards are considered binding and final and, therefore, cannot be appealed. The only way to challenge an award is through a setting-aside proceeding before a local or federal court, which is limited to the specific causes provided in the Commerce Code.

The judgment issued by the court in that setting-aside proceeding cannot be appealed; however, it can be challenged through an *amparo*.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

To recognise and enforce an arbitral award in Mexico, the interested party must file a request containing the arbitration agreement, the award and, if the award or the agreement to arbitrate is not in Spanish, a certified translation.

The interested party has to file a lawsuit before a local or federal court. If it meets the requirements referred to above, the judge summons the opposing party and grants it 15 days to submit an answer and offer evidence. Upon the expiration of such term, if the parties do not offer any evidence and if the judge does not consider it necessary, the parties are summoned to a pleadings hearing, which will take place within the following three days. If the parties file evidence or if the judge deems it necessary, the parties are granted a 10-day period to produce evidence (articles 1471 to 1476 of the Commerce Code).

A court may deny recognition and enforcement of an award under Mexican law for the following limited reasons established in article 1462 of the Commerce Code:

- the arbitration agreement was invalid or the parties lacked legal capacity to make the agreement;
- the appointing authority did not give the losing party proper notice of the appointment of the arbitrator or of the arbitration proceedings, or the losing party was otherwise unable to present its case;
- the award deals with a matter not contemplated by or falling within the terms of the arbitration agreement;
- the composition of the arbitral tribunal or arbitral procedure violated the parties' agreement or (absent any such agreement) the law of the seat of arbitration;
- the award is either not yet binding in, or was set aside by a court at, the seat of arbitration;
- the subject matter of the parties' dispute is not arbitrable; and
- recognition or enforcement of the award would be contrary to public policy.

The court has discretion whether to enforce an award despite the confirmation of one of the grounds mentioned. However, we do not know of any case in which a Mexican court decided to exercise this discretion.

Mexican courts tend to look favourably upon enforcing awards and have a pro-arbitration approach.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

To our knowledge, no such case has been brought before Mexican courts. However, if an award has been set aside by the courts at the place of arbitration, the Mexican court may refuse to recognise and enforce it (article 1462 of the Commerce Code).

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The Commerce Code makes no distinction between orders issued by arbitral tribunal or emergency arbitrators. Therefore, interim measures are enforced without regard as to whether they were obtained from an arbitral tribunal or an emergency arbitrator.

47 Cost of enforcement

What costs are incurred in enforcing awards?

The party interested in the enforcement of an award is not required to pay any costs or fees to the court. This is because, according to the Mexican Constitution, judicial proceedings have no cost.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

In Mexico, discovery is not regulated. Considering it is not forbidden, parties could agree to include a document production stage in the proceeding. It is common to establish a stage for the production of documents using the IBA Rules on the Taking of Evidence as an important guideline. Written statements and testimony from party officers are very common.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are no specific professional or ethical rules applicable to counsel in international arbitration in Mexico.

In past few years, Mexican practice has started to reflect the IBA Guidelines on Party Representation in International Arbitration; however, their use is not widespread.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Although there is no specific provision regarding third-party funding in Mexican law, those kind of agreements are not forbidden. Therefore, it is possible to execute third-party funding or risk-sharing agreements.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Under the law regulating article 5 of the Constitution in Mexico City, only attorneys admitted to practise in Mexico may provide legal services on a regular basis. However, in our view, counsel to the parties and arbitrators may act and participate in proceedings in Mexico provided they do not do it on a regular basis. There is no definition of what 'regular basis' signifies, and to our knowledge courts have not issued a criterion in this regard.



Adrián Magallanes Pérez
Rodrigo Barradas Muñiz

amagallanes@vwys.com.mx
rbarradas@vwys.com.mx

Guillermo González Camarena 1100, Piso 7
Col. Santa Fe
01210 Mexico City
Mexico

Tel: +52 55 5258 1000
Fel: +52 55 5258 1098
www.vonwobesersierra.com

Morocco

Azzedine Kettani

Kettani Law Firm

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Morocco is a contracting state to the New York Convention, which entered into force on 7 June 1959. According to the Moroccan law ratifying the Convention, no reservations or declarations were made. However, Morocco applies the New York Convention only to the recognition and enforcement of awards made in the territory of another contracting state.

Morocco is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which was ratified by a royal decree dated 31 October 1966.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Several bilateral investment treaties (BITs) to which Morocco is a party include provisions for arbitration as a means of settling bilateral investment disputes.

The BITs that Morocco is a party to and that are currently in force are with: Argentina, Austria, Bahrain, Belgium and Luxembourg, Bulgaria, China, the Czech Republic, the Dominican Republic, Egypt, El Salvador, Finland, France, Gabon, Germany, Greece, Hungary, India, Indonesia, Iran, Italy, Jordan, Korea, Kuwait, Lebanon, Libya, Malaysia, Mauritania, the Netherlands, Oman, Poland, Portugal, Qatar, Romania, Spain, Sudan, Sweden, Switzerland, Syria, Tunisia, Turkey, Ukraine, the United Arab Emirates, the United Kingdom and the United States.

Morocco is also party to BITs with the following countries, but these BITs are not yet in force: Benin, Burkina Faso, Cameroon, the Central African Republic, Chad, Croatia, Denmark, Equatorial Guinea, the Gambia, Guinea, Iraq, Pakistan, Senegal, Serbia, Slovakia, Vietnam and Yemen.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The main sources of law are Royal Decree No. 1-59-266 of 19 February 1960 relating to the ratification of the Convention adopted by the Economic and Social Council of the United Nations (the New York Convention), and articles 306 to 327 of the Moroccan Code of Civil Procedure, Law No. 1-74-447 of 28 September 1947, as completed and modified by Law No. 08-05 of 30 November 2007 (the Civil Procedure Code).

The Civil Procedure Code governs both foreign and domestic arbitration proceedings and enforcement of awards. According to the said Code, arbitration is considered as 'international' if it relates to international trade and provided that at least one of the parties resides abroad.

Arbitration is also considered international if:

- the parties have their place of business in different states;
- the place of arbitration is in a state other than the parties' place of business;
- a substantial part of the obligations resulting from the commercial relationship must be performed outside the state in which the parties have their place of business;
- the place with which the subject matter of the dispute is most closely connected is outside the state in which the parties have their place of business; or
- the parties expressly agree that the subject of the arbitration agreement has connections with multiple countries.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The provisions of the Moroccan Code on Civil Procedure relating to arbitration are loosely based on, and are generally in conformity with, the UNCITRAL Model Law.

However, there are some differences, for example, regarding the restrictions on who can act as an arbitrator and the grounds for challenging an arbitrator, the deadlines for appointing and challenging arbitrators and the grounds for annulling the arbitration award and corresponding delays.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The arbitral tribunal is generally free to determine the procedural rules applicable in an arbitration proceeding and is not bound by formal rules of court procedure, unless the parties decide otherwise in the arbitration agreement. In the case of 'ad hoc arbitration', the tribunal is responsible for organising the proceedings and determining the procedures to follow, unless the parties have agreed otherwise. With 'institutional arbitration', the institution organises the proceedings and ensures they are carried out in accordance with its internal rules.

Nevertheless, certain provisions are mandatory. For example, the rules relating to the parties' right of defence must be respected in all cases, and each party must be given an equal opportunity to present its arguments. Furthermore, the limitations on who can act as an arbitrator are universal and the number of arbitrators designated by the parties must be an odd number.

Moroccan law also contains basic provisions that require parties to submit written memorials within the deadlines determined by the tribunal or agreed upon by the parties, and the submissions must contain certain information specified by law (eg, name, address, explanation of facts or issues in dispute).

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

In domestic arbitration, the arbitral tribunal decides the case in accordance with the law agreed upon by the parties. In the absence of such agreement, the tribunal applies the law that it considers to be the closest and most relevant to the dispute. In all cases, the tribunal takes into consideration the terms of the contract, the usages and customs of trade, and what is habitually customary between the parties. If the parties have expressly authorised the arbitral tribunal to decide as amiable compositeur, the tribunal is not obliged to apply rules of law and shall decide according to principles of justice and equity.

In international arbitration, the arbitration agreement freely determines the applicable law that the tribunal must apply to the merits of the case. Failing any designation by the parties, the arbitral tribunal decides the case in accordance with the laws that it considers to be most appropriate. In all cases, the arbitral tribunal shall take into consideration the terms of the contract as well as the relevant usages and customs of trade. The tribunal decides as amiable compositeur only if the parties to an international arbitration have authorised it.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

One of the key institutions is the Moroccan Court of Arbitration within the International Chamber of Commerce of Morocco:

Casablanca Technopark
Route de Nouaceur, RDC
Bureaux No. 163, 140 and 141
Casablanca
Morocco
www.iccmaroc.ma

According to the internal rules of the Moroccan Court of Arbitration, if the parties have failed to determine the number of arbitrators and the court has decided that there will be three arbitrators, then the court may designate an arbitrator should one of the parties fail to do so. Any court-appointed arbitrator must be included on a list of approved arbitrators established by the ICC-Morocco board.

The ICC Moroccan Court of Arbitration fixes the arbitration fees, including administrative fees and arbitrators' fees, which are calculated on the basis of the amount of the dispute, as well as fees for Court-appointed experts. Appendix II of the internal rules provides the detailed fee structure.

Other notable arbitration institutions in the country include the Euro-Mediterranean Centre for Mediation and Arbitration and the Moroccan Centre on Mediation and Arbitration in Rabat:

Euro-Mediterranean Centre for Mediation and Arbitration
CGEM, 23 Boulevard Mhamed Abdou
Palmier 20340
Casablanca
Morocco
http://cema.org.ma

Moroccan Centre on Mediation and Arbitration in Rabat
Chamber of Commerce and Industry
1 rue Ghandi
Rabat 10000
Morocco
www.cimar.org.ma

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Moroccan law specifically prohibits arbitration agreements that concern the status and capacity of persons, or those relating to personal, non-commercial rights.

Furthermore, disputes involving unilateral acts of the state, local governments, or other entities that are endowed with public power are not arbitrable. Nevertheless, pecuniary challenges resulting from the aforementioned may be subject to arbitration, except for those relating to public fiscal laws.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

An arbitration agreement must be in writing, either in an official deed or in a private agreement, or in minutes drawn up before the tribunal.

An arbitration agreement is considered to be in writing when it is recorded in a document signed by the parties, in an exchange of letters or in telecommunications that attest to the existence of the arbitration agreement.

An arbitration agreement is also deemed to be established in writing when it is recorded in an exchange of arguments in a claim or reply to a claim, in which the existence of an agreement is alleged by one party and is not contested by the other.

Any reference in a written contract to the provisions of a model contract, to an international convention, or to another document containing an arbitration clause is deemed to be a written arbitration agreement when the reference clearly stipulates that the clause is an integral part of the contract.

In the case of arbitration agreements relating to existing disputes, the agreement must indicate the subject of the dispute and must designate the arbitral tribunal or provide for the modalities for its designation. Otherwise, the agreement is null. If an arbitrator designated by the agreement does not accept the task conferred upon him or her, the agreement is also void.

In the case of arbitration clauses relating to future disputes, the written clause must be in the main contract or in a document referred to in the contract. Furthermore, the clause must either designate the arbitrators or provide for the modalities of their designation. Otherwise, the arbitration clause is void.

Appendix II of the internal rules of the ICC Moroccan Court of Arbitration provide a recommended arbitration clause for the purpose of agreement on arbitration.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

Under Moroccan law, an arbitration clause is considered to be an agreement that is independent from the other clauses of the contract. Therefore, the nullity, termination or cessation of the underlying contract does not affect the arbitration clause when the clause itself is valid.

The arbitration agreement is not enforceable if the subject matter is not arbitrable (see question 8). Moreover, general principles of contract law may render an arbitration agreement void and unenforceable, for example, in the case of impossibility or voluntary termination by both parties.

In addition, if a party refers a dispute to court despite the existence of an arbitration agreement, and the other party does not object, the latter party waives its right to pursue arbitration.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Arbitration awards rendered in Morocco are generally not enforceable against third parties. There are exceptions, for example, in the case of assignment, succession, and agency where the agent accepts to be bound by the arbitration agreement.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

A third party whose rights are prejudiced by an award may oppose the award if he or she was not called before the tribunal. Third parties may

also be requested to provide evidence in arbitration proceedings, for example, as witnesses or experts.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the ‘group of companies’ doctrine?

The ‘group of companies’ doctrine is not automatically recognised by courts and arbitral tribunals in the context of arbitration, but the parties can agree to include necessary references to their respective groups of companies in their arbitration agreement.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

There are no special provisions relating to multiparty arbitration agreements under Moroccan law and general rules on arbitration apply in such cases.

The internal rules for the ICC Moroccan Court of Arbitration provide that, in the case of multiparty arbitration proceedings, the claimants or respondents must jointly appoint the same arbitrator. In the absence of joint appointment, the arbitrators are named by the said court.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The role of arbitrator may be entrusted to a physical person with full capacity who is not subject to a conviction for actions contrary to principles of honour, integrity or good morals or that deprive him or her of the capacity to exercise commerce or his or her civil rights.

If the arbitration agreement appoints a legal person (as opposed to a natural person), that person only has the power to organise the proceedings and ensure they are carried out properly.

Active judges cannot act as arbitrators as they are prohibited from exercising any other activity.

Persons who act as arbitrators on a habitual basis or by profession must make a declaration to the court of appeals, which, after examining the declaration, will include them on its list of arbitrators.

The appointment of an arbitrator may be challenged by the parties on various grounds outlined in the law (see question 17).

Moroccan law does not prohibit the parties from stipulating specific contractual requirements for arbitrators on nationality, religion or gender as long as such specific requirement is lawful and enforceable under Moroccan law (for example, it does not violate Moroccan public policy).

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Parties are free to determine the means of selecting arbitrators and the number of arbitrators, either in the arbitration agreement or by reference to the rules of an arbitration institution.

According to the Civil Procedure Code, in the absence of the parties’ agreement on the number of arbitrators, the tribunal comprises three arbitrators. The number of arbitrators must be an odd number; otherwise the arbitration is null.

If the tribunal has not been designated in advance and the method and date for the selection of arbitrators have not been fixed, then the law provides for the following procedures. A sole arbitrator is appointed by the president of the court upon request of one of the parties. In the case of three arbitrators, each party appoints one arbitrator, and the two selected arbitrators agree on the third. If a party does not select an arbitrator, or the two arbitrators cannot agree on the third, then the

president of the court makes the appointment upon the request of one of the parties.

In the case of institutional arbitration, the procedure and the number of arbitrators are those provided for by the selected arbitration institution.

The internal rules of the ICC Moroccan Court of Arbitration provide that unless the parties agree otherwise, the court decides whether there will be one or three arbitrators depending on the nature and value of the dispute. If it appears that the nomination of three arbitrators is justified, the parties are invited to each appoint one arbitrator of its choice. If one of the parties fails to appoint an arbitrator, then the Moroccan Court of Arbitration shall proceed with the appointment. The president of the arbitral tribunal is also named by the said court, unless the parties have agreed upon another procedure. Any arbitrator named by the Moroccan Court of Arbitration must be taken from a list of approved arbitrators established by the court’s board of directors.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

A party may challenge an arbitrator if:

- the arbitrator has been convicted for actions contrary to honour, integrity or good morals;
- the arbitrator or the arbitrator’s spouse, ancestors or descendants have a personal interest in the dispute;
- the arbitrator or the arbitrator’s spouse is related to a party, up to the degree of first cousin;
- there is a proceeding between a party and the arbitrator or the arbitrator’s spouse, or their ancestors or descendants;
- the arbitrator is a creditor or debtor of a party;
- the arbitrator has previously pleaded or deposed as a witness in respect of the dispute;
- the arbitrator has previously acted as counsel for a party;
- there is a relationship of subordination between the arbitrator or the arbitrator’s spouse, ascendants or descendants and one of the parties or the arbitrator’s spouse, ascendants or descendants; or
- there is a well-known friendship or enmity between the arbitrator and one of the parties.

A written request challenging an arbitrator is presented to the president of the court within eight days from the time the applicant learns of the constitution of the arbitral tribunal or the circumstances justifying the challenge. If the arbitrator does not resign voluntarily, then the court makes a decision on the request within 10 days. When an arbitrator is removed, the arbitration proceeding in which the arbitrator participated is considered to be null, including the award. In addition, an arbitrator may be revoked by the unanimous consent of the parties.

When the arbitrator is prevented from exercising his or her duties, or when the arbitrator does not begin his or her duties or ceases to exercise his or her duties resulting in an unjustified delay in the arbitration procedure, without the arbitrator resigning or the parties agreeing to revoke his or her position, then the president of the court may, upon the parties’ request, terminate the arbitrator’s duties.

When an arbitrator’s duties end for whatever reason, a replacement is appointed according to the same procedures used for nominating the original arbitrator.

In addition, neither ICC Morocco nor the Moroccan Arbitration Law makes reference to the IBA Guidelines.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

There is no contractual relationship between the parties and the arbitrators. At the time of accepting the task entrusted to him or her, an arbitrator must make a written declaration identifying any circumstances

that may raise doubts as to his or her impartiality or independence as an arbitrator cannot accept any instructions from the party nominating him or her (or from any third person) in connection with the proceedings.

Arbitrators are required to carry out their duties to completion. They may not step down without a legitimate reason and a prior notice mentioning those reasons; failure to do so may result in liability for damages.

An arbitrator is bound by professional privilege under penal law. The arbitrators are entitled to remuneration, and the arbitration award fixes the arbitrators' fees, the costs of arbitration and the means of allocating such fees and costs between the parties.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

In accordance with article 327-6(4) of the Civil Procedure Code, each arbitrator shall carry out his or her appointment until it is completed. Consequently, under pain of being sued for damages, arbitrators may not exclude themselves without a lawful cause notified in advance in writing.

Furthermore, and pursuant to article 326 of the Civil Procedure Code, arbitrators are committed to maintaining professional secrecy in accordance with the provisions of criminal law.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If a court procedure is initiated despite the existence of an arbitration agreement, then, upon the defendant's request, the court must declare the case inadmissible until the arbitration procedure is completed or until the arbitration agreement is annulled. If the case is not yet referred to an arbitral tribunal, the court must also declare the case to be inadmissible if the defendant so requests, unless the arbitration agreement is manifestly null. The defendant must make the aforementioned requests prior to the court deciding on the merits of the case. In the event the court rejects the jurisdictional objection by the defendant and issues a decision on the admissibility of the case, the defendant may challenge such a decision at each level of appeal provided by law. Appeals must usually be presented within 30 days.

Nevertheless, when a case is referred to court under such circumstances, arbitration proceedings may be initiated and an award may be issued while waiting for the court to render its decision.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitration proceedings have been initiated and what time limits exist for jurisdictional objections?

Prior to examining the merits of a case, the arbitral tribunal may, either on its own initiative or upon the request of one of the parties, decide on the validity or the limits of its jurisdiction or the validity of the arbitration agreement. This decision is made by way of an order that is subject to appeal only on those grounds available in appealing the award on the merits.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

If the parties fail to identify the place of arbitration, the arbitral tribunal chooses the location, taking into account the circumstances of the case and the parties' residence. However, this does not prevent the arbitral tribunal from meeting in any place it considers convenient to hear parties, witnesses or experts, to consult documentation, to investigate goods, or to hold deliberations between the arbitrators.

The language of arbitration is Arabic, unless the parties agree otherwise or the arbitral tribunal selects another language.

The internal rules of the ICC Moroccan Court of Arbitration require that the language of arbitration be incorporated into the Terms of Reference of the arbitration.

23 Commencement of arbitration

How are arbitral proceedings initiated?

In the absence of an agreement by the parties on the procedure for initiating arbitral proceedings (whether in the contract or by reference to the rules of an arbitration institution), the procedure is as follows. In the case of one arbitrator, the party seeking arbitration makes a request to the president of the court who appoints the arbitrator. In the case of three arbitrators, the party seeking arbitration appoints an arbitrator and notifies the other party of the arbitration and of its arbitrator. The other party must then appoint its arbitrator, and the two arbitrators agree to appoint a third arbitrator. If a party fails to appoint an arbitrator, or the two arbitrators fail to agree on a third arbitrator, then the parties can request the president of the court to make the necessary appointment.

The internal rules of the ICC Moroccan Court of Arbitration provide that the request for arbitration submitted to the secretariat of the court must contain the names and addresses of the parties, the nature of the dispute, a brief summary of the claimant's arguments, and mention of the arbitration agreement. The request must include an advance payment according to the court's schedule of fees. The secretariat then sends the request and annexed documents to the defendant, who has 15 days to respond, and a copy of that response is sent to the claimant.

24 Hearing

Is a hearing required and what rules apply?

Under the Civil Procedure Code, the arbitral tribunal determines the rules regulating the arbitration proceedings, subject to the dispositions of the Civil Procedure Code, unless the parties choose otherwise. As a general rule, the parties benefit from an equal opportunity to present their cases and their arguments. Furthermore, the tribunal may make investigations by hearing witnesses or any other person it deems necessary, by appointing experts, or by other means.

Unless the parties agree otherwise, the tribunal holds hearings to allow the parties to present their cases and evidence or, alternatively, may limit itself to written submissions and documents. The parties must be advised of the dates of any hearings or meetings at least five days in advance, and all hearings are recorded in written minutes that are delivered to the parties. As a mandatory rule of Moroccan law, oath must be sworn upon commencement of a hearing session.

The internal rules of the Moroccan Court of Arbitration of ICC-Morocco do not specifically require that a hearing take place.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Under the Civil Procedure Code, the arbitral tribunal may proceed with any investigations by hearing witnesses, appointing experts or taking any other similar measures. If a party has relevant evidence, the tribunal may demand that such evidence be produced. The tribunal may also hold a hearing for any persons whom it considers useful to hear.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Moroccan law provides for various instances in which the court may intervene in arbitration proceedings.

For example, courts may be involved in naming arbitrators in certain situations, deciding to remove an arbitrator whose appointment is challenged, or terminating the duties of an arbitrator who is no longer able to perform his or her functions.

Parties to an arbitration agreement may have recourse to the courts in order to obtain interim or conservatory measures, before or during arbitration proceedings. If the arbitral tribunal has issued an interim or

conservatory measure and the party against which the award has been rendered does not execute it, then the prevailing party may seek an execution order from the court.

If an arbitration award is not rendered within the fixed deadlines, then either party may request the president of the court to terminate the arbitration proceedings by issuing an order.

Furthermore, court intervention is also required for enforcing arbitration awards.

27 Confidentiality

Is confidentiality ensured?

As a general rule, an arbitrator is bound by professional privilege under penal law, and deliberations of the arbitrators are confidential.

An arbitration award, or excerpts of the award, cannot be published without the authorisation of the parties to the arbitration.

With regards to enforcement proceedings, all documents filed with the court may be viewed by the parties and their lawyers. A third party may only view such documentation if permitted by the court. Judgments on enforcement and recognition are not published by the courts. However, private publications and reviews exist and, in general, parties' names are not disclosed.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

An arbitration agreement does not prevent parties from having recourse to the courts to obtain interim or conservatory measures, before or during the course of arbitration proceedings. For example, the court may take urgent measures to appoint an expert when there is a risk that the evidence may disappear or be destroyed. The court may also order conservatory seizures and other similar interim measures necessary to protect the parties' interests.

At the same time, the arbitral tribunal may itself take interim or conservatory measures (see question 30).

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The concept of emergency arbitrator as such does not exist under Moroccan law but parties can request local courts to impose extraordinary interim measures based on relevant provisions of the Civil Procedure Code, either before or during the arbitration process. The same rules apply for the parties' withdrawal from such extraordinary interim measures.

The internal rules of the Moroccan Court of Arbitration provide that the parties can require that a legal authority carries out temporary measures or academics, without being regarded as having given up or having contravened the convention on arbitration. Nevertheless, the arbitration tribunal must be informed of any of such measures.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Unless the parties agree otherwise, the arbitral tribunal may, at the request of one of the parties, take any interim or conservatory measures that it deems necessary within the limits of its mission. The tribunal may, for example, appoint an expert to evaluate damages or issue an injunction against a party.

The tribunal does not order security for costs.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitration institutions?

The arbitration tribunal may use its statutory procedural powers to order procedural measures against such 'guerilla tactics' in arbitration. If such tactics cannot be regulated by means of the tribunal's procedural powers, criminal or administrative procedures can be initiated by Moroccan authorities at the request of anyone adversely affected by these 'guerilla tactics'.

The internal rules of the ICC Moroccan Court of Arbitration do not confer to the tribunal any specific powers to use against 'guerilla tactics' either. Please note, however, that any measures taken (that have been rendered by the court) usually suspend the arbitration for a maximum of 60 days.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

The arbitral award is decided by majority vote, and is generally signed by each arbitrator.

However, if the minority refuses to sign, the other arbitrators must mention this in the award and indicate the reasons for such refusal. Such an award has the same effect as if it were signed by all the arbitrators.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

An arbitral award is generally signed by each of the arbitrators. However, if the minority refuses to sign the award, the other arbitrators must mention this and indicate the reasons for such refusal. Nevertheless, in this case the award has the same effect as if it were signed by all the arbitrators.

34 Form and content requirements

What form and content requirements exist for an award?

The award must be in writing, contain a summary of facts, claims and arguments of the parties, exhibits, issues in dispute settled by the award and a decision on these issues.

Generally, the award must provide reasons for the decision, unless the parties have decided otherwise in the arbitration agreement or the applicable law does not require providing reasons.

The award must also mention:

- the name, nationality, title, and address of the arbitrators; the date of the award;
- the place in which it was rendered;
- the parties' names and addresses; and
- the names of the parties' legal representatives.

Furthermore, the award must fix the costs, arbitrators' fees, and the method by which these costs are allocated between the parties.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

If the arbitration agreement does not fix a deadline for the arbitral tribunal to render its award, the arbitrators' remit ends six months from the day the last arbitrator accepted the remit. The arbitration tribunal sets the proposed final date of the award once it has finished its

investigations in the merits of the case. The deadline for rendering the award may be extended, either by the agreement of the parties or by a decision of the president of the court upon request of one of the parties. If the award is not rendered within this deadline, then either party may request the court to terminate the arbitration proceedings by issuing an order to this effect. Any of the parties can then initiate court proceedings at the competent public tribunal.

The internal rules of the ICC Moroccan Court of Arbitration provide that the arbitration tribunal must deliver its sentence in a maximum six months from the filing of the case.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

An award is considered to be a final judgment (ie, the same dispute cannot be retried) from the time that it is rendered by the tribunal.

The time limits for the tribunal to rectify the award on its own initiative run from the date on which the award was pronounced. However, if the parties seek the rectification or interpretation of the award, or the rendering of a complementary award regarding a claim the tribunal failed to decide upon, then the time limit runs from the date on which the parties were notified of the award.

An annulment may be sought any time after the award was pronounced, although the deadline for seeking the annulment runs from the date on which the award was notified.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

In the case of ad hoc arbitration, an order on jurisdiction or the validity of the arbitration agreement may be rendered if the tribunal chooses to render such a decision on its own initiative or at the request of one of the parties. There is also a possibility of an interpretative or corrective award after the final award has been rendered, as well as a complementary award on any part of the claim that the tribunal failed to decide upon.

In the case of institutional arbitration, the types of awards possible depend on the relevant institutional rules. The internal rules of the ICC Moroccan Court of Arbitration allow arbitrators to issue partial awards regarding parts of the claim that they consider are able to be resolved.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

If the parties agree to amicably resolve the dispute during the course of arbitration proceedings, then the tribunal ends those proceedings. Upon the parties' request, the arbitral tribunal notes the end of the proceedings in an award rendered by way of agreement of the parties. This award has the same effect as any other arbitral award rendered on the merits of the case.

The tribunal may also order the close of the arbitration procedure when the continuation of the proceedings is, for any other reason, superfluous or impossible.

The arbitration proceedings may be terminated in other cases, for example, where the tribunal fails to render a decision within the defined timelines.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The arbitral award fixes the arbitrators' fees and arbitration costs, as well as their allocation between the parties. If the parties and the arbitrators do not come to an agreement on the fixing of arbitrators' fees, they are fixed by an independent decision of the arbitral tribunal.

Update and trends

The domestic arbitration regulations mentioned in this chapter are quite recent in Morocco; therefore, we do not anticipate any immediate legislative reform.

The most recent ICSID case to which Morocco was a party was rendered in 2004 and gave rise to what is now known as the 'Salini test', defining the means of how the jurisdiction of the ICSID tribunal depends upon the existence of an investment within the meaning of the BIT concerned, as well as that of the Washington Convention. We are currently not aware of any case pending at ICSID with the involvement of the Kingdom of Morocco.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Yes, interest may be awarded at the contractual rate, if any, or otherwise at the legal rate fixed by the Central Bank.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Within 30 days after an award has been pronounced, the arbitral tribunal may on its own initiative rectify any material calculation errors or typographical errors contained in the award.

Within 30 days of the notification of the award, the arbitral tribunal may, at the request of one of the parties: rectify any material calculation errors or typographical errors; interpret a specific part of the award; or render a complementary award regarding a claim that the tribunal failed to decide upon. The request is notified to the other party, which has 15 days to respond. The tribunal must render its decision within 30 days in the case of corrective or interpretation awards, and within 60 days in the case of complementary awards.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

An arbitration award generally cannot be appealed by the parties, although it may be annulled on certain grounds defined by the law, for example, if:

- the award was rendered in the absence of an arbitration agreement, based on a null agreement, or after the deadline for arbitration had passed;
- the tribunal was irregularly constituted or the agreement of the parties was not respected;
- the tribunal did not abide by the mission to which it was entrusted, decided on issues falling outside the scope of arbitration, or was mistaken about the limits of the arbitration agreement;
- certain requirements related to the award were not followed, for example, regarding the inclusion of the arbitrator's name and the signing of the award;
- one of the parties was unable to present its defence, for example, because it was not informed about the arbitration procedures;
- the arbitral award violated public policy; or
- the procedural formalities agreed upon by the parties were not respected or the applicable law agreed upon by the parties was not applied.

Notwithstanding any stipulation to the contrary, an arbitration award is subject to annulment from the time it was pronounced until 15 days after its notification. The court of appeals hearing the annulment case may also order an annulment on its own initiative if the award violates Moroccan public policy or if the subject of the dispute is not arbitrable.

If the court of appeals annuls the award, it rules on the merits of the case within the limits of the arbitral tribunal's mission, unless the annulment is granted because of the absence or nullity of an arbitration agreement.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

The award may be annulled by the court of appeals on the grounds outlined in question 41. The decisions of the court of appeals may be reviewed by the Supreme Court on limited grounds, such as lack of jurisdiction, a court acting ultra vires or violation of a local law. The procedure before the court of appeals lasts about six to eight months, and the costs include court fees (about US\$50 for an annulment, for example). The procedure before the Supreme Court lasts on average about 12 to 15 months and costs approximately US\$100.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

The enforcement of a domestic award requires an enforcement order from the president of the court where the award was rendered. The original award, a copy of the arbitration agreement and a translation in Arabic, if necessary, is submitted by one of the arbitrators or by one of the parties to the court clerk within seven days of the award being pronounced. The order that grants enforcement is not subject to appeal, while the order that refuses enforcement, for which the tribunal must provide reasons, is subject to appeal.

Foreign arbitration awards are recognised in Morocco if they are properly established and if such recognition is not contrary to Moroccan or international public policy. Under the same conditions, a foreign award is declared to be recognised and executory in Morocco by the president of the commercial court of the place of execution.

An order that refuses to recognise or enforce a foreign award is subject to appeal, while an order that decides to recognise or enforce the foreign award may be appealed on a limited number of grounds (eg, the arbitral tribunal was irregularly constituted or the recognition or enforcement is contrary to public policy).

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Although Moroccan law does not address this point directly, foreign awards that have been set aside by the courts at the place of arbitration will generally not be enforced in Moroccan courts.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Yes, it does, according to article 327-15 of the Code of Civil Procedure.

47 Cost of enforcement

What costs are incurred in enforcing awards?

The enforcement of awards is subject to the payment of fixed fees to the relevant court.

Other**48 Judicial system influence**

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

There is no US-style discovery in Morocco, and the legal system is more in line with the French system. Indeed, a Moroccan judge can ask either party to produce further documentation or other evidence that he or she deems is necessary to decide the case.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Ethical rules are applicable, of course, and the main rules relate to independence and integrity, but there are no specific rules published for international arbitrators.

IBA Guidelines are not applicable in Morocco.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding is not restricted in Morocco. Indeed, the principle is that the funding may be provided by anyone, and that the arbitral tribunal should not question the funded party to the proceedings about the origin of the funding.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Visas are required for certain nationals. In the case of work for a limited duration, work permits are generally not required. If foreign attorneys want to establish themselves in Morocco, they are subject to the Moroccan regulations on the legal profession. In addition, VAT applies for arbitrators and counsel.



Azzedine Kettani

k@kettlaw.com

8, rue Lahcen El Basri
Casablanca
Morocco

Tel: +212 522 438 900
Fax: +212 522 205 925
www.kettlaw.com

Mozambique

Sofia Martins, Filipa Russo de Sá and Ricardo Saraiva

Miranda & Associados

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Mozambique adopted the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which entered into force in the country on 9 September 1998.

Under article I(3) of the New York Convention, Mozambique declared that it would enforce an award rendered in another contracting state's territory on the basis of reciprocity. No other reservation was made by Mozambique to the New York Convention.

Mozambique has also ratified the Washington Convention dated 1965 on the Settlement of Investment Disputes between States and Nationals of other States (ICSID), which entered into force in the country on 7 June 1995.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Mozambique is a party to bilateral investment treaties with 26 different states, of which 21 are presently in force, according to UNCTAD.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary domestic source of law relating to arbitration in Mozambique is the Law on Arbitration, Conciliation and Mediation (the LACM), Law No. 11/99, dated 8 July 1999.

The LACM governs both domestic and international commercial arbitration. According to the LACM, arbitration will be of an international nature when international trade interests are involved, in particular when parties to an arbitration agreement have business domiciles in different countries at the time of the arbitration agreement's execution or when parties have expressly stipulated that the subject matter of the arbitration has connections with more than one country.

Regarding recognition and enforcement of awards, the rules set forth in the Code of Civil Procedure apply, without prejudice to applicable international treaties such as the New York Convention.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The LACM is, for the most part, based on the 1985 UNCITRAL Model Law. No major differences can be identified between both texts since the LACM has adopted the Model Law's most salient features, notably

in terms of the arbitration agreement and its requirements, tribunal composition, jurisdiction, conduct of proceedings, the making of the award and recognition and enforcement proceedings.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The following principles of due process are mandatory for any arbitration (domestic or international) taking place in Mozambique:

- parties must be treated equally; and
- the proceedings must have an adversarial nature.

Also, it is mandatory that each party be granted full opportunity to present its case, either orally or in writing. The LACM also guarantees privacy and confidentiality of the proceedings and parties involved.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Pursuant to the LACM, parties in domestic arbitration as well as in international arbitration are free to designate the substantive law or rules of law applicable to the merits of the case. Parties may also authorise the tribunal to decide *ex aequo et bono*, provided they do so expressly.

If, however, in domestic arbitration the parties fail to agree on the substantive applicable law, the tribunal shall decide according to the rules of law it deems most suited to the case. As to international arbitration, failing party agreement, the tribunal shall apply the law resulting from rules on conflict of laws.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The Centre for Arbitration, Conciliation and Mediation (CAMC) is the only arbitration institution operating in Mozambique for disputes of a commercial nature. It was created in 2001, is based in Maputo, with other offices in Nampula and Beira and is responsible for promoting commercial arbitration, conciliation and mediation in Mozambique.

CAMC's address and website are as follows:

Centre for Arbitration, Conciliation and Mediation
Av. Ahmed Sekou Touré, No. 1597, R/C Dto
Maputo
Mozambique
Tel: +258 21 303 303 / 21 303 305
Fax: +258 21 414 527
www.cacm.org.mz

Arbitration agreement

8 Arbitrability**Are there any types of disputes that are not arbitrable?**

The general rule under the LACM is that parties are free to submit their disputes to arbitration, except disputes that fall under the state courts' exclusive jurisdiction and disputes that relate to inalienable or non-negotiable rights. As a rule, to which there are a number of exceptions, disputes relating to the following issues can be submitted to arbitration: IP rights, antitrust, competition law, securities transactions and intra-company disputes.

9 Requirements**What formal and other requirements exist for an arbitration agreement?**

The arbitration agreement may consist of either an arbitration clause or a submission agreement. The arbitration clause concerns potential future disputes arising from a given contractual or extra-contractual relationship, whereas the 'submission agreement' arises from existing disputes, whether or not they have already been submitted to a state court. The LACM treats both types of arbitration agreements on an equal footing.

Arbitration agreements must be in writing. An arbitration agreement is considered to be in writing if it is found to be documented either in a written instrument signed between parties or in correspondence exchanged between them.

In addition to this, the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that such contract is in writing and that the reference is made in such a manner as to render said clause an integral part of the contract.

10 Enforceability**In what circumstances is an arbitration agreement no longer enforceable?**

The LACM expressly adopts the doctrine of separability by stating that the arbitration clause is autonomous in relation to other clauses of the contract in question. Consequently, a decision rendered by the arbitral tribunal on the contract's nullity shall not entail the invalidity of the arbitration clause *ipso jure*.

An arbitration agreement will be declared null when entered into in breach of the provisions on legitimacy, scope and arbitration exclusion.

The arbitration agreement will no longer be enforceable if parties agree to its revocation before the tribunal is constituted; when an arbitrator dies, excuses him or herself or is unable to exercise his or her duties as long as he or she is not replaced in the meantime; or if the award is not rendered within the time limit set for such a purpose.

Also, the arbitration agreement will not be enforceable in relation to a specific dispute in the event a party submits the dispute to a state court and the counterparty, in its first submissions, does not oppose to the state court's jurisdiction.

11 Third parties – bound by arbitration agreement**In which instances can third parties or non-signatories be bound by an arbitration agreement?**

The LACM does not contain a provision on the extension of an arbitration agreement over third parties. Unless a third party subsequently adheres to the arbitration agreement, claims against such a third party lodged with an arbitral tribunal will not be admissible nor will it be admissible to invoke an arbitration clause against a third party that has lodged a claim with a state court.

Pursuant to Mozambican law, rights or obligations under a main contract can be transferred to third parties. When applied to arbitration clauses, such a rule results in an automatic transfer to the transferee of the transferor's rights and obligations under the arbitration agreement. Exceptions to the automatic transfer occur when parties have excluded the assignment of the arbitration agreement or entered into the arbitration agreement on an *intuitus personae* basis.

Automatic transfers of arbitration agreements may further occur in cases of statutory or contractual subrogation, whereby a third party replaces a contracting party (eg, by paying a debt of the

said party pursuant to a guarantee). In those cases, the third party is bound by the arbitration agreement and is allowed to invoke it before the counterparty.

12 Third parties – participation**Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?**

The LACM does not contain any provision on third-party participation.

13 Groups of companies**Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?**

There is no information available in this respect.

14 Multiparty arbitration agreements**What are the requirements for a valid multiparty arbitration agreement?**

The LACM does not expressly provide for multiparty arbitration agreements.

Constitution of arbitral tribunal

15 Eligibility of arbitrators**Are there any restrictions as to who may act as an arbitrator?****Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?**

Any person enjoying full legal capacity may act as an arbitrator. Further to this, no special qualifications are required to act as an arbitrator. In particular, the arbitrator does not have to be admitted to the Mozambican Bar Association or even to possess a legal background. Generally, arbitrators are not restricted by nationality, with the exception of administrative arbitration, where arbitrators are required to be Mozambican citizens.

There is no available information as to whether any contractually stipulated requirement for arbitrators based on nationality, religion or gender would be recognised by Mozambican courts.

16 Default appointment of arbitrators**Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?**

In all cases in which the parties are unable to agree on the appointment of an arbitrator, the appointment will fall upon a permanent arbitral institution chosen by the parties or a delegate thereof. Failing agreement as to the choice of this body, the arbitrator appointment will fall upon the competent state court at the request of the parties. The decision on the request filed with a permanent arbitral institution or the state court under such terms is not subject to appeal.

17 Challenge and replacement of arbitrators**On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?**

Arbitrators may be challenged where there are justified doubts as to their impartiality or independence or whenever the qualifications agreed to by the parties are not met by the arbitrator.

Parties are free to agree on the procedures for the challenge of arbitrators. Failing agreement, the party intending to challenge an

arbitrator shall submit a written statement to the arbitral tribunal within 15 days from the date on which it was given notice of the tribunal's constitution or the date on which it became aware of the reasons for such a challenge. The tribunal shall decide on the challenge unless the challenged arbitrator withdraws from office in the meantime or the counterparty agrees with the challenge.

Similarly to the Model Law, the LACM allows the unsuccessful party in a challenge to proceed with such a challenge before the state court, the court's decision being final and binding. While such a request is pending, the arbitral tribunal may proceed with the arbitral proceedings and the final award may even be rendered.

Arbitrators are replaced when unable to perform their duties *de jure* or *de facto*, notably in the event of death, voluntary withdrawal or successful challenge. The replacement arbitrator is appointed in the same manner as the replaced arbitrator, and proceedings are suspended until replacement has been ensured. In the event that the substitute arbitrator does not consider the review of the recorded evidence to be sufficient, the arbitral tribunal may order oral evidence to be repeated.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Typically the relationship between parties and arbitrators is both of a contractual and jurisdictional nature. Arbitrators must meet the requirements of independence, impartiality, loyalty and good faith and are bound to disclose all facts that may have potential implications on their impartiality and independence.

As to remuneration, unless the arbitration is governed by institutional rules, arbitrator fees are to be agreed between the parties and the arbitrators as a whole, with the exclusion of any one party fee arrangement with one or more arbitrators.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators are generally immune, much as state judges are, but they may be held liable on account of dishonest or fraudulent exercise of their office. In addition to this, an arbitrator who unjustifiably withdraws from office may also be held accountable for damages resulting therefrom.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

An agreement to arbitrate implies the waiver by the parties to initiate state court action on the matters or disputes submitted to arbitration.

As a result, once the parties have agreed to use arbitration the intervention of the judicial court is limited to those instances set forth in the LACM.

Should proceedings be filed with a judicial court, the arbitration agreement may be relied upon by the respondent with a view to request that the proceedings be dismissed. The matter must be raised by respondent until its first submission on the substance of the dispute. The court will not address this matter *ex officio*.

Actions concerning the validity of an arbitration agreement filed with a judicial court once the arbitral tribunal has been constituted shall not be admitted.

If parties to a court action should enter into a submission agreement during the course of judicial proceedings, this will trigger the extinction of the proceedings.

Arbitral proceedings may be initiated regardless of the existence of judicial proceedings on matters or disputes submitted to arbitration and an award can be granted while the question is pending before the state court.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Under the LACM, the arbitral tribunal is entitled to decide on its own jurisdiction and for this purpose may rule on the existence, validity and effectiveness of the arbitration agreement.

Parties may claim that the arbitral tribunal lacks jurisdiction until the time limit set for submission of the statement of defence, or jointly therewith. A party is not, however, precluded from raising such a plea by the fact that it has appointed or participated in the appointment of an arbitrator. If relevant facts evidencing the tribunal's lack of jurisdiction should supervene, parties may still raise the issue.

Further to this, the arbitral tribunal may rule on the plea referred to in the foregoing paragraph as a preliminary question or with the final award on the merits. If the arbitral tribunal rules on the matter preliminarily, any party may request for a judicial court decision on the matter within 30 days from the date on which it was given notice of such a ruling. The judicial court's decision on such a matter is not subject to appeal. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and even render an award on the merits. If, on the other hand, the tribunal only rules on such a matter with the final award, the decision by which the tribunal finds itself as competent will only be open for challenge in setting-aside proceedings.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Failing the agreement of the parties, the choice shall be made by the arbitrators based on the circumstances of the case and on the parties' convenience. Regardless of the seat, and unless otherwise agreed to by the parties, the arbitral tribunal is free to meet at any place it considers appropriate for consultation among its members, to hear witnesses, experts or parties or even for the purpose of inspecting goods, other property or documents.

As to the language, the LACM rules governing international arbitration provide that parties are free to agree on the language or languages to be used in the proceedings. Failing such an agreement, the choice of language is decided by the tribunal.

23 Commencement of arbitration

How are arbitral proceedings initiated?

There being no prior agreement as to the form for instituting arbitration, the party intending to bring a dispute before an arbitral tribunal must notify the opposing party of such a fact. The notice shall indicate the arbitration agreement or specify the subject matter of the dispute, if this has not already been done in the arbitration agreement, and must be delivered to the addressee personally or at its place of business, residence or mailing address or at any other special address as indicated by the party.

If within eight days from the notice of arbitration the parties have not arrived at an agreement on the determination of the subject matter of the dispute or on other matters considered essential by the parties, they may request a decision from a permanent arbitral institution or a delegate thereof.

The LACM does not address the matters of signature and number of copies necessary to institute an arbitration.

24 Hearing

Is a hearing required and what rules apply?

It is not mandatory to hold a hearing. Subject to party agreement, the tribunal shall decide on the existence of oral hearings for purposes of evidence or oral argument presentation.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

With regard to burden of proof, each party must prove the facts that it claims but state courts may order that evidence be provided for said purpose *ex officio*.

There is no particular standard of proof under the LACM. Parties are thus free to agree on the matter, and failing agreement the arbitral tribunal shall decide.

All means of evidence allowed for under the Mozambican Code on Civil Procedure (the CCP) are admissible in arbitration proceedings (ie, documentary, witness and expert evidence).

Parties may present the tribunal with documents voluntarily, notably with their submissions. Furthermore, the tribunal may order parties or third entities to submit documents held by them. Failing voluntary compliance with such an order, the tribunal may request judicial court assistance on the matter.

Although witness evidence is admissible, the LACM is silent on the admissibility of written statements. Such matters are subject to party autonomy, and failing that, to the decision of the tribunal.

The LACM also states that unless otherwise agreed between parties, the arbitral tribunal may appoint one or more experts for the purpose of preparing a report on specific issues. For this purpose the tribunal may require that parties provide the experts with all relevant information and documentation, goods or other property. Experts may be summoned to oral hearings with a view to clarify their reports or findings.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

According to the LACM, during arbitration proceedings Mozambican state courts may be called upon to assist the arbitral tribunal for the following purposes:

- to grant interim measures, which may be ordered even before the commencement of arbitral proceedings;
- to appoint an arbitrator in all cases in which a permanent arbitral institution has failed to be chosen between the parties to that effect;
- to rule on the arbitral tribunal's decision in its own jurisdiction;
- to rule on the challenge of an arbitrator; and
- to assist the tribunal in the taking of evidence.

Once arbitration proceedings are finished the award must be deposited with the judicial court, with an exception being made to cases in which the parties have expressly agreed otherwise or whenever the rules of the chosen institution provide for a different type of deposit. Further to this, judicial courts may intervene in setting-aside or enforcement proceedings.

27 Confidentiality

Is confidentiality ensured?

The LACM provides specifically on privacy stating that all arbitration, conciliation and mediation proceedings are subject to confidentiality.

Despite such protection, awards may easily become part of the public domain if legal proceedings for purposes of award annulment or enforcement are initiated in a state court because, as a rule, they are not held in private.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

The LACM expressly provides that a request for interim measures made by a party to a judicial court before or during arbitral proceedings is not incompatible with an arbitration agreement.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Neither the LACM nor the CAMC's rules provide for emergency arbitrators.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The LACM expressly provides that the arbitral tribunal has the power to grant interim measures. This provision is, however, silent on the kind of interim measures that the tribunal may order.

The LACM does not address the issue of security for costs.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitration institutions?

Both the LACM and the CAMC's rules are silent in this regard.

As arbitrators have little or no authority to apply compulsory measures, they may notify the relevant regulatory association of counsel's activities (eg, the Bar Association) for purposes of disciplinary proceedings.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Whenever the tribunal is made up of more than one arbitrator, all decisions must be made by the majority of its members unless the parties agree otherwise. Issues of procedure may be decided by the presiding arbitrator if so authorised by the parties or by all members of the arbitral tribunal. In addition to this, if a majority is not formed, and an arbitrator's dissent exists as to merely the monetary aspect of the award (the amount by which one of the parties is to be held liable), the issue will be decided in accordance with the chairperson's vote, an exception made to cases in which the parties have expressly agreed to the contrary.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

The LACM neither requires nor prohibits the inclusion of arbitrators' dissenting and concurring opinions in the award.

34 Form and content requirements

What form and content requirements exist for an award?

The award shall be made in writing and include the following contents:

- identification of the parties;
- reference to the arbitration agreement;
- the subject matter of the dispute;
- identification of the arbitrators;
- the seat of the arbitration;
- the location and date on which the award was granted; and
- the arbitrators' signatures.

In addition, and unless otherwise agreed by the parties, the award must be reasoned, an exception being made to consent awards.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

If not otherwise provided by the parties, according to the LACM, the arbitral tribunal shall render the award within six months from the date of the arbitral tribunal's constitution. This time limit may be extended by means of a written agreement between the parties or on the tribunal's own initiative, should there be force majeure circumstances. This extension is limited to twice the time of the initial duration.

The CAMC rules have adopted the same solution as the one provided for by the LACM in this respect.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Requests for correction or interpretation of the award must be made within 30 days of the award's receipt by the parties.

On the other hand, applications for setting aside an arbitral award must be lodged with the arbitral tribunal responsible for the award's issuance within 30 days from the notification thereof or from the notification of a decision that has corrected, interpreted or supplemented said award.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The LACM makes express reference to different types of awards, notably to interim, consent and final awards. No reference is made to partial awards.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Other than the grounds for termination of proceedings mentioned in question 10, arbitral proceedings may also be terminated by settlement between the parties.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The remuneration of arbitrators (and that of others participating in the proceedings), as well as other charges related to the proceedings and their sharing between the parties are to be set in the arbitration agreement (or in a subsequent document signed by the parties) or otherwise shall result from the arbitration regulations chosen by the parties.

In the final award, the tribunal must rule on proceeding costs and their allocation between the parties.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Interest may be awarded to the parties only if initially claimed and will be attributed according to the statutory rate applicable to each case.

Proceedings subsequent to issuance of award**41 Interpretation and correction of awards**

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Parties may request the tribunal to correct calculation, typographical and material errors within 30 days from the date of receipt of the award. The tribunal may also render parties with interpretation on specific issues of the award at the parties' request as long as the tribunal considers such a request as justified.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

A party wishing to set aside the award may do so based on the following grounds:

- the subject matter of the dispute is not arbitrable under Mozambican law;
- a party to the arbitration agreement is legally incapacitated;
- the arbitration agreement is not valid under the law to which the parties have submitted it to or, failing this, under the laws of Mozambique;
- a party to the arbitration was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or it was otherwise unable to present its case;
- the award deals with a dispute not referred to in the arbitration agreement or not contemplated in the submission for arbitration, or contains decisions on matters beyond the agreement's scope or that of the submission for arbitration, provided that if the decision in the award in respect of matters submitted to arbitration can be separated from those not submitted, only that part of the award containing decisions on matters not submitted to arbitration may be set aside;
- the composition of the arbitral tribunal or the arbitral procedures are not in accordance with the agreement of the parties (unless such agreement was in conflict with a provision of the LACM from which the parties cannot derogate) or, failing such agreement, are not in accordance with the LACM; or
- the judgment is in conflict with the public policy of Mozambique.

A party wishing to set aside the award must launch proceedings before the arbitral tribunal within 30 days from the date of the award's notification to the challenging party. The counterparty shall be given notice of this application and be allowed to reply within a similar 30-day time limit. Once the reply is received, or in its absence, the arbitral tribunal shall rule on the application's admissibility. An appeal to the state courts is allowed from the time of the arbitral tribunal's decision refusing to admit the application.

When requested to set aside an award, the judicial court may, where appropriate and if so requested by a party, stay the setting-aside proceedings so as to allow the arbitral tribunal to resume arbitral proceedings or take any action deemed necessary by the court to eliminate the grounds for setting aside. Such a decision will be final and binding.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Pursuant to the LACM, an award may only be challenged through setting-aside proceedings, there being no appeal on the merits. There is no publicly available information regarding average duration of challenges. Costs will vary depending on the amount in dispute.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

The LACM does not address recognition proceedings.

If the losing party fails to comply with the award's terms within the time limit set for the purpose, enforcement proceedings may be initiated by the counterparty.

An arbitral award rendered in connection with an institutional arbitration is enforced in accordance with the domestic rules applicable to the small claims enforcement procedure set forth in the CCP, while the remaining awards are enforced pursuant to the rules on ordinary enforcement procedures.

An award rendered in Mozambique is considered to have the same value as a state court ruling and, as such, no recognition or exequatur procedure is required prior to enforcement.

As regards foreign arbitral awards, the same must be recognised prior to enforcement. Recognition proceedings of foreign arbitral awards rendered will follow the rules set forth in the Code of Civil Procedure. If the award was rendered in a country that is party to the 1958 New York Convention (see question 1), the grounds for refusal will be those foreseen therein.

The party wishing to enforce the award – rendered in Mozambique or recognised therein – shall file a request to that effect with the competent court (the provincial court with territorial jurisdiction). Certified copies of the arbitration agreement, arbitration award and evidence of notification of the award served on the parties as well as evidence of the deposit of the award, if applicable, must be submitted with the application.

Enforcement may be denied by the courts on the grounds set forth for the challenge of an award (see question 42) or in those cases where either the party against whom the award is being enforced has already complied with its terms or when a party has initiated proceedings for the award's setting aside.

The state courts shall reject an application challenging enforcement of an award when it relies on grounds other than those mentioned above. Such a ruling is not subject to appeal.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

There is no relevant information available in this respect.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Neither the LACM nor the CAMC's rules provide for emergency arbitrators.

47 Cost of enforcement

What costs are incurred in enforcing awards?

A party seeking to enforce an award will be subject to payment of regular court fees, depending on the case's economic value.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Mozambique is a civil law jurisdiction. The LACM makes clear reference to the Mozambican CCP in regard to the means and rules of evidence available to the arbitral tribunals.

The Mozambican CCP presents a mixed approach between the inquisitorial and adversarial systems. Thus, although the general rule is that each party must prove the facts that it claims, courts also have the duty to seek the truth, and in view of such duty, are allowed to order that evidence be provided for said purpose ex officio.

There is no tendency towards US-style discovery. The LACM is silent on written statements and party officer testimonials. Such matters are subject to party autonomy.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are no specific professional or ethical rules applicable to counsel in international arbitration in Mozambique.

The information available is not enough to allow for a conclusion on whether best practice in Mozambique reflects or contradicts the IBA Guidelines in International Arbitration.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

There is no regulation on third-party funding of arbitration in Mozambique.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Foreign practitioners may act as arbitrators in Mozambique with no limitation on nationality (see question 15), with an exception made to administrative law arbitrations where arbitrators must be Mozambican citizens.

In relation to acting as counsel, at present, only foreign practitioners who have studied law in Mozambique or those who have been admitted to the Mozambican bar under certain bilateral agreements can act as counsel in the territory.

A 17 per cent VAT rate is applicable to independent service providers who are Mozambican residents.

Non-Mozambican citizens are required to hold a visa when entering the country, although an exception is made for nationals of Botswana, Cape Verde, Lesotho, Namibia, the Republic of Mauritius, South Africa, Seychelles, Swaziland, Tanzania, Zambia and Zimbabwe.

MIRANDA
Miranda & Associados Sociedade de Advogados RL

Sofia Martins
Filipa Russo de Sá
Ricardo Saraiva

sofia.martins@mirandalawfirm.com
filipa.sa@pimentalawfirm.com
ricardo.saraiva@mirandalawfirm.com

Av. Eng. Duarte Pacheco 7
1070-100 Lisbon
Portugal

Tel: +351 217 814 800
Fax: +351 217 814 802
www.mirandalawfirm.com

Myanmar

Kelvin Poon, Min Thein and Daryl Larry Sim

Rajah & Tann Singapore LLP

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Myanmar acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 6 April 2013.

Myanmar is also a party to the 2009 ASEAN Comprehensive Investment Agreement (ACIA). Among other things, the ACIA governs the international investment regime among member states (ASEAN countries).

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Yes. There are six that are currently in force.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary domestic source of law relating to arbitration in Myanmar is the Burmese version of the Arbitration Act 2016 (the AA). The AA governs both domestic and international arbitration and the recognition and enforcement of awards.

Under the AA, arbitration will be considered international where:

- the parties to the arbitration agreement have, at the time of concluding the agreement, their place of business in different countries;
- the place of arbitration pursuant to the arbitration agreement is different from the place of business of the parties;
- a substantial part of the obligations of the commercial relationship or the subject matter of the dispute is most closely connected to a different place from the business of the parties; or
- the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

In addition, arbitrations that are not international are considered domestic arbitrations.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The provisions of the AA generally mirror those of the UNCITRAL Model Law. However, there are some differences. Under the AA:

- where there the parties fail to determine the number of arbitrators, the default is one arbitrator, as opposed to three under the Model Law;

- unless otherwise agreed by the parties, the arbitral tribunal shall specify the party entitled to costs, the party that shall pay the costs, the amount of costs or the method of determining costs and the manner in which costs shall be paid. Under the Model Law, there are no express requirements for the tribunal to specify costs; and
- the courts are expressly permitted to determine costs in instances where the award contains no provisions.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Generally, the parties are free to agree on the procedure of the arbitration. Mandatory provisions include the following:

- the parties shall be treated with equality and each party shall be given a full opportunity to present its case;
- when a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence; and
- an arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

For domestic arbitrations, the dispute shall be decided in accordance with the substantive law of Myanmar.

For international arbitrations, the dispute shall be decided in accordance with the substantive law agreed to by the parties or, failing such agreement, the substantive law that the arbitral tribunal considers applicable.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

There are no formal institutions that administer arbitrations in Myanmar. However, there are plans for the Union of Myanmar Federation of Chamber of Commerce and Industry (UMFCCI) to administer and set up arbitrations in Myanmar. Currently, the UMFCCI settles disputes between UMFCCI members, typically on an ad hoc basis.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Generally, commercial disputes are arbitrable under the AA. However, other Myanmar laws provide that the Myanmar courts have exclusive jurisdiction for certain matters:

- determination of insolvency: the Burma Insolvency Act 1920;
- winding-up of a company: the Myanmar Companies Act 1914; and
- appointment of a guardian: the Guardian and Wards Act 1890.

In practice, some restrictions are placed on a party's ability to choose its dispute resolution mechanism.

Export Rules and Regulations provide that any dispute arising from trade disputes under sale contracts must be governed by arbitration in Myanmar.

As a rule, the Myanmar government requires contracts between its state-owned enterprises and foreign companies to provide that disputes will be settled by arbitration under the AA.

Generally, the standard term in production sharing contracts for oil and gas sectors provides for arbitration pursuant to the UNCITRAL Arbitration Rules. Given the recent passing of the AA, this requirement may now have little relevance.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Under the AA, an arbitration agreement is a written agreement between the parties to arbitrate their disputes.

An arbitration agreement shall be deemed as written when:

- the parties have signed the agreement;
- the parties have concluded the agreement via correspondence whether electronically or otherwise; or
- a party claims the existence of an agreement to arbitrate in a claim to a dispute and the other party does not deny the same in its defence.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement contained in a contract will continue to be enforceable even if the arbitral tribunal determines that the said contract is null and void.

An arbitration agreement shall not be discharged by the death of any party and, in such event, shall be enforceable by or against the legal representative of the deceased. A legal representative is a person who in law represents the estate of the deceased.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

There are no provisions in the AA with respect to third-party participation in arbitration.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

See question 11.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

There does not appear to be any Myanmar case law that has recognised the 'group of companies' doctrine with respect to arbitration agreements.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The AA does not expressly prohibit multiparty arbitrations. However, it is silent as to the procedural requirements for a valid multiparty arbitration agreement.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The AA does not stipulate any requirements for the appointment of arbitrators. A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

However, where an arbitrator has not been appointed, the Chief Justice or the person or arbitration institution designated by him or her may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

If the parties fail to agree on the number of arbitrators, the number of arbitrators shall be one.

In an arbitration tribunal of three arbitrators, the default appointment mechanism is as follows:

- each party shall appoint one arbitrator;
- if one party fails to appoint an arbitrator within 30 days, a party may apply to the Chief Justice or the person or institution designated by him or her to appoint that arbitrator;
- the two party-appointed arbitrators shall appoint the third arbitrator;
- if, within 30 days, the two party-appointed arbitrators cannot agree on the appointment of the third arbitrator, any party may apply to the Chief Justice or arbitration institution to appoint the third arbitrator; or
- in an arbitration tribunal of one arbitrator, the default mechanism is that any party may apply to the Chief Justice or the arbitration institution to appoint the arbitrator.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

An arbitrator may only be challenged if:

- circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality; or
- he or she does not possess the qualifications agreed by the parties.

However, a party may challenge an arbitrator that it has appointed, or in whose appointment that party has participated, only for reasons that the party became aware of after the appointment was made.

The parties are free to agree on the procedure for challenging an arbitrator. However, failing any such agreement, the default mechanism is as follows:

- the party that intends to challenge the arbitrator shall, within 15 days of becoming aware of the constitution of the arbitral tribunal or the circumstances giving grounds for challenge (see above), send a written statement of the reasons for the challenge to the arbitral tribunal;
- unless either the arbitrator being challenged agrees to withdraw from his or her office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge;

- if the challenge of an arbitrator is not successful, the party may, within 30 days of the date the challenge was set aside, apply to the court for a decision on the challenge;
- if an arbitrator withdraws from office, a substitute arbitrator shall be appointed pursuant to the rules that were applicable to the appointment of the arbitrator being replaced; and
- the mandate of an arbitrator shall not be terminated by the death of any member of the party by whom he or she was appointed.

Given that the AA was only recently enacted, it is not known whether the Myanmar courts may apply the IBA Guidelines on Conflicts of Interest in International Arbitration to the AA.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

A person of any nationality may be an arbitrator, unless otherwise agreed by the parties. As stated above, all arbitrators must be independent and impartial and possess the qualifications agreed by the parties.

Unless otherwise agreed by the parties, the costs of the arbitration shall be fixed by the arbitral tribunal.

If the court removes an arbitrator for reasons of either justifiable doubts as to his or her independence or impartiality or not possessing the qualifications agreed by the parties, the court may decide as to whether the arbitrator who was challenged is entitled to any fees.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

In carrying out his or her obligations, the arbitrator shall not be liable for any negligence or breach of duties as long as reasonable care has been exercised in the discharge of his or her duties.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

A court before which an action is brought in a matter that is the subject of an arbitration agreement shall, if a party applies no later than when submitting its first statement on the substance of the dispute, refer the parties to arbitration. Upon referring the parties to arbitration, the court shall terminate all proceedings.

If the court decides to refer the parties to arbitration, there shall be no appeal against such decision. However, if the court refuses to refer the parties to arbitration, a party may appeal such decision.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

In the absence of any agreement between the parties, the arbitral tribunal may rule on its own jurisdiction, including any objections to the existence or validity of the arbitration agreement.

A plea that the arbitral tribunal does not have jurisdiction over the dispute must be raised no later than the submission of the statement of defence. The arbitral tribunal may admit a later plea if it considers the delay justified.

A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as possible after the occurrence of the matter alleged to be beyond the scope of its authority. The arbitral tribunal may admit a later plea if it considers the delay justified.

Once the arbitral tribunal determines whether it has jurisdiction or whether it is exceeding the scope of its authority, the party may appeal to the court within 30 days of such determination.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Failing the parties' agreement on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

Failing agreement of the parties on the language of the arbitration proceedings, the arbitral tribunal shall determine the language or languages to be used in the arbitration proceedings.

23 Commencement of arbitration

How are arbitral proceedings initiated?

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a notice of arbitration is received by the respondent.

The AA does not expressly provide formal requirements for a notice of arbitration. However, such notice may typically indicate:

- the parties to the dispute;
- reference to the arbitration agreement; and
- the subject matter of the dispute.

With regard to the delivery of such notice, if nothing is provided in the arbitration agreement, such notice may be delivered in person or by registered post to the other party's usual or last known place of abode or business in Myanmar.

24 Hearing

Is a hearing required and what rules apply?

Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Unless otherwise agreed by the parties, the arbitral tribunal shall decide on the conduct of the proceedings, including the admissibility, relevance, materiality and weight of any evidence.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Generally, in the absence of any agreement between the parties the court may (on the application of the parties) make orders related to the following:

- the obtainment and custody of evidence for the arbitration;
- the goods that are the subject of the dispute or arbitral award;
- the inspection, taking of photos, custody and possession of any property or thing that is the subject matter of the dispute;
- the sampling, observation or experimentation of any property or matter that is the subject matter of the dispute;
- the authorisation for entry into a property that is the subject matter of arbitration and that is owned or in custody of one of the parties;
- the sale of any key thing or property of the arbitration; and
- the issuance of a temporary warrant or the appointment of receiver.

Unless the matter is urgent, the applicant must notify, by letter, the counterparty and arbitral tribunal and obtain the written consent of the counterparty or the arbitral tribunal before making the application to the court.

As stated in question 43, the court may hear appeals on the arbitral tribunal's determination on its jurisdiction and scope of authority.

27 Confidentiality**Is confidentiality ensured?**

The AA does not expressly address whether arbitral proceedings are confidential. Generally, the parties may agree on whether the arbitral proceedings shall be confidential or failing such agreement, the arbitral tribunal may decide on the issue.

However, in order to enforce an award in Myanmar, such award must be filed with the Myanmar courts. As such, the award may be disclosed into the public domain to that extent.

Interim measures and sanctioning powers**28 Interim measures by the courts****What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?**

The AA provides that the court has the power in relation to:

- the preservation, interim custody or sale of any goods that are the subject matter of the dispute;
- the securing of the amount in dispute;
- the detention, preservation or inspection of any property that is the subject of the dispute;
- the authorisation of persons to enter into any land or building in the possession of any party;
- the authorisation of persons to obtain samples, make observations or conduct experiments that may necessary for the purpose of obtaining information or evidence;
- interim injunctions or the appointment of a receiver; and
- the appointment of a guardian for a minor or a person of unsound mind for the purposes of the arbitration proceedings.

However, such powers may also be vested in and do not prejudice the powers of the arbitral tribunal.

29 Interim measures by an emergency arbitrator**Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?**

The AA does not provide for an emergency arbitrator prior to the constitution of the arbitral tribunal.

30 Interim measures by the arbitral tribunal**What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?**

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order decisions or directions in relation to the following:

- security for costs;
- discovery of documents or enquiries;
- presentation of evidence under oath;
- protection or interim custody or sale of the property or thing that is the subject matter of dispute;
- sampling, observing or experimenting the property or thing that is the subject matter of dispute;
- protection or interim custody of any objects of evidence;
- security on the disputed monies; and
- issue of temporary warrants or any other interim measures.

31 Sanctioning powers of the arbitral tribunal**Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?**

The AA does not expressly provide for sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration.

Awards**32 Decisions by the arbitral tribunal****Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?**

The AA states that, unless the arbitration agreement provides otherwise, an award may be issued by a majority of the arbitrators.

33 Dissenting opinions**How does your domestic arbitration law deal with dissenting opinions?**

The AA does not specifically address dissenting opinions.

34 Form and content requirements**What form and content requirements exist for an award?**

The arbitral award shall be made in writing and signed by the members of the arbitral tribunal. If the tribunal has more than one arbitrator, the signatures of the majority of members would be sufficient, provided that the reason for any omitted signature is stated.

Unless otherwise agreed by the parties, the arbitral award shall state the reasons on which it is based and the costs of the arbitration.

The arbitral award shall also state the date and the place of arbitration. After the arbitral award is made, a signed copy shall be delivered to each party.

35 Time limit for award**Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?**

The AA does not expressly provide a time limit within which an arbitral award must be rendered. However, the arbitral tribunal should act without undue delay.

36 Date of award**For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?**

Generally, under the Myanmar Limitations Act (the Limitations Act), an award under the AA should be filed with the court within 90 days from the date that the parties are notified that an award has been issued, or it will be dismissed (unless the court gives leave).

37 Types of awards**What types of awards are possible and what types of relief may the arbitral tribunal grant?**

The AA provides that final awards and interim awards may be made. The AA is silent on partial awards and consent orders.

38 Termination of proceedings**By what other means than an award can proceedings be terminated?**

An arbitral tribunal shall issue an order for the termination of arbitral proceedings where:

- the claimant withdraws its claim, unless the respondent objects to the order and the arbitral tribunal determines a legitimate interest in reaching a final resolution of the dispute;
- the parties agree to terminate the proceedings; or
- the arbitral tribunal determines that the continuation of proceedings has become unnecessary or impossible.

The tribunal shall also terminate the proceedings if the parties settle the dispute. If requested by the parties, and not objected to by the tribunal, the tribunal shall record the settlement in the form of an arbitral award on agreed terms.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Unless otherwise agreed by the parties, the costs of the arbitration shall be fixed by the arbitral tribunal. This includes reasonable costs relating to:

- the fees and expenses of the arbitrators and witnesses;
- legal fees and expenses;
- any administration fees of the institution supervising the arbitration; and
- any other expenses incurred in connection with the arbitral proceedings and the arbitral award.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

In the absence of any other direction, interest on the amount stated in the arbitral award shall accrue in accordance with the Code of Civil Procedure at a reasonable rate to be stipulated by the court starting from the day the award was rendered.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Unless otherwise agreed by the parties, within 30 days from the receipt of the arbitral award, a party may, with notice to the other party, apply to the arbitral tribunal to correct any computational errors, clerical or typographical errors or any other errors of a similar nature. Upon such application, the tribunal may correct the errors and forward one copy of the corrected award to each party.

The tribunal may also, on its own initiative, correct any computational errors, clerical or typographical errors or any other errors of a similar nature and thereafter forward one copy of the corrected award to each party.

If agreed to by the parties, a party may, with notice to the other party, request the tribunal to give an interpretation on a specific point or part of the award. If the tribunal considers the request to be justified, it shall make the correction or give the interpretation within 30 days from the receipt of such request. The interpretation shall thereafter form part of the arbitral award.

In addition, unless otherwise agreed by the parties, within 30 days from the receipt of the arbitral award, a party may, with notice to the other party, request the tribunal to make an additional arbitral award on claims presented in the arbitral proceedings but omitted from the arbitral award. If the arbitral tribunal considers the request to be justified, it shall make the additional arbitral award within 60 days of the receipt of such request.

Notwithstanding the above, the arbitral tribunal may extend the period of time within which it shall make the correction, give an interpretation or make an additional arbitral award.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

A domestic award may be set aside by the court on the following grounds:

- the parties to the agreement are under some incapacity under the law applicable to them;
- the arbitration agreement is not valid under the law to which the parties have subjected it to or failing any indication thereon under Myanmar law;
- the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present its case;
- the arbitral award was made by the arbitral tribunal without following the rules of the arbitration or the arbitral award was made in breach of the rules of the arbitration or the award contains

Update and trends

The most recent development was the passing of the Arbitration Act on 5 January 2016.

- decisions on matters that are not within the scope of the arbitration. However, if the part of the award not within the scope of the arbitration can be separated from the rest of the award, the court may set aside only part of the award that is not relevant;
- when the process of the actual appointment of the arbitral tribunal or the arbitration was different from the way the parties agreed to or pursuant to the AA;
- the subject matter of the dispute is not capable of settlement by arbitration under the law for the time it is in force;
- when it is impossible to decide on the substantive matter of the dispute with the current existing law; and
- the arbitral award is contrary to the national interests of Myanmar.

Generally, a party shall not be permitted to request to set aside the arbitral award once three months have lapsed since the receipt of the arbitral award by the party applying to set aside the arbitral award.

A foreign award (an award made in another country that is a signatory to the New York Convention) may be refused enforcement by the court on grounds including the first four points listed for a domestic award, and in addition:

- the composition of the arbitral authority 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.

The enforcement of a foreign award may also be refused if the court finds that:

- the subject matter of the dispute is not capable of settlement by arbitration under Myanmar law; or
- the enforcement of the award would be contrary to the national interests of Myanmar.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level?

Approximately what costs are incurred at each level? How are costs apportioned among the parties?

For domestic arbitrations, the following may be appealed:

- any legal questions arising out of the arbitral award;
- where the arbitral award is obviously wrong;
- court orders refusing to refer the parties to arbitration;
- court orders relating to the granting of or refusal to grant interim orders;
- court orders relating to legal questions arising out of the arbitration;
- arbitral tribunal decisions relating to the jurisdiction of the arbitral tribunal; and
- arbitral tribunal decisions relating to the granting of or refusal to grant interim orders.

Once a court has determined such appeals, the parties are not entitled to a second appeal.

Generally, for international arbitrations seated in Myanmar, the following may be appealed:

- court orders refusing to refer the parties to arbitration;
- court orders relating to the granting of or refusal to grant interim orders;
- court orders relating to the enforcement of or refusal to enforce a foreign award;
- arbitral tribunal decisions on the jurisdiction of the arbitral tribunal; and
- arbitral tribunal decisions relating to the granting of or refusal to grant interim orders.

For international arbitrations that have the seat in another country that is a signatory to the New York Convention, only the following may be appealed:

- court orders refusing to refer the parties to arbitration;
- court orders relating to the granting of or refusal to grant interim orders; and
- court orders relating to the enforcement or refusal to enforce a foreign award.

The costs of such appeals are highly dependent on the complexity of the appeal and the value of the dispute.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

A domestic award may be enforced under the Code of Civil Procedure in the same manner as if were a decree of the court. A decree executed pursuant to an award has the same power as any other court-executed decree. However, the court shall not make an order for enforcement if it is proven (to reasonable satisfaction) that there is an absence of jurisdiction over the party that is having the award enforced against it.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

A party may apply to enforce a foreign award by producing before the court:

- the original award or a copy of the award duly authenticated in the manner required by the law of the country in which the award was made;
- the original arbitration agreement or a copy of the arbitration agreement duly certified; and
- such evidence as may be necessary to provide that the award is a foreign award.

If the foreign award is in a foreign language, the party seeking to enforce the award shall produce an English translation either certified as correct by a diplomat or consular agent of the country to which that party belongs or an official translator or notarial translator, or certified as correct in accordance with the laws of Myanmar.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The AA does not provide for the enforcement of orders by emergency arbitrators.

47 Cost of enforcement

What costs are incurred in enforcing awards?

Generally, a party seeking to enforce an arbitral award will be subject to the usual court fees. This would typically include an application fee of 6,000 kyat.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Currently, there is no particular, commonly adopted practice for discovery, the delivery of testimony or the permissibility of party officers to testify. As such, there is no particular tendency towards US-style discovery.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Myanmar lawyers acting in arbitration are still bound by their professional codes of conduct. However, the AA does not expressly provide for any particular ethical or professional rules with regard to arbitral proceedings.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

The AA does not expressly regulate third-party funding of arbitral claims.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

In general, foreign practitioners will be subject to the same requirements as other international businesspeople operating in Myanmar, and may be required to obtain the relevant business visa.

RAJAH & TANN

Kelvin Poon
Min Thein
Daryl Larry Sim

kelvin.poon@rajahtann.com
min.thein@rajahtann.com
daryl.sim@rajahtann.com

9 Battery Road #25-01
Straits Trading Building
Singapore
049910

Tel: +65 6232 0403 / +95 9 73040763 / +65 6232 0356
Fax: +65 6428 2007 / +95 1 9665537 / +65 6428 2209
www.rajahtannasia.com

Nigeria

Babajide O Ogundipe and Lateef O Akangbe

Sofunde, Osakwe, Ogundipe & Belgore

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Nigeria is a contracting state party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention). The country also ratified the Convention on 17 March 1970, and it entered into force on 15 June 1970.

With respect to article I of the Convention, the relevant Nigerian law provides that any foreign award based on convention will only be recognised and enforced in Nigeria if the contracting state party, where the award was issued, has reciprocal legislation recognising the enforcement of arbitral awards made in Nigeria in accordance with the provisions of the Convention. That law also limits the applicability of the convention to only differences arising out of a legal relationship that is contractual.

Aside from the New York Convention, Nigeria is also a contracting state party to the Convention of the International Centre for Settlement of Investment Disputes (ICSID Convention). The Convention was ratified by Nigeria in August 1965 and entered into force in October 1966.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Nigeria has entered into bilateral investment treaties with the following countries:

- Algeria (not yet in force);
- Austria (not yet in force);
- Bulgaria (not yet in force);
- Canada (not yet in force);
- China (18 February 2010);
- Ethiopia (not yet in force);
- Egypt (not yet in force);
- Finland (20 March 2007);
- France (19 August 1991);
- Germany (20 September 2007);
- Italy (22 August 2005);
- Jamaica (not yet in force);
- Korea (1 February 1999);
- Kuwait (not yet in force);
- the Netherlands (1 February 1994);
- Romania (3 June 2005);
- Russia (not yet in force);
- Serbia (7 February 2003);
- Singapore (not yet in force);
- South Africa (27 July 2005);
- Spain (19 January 2006);
- Sweden (12 January 2006);
- Switzerland (1 April 2003);

- Taiwan (7 April 1994);
- Turkey (not yet in force);
- Uganda (not yet in force); and
- the United Kingdom (11 December 1990).

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary sources of Arbitral proceedings in Nigeria are as follows:

- the Arbitration and Conciliation Act (Cap A18, Laws of the Federation of Nigeria, 2004) (the ACA);
- the Lagos State Arbitration Law (2009);
- the International Centre for Settlement of Investment Disputes (ICSID) Convention. The ICSID Convention has been implemented in Nigeria through the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act (Cap 120, Laws of the Federation of Nigeria, 2004); and
- Nigeria became a signatory to the New York Convention 1958 on 17 March 1970, adopting both the reciprocal and commercial reservations. The Convention came into force in June 1970. The New York Convention has been implemented in the ACA.

The ACA is the chief of all laws governing arbitration in Nigeria. It governs both domestic and foreign arbitral proceedings with the incorporation of the Convention in its Second Schedule.

The ACA did not specifically define what a foreign award is. But since the Convention has been domesticated in the Second Schedule of the ACA, it becomes imperative that we rely on article 1 of the Convention, which defines the scope of the applicability of the Convention to include arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought. And further, extends it to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought. Therefore, there is the possibility under Nigerian law to consider arbitral proceedings made within the Nigerian territory as foreign.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The Arbitration Law in Nigeria is largely drafted following the UNCITRAL Model Law and the Arbitration Rules (contained in the First Schedule to the Act).

One major difference between the Nigerian domestic arbitration law and the UNCITRAL Model Law is that under section 19 of the UNCITRAL Model Law, parties are given the autonomy to agree on the procedure to be followed by the arbitral tribunal for the conduct of the proceedings; but in the ACA, the parties, as well as the arbitral tribunal, are bound by the provisions of the Arbitration Rules.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Parties are generally bound by the substantive arbitration law as contained in the ACA. They are also bound by the procedural rules (the Arbitration Rules) contained in the First Schedule of the Act. Arbitration agreements that contravene the provisions of the Act and the Rules in the First Schedule thereof shall generally be declared void by the competent Nigerian court.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Article 33 of the Arbitration Rules contained in the First Schedule of the ACA gives parties the liberty to designate which law will be applicable to the substantive matter. The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorised the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The Chartered Institute of Arbitrators (UK) Nigeria Branch
Old Niger House (2nd Floor)
163/165, Broad Street (Marina View)
Lagos
Nigeria
Tel: +234 1 264 7036
Fax: +234 1 263 6757
www.ciarb.org

The Chartered Institute of Arbitrators Nigeria
233 Ikorodu Road
Lagos
Nigeria
Tel: +234 1 803 3349101 / +234 1 854 7483
www.arbitratorsnigeria.org

Lagos Court of Arbitration (International Centre for Arbitration and ADR)
1A Remi Olowude Street
2nd Roundabout, Lekki-Epe Expressway
Okunde Blue water Scheme
Lekki Peninsula Phase 1
Lagos
Tel: +234 (0) 8094804504
info@lagosarbitration.org
www.lagosarbitration.org

Maritime Arbitrators Association of Nigeria
Maritime Arbitrators Association of Nigeria Secretariat
C/o Sofunde Osakwe Ogundipe & Belgore
St Nicholas House (7th Floor)
Catholic Mission Street
Lagos
Nigeria
Tel: +234 1 263 1184
Fax: +234 1 263 4980
maan@mannigeria.com
www.maanigeria.com

Regional Centre for International Commercial Arbitration Lagos
6th Floor Union Marble House
1 Alfred Rewane Road
PO Box 50565
Falomo, Ikoyi
Lagos
Nigeria
Tel: +234 1 270 5516, 270 3572, 479 8926
Fax: +234 1 271 3579
info@rcicalagos.org
www.rcicalagos.org

The Lagos Multi-Door Court House
High Court of Lagos
Lagos Judicial Division
Lagos
Nigeria
Tel: +234 1 723 7415 / +234 1 8033076534 / +234 1 8023129002
Hotlines: +234 1 7028162452 / +234 1 7028162451
info@lagosmultidoor.org
www.lagosmultidoor.org

The Abuja Multi-Door Court House
High Court of the Federal Capital Territory
Wuse Zone 5, FCT, Abuja
Tel: +234 1 8033605506 / +234 1 8023268606

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The interpretation section of the ACA specifically defines Arbitration to mean 'Commercial Arbitration'. The word 'Commercial' was further interpreted to mean:

all relationships of a commercial nature, including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreement or concession, joint venture and other forms of industrial or business cooperation, carriage of goods or passengers by air, sea, rail or road.

It therefore follows that criminal, constitutional and matrimonial matters, national security disputes and company law disputes, like winding-up/bankruptcy and so on, are not arbitrable in Nigeria.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

It is a requirement as contained in section 1(1) of the ACA that every arbitration agreement shall be in writing. The agreement can also be contained under the general terms, provided it is in writing. Section 1(2) provides that: 'Any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract.'

The above requirements will be satisfied provided the agreement is contained in:

- a document by both parties;
- an exchange of letters, telex, telegrams or other means of communication that provides a record of the arbitration agreement; or
- an exchange of points of claim and of defence in which the existence of an arbitration agreement is alleged by one party and not denied by another.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

Section 2 of the ACA is unequivocal on the non-enforceability of an arbitration agreement. It provides that, unless a contrary intention is expressed in the agreement, an arbitration agreement shall be irrevocable except by agreement of the parties or by leave of the court or a judge.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Section 3 of the ACA makes it possible to enforce an arbitration agreement against the personal representatives of a deceased party. Liquidators will also be bound by the decision of an arbitral tribunal if appointed by the court.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

There is no provision on joinder of parties in the ACA. However, the Lagos State Arbitration law, which is only applicable within the province of Lagos, provides that a party may by application and with the consent of the parties be joined to arbitral proceedings.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the ‘group of companies’ doctrine?

In the absence of any express provision in the law on the group of companies’ doctrine, the courts are nonetheless empowered by case law to go by the circumstances of each case in determining the scope of the arbitration agreement. Thus, where the circumstances may warrant that the doctrine be applied, the courts and tribunals may exercise their discretion for the purpose of achieving justice.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The ACA makes no provision for a valid multiparty arbitration agreement. Thus, since there is no prohibition of such an arrangement under the Act or any other law, parties may agree to confer on the arbitrator, in the case of multiplicity of claims, power to consolidate the claims or join other claims. It is important to state that the Lagos Arbitration Law makes provision for the consolidation of arbitral proceedings or concurrent hearing upon agreed terms.

Constitution of arbitral tribunal**15 Eligibility of arbitrators**

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Serving Judges in Nigeria cannot act as arbitrators, but they can when they are retired. The Act does not specify any qualifications as to who can act as an arbitrator. However, the following are customarily considered before persons are appointed as arbitrators:

- conflict of interest with the parties or the subject matter;
- the experience of the arbitrator; and
- the arbitrator’s legal knowledge and special qualifications.

In the absence of any law prohibiting a contractually stipulated requirement for arbitrators based on nationality, religion or gender, such a contractual term stands to be recognised by the courts in Nigeria.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

In line with section 6 of the ACA, parties to an arbitration agreement may determine the number of arbitrators to be appointed under the agreement, but where no such determination is made, the number of arbitrators shall be deemed to be three.

Also, section 7 of the ACA provides that where the arbitral tribunal is deemed to be three and the parties fail to appoint a third arbitrator within 30 days, any party to the arbitration agreement may apply to the court to appoint an arbitrator to preside over the arbitral proceedings. Furthermore, where it is agreed by both parties that there will be a sole arbitrator and the parties fail to agree on a choice of arbitrator, any party can apply to the court within 30 days to appoint an arbitrator to preside over the arbitral proceedings.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Section 8(3) of the ACA, provides that an arbitrator can be challenged and replaced if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence and whether he or she does not possess the qualification agreed by both parties.

Section 9(1) to (3) further provides that a party challenging the arbitrator must, within 15 days of becoming aware of the constitution of the arbitral tribunal or the circumstances stated in section 8 of the Act, send to the arbitral tribunal a written statement stating the reasons for the challenge.

The ACA further provides that an arbitrator can be replaced where an arbitrator dies or resigns during the course of proceedings, or where he or she fails to act or in the event of the de jure or de facto impossibility of performing his or her functions.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

An arbitrator is required to be independent and impartial. Thus, section 8 of the Act and article 9 of the Arbitration Rules require that a potential arbitrator discloses to the parties any circumstance that is likely to give rise to justifiable doubts as to his or her impartiality or independence.

The arbitrator must be free from bias or undue influence and should be objective. Each party must be given the opportunity to present its case, and, where there is a hearing, it must be done in the presence of both parties. Where the arbitrator receives information from one party, the arbitrator must disclose it to the other party.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

There is no provision in the ACA conferring immunity on Arbitrators. However, their immunity when exercising their arbitral duties is generally considered as a public policy. Notably, section 18 of the Lagos Arbitration Law (2009), which is applicable only within Lagos, confers immunity on an arbitrator for anything done or omitted in the discharge of his or her functions as arbitrator, unless the act or omission was determined to be in bad faith.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If any party to an arbitration agreement commences any action in any court with respect to any matter that is the subject of that arbitration agreement, a counterparty to the arbitration agreement may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings and refer the parties to arbitration. The court will stay proceedings if it is satisfied that there are no sufficient reasons why the matter should not be referred to the arbitration.

It is crucial to know that a defendant who applies for a stay of proceedings in an action pending arbitration must not have delivered any pleadings or taken any steps in the proceedings beyond entering a formal appearance.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Section 12(1) of the ACA authorises an arbitral tribunal to rule on questions pertaining to its jurisdiction and on any objections with respect to the existence or validity of an arbitration agreement. A plea that the arbitral tribunal lacks jurisdiction must be raised no later than the time of submission of the points of defence, and a party is not precluded from raising such plea by reason that he or she has appointed or participated in the appointment of an arbitrator.

Furthermore, a plea that the arbitral tribunal is exceeding the scope of its authority can be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the proceedings. However, an arbitral tribunal shall rule on any such pleas either as a preliminary question or in an award on the merits, and such ruling is final and binding. The Act makes no provision for circumstances in which parties can be precluded from raising jurisdictional objections.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

In a situation where the parties did not provide for the place of arbitration and language of the proceedings, the tribunal shall provide for a place that is convenient to both parties and the language to be adopted shall be a language relevant to the circumstances of the case.

23 Commencement of arbitration

How are arbitral proceedings initiated?

The first step for the initiation of arbitral proceeding according to article 3 of the Arbitration Rules is for the party initiating recourse to arbitration (claimant) to give to the other party (respondent) a notice of arbitration. An arbitral proceeding shall be deemed to have commenced on the date on which the notice of arbitration is received by the respondent.

24 Hearing

Is a hearing required and what rules apply?

Except where the contrary is expressed by the parties in the agreement, the arbitral tribunal shall decide whether the arbitral proceedings shall be conducted orally on the basis of the document or other materials, or both. The arbitration is also to be conducted in accordance with the procedure contained in the Arbitration Rules set out in the First Schedule to the ACA.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The rules of evidence that would be applied by an arbitral tribunal are any rules arising from or referred to by the parties in the arbitration agreement: general evidential principles, such rules as the arbitral tribunal may direct or a combination of these rules and principles.

The types of evidence that are admitted include statements, documents, other information, expert reports and evidentiary documents (section 20(3) and (4)). Section 20(5) of the ACA gives power to the arbitral tribunal unless otherwise agreed by the parties, to administer oaths to or take the affirmations of the parties and witnesses appearing.

Section 20(6) of the ACA allows any party to an arbitral proceeding to issue out a writ of subpoena ad testificandum or subpoena duces tecum. However, no person shall be compelled under such writ to produce any document that he or she could not be compelled to produce on the trial of an action.

Section 22(1)(a) ACA vests power on the arbitral tribunal to appoint experts on specific issues to be determined by the tribunal. The tribunal, under section 22(1)(b), can request that a party supply the expert with relevant information or produce or provide access to any documents, goods or other property for inspection.

The expert, after delivering the written or oral report, may participate in the hearing at the request of a party or on the consideration of the tribunal as being necessary. The parties will thus be entitled to put questions to the expert and present expert witnesses to testify on their behalves on the points at issue (section 22(2)).

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Some of the instances where courts may intervene in arbitration issues are as follows:

- to stay court proceedings brought in defiance of the arbitration agreement (sections 4 and 5);
- to order the revocation of the arbitration agreement (section 2);
- to appoint an arbitrator where a party fails to appoint or the parties cannot agree (section 7);
- to compel the attendance of witnesses or production of documents (section 23); and
- to set aside or remit an award or to remove an arbitrator and to enforce or refuse the enforcement of an award.

27 Confidentiality

Is confidentiality ensured?

Arbitral proceedings are generally considered confidential and private in Nigeria. Article 25(4) of the Arbitration Rules provides that hearings shall be in camera unless the parties agree otherwise.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Article 26 of the Arbitration Rules entitles a court approached by a party to arbitral proceedings to grant interim relief. The Arbitration Rules provide that such a request will not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Section 5 of the ACA also vests the court the power to stay proceedings where a party to the arbitration agreement commences an action with respect to a matter that is the subject of an arbitration agreement and an application is made by the other party to the court to stay proceedings.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The office of an emergency arbitrator appointed temporarily and prior to the constitution of the arbitral tribunal is yet to be recognised under the ACA or the Arbitration Rules in Nigeria.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Section 13 of the ACA empowers the tribunal to order a party upon the request of the other party to take interim measures of protection as the tribunal may consider necessary in respect of the subject matter of the dispute and the tribunal may request any party to provide appropriate security in connection with any measure taken.

Article 26 of the Arbitration Rules further goes on to list some of the measures, such as measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods. Such interim measures may be established in the form of an interim award, and the tribunal shall be entitled to require security for the costs of such measures.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use ‘guerrilla tactics’ in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

In the absence of any express provision on sanctions to be ordered by the tribunal against parties who use guerrilla tactics, article 15 of the Arbitration Rules provides that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. By implication, they may also impose some sanctions on parties, provided it does not contravene the ACA and the Rules.

In addition, article 28 of the Rules empowers the tribunal to terminate the arbitral proceedings if the claimant has failed to communicate his or her claim without showing sufficient cause for such failure within the time prescribed. The arbitral tribunal shall also order that the proceedings continue if within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his or her statement of defence without showing sufficient cause for such failure.

Also, if one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

Awards**32 Decisions by the arbitral tribunal**

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Section 24 of the ACA provides that where there is more than one arbitrator, any decision of the tribunal shall, unless otherwise agreed by the parties, be made by a majority of all its members. Therefore, the dissent of a minority arbitrator will have no consequence whatsoever on the enforceability of the award, except if the parties have agreed to the contrary. This same position was reproduced in article 31(1) of the Arbitration Rules.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

As stated above, the Act makes no special provision for a dissenting opinion. However, the opinion of the majority of the arbitrators will always prevail.

34 Form and content requirements

What form and content requirements exist for an award?

In line with section 26 of the Act, an award must be in writing and be signed by the arbitrators. The award must also contain the reasons upon which it was based (unless agreed by both parties that no reason should be given), the date it was made and the place of arbitration.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The Act did not make any such provision as to the time limit within which the award must be rendered. However, it is a custom of arbitration that the award must be within a reasonable time.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Similar to above, there is no specific time limit in both the Act and the Arbitration Rules. But it is strongly encouraged that the awards be delivered within a reasonable time.

Article 32(2) of the Rules provides that the parties are to undertake to carry out the award without delay.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

Awards could be final, interlocutory, default, interim and consent awards. Also, the reliefs granted could be monetary, declaratory, performance, injunctive or rectification.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

By the virtue of section 34 of the Act, an arbitral proceeding could be terminated where parties agree on a settlement of the dispute.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Section 49(1) of the Act provides that the arbitral tribunal shall fix costs of arbitration in its award, and the term ‘costs’ includes

- only the fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself;
- the travel and other expenses incurred by the arbitrators;
- the cost of expert advice and of other assistance required by the arbitral tribunal;
- the travel and other expenses of witnesses to the extent that such expenses are approved by the arbitral tribunal; and
- the costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Interest may be awarded on the principal claims and costs at such rate as the tribunal may specify in exercise of its incidental power to grant pecuniary reliefs sought.

Proceedings subsequent to issuance of award**41 Interpretation and correction of awards**

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Section 28(3) of the Act and article 36 of the Arbitration Rules empowers the tribunal to correct any errors in the award relating to computation, clerical or typographical errors or any errors of a similar nature, on its own volition and within 30 days of the date of the award.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

In line with sections 29 and 30 of the Act, an award can be challenged and set aside if the aggrieved party can furnish proof that the arbitral award contains matters beyond the scope of submission to arbitration, the arbitrator misconducted himself or herself or the award was improperly procured.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

An arbitral award is final and cannot be appealed, except for the reasons stated in question 38.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

All domestic awards in Nigeria are to be recognised as binding and shall, upon application in writing to the court, be enforced by the court. See section 31 of the ACA.

As for the foreign awards, section 51 of the ACA provides that an arbitral award shall, irrespective of the country in which it is made, be recognised as binding and shall, upon application in writing to the court, be enforced. The party wishing to enforce the award must supply the following:

- the duly authenticated original award or a duly certified copy thereof;
- the original arbitration agreement or a duly certified copy thereof; and
- where the award or arbitration agreement is not made in the English language, a duly certified translation thereof into the English language.

Section 52(1) of the ACA provides that any of the parties to an arbitration agreement may request the court to refuse recognition or enforcement of the award. In line with section 52(2) of the ACA, the courts in Nigeria may refuse any arbitral award if:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement is not valid under the law which the parties have indicated should be applied or under the law of the country where it was made;
- a party was not given proper notice of the appointment of an arbitrator or of the proceedings or was otherwise not able to present his or her case;
- the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
- the award contains decisions on matters that are beyond the scope of the submission to arbitration;
- the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties;
- the subject matter of the dispute is not capable of settlement by arbitration under the laws of Nigeria; and
- the recognition or enforcement of the award is against the public policy of Nigeria.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Section 52 (2)(a)(viii) of the ACA provides that the Nigerian courts may refuse to recognise and enforce an award if it has been set aside or suspended by a court of the country in which, or under the law of which, the award was made.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

As mentioned in question 29, the idea of an emergency arbitrator prior to the constitution of the proper arbitral tribunal is unrecognised in Nigeria. However, section 13 of the ACA empowers the arbitral tribunal to 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.

Sofunde Osakwe Ogundipe & Belgore
legal practitioners

Babajide O Ogundipe
Lateef O Akangbe

7th Floor, St Nicholas House
6 Catholic Mission Street
Lagos
Nigeria

boogundipe@sooblaw.com
loakangbe@sooblaw.com

Tel: +234 1 462 2501-2
Fax: +234 1 462 2501
www.sooblaw.com

In cases of extreme of urgency, a party intending to commence arbitration may apply to the High Court for interim measures to protect the subject matter of the dispute.

47 Cost of enforcement

What costs are incurred in enforcing awards?

Costs that may be incurred in enforcing arbitral awards are legal practitioners' fees for the preparation and filing of the necessary applications and some small administrative fees.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

The courts have the power to order the attendance of a witness to an arbitral tribunal. This may occur by ordering that a writ of subpoena ad testificandum or of subpoena duces tecum should be issued, or order that a writ of habeas corpus ad testificandum shall be issued to bring up a prisoner for examination before any arbitral tribunal.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

The ethical rules applicable to counsel in international arbitration in Nigeria is largely in conformity with the international best practices and not contrary to the IBA Guidelines on Party Representation in International Arbitration.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding is impliedly not prohibited in Nigeria because of the absence of any law expressly prohibiting it or declaring it as criminal.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Foreign Practitioners (Arbitrators and Counsels) in Nigeria have no restrictions, be it legal or administrative on them. Such practitioners are free to come to Nigeria for the purpose of conducting their arbitral proceeding. Nonetheless, a foreign practitioner would normally require a business visa to conduct an arbitral proceeding in Nigeria.

Portugal

Agostinho Pereira de Miranda, Sofia Martins and Pedro Sousa Uva

Miranda & Associados

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Portugal became a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in January 1995, on the basis of the reciprocity reservation. The New York Convention has been in force since 16 January 1995.

Portugal acceded to the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States in August 1984. It further signed, on 17 December 1994, the Energy Charter Treaty, which came into force on 16 April 1998.

Portugal has also been a party to the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards since 1930, and, in 2002, it ratified the Inter-American Convention on International Commercial Arbitration.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

According to both UNCTAD and ICSID, Portugal is a signatory to 55 bilateral investment treaties, 41 of which have actually entered into force in the territory.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary domestic source of law relating to domestic and foreign arbitral proceedings, including recognition and enforcement of awards, in Portugal is the Voluntary Arbitration Law (the VAL), Law No. 63/2011, of 14 December 2011, which entered into force on 14 March 2012.

The VAL governs both domestic and international arbitration provided the arbitration has its seat in Portugal. Pursuant to the VAL, arbitration is deemed as being international when international trade interests are at stake.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The VAL is based on the UNCITRAL Model Law. There are no significant differences in respect of the latter, although the VAL contains some features that the UNCITRAL Model Law does not, such as, for example, provisions on joinder. Also, and in respect of setting aside proceedings, the VAL takes some provisions of the Model Law a step

further (such as those concerning violation of due process and the composition of the arbitral tribunal or arbitral procedure), stating that they may only lead to a decision to set aside if any such violations have a decisive influence in the outcome of the dispute. Also, if the tribunal exceeds the time limit (foreseen in the law or agreed upon by the parties) to render the award, that too will constitute grounds for setting aside. Furthermore, the time limit to apply for setting aside is 60 days from receipt of the award, and not three months.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Arbitral proceedings must comply with the following principles of due process, which are mandatory for all parties and at all stages of proceedings:

- parties must be treated equally;
- the respondent must be summoned in order to present their defence;
- the adversarial nature of the proceedings must be observed; and
- each party must be granted full opportunity to present its case, either orally or in writing, before the final award is rendered.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Parties enjoy full autonomy when choosing the substantive law or rules of law applicable to the merits of the case provided they have not authorised the tribunal to decide *ex aequo et bono*. In the event that the parties fail to agree on the substantive applicable law or rules of law, the tribunal shall apply the law of the state to which the subject matter in dispute is most closely related. In any case, the arbitral tribunal shall always take into due consideration the contractual terms agreed between the parties as well as the relevant trade usages.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The most prominent commercial arbitration institution in Portugal is the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (PCCI). The contact details for the PCCI are as follows:

Câmara de Comércio e Indústria Portuguesa
Rua das Portas de Santo Antão 89
1169 022 Lisbon
Portugal
Tel: +351 213 224 050
Fax: +351 213 224 051
avs.centrodearbitragem@ccip.pt
amp.centrodearbitragem@ccip.pt
www.centrodearbitragem.pt

Pursuant to PCCI rules, when the parties have not agreed on the number of arbitrators, a tribunal comprises one arbitrator unless, after consulting the parties, and bearing in mind the characteristics of the dispute, the chairman of the centre decides that the tribunal shall consist of three arbitrators. Parties are free to appoint the arbitrator or arbitrators and in doing so are not restricted to the PCCI's list of arbitrators. The PCCI's chairman will appoint the arbitrators whenever the parties fail to do so, in which case the arbitrator will be selected from the pre-approved list. Arbitrators' fees are set in accordance with the amount in dispute, and may be increased or decreased by the chairman of the centre in certain circumstances. Parties are also free to choose the language of proceedings, as well as the applicable substantive law.

Furthermore, a relevant arbitral centre was launched in December 2014:

Concórdia
Rua Rodrigo da Fonseca, 149 - 3ºDt
1070-242 Lisboa
Tel: 213 812 815
Fax: 213 812 817
correio@concordia.pt
www.concordia.pt/centro.php

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

As a general rule, the VAL provides that parties are free to refer any dispute concerning an economic interest to arbitration. The VAL further provides that parties are also free to arbitrate disputes not involving economic interests if, by law, such disputes may be settled amicably. Disputes falling under the exclusive jurisdiction of national courts are not arbitrable. An arbitration agreement entered into in breach of this arbitrability rule will be deemed null and void.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Pursuant to the VAL, an arbitration agreement may consist of either an arbitration clause or a submission agreement. Arbitration clauses deal with potential future disputes arising from a given contractual or extra-contractual relationship, while submission agreements arise from existing disputes, whether or not they have already been submitted to a state court. A submission agreement must define the subject matter of the dispute, while an arbitration clause must specify the legal relationship to which the dispute relates. The VAL treats both types of arbitration agreements on an equal footing.

Arbitration agreements must be entered into in writing, meaning they must be documented either in a written instrument signed by the parties or in correspondence exchanged between them, including electronic means of communication.

Additionally, the mere reference in a contract to a document containing an arbitration clause will also be deemed to meet the written form requirement provided that the contract is in writing and the reference makes the arbitration clause an integral part of the contract.

An arbitration agreement entered into in breach of the above-mentioned requirements will be deemed null and void.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The VAL expressly enshrines the separability doctrine by stating that an arbitration clause is independent of the other clauses of the contract in which it is included. Consequently, a decision rendered by the arbitral tribunal declaring the contract null and void does not automatically entail the invalidity of an arbitration clause included therein, unless it is proven that the contract would not have been entered into without such a clause.

Pursuant to the VAL, an arbitration agreement will be declared null and void when entered into in breach of formal requirements or provisions on arbitrability.

Parties are entitled to mutually revoke their arbitration agreement before the award has been issued by the arbitral tribunal, provided such revocation is made in writing.

Unless otherwise stipulated by the parties, an arbitration agreement will not terminate upon the death (or dissolution, in the case of corporate persons) of any of the parties.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Third parties may be bound by an arbitration clause from the outset or by means of subsequent adherence to it. Pursuant to the VAL, third parties will only be permitted to join arbitration proceedings if they are bound to the corresponding arbitration agreement. In addition, the consent of all parties to the arbitration is required for this type of joinder. If joinder is requested after the arbitral tribunal has already been constituted, the third party must declare to accept the tribunal's composition. This acceptance is presumed when joinder is requested by the third party itself.

The locus standi (standing to sue or to be sued) of a party to the arbitration may be passed on to third-party successors.

There are other situations in which an assignment of rights or obligations under the main contract entails the transferee automatically assuming the standing of the transferor under the arbitration agreement, whether by law or agreement. This happens, for instance, in the assignment of an entire contract or in the assignment of specific rights or interests, as per articles 424 and 577 of the Civil Code, respectively. Although these articles do not make explicit reference to the arbitration agreement, prevailing legal doctrine states that the arbitration agreement is an accessory part of the assigned substantive right and is automatically transferred to the assignee pursuant to article 582 of the Civil Code. Exceptions are made where the parties have excluded the assignment of the arbitration agreement or entered into it on an *intuitus personae* basis. An automatic transfer of the arbitration agreement may likewise occur in cases of subrogation by agreement or operation of law. Subrogation exists where one party 'steps into the shoes' of another, for example, by paying their debt under a guarantee. In these cases, the former is placed by law or by agreement of the creditor in the position of the debtor.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The admissibility of joinder is subject to the tribunal's decision. This decision is only issued after the original parties to the proceedings and the third party itself have all been granted the opportunity to voice their position on the joinder. According to the VAL, however, the arbitral tribunal may only allow joinder to take place if it finds that it will not unduly disrupt the normal course of proceedings and that there are relevant reasons that justify the joinder.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The VAL does not address this issue, but Portuguese case law does recognise the 'group of companies doctrine'.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The VAL allows for multiparty arbitration agreements.

Where there are multiple claimants or multiple respondents and the dispute is to be referred to a panel of three arbitrators, the claimants

have to jointly appoint an arbitrator, as do the respondents, unless otherwise agreed by the parties.

Should the claimants or respondents fail to reach an agreement on the appointment of the arbitrator they should indicate, it will be for the competent state court to make the appointment. In such case, the state court may appoint all arbitrators and indicate which one of them shall be the chairman, if it becomes clear that the parties that failed to jointly appoint an arbitrator have conflicting interests regarding the substance of the dispute, and in such event the appointment of the arbitrator made in the meantime by one of the parties shall become void.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Any person with full legal capacity may act as an arbitrator, no additional qualifications being necessary. Generally, contractually stipulated requirements (ie, by nationality, will be recognised); indeed, whenever the appointment of an arbitrator in an international arbitration falls to a state court, the court must take into consideration the suitability of appointing an arbitrator of a nationality other than that of the parties. There is no indication in the VAL on issues related to gender or religion, so such qualifications would have to be analysed on a case-by-case basis. If discriminatory, issues could arise.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

The appointment of arbitrators falls to the competent state court whenever the parties are unable to agree on it. When appointing an arbitrator, the state court must consider the qualifications that have been agreed upon by the parties as well as any aspects considered relevant to ensure the appointment of an independent and impartial arbitrator.

The decision of the state court on the appointment of an arbitrator may not be appealed.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Arbitrators may be challenged if there are justified doubts as to their impartiality or independence, or whenever the arbitrator does not meet the qualifications determined by the parties.

Parties are free to agree on the procedure to challenge arbitrators. In the absence of such an agreement, the party intending to make the challenge must submit a written statement to the arbitral tribunal within 15 days from the date on which it received notice of the tribunal's constitution or the date on which it became aware of the reasons for the challenge. The tribunal will decide on the challenge unless the challenged arbitrator agrees to step aside or the other party agrees with the challenge.

Similarly to the Model Law, the VAL allows the unsuccessful party in a challenge to bring its challenge before a state court, whose decision will be final and binding. While the request is pending, the arbitral tribunal may continue with the proceedings and the final award may even be rendered in the meantime.

Both the Portuguese Arbitration Association and the Portuguese Chamber of Commerce and Industry have a code of ethics based on the same philosophy as the IBA Guidelines. Moreover, during the past two years, some court decisions have made reference to the IBA Guidelines.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Typically, the relationship between parties and arbitrators is of both a contractual and jurisdictional nature. Arbitrators must be independent and impartial and they are bound to disclose all facts that may have potential implications on their impartiality and independence. Additionally, arbitrators must ensure that arbitral proceedings are both swift and fair.

Where remuneration and expenses have not been dealt with by the parties in the arbitration agreement or the arbitration is not subject to institutional rules, they must be governed by a written agreement concluded between the parties and the arbitrators before the last arbitrator has accepted his or her duties. If no agreement is reached up to this time, the arbitrators will set their own fees and expenses, taking into account the complexity of the case, the amount under dispute and the length of time that arbitrators foresee will be necessary to decide on the subject matter. Such decision may be reviewed by the competent state court.

Arbitrators may request advances on their fees and expenses; where the parties fail to provide these advances, the arbitrators may suspend or end the arbitral proceedings after a reasonable additional period has been given for the parties to do so.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators are generally immune, much like state judges, but they may be held liable for dishonest or fraudulent conduct in the course of the arbitration.

In addition, an arbitrator who unjustifiably withdraws from his or her duties may also be held accountable for the resulting damages. Equally, arbitrators whose conduct unjustifiably delays the award may also be held accountable for the resulting damages.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

An agreement to arbitrate entails the parties waiving their right to institute judicial proceedings on the matters or disputes submitted to arbitration. As a result, once the parties have agreed to resort to arbitration, courts may only intervene in those situations foreseen in the VAL.

The VAL recognises the negative effect of the principle of competence-competence, whereby a state court asked to rule on a dispute subject to an arbitration agreement is bound to dismiss the case unless it finds that the arbitration agreement is manifestly null and void, is or became inoperative or is incapable of being performed. The court will not address this matter on its own volition. Unless the party raising this question is only made aware of the relevant facts at a later stage, it must be submitted to the court in the respondent's statement of defence.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The arbitral tribunal is entitled to decide the issue of its own jurisdiction. For this purpose the arbitral tribunal may rule on the existence, validity and effectiveness of the arbitration agreement. Parties may only challenge the arbitral tribunal's jurisdiction within the time limit set for submitting the statement of defence, or together with it. Should relevant facts evidencing the tribunal's lack of jurisdiction subsequently come to light, the parties may still raise the issue at a later stage.

The arbitral tribunal may rule on its own jurisdiction either in the award on the merits or by means of an interim decision. In the latter case, a party may challenge the decision before the state court within 30 days of its service. While the appeal is pending, the arbitral tribunal may continue proceedings and even render an award on the merits. Should the judicial appeal succeed, the arbitral award will be deemed void. If, on the other hand, the arbitral tribunal only reaches a decision on this issue in the final award, the decision by which the tribunal finds itself competent may only be challenged in proceedings to set aside the award.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

In the absence of a prior agreement between the parties, the choice of the place of the arbitration falls to the arbitral tribunal, taking into account both the specific circumstances of the case and how convenient the place would be to the parties.

The choice of seat does not preclude the arbitral tribunal from meeting or conducting hearings at any place it deems appropriate.

Parties are also free to agree on the language or languages to be used in the proceedings. Failing such an agreement, the choice of language will also fall to the tribunal.

23 Commencement of arbitration

How are arbitral proceedings initiated?

Where there is no prior agreement as to how to commence proceedings, the party intending to bring a dispute before an arbitral tribunal must notify the opposing party of that fact. Arbitral proceedings begin on the date on which the request for arbitration is received by the respondent.

24 Hearing

Is a hearing required and what rules apply?

The arbitral tribunal has the discretion to decide whether to hold a hearing or not. Nevertheless, the tribunal must hold a hearing for the production of evidence should any of the parties so request.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Parties may freely choose the rules governing the proceedings, including rules on the types of evidence that may be admitted. Failing such an agreement, it is up to the tribunal to set the rules it deems most appropriate to the case. Indeed, the VAL sets forth that the tribunal may determine the admissibility, relevance, materiality and weight of any evidence.

Inspired by the Model Law, the VAL allows for all means of evidence, either allowed or not under the Portuguese Civil Procedure Code, precisely to stress that limitations arising therefrom (such as the limitations to the possibility for a party representative to be called as a witness), do not apply in arbitration.

Parties may voluntarily submit documents to the tribunal, notably with their submissions. Furthermore, the arbitral tribunal may order the parties or other persons to submit documents in their possession. Where such a request is not voluntarily complied with, a party may, upon authorisation of the tribunal, request judicial assistance on the matter.

Although witness evidence is admissible, the VAL is silent on the matter, particularly on the admissibility of written statements. This matter is thus subject to the will of the parties.

Unless agreed by the parties, the arbitral tribunal may, of its own volition or at the request of the parties, nominate one or more experts to prepare a written or oral expert report on specific issues determined by the tribunal.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

The VAL does not specifically provide for a situation in which the tribunal itself may request assistance from state courts. Indeed, even in respect of state court assistance in the production of evidence, the tribunal cannot do so on its own volition: it must be one of the parties to request such assistance, although the tribunal must authorise the party to do so.

Having said that, there are several instances where state courts may intervene during arbitration proceedings, namely for the following purposes:

- to grant interim measures, which may be ordered even prior to the commencement of arbitral proceedings;
- to enforce interim measures ordered by arbitral tribunals;
- to appoint arbitrators where the parties or appointing authorities have failed to do so and to decide on challenges, following prior decision of the tribunal refusing a challenge;
- to decide on requests for reduction of fees or costs, as mentioned above; and
- to assist the tribunal with the submission of evidence when one of the parties or a third party refuses to cooperate.

When the arbitral proceedings are finished, the courts will rule on appeals (if the parties have expressly agreed to allow them), and on proceedings for setting aside, recognising and enforcing awards. State courts may also be called upon to rule on interim awards on jurisdiction, as mentioned above.

27 Confidentiality

Is confidentiality ensured?

Arbitrators, the parties and arbitral institutions, as the case may be, are all bound to maintain the confidentiality of any information and documents they may have access to in the course of the proceedings. Nevertheless, parties have the right to disclose information involved in the proceedings if necessary to defend their rights or if ordered to do so by any authority.

Awards and other decisions issued by arbitral tribunals may be published provided the parties so agree and are not identified.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Interim measures may be requested from an arbitral tribunal or a state court without distinction. Indeed, a request for interim measures made by a party to a state court prior to or in the course of arbitral proceedings is not deemed incompatible with an arbitration agreement. Such interim measures will follow local civil procedural law, which foresees, in general, measures intended to maintain status quo or to prevent irreparable harm pending final determination of the dispute.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The VAL does not address the issue of emergency arbitrators. However, the Arbitration Centre of the Portuguese Chamber of Commerce and Industry has revised its rules (effective March 2014) and has included emergency arbitrator provisions.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The VAL expressly entitles an arbitral tribunal to grant both interim measures and preliminary orders. There is no limitation to the types of interim measures that can be granted by an arbitral tribunal, defined by the VAL as measures of a temporary nature, 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:

- maintain or restore the status quo pending determination of the dispute;
- take action that would prevent, or refrain from taking action that is likely to cause, harm or prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award may be satisfied; and
- preserve evidence that may be relevant and material to the resolution of the dispute.

Practical considerations, such as the need for enforcement, may suggest that it is preferable to resort to state courts in certain cases.

Arbitrators may request advances on their fees and expenses; where the parties fail to provide these advances, the arbitrators may suspend or end the arbitral proceedings after a reasonable additional period has been given for the parties to do so. The VAL does not, however, address the issue of security for costs.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use ‘guerrilla tactics’ in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

When addressing the contents of the award, the VAL states that the tribunal may, if deemed fair and adequate, decide that one or some of the parties must compensate the other or others for all or part of the reasonable costs and expenses (including lawyers’ and expert fees) incurred in connection with the arbitration. This rule is aimed, according to relevant authors, at allowing the tribunal to sanction parties giving rise to costs owing to their procedural behaviour. There is no other provision in the VAL or in the PCCI Rules that specifically addresses the powers of arbitrators to sanction counsel.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

The VAL provides for majority voting. When a majority cannot be reached, the award must be rendered by the tribunal’s chairperson.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Presently, the VAL no longer provides for dissenting opinions. Therefore, they no longer need to be included in the text of the award, nor does the award need to be signed by the dissenting arbitrator.

Under the previous Arbitration Law, dissenting opinions were common practice in Portugal.

34 Form and content requirements

What form and content requirements exist for an award?

The award must be made in writing and signed by the arbitrators. In arbitrations with more than one arbitrator, the signature of a majority

of the arbitrators or of the chairperson, if the award is rendered only by the latter, will suffice. Where an award is signed by a minority of arbitrators or by the chairperson only, it must state the reasons for omitting the remaining signatures.

Unless otherwise agreed by the parties, the reasons for the decision must be set out. This does not apply to awards by consent.

Finally, the award must also mention the date on which it was rendered and the seat of arbitration.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

Unless otherwise agreed by the parties, the final award must be delivered to the parties within 12 months of the date of acceptance of the last of the arbitrators to be appointed. This time limit may be extended one or more times for successive periods of 12 months if the parties so agree. The arbitral tribunal may also extend the time limit itself provided there are grounds for doing so and the extension is justified. Parties have the right to oppose this latter type of extension provided they are both in agreement.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The date of delivery of the award is decisive, as mentioned in the preceding answer, for fulfilment of the time limit to render the award. Furthermore, the time limit for requesting that the award be corrected or clarified is counted from the date on which the applicant receives notice of the award, the same applying to additional awards as to parts of the claim or claims presented in the arbitral proceedings but omitted from the award. Finally, the time limit to request the setting aside of the award is also counted from date of delivery of the same to the parties.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The VAL does not expressly distinguish between different types of award. It does, however, provide for final and interim awards and also awards by consent.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

If the claimant fails to present its statement of claim, the tribunal shall terminate the arbitral proceedings. The same occurs if, during the proceedings, the parties settle the dispute. Failure to deliver the final award within the maximum time limit shall also automatically terminate the arbitral proceedings. Furthermore, the VAL sets forth that the arbitral tribunal shall issue an order for the termination of the arbitral proceedings when the claimant withdraws its claim with no objection from the respondent or the arbitral tribunal finds that it has become unnecessary or impossible to continue the proceedings. Finally, in case of failure on advance payments for fees and expenses previously agreed or fixed by the arbitral tribunal or state court, the tribunal may suspend or end the arbitral proceedings after a reasonable additional time limit granted to that effect to a party or parties at fault has elapsed. Prior to such decision, the tribunal shall give notice of lack of payment to the remaining parties so that these may, if they wish, remedy the failure to make said advance payment within the time limit granted to that effect.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Unless otherwise agreed by the parties, the award must contain a decision on cost allocation. Arbitrators may order one or more of the parties to pay reasonable costs incurred by other parties during the

proceedings (including attorney fees) as long as proof of those costs and expenses is provided.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

The question of whether interest may be awarded for principal claims is a matter to be decided under the applicable substantive law. The VAL is silent on the issue of interest for costs.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative?

What time limits apply?

Unless another time limit has been agreed upon, parties have 30 days from the date of delivery of the award to request the correction of any calculation, typographical error or other similar error.

The same time limit applies for parties to request that the arbitral tribunal clarify any point of the award or underlying reason given for it that is unclear or ambiguous.

If the arbitral tribunal considers the request to be justified, it must correct the award or clarify it within 30 days of receiving the request. The clarification will then become part of the award.

The arbitral tribunal may also correct any error of the types referred to above of its own volition within 30 days of giving notice of the award.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

A party may, furnishing proof thereof, apply to have an award rendered in Portugal set aside on the following grounds:

- one of the parties to the arbitration agreement was under a legal incapacity or the agreement is not valid under the law to which the parties agreed to submit it (or under the VAL, where no law is expressly chosen);
- there has been a breach of any of the mandatory principles of due process applicable under the VAL and the breach has decisively influenced the decision of the dispute;
- the award deals with a dispute not contemplated by the arbitration agreement or it contains decisions on matters beyond the scope of the arbitration agreement;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement between the parties, unless such agreement was in conflict with a provision of VAL from which the parties cannot derogate, or, failing such agreement, was not in accordance with the VAL, and in any case, said inconformity had a decisive influence on the decision of the dispute;
- the tribunal makes an award in excess of the amount claimed or on a different claim from that which was presented, rules on issues for which no decision was required or fails to rule on issues for which a decision was required;
- the award is not signed by the arbitrators or the chairperson (where applicable) or no reasons are given to justify the award, as required by the VAL; or
- the award is notified to the parties after the time limits set under the VAL or agreed to by the parties have elapsed.

An award may also be set aside if the court, *sua sponte*, finds that the subject matter of the dispute cannot be settled by way of arbitration under Portuguese law, or the award is contrary to principles of international public policy of the state of Portugal.

Update and trends

The Portuguese Arbitration Association's think tank in charge of studying arbitration in corporate disputes and the need for specific regulation prepared two relevant drafts in May 2016: on the one hand, a preliminary draft law regulating the rules applicable to corporate arbitration, namely those arbitrations triggered by arbitration clauses inserted in company's by-laws; and on the other, a body of rules on arbitration for corporate disputes to be adopted by arbitral centres. These two drafts were subject to debate and were presented to the Ministry of Justice.

Although there is no pending investment arbitration case, it is worth mentioning that a Mexican company has recently threatened to bring an investment treaty claim against Portugal over a cancelled deal to privatise part of Lisbon's public transport system.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level?

Approximately what costs are incurred at each level? How are costs apportioned among the parties?

As a rule, an award is not subject to appeal, either in domestic or international arbitration, unless otherwise agreed by the parties. The only means to challenge an award under the VAL is to institute proceedings to set it aside.

There are no statistics on how long such proceedings will take to be decided, but they may take at least several months.

The statutory costs incurred by the parties will depend basically on the value of the dispute.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Domestic awards are considered equivalent to state court judgments and, as such, do not need to be recognised prior to enforcement. The party applying to a state court for the enforcement of an award must provide the original award or a certified copy thereof and, if the award is written in a language other than Portuguese, a certified translation.

The arbitral award may be enforced even if an application for setting it aside has been made. However, the party against whom the enforcement is being sought may request that enforcement proceedings be stayed while the proceedings to set aside the award are pending, provided that it posts security.

The party against whom the enforcement is being sought may oppose enforcement on any of the grounds available for setting aside the award provided that an application to set aside the award based on those same grounds has not already been dismissed by a final and binding judgment.

Without prejudice to the mandatory provisions of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as well as to other treaties or conventions that are binding on the Portuguese state, foreign awards are only effective in Portugal when recognised by a competent court pursuant to the VAL. To this effect, the party seeking recognition must supply the duly authenticated original or a certified copy of the award, as well as the original or a certified copy of the arbitration agreement. If these are not written in Portuguese, a duly certified translation of the same must also be attached. The party against whom recognition is sought is then served in order to present its opposition, having 15 days to do so. The competent state court will then carry out any eventual actions it deems appropriate, after which the parties will have the possibility to present closing arguments.

Recognition and enforcement of a foreign arbitral award may be refused only:

- at the request of the party against whom the award is invoked, where it can prove any one of the following:
 - a party to the arbitration agreement was subject to some legal incapacity or the agreement is not valid under the law to which the parties have subjected it or, where no law has been chosen, under the law of the country where the award was rendered;

- 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 its case;
- the award deals with a dispute not contemplated by the arbitration agreement or contains decisions on matters beyond the scope of the arbitration agreement, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement between the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;
- the award is not yet final and binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was rendered; or
- if the court itself finds that:
 - the subject matter of the dispute cannot be settled by arbitration under Portuguese law; or
 - the recognition or enforcement of the award would lead to a result clearly incompatible with the international public policy of the state of Portugal.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

There is no relevant information available on this matter.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The VAL does not specifically address either the issue of emergency arbitrators or the enforcement of orders issued by emergency arbitrators.

The PCCI Rules set forth emergency arbitrator provisions and specifically state that the decision made by the emergency arbitrator shall be binding on all parties, except in the situations described in those rules (eg, when a period of 120 days has elapsed since the decision and the arbitral tribunal has not been constituted owing to reasons not caused by the responding party). It does not contain, however, any specific provisions on enforcement of orders by emergency arbitrators.

As a matter of interest, the PCCI Rules state that:

- emergency arbitrators may not issue preliminary orders but only interim measures;
- the emergency arbitrator's decision may be freely amended and reversed upon request by any of the parties and is not binding on the arbitral tribunal; and

- until the arbitral tribunal is constituted, the emergency arbitrator is competent to modify the decision and, afterwards, the arbitral tribunal is competent to do so.

That said, pursuant to article 27 of the VAL, enforcement of interim measures issued by an arbitral tribunal is possible upon application to the competent state court. As such, an order issued by an emergency arbitrator should, in principle, be enforceable under this provision.

47 Cost of enforcement

What costs are incurred in enforcing awards?

Costs to be incurred by the parties with enforcement proceedings are set out in the law and will depend primarily on the value of the dispute.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Portugal is a civil law jurisdiction.

The Civil Procedure Code provides for a combination of the inquisitorial and adversarial systems. Thus, although the general rule is that each party must prove the facts that it claims, courts are also under a duty to seek the truth and may on their own motion order that evidence be submitted.

There is no tendency towards US-style discovery. The VAL is silent on written statements and party officer testimonials. These matters are subject to the will of the parties.

Documentary evidence carries considerable weight. However, contrary to other civil law systems, the hearing of witnesses is frequent and both judges and arbitrators rely on witness testimony, notably to confirm and clarify documentary evidence.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

In 2010, the Portuguese Arbitration Association approved a Code of Ethics, since revised (in 2014). Such Code applies to all members of the association, which is to say the majority of the Portuguese arbitration community. Furthermore, in March 2014 the Arbitration Centre of the Portuguese Chamber of Commerce and Industry, upon revision of its Rules, approved a similar Code of Ethics that applies to arbitrations conducted under its auspices. At least another arbitration institution has, since, adopted similar rules. All these Codes of Ethics specifically refer to the IBA Guidelines on Conflicts of Interest, namely stating that the provisions of the Codes shall be interpreted and integrated in accordance with the latter.

MIRANDA
Miranda & Associados Sociedade de Advogados RL

Agostinho Pereira de Miranda
Sofia Martins
Pedro Sousa Uva

agostinho.miranda@mirandalawfirm.com
sofia.martins@mirandalawfirm.com
pedro.uva@mirandalawfirm.com

Av. Eng. Duarte Pacheco 7
1070-100 Lisbon
Portugal

Tel: +351 217 814 800
Fax: +351 217 814 802
www.mirandalawfirm.com

These Codes enshrine some of the principles contained in the IBA Guidelines on Party Representation in International Arbitration, such as, for instance, in respect of communication with arbitrators.

Portuguese lawyers are further bound by the Rules of Ethics of the Portuguese Bar Association that also reflect some of the principles contained in the IBA Guidelines on Party Representation in International Arbitration. The main exception would concern matters of document production.

50 Third-party funding**Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?**

There is no regulation on third-party funding of arbitration in Portugal.

However, as referred to in answer to question 49, both the Code of Ethics of the Portuguese Arbitration Association and the Code of Ethics of the Portuguese Chamber of Commerce and Industry, by specifically

stating that the provisions of such Codes shall be interpreted and integrated in accordance with the IBA Guidelines on Conflicts of Interest, will take into consideration Standard 7 of the revised Guidelines (2014), whereby the parties should disclose any relationship, either direct or indirect, between the arbitrator and one of the parties. This extends the concept of party to 'relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such as an entity providing funding for the arbitration, or having a duty to indemnify a party for the award'.

51 Regulation of activities**What particularities exist in your jurisdiction that a foreign practitioner should be aware of?**

Non-EU citizens are generally required to hold a visa when entering the country, although there are several exceptions to this rule.

Qatar

Sean Whitham and Janine Mallis

Herbert Smith Freehills LLP

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Qatar acceded to the New York Convention on 30 December 2002, and it came into force on 30 March 2003 by way of Emiri Decree No. 29 of 2003. Qatar declared the 'reciprocity reservation' pursuant to article 1(3) of the New York Convention, meaning that it will only recognise and enforce awards made in other contracting states.

Qatar is also a signatory to the following:

- Convention on the International Centre for Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID Convention) (which came into force in Qatar on 20 January 2011);
- Convention on Judicial Cooperation between states of the Arab League (Riyadh Convention) of 1983;
- Arab League Convention on Commercial Arbitration of 1987; and
- Gulf Council Convention for the Execution of Judgments, Delegations and Judicial Notifications of 1996 (Gulf Convention).

Qatar has also been a member of the World Trade Organisation since 13 January 1996.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Qatar has signed 52 bilateral investment treaties, 22 of which are currently in force.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

There are two legal jurisdictions in Qatar with their own sources of arbitration law: the state of Qatar and the Qatar Financial Centre (the QFC).

State of Qatar

Arbitration in the state of Qatar is governed by Part 13 of the Qatari Civil and Commercial Procedure Law (No. 13 of 1990) (the CCPL). Articles 190 to 210 of the CCPL set out the rules dealing with arbitration. Articles 379 to 383 deal with the recognition and enforcement of foreign arbitral awards. The CCPL does not distinguish between 'domestic' and 'international' arbitration.

In October 2016, the Qatari Justice Ministry reported that the draft new arbitration law (the Draft Law), which has been expected for a number of years, had been approved by the Advisory Council. The

Draft Law is expected to replace the arbitration provisions of the CCPL and to be based on the UNCITRAL Model Law.

QFC

The QFC was established in March 2005 under QFC Law No. 7 of 2005 (the QFC Law). The QFC has its own legal jurisdiction that is separate to the Qatari legal system (save for matters not governed by the QFC, such as criminal law). The QFC provides an independent legal, tax and business framework in which companies may be 100 per cent foreign-owned and may carry out permitted business activities within Qatar.

In November 2005, the QFC enacted the QFC Arbitration Regulations (Regulation No. 8 of 2005) (the QFC Arbitration Regulations) that apply to commercial disputes relating to contracts concluded under QFC legislation and where the chosen seat of the arbitration is the QFC. The QFC Arbitration Regulations are based on the UNCITRAL Model Law.

The QFC Arbitration Regulations refer to the 'QFC tribunal' (which was established by the Tribunal and Dispute Resolution Regulations under the QFC Law). The QFC tribunal oversees arbitrations at a high level and is available to make certain determinations upon the request of the parties. For example, a party may apply to the tribunal to have a QFC arbitral award set aside, or request a determination regarding the appointment of arbitrators (article 14 of the QFC Arbitration Regulations).

The QFC has the power to recognise and enforce awards made in a seat other than the QFC (including foreign awards) in relation to disputes arising out of or in relation to the QFC (Part 4 and 5 of the QFC Arbitration Regulations). The QFC's powers are limited to recognising and enforcing awards within the QFC (as opposed to outside it, within the state of Qatar).

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The CCPL arbitration provisions are not based on the UNCITRAL Model Law. The Draft Law is expected to be based on the UNCITRAL Model Law. The Qatar International Centre for Conciliation and Arbitration (the QICCA) Rules are based on the UNCITRAL Arbitration Rules. The QFC Arbitration Regulations are based on the UNCITRAL Model Law.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The CCPL includes the following mandatory provisions for arbitration:

- the arbitration agreement must be in writing (article 190). That there was a written arbitration agreement may not be established as a matter of proof, such as by affidavit. There must be a written arbitration agreement for the arbitration to be valid;
- the subject matter of the dispute must be provided in the arbitration agreement, or more likely, determined during the proceedings (article 190);

- parties to an arbitration must have the capacity to dispose of their rights (article 190);
- if more than one arbitrator is appointed to a tribunal, the number of arbitrators must be odd (article 193);
- the procedure for rendering a final award must be followed (article 202); and
- the procedure for the enforcement and challenge of an award must be followed (articles 204 and 207).

Article 10 of the QFC Arbitration Regulations also provides that the arbitration agreement must be in writing.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Article 198 of the CCPL provides that parties are free to agree on the law applicable to the merits of the case. If the seat of the arbitration is Qatar, the laws of the state of Qatar shall apply. Under article 198 of the CCPL, the arbitrators are not bound by Qatari procedural law. It is possible for an arbitration in Qatar to be subject to, for example, English procedural law, and French substantive law, if the parties so desire.

It is expected that under the Draft Law, where the parties have not agreed on the applicable substantive law, the tribunal may determine the appropriate substantive law by applying the relevant conflict of laws rule. Under the UNCITRAL Model Law, upon which the Draft Law is expected to be based, the tribunal may choose the applicable law by considering the factors that link the substantive legal issues to the potentially relevant states in order to determine which state's laws have the greatest connection. The law with the greatest connection would be expected to be held as the applicable law.

Under article 34 of the QFC Arbitration Regulations, where the parties fail to decide the law applicable to the substance of the dispute, the tribunal will apply the law determined by the conflict of laws rules that it considers applicable, taking into account the usages of the trade applicable to the transaction.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

QICCA

The QICCA was established within the Qatar Chamber of Commerce and Industry by Decision No. 5/8 of 2006. The QICCA is located in Doha and has its own arbitration rules where the parties have chosen the QICCA as the forum for their arbitration. The rules are modelled on the UNCITRAL Arbitration Rules.

The QICCA maintains a list of individuals who are qualified to act as arbitrators under the QICCA Arbitration Rules, although parties may appoint someone who is not on the list as an arbitrator with the prior approval of the QICCA.

Fees are calculated on the basis of the amount in dispute, as per Table 2 ('Arbitrators' Fees') of Chapter 5 of the QICCA's Rules of Conciliation and Arbitration.

Qatar Chamber of Commerce & Industry
PO Box 402
Doha
Qatar
<http://qatarchamber.com/1505>

QFC

The QFC Arbitration Regulations deal with arbitrations relating to contracts concluded under the QFC Law (No. 7 of 2005) and where the QFC is designated as the seat of the arbitration. The QFC has not yet administered any arbitrations.

Arbitrators are not required to be selected from a list of arbitrators.

Fees are likely to be calculated on the basis of the amount in dispute, however this is not explicitly provided for in any legislation or regulations.

Qatar Financial Centre
Level 14, QFC Tower
PO Box 22989
Doha
Qatar
www.qfcra.com/en-us/SitePages/Home.aspx

The QFC will, however, be moving to a new location in mid-2017 (see 'Update and trends').

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Under article 190 of the CCPL, arbitration is not possible for matters that cannot be settled amicably. This includes:

- personal disputes, such as those relating to marriage, incapacity or guardianship; and
- criminal disputes and those contrary to public policy, such as disputes relating to gambling, drugs or prostitution.

The Draft Law is expected to include a definition of 'commercial arbitration' that would be based upon the definition of 'commercial' in the UNCITRAL Model Law on Commercial Arbitration. This would have the effect of limiting the types of disputes that are arbitrable to those that are commercial in nature.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

As provided in the response to question 5, article 190 of the CCPL sets out the requirements for an arbitration agreement as follows:

- the arbitration agreement must be in writing;
- the arbitration agreement must set out the subject matter of the dispute, otherwise the subject matter must be specified during the dispute;
- the parties must have full legal capacity; and
- the dispute must be arbitrable.

As with article 190 of the CCPL, the Draft Law is also expected to require arbitration agreements to be in writing. The Draft Law is expected to provide that an exchange of letters, emails or other correspondence will be sufficient in determining the existence of an arbitration agreement. Under the Draft Law an arbitration agreement may be in the form of an arbitration clause in the contract between the parties or in the form of a separate document. This would clarify, and potentially expand, the type of arbitration agreements that are enforceable.

For QFC arbitrations, an arbitration agreement must be in writing (article 10 of the QFC Arbitration Regulations). An arbitration agreement can be in the form of an exchange of documents or emails, a clause in a contract, or a separate document, as long as there is a tangible or electronic record of the agreement.

In relation to public works and public procurement contracts, an arbitration agreement involving a state entity requires the prior approval of the Ministry of Finance (article 34 of the Law on the Regulation of Tenders and Auctions (Law No. 24 of 2015) (the Public Procurement Law, superseding Law No. 26 of 2005)).

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement will not be enforceable if it does not meet the formal requirements (see question 9). For example, an arbitration agreement would not be enforceable where a party loses legal capacity.

While the CCPL and QFC Arbitration Regulations are silent on the matter, the Qatari courts apply the principle of severability, such that the arbitration agreement under a contract is autonomous from the balance of the contract. The arbitration agreement ought to remain enforceable despite the invalidity or termination of the contract.

It is possible for a party to waive its right to insist on arbitration. In Court of Cassation case 7/2008, the Court held that in circumstances

where one party commences litigation, the other party waives its right to arbitration if it acquiesces in the other party referring the dispute to litigation. A party must seek to enforce an arbitration agreement as soon as possible, to avoid the risk of waiving its right to insist upon it.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Article 190 of the CCPL provides that the ‘parties’ to a contract may agree to arbitration. The CCPL is otherwise silent in respect of whether third parties may be bound by an arbitration agreement. Article 177 of the Qatar Civil Code (Law No. 22 of 2004) (the Code) establishes priority of contract under Qatari law. Article 177 provides that a contract shall not create obligations binding on third parties. Furthermore, article 175 of the Code provides that a contract is binding on the contracting parties, and their successors.

The Code provides for the transfer of contractual rights and obligations by assignment or novation. A third-party transferee may subsequently become bound by an arbitration agreement.

Generally, only the parties to an arbitration agreement and their successors will be bound by it.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The CCPL does not provide for third-party participation in arbitral proceedings, except for articles 200 and 207. Article 200 allows a tribunal to solicit the Qatari Court’s assistance in order to summon a third party to appear as a witness in the proceedings or to disclose a necessary document in its possession. Article 207 provides that any interested party may request the setting aside of the final award. An interested party is not limited to the parties to the arbitration agreement and may extend to third parties.

Joinder may be provided for under the applicable arbitration rules, for example article 7 of the ICC Arbitration Rules (ICC Rules). Joinder would however require the consent of all parties, and the third party, as there is no power for the tribunal (or the Qatari court on behalf of the tribunal) to compel parties to be joined to an arbitration.

For QFC arbitrations, the QFC tribunal may, on the application of the parties to two or more arbitration proceedings, order the proceedings to be:

- consolidated;
- heard at the same time or immediately one after the other; or
- any of the arbitration proceedings to be stayed until the determination of any other of them (article 20 of the QFC Arbitration Regulations).

The QFC Arbitration Regulations do not otherwise refer to third-party participation in arbitration.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the ‘group of companies’ doctrine?

The ‘group of companies’ doctrine does not appear to be recognised in Qatar and we are not aware of circumstances of it being tested in the Qatari courts. It is unlikely that Qatari courts or arbitral tribunals would extend an arbitration agreement to a non-signatory company owing to the fact that it belongs to a group of companies involving a signatory entity.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The CCPL does not expressly deal with multiparty arbitration agreements. However, it is likely that the same requirements relating to bilateral arbitration agreements will still apply (see question 9).

The QFC Arbitration Regulations do not expressly deal with multiparty arbitration agreements. However, it is likely that articles 10 to 12 of the QFC Arbitration Regulations dealing with arbitration agreements generally will still apply.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Article 193 of the CCPL provides that an arbitrator must not be a minor, bankrupt, legally incapacitated or a person deprived of his or her civil rights because of a criminal offence (unless he or she has been rehabilitated). There are no restrictions regarding nationality, religion or gender. In principle, a contractual stipulation requiring an arbitrator to be a certain nationality, religion or gender ought to be upheld by the Qatari courts.

The Draft Law is expected to provide that an arbitrator may be appointed if he or she has legal capacity and a good reputation (this would likely exclude a person convicted of a crime involving moral turpitude or dishonesty, even if rehabilitated). It is expected that arbitrators will be registered with the National Registry of Arbitrators at the Ministry of Justice (which is expected to be established under the Draft Law) or in the case of institutional arbitration, from the lists of arbitrators kept by the respective arbitration centres. It is unlikely that there would be any restrictions or requirements regarding nationality, religion or gender under the Draft Law.

For QFC arbitrations, article 14 of the QFC Arbitration Regulations provides that no persons shall be precluded from acting as an arbitrator on the basis of nationality, unless otherwise agreed by the parties.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Article 193 of the CCPL provides that an arbitrator shall be appointed as agreed between the parties. Article 195 of the CCPL provides that if a dispute arises between the parties in relation to the appointment of arbitrators, or if one or more of the arbitrators is unavailable, refuses to act, withdraws or is dismissed, then the Qatari court may appoint the arbitrators at the request of either or both parties. An application to appoint an arbitrator is heard before all parties. An application may proceed even if one party refuses to attend after being summoned to appear. If the arbitration is subject to institutional arbitration rules, those rules may provide a default mechanism for the appointment of arbitrators.

For arbitrations regulated by the QFC Arbitration Regulations, the default mechanism for the appointment of arbitrators will be that each party will appoint one arbitrator and the two arbitrators will appoint the third arbitrator. Failing this, or in cases where it is decided that there will only be one arbitrator and the parties cannot agree on the arbitrator’s identity, the appointment will be made by the QFC tribunal, upon the request of a party (article 14(3) of the QFC Arbitration Regulations).

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Under article 194 of the CCPL, an arbitrator may not be removed except with the approval of all of the parties to the dispute, or upon an

order from the court. The grounds for removal must occur or emerge after the arbitration agreement was entered into. The grounds are the same as those for which a Qatari court judge may be recused. The grounds for recusal of a judge are provided under articles 98 and 100 of the CCPL, and include if the judge is a relative or spouse of a party or their lawyers. Parties may appeal against the court's decision in removing or refusing to remove an arbitrator.

If the arbitration is subject to institutional rules, then these rules may also provide for a procedure to challenge the appointment of an arbitrator, such as article 14 of the ICC Rules.

Under article 194 of the CCPL, an application to remove an arbitrator must be made within five days from the date of notification of the arbitrator's appointment. An obvious difficulty is that a party might not become aware of the ground for removal of the arbitrator until after five days have elapsed. There are no known cases where this provision has been tested, although in response to such an application, the court may be inclined to find that the five-day period runs from the date the challenging party became aware of the grounds giving rise to the challenge.

For QFC and QICCA arbitrations, a request for recusal shall be submitted to the arbitral tribunal within 15 days from the appointment (QICCA) or from when the challenging party first became aware of the cause (QFC), unless otherwise agreed by the parties.

Under article 15 of the QFC Arbitration Regulations, an arbitrator may be disqualified in circumstances where there are justifiable doubts as to the arbitrator's independence or impartiality. A party may only challenge the appointment of the arbitrator for reasons of which he or she became aware after the appointment of the arbitrator.

The IBA Guidelines on Conflicts of Interest in International Arbitration may be used for guidance, but is not binding.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

While not dealt with expressly, article 190 of the CCPL provides that the parties 'may agree' to arbitration. The relationship between the parties is contractual.

The parties' relationship with the arbitrators is also contractual, albeit arbitrators also have additional rights and obligations under the CCPL. For example, an arbitrator that has accepted his or her appointment may not withdraw without good reason. Arbitrators may only be removed by agreement by all parties by an order of the court. If an arbitrator unilaterally withdraws from the arbitration, he or she is liable to compensate the parties under article 194. As mentioned in question 17, the same conflict of interest rules apply to arbitrators as to judges.

Article 210 of the CCPL provides that the remuneration of arbitrators shall be specified in the arbitration agreement or in a subsequent agreement between the parties. In the absence of such an agreement, the court may determine the amount payable to the arbitrators.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The CCPL does not provide arbitrators with immunity from liability. As mentioned in the response to question 18, under article 194 an arbitrator must not withdraw without the agreement of the parties or a court order, otherwise the arbitrator is liable to compensate the parties. If the arbitration is subject to institutional rules, these rules may provide for an immunity or limitation of any liability of the arbitrators and the appointing authority, for example article 40 of the ICC Rules. The Draft Law is expected to provide for the immunity of arbitrators.

Article 17 of the QICCA Rules of Conciliation and Arbitration (QICCA Rules) excludes any liability of the arbitrators, save for intentional wrongdoing.

For QFC arbitrations, article 19 of the QFC Arbitration Regulations provides that an arbitrator shall not be liable for anything done or omitted in the discharge or purported discharge of his or her functions, unless the act or omission is shown to be in bad faith.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Article 192 of the CCPL provides that by agreeing to arbitrate, the parties waive their rights to have recourse to the courts. If a party, in breach of an arbitration agreement, seeks to commence proceedings in court, the other party may insist that the parties comply with the arbitration agreement. The court may find that the claim is inadmissible.

Under article 70 of the CCPL, any assertion that a claim is inadmissible must be raised in the first written submission to the court, and should be raised during the first hearing as a matter of practice. A party who fails to raise the arbitration agreement risks the defence lapsing. The Court of Cassation in Judgment 57/2008 found that a party may waive its right to insist on an arbitration agreement where it does not object to proceedings issued in court.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The CCPL is silent as to disputes regarding the jurisdiction of the arbitral tribunal. The CCPL is also silent as to the arbitral tribunal's ability to rule on its own jurisdiction (the 'competence-competence' principle).

For arbitrations regulated by the QFC Arbitration Regulations, the arbitral tribunal may rule on its own jurisdiction (article 21).

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

The CCPL does not provide a default mechanism for the determination of the seat or language of the arbitral proceedings where the arbitration agreement is silent. It is expected that the Draft Law will deal with this.

Article 198 of the CCPL provides that if the parties agree to hold their arbitration in Qatar, the laws of Qatar shall apply to all elements of the dispute, unless otherwise agreed by the parties. This might suggest that the default seat for the arbitration would be Doha, and the language would be Arabic. However, the view is also held that the seat and language of the arbitration, if the arbitration agreement is silent, are matters for determination by the arbitral tribunal at the commencement of the arbitration.

For arbitrations regulated by the QFC Arbitration Regulations, the parties are free to decide on the place and language of the arbitration. Failing this, the seat and language of the arbitration shall be determined by the arbitral tribunal or, in the case of an administered arbitration, the administering arbitral institution, having regard to the circumstances of the case and the convenience of the parties (article 26 of the QFC Arbitration Regulations).

23 Commencement of arbitration

How are arbitral proceedings initiated?

The CCPL does not provide for the way in which arbitral proceedings should be initiated. For an institutional arbitration, the relevant rules may, however, deal with the commencement of proceedings (for example, article 4 of the ICC Rules).

For arbitrations under the QFC Arbitration Regulations, the arbitration proceedings will commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent, subject to any contrary agreement by the parties (article 27 of the QFC Arbitration Regulations).

24 Hearing

Is a hearing required and what rules apply?

The CCPL does not expressly provide that a hearing is required. Qatari arbitrations usually include oral hearings involving the parties, witnesses and experts.

For arbitrations regulated by the QFC Arbitration Regulations, article 30 provides that, unless the parties have otherwise agreed, the arbitral tribunal shall decide whether to hold oral hearings or whether the arbitration should be conducted on the basis of documents and other materials.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Article 200 of the CCPL provides that the arbitrators shall rule on the dispute on the basis of the arbitration agreement and statements made by the parties, which must be submitted by the date stipulated by the tribunal. The parties must submit all of the documentation and evidence that they hold and comply with any request by the arbitral tribunal in this respect.

The arbitral tribunal may request the court with original jurisdiction over the dispute to order the production of evidence and documentation from a third party, or summon a third person to appear as a witness before the arbitral tribunal (article 200 of the CCPL).

The CCPL otherwise leaves it to the discretion of the arbitral tribunal in relation to the taking and assessment of evidence. The IBA Rules on the Taking of Evidence in International Arbitration may be considered by the arbitral tribunal, but are not mandatory.

Under the QFC Arbitration Regulations, the parties to a QFC arbitration are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings (article 24). Failing such agreement, the arbitral tribunal may conduct the arbitration in the manner it considers appropriate, including by determining the admissibility, relevance, materiality and weight of any evidence (article 25).

Unless otherwise agreed by the parties, the tribunal in a QFC arbitration will decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings will be conducted on the basis of documents and other materials (article 30(1)). All statements, documents or other information submitted to the tribunal by one party shall be communicated to the other party, including any expert reports or evidentiary documents upon which the tribunal may rely in making its decision (article 30(3)). Experts may be appointed by the tribunal (article 32).

Under article 33 of the QFC Arbitration Regulations, the arbitral tribunal or a party with the approval of the arbitral tribunal may request the QFC tribunal to provide assistance in taking evidence. The QFC tribunal will execute the request according to its rules on taking evidence.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

As set out in question 25, a court may order the production of evidence by a third party or summon a third party to appear as a witness before the arbitral tribunal if requested by the tribunal. Under article 201 of the CCPL, the arbitrators may also request that the court punishes any third party who fails to appear or refuses to give evidence.

Under article 201 of the CCPL, arbitrators may seek the assistance of the courts to punish contempt or perform any necessary judicial procedures to settle the dispute. The court may also intervene in certain circumstances, such as to hear challenges to arbitrators or replace arbitrators who have withdrawn or have been dismissed.

27 Confidentiality

Is confidentiality ensured?

The CCPL does not provide that arbitration proceedings are confidential. This may of course be required under the parties' arbitration agreement.

Under the Draft Law, the publication of an award, including partial awards, is expected to be prohibited, unless authorised by the parties.

The QFC Arbitration Regulations also make no mention of the confidentiality of proceedings.

Article 41 of the QICCA Rules expressly provides for the confidentiality of the award and of evidence.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

The CCPL does not expressly deal with interim measures by the courts. If a preliminary matter that is outside the powers of the arbitrator arises, or if a party seeks to challenge a document on the basis that it was forged, the arbitrator shall suspend the arbitration, and the matter shall be determined by the courts under article 199 of the CCPL. Under article 200 of the CCPL, during proceedings a court may, on the request of a party, order a third party to produce a document or order a witness to attend and give evidence. The courts otherwise have jurisdiction to deal with urgent matters in relation to a dispute.

Under article 12 of the QFC Arbitration Regulations, a party may request an interim measure of protection from the courts (including the QFC tribunal) before or during the arbitration.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Neither the CCPL nor the QFC Arbitration Regulations deal with the appointment of an emergency arbitrator.

Article 18 of the QFC Arbitration Regulations deals with the appointment of a 'substitute arbitrator' in circumstances where the arbitrator's appointment is successfully challenged by the parties, or where an arbitrator withdraws or it is impossible for him or her to act.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The CCPL does not deal with interim measures by the courts.

The Draft Law is expected to provide that arbitral tribunals may grant interim relief when empowered to do so by the parties. This will be enforceable through the courts.

For QFC arbitrations, the arbitral tribunal is empowered to order interim measures and related securities for QFC-related disputes, unless otherwise agreed by the parties (article 22 of the QFC Arbitration Regulations). This will be enforceable by application to the QFC tribunal, subject to the requirements for the enforcement of an award (article 23 of the QFC Arbitration Regulations).

Qatari law does not provide for security for costs. Security for costs may not be available for arbitrations seated in Qatar.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The CCPL does not expressly deal with the use of 'guerrilla tactics' in arbitration. Article 200 of the CCPL provides that the parties shall submit documents and comply with what is requested by the arbitrators. The arbitral tribunal has the ability to make 'requests' of the parties, which the parties should comply with. There is some scope for an arbitral tribunal to deal with the conduct of parties through the making of requests and procedural orders. The ability of the arbitral tribunal

to sanction parties and counsel for the use of guerrilla tactics is, however, limited.

The QFC Arbitration Regulations do not specifically deal with 'guerrilla tactics' or confer on the arbitral tribunal any express power to sanction parties or their counsel for such conduct. In relation to the conduct of QFC arbitral proceedings generally, article 24 provides that the parties shall be treated with equality and each party shall be given a full opportunity to present its case.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Article 202 of the CCPL provides that the decision of an arbitral tribunal will be made on the basis of a majority of votes. If one or more of the arbitrators refuses to sign the award, the refusal shall be recorded. An award is valid and enforceable if signed by the majority of the arbitrators.

For QFC arbitrations, the decision of the arbitral panel will be made, unless otherwise agreed by the parties, by a majority of votes. Questions of procedure may be decided by a presiding arbitrator if so authorised by the parties or all members of the arbitral panel (article 35 of the QFC Arbitration Regulations).

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

The CCPL does not deal with dissenting opinions. A dissenting tribunal member may refuse to sign the award if the member does not agree with the decision and his or her refusal will be noted on the award (article 202 of the CCPL). If the award is signed by a majority of the members, the award is valid and enforceable.

The QFC Arbitration Regulations do not expressly deal with dissenting opinions. However, article 35 provides that a decision of the arbitral tribunal will be made by a majority of its members and article 37(1) provides that the arbitral award must be signed by a majority of the members, provided that the reason for any omitted signature is stated.

34 Form and content requirements

What form and content requirements exist for an award?

Under article 202 of the CCPL, an arbitral award must be in writing. The award must include a summary of the parties and their evidence, the reasons for the decision, the text of the decision, the date and place of the issuance of the award and the signatures of the arbitrators. A copy of the arbitration agreement must be attached to the award. The award will be valid and enforceable if signed by the majority of arbitrators.

Under article 203 of the CCPL, the award must be filed in the registry of the court with original jurisdiction over the dispute within 15 days after the decision is issued.

For QFC arbitrations, the award must be in writing and include the reasons on which it is based (unless the parties have agreed otherwise), the date and place of arbitration. The award must be signed by a majority of the tribunal members and the reason for any omitted signature needs to be provided (article 37(1) of the QFC Arbitration Regulations).

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

Under article 197 of the CCPL, the arbitrators must issue an award within the time limit stipulated in the arbitration agreement. If the parties have not agreed a time limit, the arbitrators must make the award within three months of being appointed as arbitrators. If the arbitrators fail to render an award within the time limit, either party may refer the dispute to the court with original jurisdiction over the dispute for

the court to extend the time limit, settle the dispute itself or appoint new arbitrators.

It is expected that the Draft Law will provide that the arbitrators must render the final award within 12 months, unless otherwise agreed by the parties. If the award is not made within the time limit, either party may refer the dispute to the president of the court with original jurisdiction over the dispute to order an extension or termination of the arbitration. In the case of a termination, either party may refer the dispute to the courts.

Under the QFC Arbitration Regulations, the time limit is determined by the parties or the arbitral tribunal without any restriction. Under the QJCCA Rules, the time limit for making an award is six months, unless otherwise agreed by the parties.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Article 202 of the CCPL provides that the award shall be considered as issued from the date of signature of the arbitrators, even before its pronouncement or deposit in court.

Under article 203 of the CCPL, the award shall be filed with the registry of the court with original jurisdiction over the dispute within 15 days from the issuance of the decision. The registry of the court shall then prepare a report on the filing with the original copy of the award delivered to the arbitrators. Under article 204 of the CCPL, the award shall not be enforceable until an order is issued by one of the court's judges upon the request of one of the parties.

Under article 205 of the CCPL, arbitral awards may be appealed within 15 days from the filing of the award with the registry of the court with original jurisdiction over the dispute. Article 205 also clarifies that this does not confer a broad right to appeal against arbitral awards in cases in which the arbitrators were authorised to arbitrate the dispute or the parties expressly waived their rights to appeal.

For QFC arbitrations, article 37 of the QFC Arbitration Regulations provides that an award shall be in writing, signed by the arbitrators and shall state its date. The date of the award is the date on which it is signed by the arbitrators. However, a request for a correction of the award must be made by either party within 30 days of the parties receiving the award, unless the parties have agreed a different time period (article 40(1)). An application to set aside an award (for example, for issues of procedural irregularity or the jurisdiction of the arbitrators) must be made within three months from the date that the parties received the award (article 41(3)).

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The CCPL does not expressly provide for the types of awards and relief that may be granted. The CCPL contemplates both 'final' and 'preliminary' awards. Both are possible. The types of awards that are possible are largely guided by the parties' arbitration agreement.

The types of awards and available relief are not set out under the QFC Arbitration Regulations; however, reference is made to proceedings being terminated by the 'final Award' (article 39(1)).

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Article 196 of the CCPL provides for the termination of a hearing of a dispute if a reason for such termination exists under the CCPL. Examples include where an arbitral tribunal does not make an award within the set time limit (article 197) and once a final award has been made. Arbitration proceedings may be terminated if the parties settle the dispute or otherwise the claimant withdraws its claim.

For QFC arbitrations, the proceedings may be terminated upon issuing the final award or by an order of the arbitral tribunal. This includes if the claimant withdraws his or her claim, the parties agree to terminate the proceedings or the arbitral tribunal finds that the continuation of proceedings has become unnecessary or impossible (article 39 of the QFC Arbitration Regulations).

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The CCPL does not expressly provide for cost allocation and recovery. Unless it has been provided for in the arbitration agreement or under any applicable rules of procedure (such as institutional rules), the award of costs is at the discretion of the arbitral tribunal. The arbitral tribunal may refer to articles 131 to 137 of the CCPL, which deal with the award of costs in the courts. Under the CCPL, costs, including legal costs, are awarded upon issuing judgment, and usually follow the event.

For QFC arbitrations, article 38 of the QFC Arbitration Regulations provides that the tribunal is entitled to fix and apportion the costs to be paid, unless otherwise agreed by the parties. Under the QICCA Rules, the losing party is responsible for the costs of arbitration, unless otherwise agreed by the parties.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

The Islamic sharia is the primary source of law in Qatar. Sharia law generally prohibits the recovery of interest. It is prudent for parties to consider claiming a lump sum (rather than separately claiming interest) if possible. Enforcement may be rejected where the award includes an amount expressed to be in respect of interest (for example, Court of Appeals Judgment 631/2006).

By contrast, under article 38(3) of the QFC Arbitration Regulations, unless otherwise agreed by the parties, arbitrators are entitled to award interest on any sums they order to be paid.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

It is uncertain as to whether the arbitral tribunal has the power to correct or interpret the award. Articles 205 to 207 of the CCPL permit the parties to appeal to the court with original jurisdiction over the dispute against an award. This is discussed further in question 42. The Draft Law is expected to deal with corrections to arbitral awards.

For QFC arbitrations, within 30 days of receipt of the award, unless another time period has been agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to correct any typographical errors or errors of a similar nature in the award or give an interpretation of a specific part of the award. If agreed by the parties, a party, with notice to the other party, may request the arbitral panel to give an interpretation of a specific point or part of the award. If the tribunal considers the request to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request and this will form part of the award (article 40 of the QFC Arbitration Regulations).

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

An arbitral award may be appealed on certain grounds, or challenged and set aside.

Article 206 of the CCPL permits appeals against an arbitral award to the court with original jurisdiction over the dispute on grounds of fraud, forgery, perjury by a witness and, apparently, where further documentary evidence has come to light that affects the award and that was concealed by the other party. An appeal must be lodged with the court within 15 days after the date of the registration of the award (article 205 of the CCPL).

Under articles 207 and 208 of the CCPL, an award may be challenged and set aside by request to the court with original jurisdiction over the dispute on the following grounds:

- if it was issued without an arbitration agreement, or exceeds the scope of the arbitration agreement or pursuant to a document that is invalid;

- the award contravenes public order or good conduct (which is very broad);
- if a party did not have full capacity;
- if the dispute was inarbitrable;
- if the appointment of the arbitrators was not pursuant to the law, or if the award was issued by arbitrators who were not authorised to arbitrate in the absence of the others; or
- if the award is invalid or the procedures affected the validity of award.

A request under articles 207 and 208 of the CCPL suspends the enforcement of the award, unless the court with original jurisdiction over the dispute orders that it should continue. Under article 209 of the CCPL, the court may either approve the award or set it aside, in whole or in part. The court may also refer the award back to the arbitral tribunal to correct any errors. Alternatively, the court may substitute its decision for the award.

The Draft Law provides that arbitral awards shall be enforced and will not be challenged by any means except by an action for nullity. The application for setting aside an award should be made before the Court of Appeal within one month from the date that the parties were notified of the award. The grounds for challenging an award are based on the UNCITRAL Model Law.

The QFC Arbitration Regulations do not provide for the appeal of awards. An award may be set aside for reasons of procedural irregularity, the arbitrators' jurisdiction or a contravention of public policy (article 41). An award may be corrected for a typographical error or other errors of a similar nature (article 40).

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Under article 205 of the CPPL, arbitral awards may be appealed before the court with original jurisdiction over the dispute. The appeal must be filed before the court within 15 days after the date of the registration of the award. The CPPL does not expressly deal with the costs incurred for an appeal or how the costs should be apportioned between the parties.

It is expected that the Draft Law will repeal the possibility to appeal arbitral awards so as to conform with the provisions of the New York Convention.

The QFC Arbitration Regulations do not deal with the appeal of awards. However, as discussed in question 42, an award may be set aside for reasons of procedural irregularity, the arbitrator's jurisdiction or a contravention of public policy (article 41) or corrected for a typographical error or other errors of a similar nature (article 40).

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

For domestic awards, the parties may request the court with original jurisdiction over the dispute to grant leave for the enforcement of the award. Leave for enforcement is granted after consideration of the award and the arbitration agreement, and after the court has determined that the award does not contravene public policy. Leave for enforcement must be endorsed on the award and the enforcing judge has jurisdiction over all questions relating to enforcement (article 204 of the CCPL).

For foreign awards, as Qatar is a signatory of the New York Convention, Qatari courts are supposed to recognise and enforce foreign arbitral awards as per the provisions in the Convention (subject to the reciprocity reservation). However, the current arbitration provisions in the CCPL do not always facilitate this approach (see the response to question 45). This is set to change under the new Draft Law that is based on the UNCITRAL Model Law.

Under the Riyadh Convention arbitral awards in one Arab country can be enforced in any other Arab country, where both parties are signatories. The court in the country where the award was made must first

Update and trends

The Public Procurement Law

The Public Procurement Law came into force on 13 June 2016, superseding the previous legislation (Law No. 26 of 2005) (see question 9). One of the key changes under the new law relates to the establishment by the Ministry of Finance of dispute settlement committees. The new committees, which will be presided over by members of the judiciary, are intended to adjudicate administrative disputes prior to the conclusion of contract.

Qatar National Vision 2030

Qatar continues to work towards implementing its National Vision 2030. This includes addressing economic, social, human and environmental development. With Qatar undertaking a vast number of projects in order to progress these development plans, we wait to see the impact that this will have on the number of arbitrations taking place in the state.

Relocation of the QFC

It has been reported that the QFC will be relocating to Msheireb Downtown Doha, with operations expected to commence in mid-2017. The QFC's move is part of Qatar National Vision 2030, and is anticipated to increase economic diversification and integration.

Investment Arbitration

On 20 January 2016, Al Jazeera Media Network commenced ICSID proceedings against Egypt under the 1999 Qatar-Egypt bilateral investment treaty arising out of Egypt's detention of Al Jazeera journalists in 2013 following the overthrow of the Muslim Brotherhood. As at the date of writing, according to ICSID, the party-nominated arbitrators had been appointed.

give leave for the award to be enforced (articles 34 and 37 of the Riyadh Convention). There are limited grounds on which the Qatari courts may refuse to enforce an award.

Under the Gulf Convention an arbitral award may be enforced in another Gulf Cooperation Council country (article 12 of the Gulf Convention). Unlike the Riyadh Convention, the Gulf Convention does not require leave by the court in the country where the award was made. Similarly, there are limited grounds on which the Qatari courts may refuse to enforce an award, including on grounds that the arbitral award is contrary to the sharia.

The QFC Arbitration Regulations only apply to arbitrations within the QFC. Only a QFC tribunal may enforce a QFC award. The QFC Arbitration Regulations are silent on the recognition and enforcement of QFC awards outside of the QFC.

Awards that are made in a seat other than the QFC (including in the state of Qatar) in relation to a dispute arising out of or in relation to the QFC (non-QFC awards) may be recognised as binding and may be enforced in the QFC by virtue of an order of the QFC tribunal (article 42). The party seeking to have the award enforced would need to apply to the QFC tribunal that has the sole and exclusive jurisdiction to hear applications for the enforcement of an award in the QFC. The QFC tribunal may refuse to recognise or enforce a non-QFC award in certain circumstances (including for reasons of procedural error or unfairness, contravention of the public policy of the QFC or if the subject matter of the dispute would not have been arbitrable under the laws of the QFC) (article 43).

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Foreign awards may be enforced in Qatar under the New York Convention, Riyadh Convention or Gulf Convention.

Article 381 of the CCPL provides that the articles 379 and 380 of the CCPL apply to foreign arbitral awards. Article 380 of the CCPL provides that courts must ensure that the:

- courts do not have exclusive jurisdiction over the dispute, and that the arbitral tribunal had jurisdiction to hear the dispute;
- parties were duly summoned and represented;
- decision is final under the applicable law; and
- judgment or order is not inconsistent with Qatari law or public policy or morality.

As Qatar is a signatory of the New York Convention, courts are supposed to recognise and enforce foreign arbitral awards as per the provisions in the Convention (subject to the reciprocity reservation).

However, there have been instances where the Qatari Courts have not recognised or enforced foreign awards due to public policy, namely because the awards were not issued 'in the name of the Emir of Qatar' (Qatar Court of Cassation Judgment 64/2012). This position has since been overturned by Qatar Court of Cassation Judgment 45-49/2014.

Other examples of the Qatari courts' refusal to enforce foreign arbitral awards include a case where, as the arbitration agreement

did not explicitly state that any awards would be final and binding, the award was considered to be open to an appeal on the merits (Case No. 631/2006), and the 2008 decision of the Court of Cassation to set aside a Paris-seated ICC arbitration award on the basis that the court considered the arbitrator's interpretation of the contract to be incorrect (Qatar Court of Cassation Judgment 33/2008).

However, a recent Qatar Court of Cassation case shows that enforcement of foreign arbitral awards under the New York Convention is improving (Qatar Court of Cassation Judgment 173/2016). The Court of Cassation overturned the lower courts' findings that the award needed to be certified and authenticated by the competent authorities in order to be enforceable and held that the New York Convention made no mention of an award requiring attestation by authorities and that the conditions for enforcement under Article IV had been met.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

No.

47 Cost of enforcement

What costs are incurred in enforcing awards?

Article 566 of the CCPL states that fees imposed on the enforcement of orders of arbitrators and judgments of foreign courts shall be estimated according to what has been ruled on the day when these orders were issued.

Article 565 of the CCPL states that the fees imposed on judgments shall be estimated as per the value upon which the execution is requested, if the value is known. However, if the value is unknown, a fixed fee shall be estimated.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

As Qatar is a civil law jurisdiction, its civil procedure legislation does not provide for the compulsory general disclosure of documents. The courts have the power to order any of the parties to disclose documents when required. Likewise, a party to an arbitration can request the court to order a party to disclose documents. Document disclosure provisions are found in articles 228 to 233 of the CCPL.

Cases in the courts are generally decided on the papers with limited oral testimony. Oral testimony of witnesses is however possible under articles 260 to 297 of the CCPL.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

The professional and ethical rules of lawyers practising in Qatar are set out in the Qatari Advocacy Law No. 23 of 2006. It deals with duties of loyalty, confidentiality and good reputation of lawyers. It also requires that lawyers in Qatar be Qatari nationals, duly enrolled with the Lawyers Admission Committee established within the Ministry of Justice. Non-Qatari lawyers may practise law in Qatar upon prior authorisation from the Lawyers Admission Committee. International law firms operating in Qatar are normally authorised and regulated by the QFC.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Qatari law does not address third-party funding.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Qatar is one of the few jurisdictions in the world still requiring witnesses to testify under oath in arbitration proceedings (article 200 of the CCPL). Foreign practitioners should be aware that an arbitral award relying on a witness testimony conducted without an oath could be set aside.

As discussed in question 45, there have been instances where the Qatari Courts have not recognised or enforced foreign awards due to public policy, namely because the awards were not issued 'in the name of the Emir of Qatar'. Following the reversal of this decision by the Qatari Supreme Court in March 2014, it appears that the current case law is now more in line with international standards and Qatar's obligations under the New York Convention.



Sean Whitham
Janine Mallis

sean.whitham@hsf.com
janine.mallis@hsf.com

Dubai International Financial Centre
Gate Village 7, Level 4
PO Box 506631
Dubai, United Arab Emirates

Tornado Tower
PO Box 24947
Doha
Qatar

Tel: +971 4 428 6300
Fax: +971 4 365 3171

Tel: +974 4429 4002
Fax: +974 4429 4001

www.herbertsmithfreehills.com

Romania

Cristiana-Irinel Stoica, Andreea Micu and Daniel Aragea

STOICA & Asociații

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Romania is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been in force since 1961. Romania has made declarations to the Convention. The Convention applies only to contractual or non-contractual disputes that are deemed commercial by Romanian legislation. The Convention also applies to arbitral awards issued in non-contracting states based only on reciprocity established by the parties' agreement.

Romania is also party to the European Convention on International Commercial Arbitration instituted at the United Nations, Geneva on 21 April 1961, ratified by Decree No. 281, 25 June 1963, and of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States, 18 March 1965, ratified by Decree No. 62, 30 May 1975.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

As of 2016, Romania has entered into 93 bilateral investment treaties, of which 88 are in force.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Following the entry into force of the New Civil Procedure Code (NCPC) (15 February 2013), the general legal framework for domestic and foreign arbitral proceedings is contained in articles 541 to 621 (Book IV - On Arbitration) and in articles 1111-1133 (Book VII - The International Civil Lawsuit, Title IV - International arbitration and the effects of the foreign arbitration awards), as well as in the Rules on Arbitral Proceedings of the International Court of Commercial Arbitration attached to the Romanian Chamber of Commerce and Industry (applicable as of June 2014) (hereinafter referred to as the Rules of the Arbitration Court). In addition, for international disputes submitted to arbitration in Romania, the provisions of international conventions ratified by Romania will also apply. The recognition and enforcement of awards is regulated by the NCPC, in articles 1124-1133 from Book VII, Title IV - The International Arbitration and the Effects of Foreign Awards, Chapter II - The Effects of Foreign Awards.

According to Romanian civil procedure, as well as to the Rules of the Arbitration Court, an arbitral dispute is considered to be international if it results from a legal relationship with foreign elements (eg, if one party to the dispute is of foreign nationality or if the contract or

the asset referring to the dispute is, or is likely to be, governed by one or more laws of different states).

Arbitration is considered to be foreign when the arbitral award is delivered on foreign territory and the said arbitral award is not deemed a national award in Romania.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

Domestic arbitration is regulated under articles 541 to 621 of the NCPC, while international arbitration is regulated under articles 1111-1133 of the same NCPC.

To an appreciable extent, the domestic arbitration provisions bear some resemblance to the UNCITRAL Model Law, especially after the entry into force of the NCPC. For instance, it is expressly mentioned that, in the case of an international arbitration, the arbitral tribunal can issue partial awards, as long as a contrary provision is not included in the arbitration agreement.

However, as compared to the UNCITRAL Model Law, the Romanian provisions do not regulate in a detailed manner the regime of interim measures and preliminary orders. Nevertheless, there are rules that allow the parties to request the application of interim measures, as well as to separately challenge, by means of a claim for annulment, the arbitral awards by which interim measures were adopted.

In any case, there is nothing that prevents the parties, in the case of non-institutionalised arbitration, to incorporate the UNCITRAL Model Law into their arbitration agreement.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The parties may not derogate from the rules regarding public policy, morality and the mandatory provisions of the law. Mandatory provisions from which the parties cannot deviate are, inter alia, the following:

- the clause by which a party nominates an arbitrator in lieu of the other party or by which it appoints a higher number of arbitrators than the other party is null and void;
- the parties are not entitled to waive their right to challenge the arbitral award, by inserting a clause in respect thereof in the arbitration agreement; and
- the arbitration proceeding must ensure the equality of treatment, the right to defence and the audiatur et altera pars principle. Conversely, the award is subject to annulment.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Under the Rules of the Arbitration Court, in an international arbitration, the parties can determine the substantive law.

Also, in international private law conventions, the right is recognised for parties to establish the substantive law by their convention.

The Romanian Civil Code – which entered into force as of 1 October 2011 – sets forth the general rules in this matter and provides that the law applicable to substantive requirements of an international private law contract is established by the parties to the said agreement.

Where the parties fail to establish the substantive law, the arbitral tribunal shall determine the substantive law based on the rules of conflict of laws. Such rules are mainly provided in the New Civil Code, under articles 2557 to 2663, as well as in Regulation No. 593/2008 of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I) and in Regulation 864/2007 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations (Rome II). In addition, conflict of laws rules are included in Book VII, title IV of the NCPC. For instance, in the particular case of international arbitration agreements (provided that the seat of the arbitral tribunal is in Romania), the NCPC stipulates that these are valid, from the perspective of the substantive requirements, if they fulfil the conditions imposed by one of the following laws: the law established by the parties; the law governing the object of the litigation; the law applicable to the contract that contains the arbitration clause and the Romanian law.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

Under Law No. 335, 3 December 2007, the permanent non-corporate arbitration institution is the Court of International Commercial Arbitration attached to the Romanian Chamber of Commerce and Industry (the Arbitration Court).

Court of International Commercial Arbitration
The Chamber of Commerce and Industry of Romania
2 Octavian Goga Blvd
3rd district
Bucharest
Romania
<http://arbitration.ccir.ro/engleza/index.htm>

Arbitration courts exist, but their activity is reduced, at the level of the local chambers of commerce and with the same rules of arbitration proceedings as the Arbitration Court.

Also, there are arbitration courts attached to the bilateral chambers of commerce established by the business community.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

As regards international arbitration, the NCPC states that any cause of a patrimonial nature can be submitted to arbitration if it concerns rights in relation to which the parties can freely dispose, and provided that the law of the state where the arbitral tribunal has its seat does not reserve exclusive jurisdiction for the national courts. In principle, only pecuniary disputes can be referred to arbitration for domestic arbitration. However, there are some pecuniary disputes excluded from the arbitral proceedings. For instance:

- regarding IP disputes, the disputes concerning the annulment of a trademark, a patent, designs, etc, or the author of a creation subject to copyright;
- as far as antitrust and competition laws are concerned, the disputes on the lawfulness of the Competition Council's decisions are reserved to the court of law. However, the parties may refer to an arbitration dispute concerning damages arising from a breach of competition law or, in the case of a contractual dispute, one party may raise competition issues in connection with the validity of some clauses and the arbitral tribunal will retain jurisdiction in order to assess such matter; and
- intra-company (corporate law) disputes are reserved to the courts of law as per the provisions of Law No. 31/1990 on Companies.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

As a general rule, the arbitration agreement must be concluded in writing. However, this requirement is considered to be fulfilled if the parties agreed to arbitration by means of an exchange of correspondence, irrespective of its form, or by an exchange of procedural acts, as well as if the defendant expressly accepts the jurisdiction of the arbitral tribunal, either by written statement or by express statement recorded by the arbitral tribunal. In addition, the NCPC expressly states that arbitration agreements that refer to litigations related to the transfer of an ownership right or the creation of another property right over an asset must be concluded in an authentic notarised form, under the sanction of absolute nullity (article 548).

Local or state entities can conclude an arbitration agreement to the extent that a special provision – either domestic or international – allows them to do so.

The model for the arbitration agreement provided by the Arbitration Court refers only to disputes that arise from the agreement containing an arbitration clause or by a separate agreement (compromise). Also, the arbitration agreement may result from the mutual agreement of the parties in dispute, expressed in front of the arbitration panel. The Rules of the Arbitration Court provide for the principle of separability of an arbitration agreement from the main contract and its full effect regarding the competence of the arbitral tribunal (except for the cases when the matter in dispute is not arbitrable).

Under the NCPC (article 550(1)), the arbitration clause must include a reference regarding the manner of nomination of the arbitrators, under the express sanction of nullity. However, in the case of institutional arbitration, such references are not mandatory, considering that the law allows a reference to the procedural norms of the institution that organises the arbitration. It is also worth mentioning that arbitration agreements must be concluded with the observance of the conditions provided for the validity of agreements in general, namely: the existence of the capacity of the parties to conclude the agreement; the parties' consent; and a valid object and a valid cause of the main contract.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

According to Romanian law, an arbitration agreement is no longer enforceable for the following reasons:

- the institution organising the arbitration fails to comply with the minimum requirements of article 6 from the European Convention on Human Rights;
- the arbitral tribunal cannot be constituted because of the defendant's obvious default; or
- the proceedings before courts of law were initiated and the defendant raised no objection on jurisdiction.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

A third party can be bound only to the extent that it is party to the arbitration agreement. In several cases, parties different from the signatories may be bound by an arbitration agreement:

- if the underlying contract was assigned to a third party in accordance with the rules set out in the NCPC;
- the assignee of a claim is bound by the arbitration agreement by virtue of the *accessorium sequitur principale* rule; or
- in the case of inheritance, the heirs and legatees of a party contracting to an arbitration agreement are bound by such a clause.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

According to the NCPC, third parties can participate to the arbitration proceedings only with their consent as well as the consent of all the parties to arbitration, with the observance of the general rules governing third-party participation in disputes. According to these general rules, any person who has a substantive interest can intervene in a dispute initiated between other parties. However, in the case of an accessory intervention – which refers to cases when a third party does not raise its own right derived from the dispute, but only supports the defence of one of the parties – the third-party participation is allowed in arbitration even without the consent of the initial parties.

In the case of arbitration disputes falling under the Rules of the Arbitration Court, third parties can participate to arbitration proceedings under the general provisions provided by the NCPC in respect to third-party participation, if such participation is possible on the basis of the arbitration agreement or if the effects of the arbitration agreement between the parties to the dispute can be extended to other participants.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the ‘group of companies’ doctrine?

The arbitral tribunal refrains from using the ‘group of companies’ doctrine in view of extending an arbitration agreement to non-signatory companies. In other words, to the best of our knowledge, the group of companies’ doctrine is not recognised in the Romanian jurisdiction.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

Romanian law is silent in this respect. However, the requirements for executing an arbitration agreement (see question 9) remain applicable for such cases as well.

In addition, regarding the nomination of arbitrators, according to the Rules of the Arbitration Court, if there are more plaintiffs or defendants, the parties having mutual interests will designate a sole arbitrator. In case the parties fail to agree on this appointment, the sole arbitrator will be designated by the president of the Arbitration Court.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

In accordance with article 555 of the NCPC, any natural person who has an unrestricted exercise of its rights can be an arbitrator. In addition, in the case of institutional arbitration, if the rules on the organisation and functioning of the Arbitration Court will be applicable, any person – whether a Romanian or a foreign national – can be arbitrator, if he or she has an unrestricted exercise of his or her rights, enjoys of an excellent reputation and is highly qualified in the field of international private law, internal and international economic relations and commercial arbitration.

As a general rule, the arbitrators are included on a list of arbitrators confirmed by the Arbitration Court. In order to be included in the list of arbitrators, a person must, among other things, have a solid legal background and at least eight years’ experience in the legal field. However, even in the case of arbitrations organised by the Arbitration Court, persons who are not included on the list of arbitrators can act as arbitrators if the parties under dispute nominated these persons in the arbitration agreement, in a specific dispute, under the condition

for these persons to meet the requirements set forth by the arbitration rules of the Arbitration Court.

Acting judges cannot be arbitrators.

The NCPC, as well as Rules of the Arbitration Court, provide that an arbitrator cannot solve a determinate arbitral dispute if he or she does not observe the qualification requirements or other conditions regarding the arbitrators, which are set forth in the arbitration agreement. Nonetheless, the law is silent as regards the possibility of accepting contractual requirements for arbitrators, based on nationality, religion or gender.

To our knowledge, no other criteria than those specified by law and arbitral rules apply to selecting an arbitrator.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Under the rules of the NCPC, the names and the number of arbitrators are indicated in the arbitration agreement. In case the parties failed to agree on this issue in the arbitration agreement, the parties can establish this subsequently. In case the parties fail to nominate the sole arbitrator, including cases when the arbitral tribunal is composed of more arbitrators and one of the parties does not nominate its party-appointed arbitrator or the two party-appointed arbitrators do not agree on the nomination of the chairman of the arbitral tribunal, the party that wishes to be part of the arbitration proceedings is allowed to request to the competent domestic courts to proceed to the nomination of the sole arbitrator or the chairman.

Under the Rules of the Arbitration Court, where the arbitrators were not nominated in the arbitration agreement, the parties can subsequently agree on this matter, either in the request for arbitration and the defendant’s answer or by a separate exchange of documents between the parties. At the request of a party, the arbitrator can be nominated by the president of the Arbitration Court. If the arbitral tribunal is composed of three arbitrators, the chairman will be nominated by the party-appointed arbitrators. In addition, if the parties or the party-appointed arbitrators fail to agree on the nomination of the sole arbitrator or chairman, the president of the Arbitration Court is competent to designate them.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

In arbitration institutionalised under the Rules of the Arbitration Court, an arbitrator can be challenged on grounds that question his or her independence and impartiality, and which qualify the arbitrators as incompatible, such as: non-observance of the cases of incompatibility that are set forth in the NCPC for the judges active in the courts of law (for instance, in case the arbitrator was a witness or expert in the same dispute or in case the arbitrator is a relative of one of the parties or their representatives, etc); non-observance of qualification conditions or other conditions related to arbitrators that are set forth in the arbitration agreement; or existence of a labour or work relationship or of direct commercial connections between the arbitrator or one of the parties. Similar grounds related to the incompatibility of the arbitrators are provided in the NCPC.

In the particular case of bias or an appearance of bias, an arbitrator can be challenged by the concerned party and its request will be settled. The standard of bias or appearance of bias that might give grounds for challenging an arbitrator is the same as in the case of judges as developed by the case law of the courts of law, which takes guidance from the judgments of the European Court of Human Rights. In some disputes, guidance is also sought from the IBA Guidelines on Conflicts of Interest in International Arbitration.

The replacement of an arbitrator may occur in the case of challenge, abstention, renunciation (for cause of illness, for example), death or other impediments.

The challenge request is settled by the arbitral tribunal without the attendance of the challenged arbitrator, who is substituted by the president of the Arbitration Court or by an arbitrator designated by the latter. If the challenge concerns the sole arbitrator, it will be settled by the president of the Arbitration Court or by an arbitrator designated by him.

In non-institutionalised arbitration, an arbitrator can be challenged on the grounds set forth in the NCPC regarding the judges active in the court of law, on the special grounds set forth in relation to the incompatibility of arbitrators, as well as on the lack of requirements as set out in the arbitration agreement. The challenge request is settled by the competent court of law with the attendance of the parties and of the challenged arbitrator.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators?

Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

In institutional arbitration under the Rules of the Arbitration Court, the arbitrators are, as a general rule, appointed by the parties. Only in cases when the parties fail to agree on this issue, will the arbitrators be designated by the president of the Arbitration Court.

The fees of the arbitrators are included in an arbitration tax, calculated by the secretariat of the Arbitration Court. Any arbitrators' expenses occurring during the pending dispute are borne by the parties.

In the case of a non-institutionalised arbitration, the arbitral tribunal shall determine the due fees and may compel the parties to pay them in advance and, with regard to the expense occurred during the dispute, the arbitral tribunal shall assess whether or not all parties will bear those expenses.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Under the Rules of the Arbitration Court, the arbitrators can be dismissed if:

- after acceptance, they waive their appointment in an unjustified manner;
- for groundless reasons, they do not attend the arbitral dispute proceedings, perform other actions that are of such a nature as to unjustifiably delay the proceedings or fail to deliver the award by the deadline as set out in the arbitration agreement or by the law; and
- they fail to observe the confidentiality of the arbitration by publishing or disclosing information known in their capacity as arbitrators, without the parties' prior authorisation.

If the above-mentioned actions are performed in bad faith or because of serious negligence, the arbitrators can be held responsible and pay damages within the limit of the received arbitration fees.

Accordingly, under Romanian law, it can be argued that the arbitrators can be held liable both for negligence or intentional breach of duties.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

In such a case, each party may challenge the court's jurisdiction and the court will verify its own competence and consequently state that it lacks jurisdiction in that case. As a general rule, at the first hearing, when the parties are legally subpoenaed before the first court, the judge is compelled to verify its own jurisdiction, as well as to discuss the objections on jurisdiction raised by the parties. However, if the defendant submits his or her statement of defence without raising any objections regarding the jurisdiction, the court of law will retain

jurisdiction. In addition, the court of law will retain jurisdiction if the arbitration agreement is affected by nullity or is not operant, as well as if the arbitral tribunal cannot be constituted because of reasons that are obviously determined by the plaintiff in the arbitration. Similarly, in the case of international civil disputes, the NCPC states that, if the parties concluded an arbitration agreement regarding litigation that is arbitrable according to Romanian law, the national court will state that it lacks jurisdiction, unless the defendant did not raise an objection on jurisdiction grounded on the arbitration agreement until the first hearing when he or she was legally subpoenaed.

In case both the court of law and the arbitral tribunal consider they have jurisdiction over a dispute, the arisen conflict of competence will be settled by the superior court of law to the one involved in the conflict of competence.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The arbitral tribunal verifies its jurisdiction either ex officio or at a party's request and it will deliver a decision in this respect (Kompetenz-Kompetenz). The verification of the jurisdiction by the arbitral tribunal takes place at the first hearing when the requirements of procedure have been legally complied with (such as legal subpoenas transmitted to the parties, payment of arbitral fees, etc). In case the arbitral tribunal declares that it has jurisdiction, the concerned party may only challenge such a decision by means of the motion to set aside the award itself. In case the arbitral tribunal declares that it does not have jurisdiction, its competence is declined in favour of the court of law and such decision of the tribunal cannot be challenged with a motion for setting aside the award.

As far as international arbitration is concerned, the NCPC provides that the arbitral tribunal will decide its own jurisdiction, without taking into account other pending claims before the same parties and having the same object, except for situations when grounded reasons result in the proceedings being held in abeyance. The jurisdictional objections must be raised prior to any defence on the merits of the case.

Under the Rules of the Arbitration Court, at the first hearing the parties must answer to the arbitral tribunal if they have objections to its jurisdiction.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

The Arbitration Court may organise institutional arbitration under its rules of arbitration or may assist the parties in ad hoc arbitration. In the first case, the place of arbitration is at the headquarters of the Arbitration Court. However, as an exception to this rule, if the parties request to the arbitral tribunal, based on grounded reasons, to organise the hearings in a different place, the arbitral tribunal can agree to such request under the conditions that the costs incurred to be borne by the parties.

The language of the institutional arbitration proceedings is Romanian and all the documents must be translated into Romanian.

However, in the case of international arbitration, the documents can also be presented in a language of international use. As far as international arbitration is concerned, the proceedings shall be held in Romanian, in the language indicated in the arbitration agreement or, in case no reference was provided in this respect or no agreement on this issue was subsequently concluded, the proceedings may be held in a language of international use set forth by the arbitral tribunal.

As far as non-institutionalised arbitration is concerned, the place of arbitration shall be determined by the parties and, where they fail to establish it, by the arbitral tribunal. In the particular case of international arbitration, the place of arbitration is established by the parties or by the arbitration institution indicated by them and, in case of failure to do so, by the arbitrators. The parties are free to decide on the language of the arbitration, either in the arbitration agreement or separately; in the alternative, the language of arbitration will be the language of the

contract out of which the dispute has arisen or a language of international circulation indicated by the arbitral tribunal.

23 Commencement of arbitration

How are arbitral proceedings initiated?

The arbitral proceedings are initiated by the plaintiff, who submits the request for arbitration. The request must be made in writing and must contain the identification data of the parties and of their attorneys, the object of the request and its value, the factual and legal merits of the case, as well as the evidence on which the request is grounded, the arbitration agreement with a copy of the corresponding contract, the signature and the stamp of the parties, as the case may be. The request for arbitration should also identify the members of the arbitral tribunal.

The request must be submitted in a number of copies sufficient to be communicated to each and every party and for each of the members of the arbitral tribunal.

Under the Rules of the Arbitration Court, the request for arbitration and the attached exhibits are submitted in hard copies, in as many counterparts as the number of defendants, each of the arbitrators and an additional one for the arbitration file. The communication of these documents is also made in electronic format.

24 Hearing

Is a hearing required and what rules apply?

According to the rules of the NCPC, the arbitral tribunal normally organises a hearing at least for the parties' debates, based on the general principle of procedural law, which states that disputes shall be debated orally. The parties can attend such a hearing personally, represented by their attorneys or assisted by any person. Nonetheless, any of the parties can require in writing that the settlement of the dispute be made in its absence, on the basis of the evidence in the file.

The Rules of the Arbitration Court contain provisions about hearings but fail to state in an express manner if such a hearing is a requisite. However, according to the same rules, the arbitral tribunal is allowed to agree that certain stages of the proceedings be accomplished by means of written or electronic correspondence, with the exception of the hearing of witness and experts and the final pleadings on the merits of the case. Therefore, the conclusion could be drawn that, at least in these cases, a hearing is required. The parties can attend such a hearing personally or be represented by their attorneys, counsel or by any other person and be assisted by interpreters.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Each party must prove the facts in connection with its claims or defences. The types of evidence are those prescribed by the common law, namely the NCPC (witnesses, experts, documents, inspection by the arbitral tribunal and cross-examination). Nevertheless, the parties retain the freedom to agree upon the evidence and upon their administration.

Regarding the experts, they are either appointed by the parties or, failing that, by the arbitral tribunal. Each party can appoint a side expert.

Note that the experts and the witnesses are not cross-examined under oath.

The parties or the representatives of legal entities' parties may be subject to examination.

In case of international arbitration, the Rules of the Arbitration Court, in article 81, allow the Arbitral Tribunal to apply IBA rules on the taking of evidence to the extent the parties agreed to this end.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Generally, pursuant to article 547 of the NCPC, the court intervenes in order to remove the obstacles in commencing or deploying the arbitration proceedings or for performing other powers that fall under the

court's competence. For instance, the court intervenes in the following situations:

- the arbitral tribunal cannot be constituted, in case of ad hoc arbitration;
- before or during arbitration proceedings, the court, by request, is asked to take interim or provisional measures;
- a party opposes the interim measures taken by the arbitral tribunal during arbitration proceedings; and
- in order to apply sanctions to the expert or to the witnesses, or if a public authority fails to respond to an information request received from the arbitral tribunal.

The referral shall be settled in an emergency procedure by the court and the judgment is not subject to any appeal.

27 Confidentiality

Is confidentiality ensured?

The arbitral file and the proceedings are confidential and the arbitrators and all the staff of the Arbitration Court are bound by the obligation of confidentiality. The complete award can be published only with the parties' approval. The enforcement file is also confidential, but certain proceedings must be made publicly.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Before the initiation of the arbitration proceedings, only the competent court may order interim measures (precautionary measures, temporary measures and measures regarding the finding of the facts). Such measures may regard, for instance, the conservation of evidence, seizure over opposing parties' assets or over the assets in dispute.

During the arbitration proceedings, such measures can be ordered either by the arbitral tribunal or by the court of law. If a party opposes the measures taken by the arbitral tribunal, then the enforcement shall be conducted by the court of law.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Both the NCPC and the Rules of the Arbitration Court are silent as far as any interim measures by an emergency arbitrator are concerned.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

A constituted arbitral tribunal may order precautionary measures, temporary measures and measures regarding the finding of the facts. The enforcement of such measures can be assured with the assistance of the courts of law.

As stated above, the arbitral tribunal may decide on measures regarding the conservation of evidence, seizure over opposing parties' assets or over the assets in dispute. In domestic arbitration and in certain situations, such measures are conditioned upon presenting a bail by the requesting party.

In international arbitration, as per the NCPC, it is stated that the arbitral tribunal may order interim measures, unless the contrary is stated in the arbitration agreement. If not, then the arbitrator may condition the measure upon presenting a bail by the requesting party. The purpose of the bail is to secure the possible damages the party might incur from ordering the interim measures.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Under both the NCPC and the Rules of the Arbitration Court the arbitral tribunal has no power to order sanctions against the parties or their counsel where it deems that 'guerrilla tactics' were used. Nevertheless, nothing prevents the arbitral tribunal from recording into the minute the 'guerrilla tactics' used by the parties or their counsel and for the concerned party to follow and rely on the provisions set forth by article 547 of the NCPC, to eliminate the procedural difficulties created in such circumstances. As far as the second question is concerned, under no circumstances may the arbitral tribunal or domestic arbitral institution sanction the counsel. If the procedural rules or the professional deontology were violated, the party concerned may resort to the provision of article 547 and ask the ordinary courts to eliminate the difficulties created in such circumstances, or they may refer the situation to the professional organisation to which the counsel belongs, which may trigger the disciplinary liability of the counsel.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Under both the rules of the NCPC, primarily article 602(3) and of the Rules of the Arbitration Court, article 65(1), decisions can be issued by a majority of the arbitral tribunal members. Unanimity is not required. Dissenting opinions are accepted.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

The arbitrator that has a dissenting opinion must prepare and sign a separate opinion, attached to the arbitration award (article 65, Rules of the Arbitration Court). Concurrent opinions are also provided by the same rules.

34 Form and content requirements

What form and content requirements exist for an award?

The award is issued in writing and must contain the following information:

- the names of the arbitrators and the arbitral assistant (if applicable), the place and delivery date of the award;
- the name of the parties, their domicile or residence or, as the case may be, the denomination and headquarters, the name of the representatives, as well as other parties attending the debates;
- the arbitration agreement;
- the dispute and the parties' arguments;
- the de facto and de jure reasons of the award, and in case of ex aequo et bono arbitration, the reasons that support the conclusion of the arbitral tribunal;
- the court decision (disposition); and
- the signatures of all arbitrators, with the observance of those provided in article 602 (3) of the NCPC, and, if applicable, the signature of the arbitral assistant.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

Under the Rules of the Arbitration Court, the court decision has to be issued within six months of the constitution of the arbitral tribunal

and this term can be extended to a period that is considered necessary for the appropriate dispute resolution, subject to the parties' express agreement. Caducity (time-bar effect) can be claimed if requested in due time in conformity with the Rules of the Arbitration Court. As far as the NCPC is concerned, article 605 provides that the arbitral award, setting out its reasoning, shall be served to the parties within one month from when it was delivered.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The date of the award is the date when the arbitral tribunal delivers the award and such date is decisive for the following:

- the time limit under which the arbitral tribunal has to render the award; and
- whether the award was delivered with the observance of the deadline set out by the NCPC or of the Rules of the Arbitration Court.

The date of the service of the award stating the reasons is decisive for the following:

- one or three months, as the case may be, for the motion to set aside the arbitral award;
- the referral for the correction of clerical errors or for the interpretation or completion of the award. The time limit is 15 days under the NCPC and 10 days under the Rules of the Arbitration Court; and
- the award is to be final and binding.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The arbitral tribunal may issue final, interim or partial awards based solely upon the relief sought by the parties in dispute. In domestic arbitration, partial awards may be delivered to the extent that a party acquiesces to the other party's claims. In international arbitration, the arbitral tribunal may issue partial awards, unless stated to the contrary.

As far as the interim awards are concerned, these can be delivered according to the criteria stated under question 30.

The arbitral tribunal may grant only the reliefs sought by the parties in dispute, provided that such relief is lawful, possible and at least determinable.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

The arbitral proceedings can be terminated by:

- the settlement of the parties formalised in writing;
- the caducity of the arbitration raised in due time by the concerned party;
- in the case of lapse of proceedings or in the case of claimants' default to comply with the duties indicated by the arbitral tribunal, but only for arbitration under the Rules of the Arbitration Court; or
- waiver of the parties to the disputed claims, which has to be formalised in a written statement or recorded by the arbitral tribunal.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The costs of the arbitral proceedings are allocated according to the parties' agreement or, failing such, the losing party will bear its own costs and will be compelled to pay the costs of the winning party in as much as the latter claims were admitted.

The costs of the arbitral proceedings include the registration fee, the administrative fee, costs for the taking of evidence, translation costs, hearing costs, fees of the arbitrators, attorneys, counsels, parties, arbitrators and witnesses, as well as experts' costs with travelling expenses and other expenses in connection with the arbitration proceedings.

Pursuant to article 43(3) of the Rules of the Arbitration Court, the arbitral tribunal may compel the party whose fault caused to the opposing party to incur costs to reimburse them as damages.

In international arbitration, pursuant to article 1122 of the NCPC, unless stated to the contrary, the arbitrator's fees and his or her travelling costs are incurred by the parties who appointed him or her. In the case of a sole arbitrator or of the chairman, the costs are allocated equally between the parties.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

The arbitral tribunal may award interest for principal claims and for costs. The interest rate shall be that established by the parties or, failing that, the interest rate established by the National Bank of Romania.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The award can be corrected ex officio or upon the request of the parties, whereas the interpretation may be decided only based on parties' request. The time limit for both requests is 15 days starting from the delivery date.

In the case of arbitration under the NCPC, the party concerned may submit a claim for the correction of clerical errors or for interpretation within 10 days of the service date.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

An award can be challenged only by means of a motion for setting aside on the following grounds:

- the dispute was not subject to arbitration;
- the arbitral tribunal settled the dispute without any arbitration agreement or the arbitration agreement was null and void or not enforceable;
- the arbitral tribunal was constituted with the non-observance of the arbitration agreement;
- the party was not present at the debate hearing and the service was unlawfully made;
- at least one party announced its interest in raising the caducity, the award was delivered after the expiry of the caducity term set out in article 567 of the NCPC and the parties did not agree on continuing the proceeding pursuant to article 568 (1) and (2) of the NCPC;
- the arbitral tribunal settled the dispute extra petita or ultra petita;
- the award does not contain the operative part (the court decision) and its reasoning, does not indicate the date and the place of delivering or does not contain the signatures of the arbitrators; and
- the award infringes public policy, morals and the mandatory provisions of the law.

If, after delivering the award, the Constitutional Court issued a judgment on the plea raised in the file, stating the non-constitutionality of the law, the ordinance or the provision from a law or an ordinance that forms the object of the plea or of other provisions from the contested enactment that necessarily and obviously are not to be dissociated from the provisions indicated in the referral to send the plea to the Constitutional Court.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

The decision on a motion to set aside an arbitral award can be challenged only by an appeal on points of law. For the motion to set aside

Update and trends

The Rules of the Arbitration Court are under full review following standards provided by reputed European courts of arbitration.

Romania is party to a pending investment arbitration case initiated in 2015 by two investors from Canada and Great Britain. The instruments invoked in this case are: the Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments 2011; the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland; and the Government of Romania for the Promotion and Reciprocal Protection of Investments 1996 (extended to the Bailiwick of Jersey by Exchange of Notes 1999).

the judgment, the judicial stamp tax is established based on the value of claims. The appeal on points of law is subject to judicial stamp tax evaluated depending on the indicated ground of appeal.

The period for deciding on a motion to set aside the judgment may vary between six months and two years for each level.

The costs are generally represented by the judicial stamp tax, as the case may be, and by the fees of the attorney.

According to the NCPC, the costs are borne by the losing party, but the court retains the liberty to decide whether the costs are to be entirely reimbursed to the winning party.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

First, in order to have the awards enforced, leave by the court has to be provided based on an application by the concerned party pursuant to article 1126 of the NCPC. The party may follow either the provisions of the New York Convention or of the NCPC.

Secondly, the principle enshrined in article 1125 of the NCPC is that any foreign arbitral award may be recognised and enforced in Romania insofar as the dispute may be subject to arbitration in Romania, and as long as the award has no provision inconsistent with Romanian public policy. Failure to comply with the two requirements implies a refusal to enforce the award.

Thirdly, as far as other impediments to enforcement are concerned, the NCPC of Romania provides under article 1129 for the following cases when the enforcement of a foreign arbitral award may be hindered:

- the parties were unable to conclude the arbitration agreement, according to their own law, established pursuant to the law of the state where the award was rendered;
- the arbitration agreement was void pursuant to the law elected by the parties or, failing such election, pursuant to the law of the state where the award was rendered;
- the party against which the award is enforced was not duly informed on the appointment of the arbitrators or on the arbitration proceedings or it was unable to defend in arbitral dispute;
- the appointment of the arbitral tribunal or the arbitration proceedings violated the convention of the parties or, failing such convention, the law of the place of arbitration;
- the award deals with a dispute not provided by the arbitration convention or outside the limit set out by such convention or comprises provisions exceeding the terms of the arbitral convention. However, as long as the provisions from the award dealing with the aspects subject to arbitration may be separated from those regarding aspects not subject to arbitration, the former are to be recognised and enforced; or
- the award is not yet binding on the parties or it was set aside or stayed by a competent authority from the state where or pursuant to which it was rendered.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

An award set aside by a court at the place of arbitration cannot be enforced on Romanian territory.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

There are no provisions dealing with the appointment of an emergency arbitrator in the NCPC or in the Rules of the Arbitration Court. However, it cannot be assumed that the parties do not have the freedom to set out rules with regard to an emergency arbitrator. Based on the parties' agreement, were such an emergency arbitrator appointed, they would rule any provisional measures that may be enforced by ordinary courts of law, if the party that is having provisional measures enforced upon them, opposes it.

47 Cost of enforcement

What costs are incurred in enforcing awards?

In enforcing awards, the concerned party may incur, inter alia, the following costs:

- costs of the attorneys;
- fees of the bailiff;
- judicial stamp tax for enforcing the award; and
- other costs that might occur in the case of challenging the enforcement procedure.

Other**48 Judicial system influence**

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Generally, in the Romanian judicial system the proceedings are conducted either by a judge or an arbitrator, as the case may be. High observance is granted to the provisions of the NCPC, with the result that written witness statements are not common practice in proceedings and that a party in dispute may be subject to examination, but without the possibility of testifying as witness.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

A counsel is subject to the rules enacted by the bar to which it adheres. In Romania, the counsels are members of one of the bars composing the National Union of Lawyers. The rules for counsel are comprised in the statute on the lawyer profession issued by the Union. With regard to the fact that the National Union is a full member of the Council of Bars and Law Societies of Europe, the Code of Conduct issued by the latter was adopted by the National Union. Such rules are not specific professional or ethical rules applicable only in case of international arbitration, but rather general rules on the relationship of the counsel with the client, the magistrate and with other counsel. The rules on relations with the magistrate are the same for relations with the arbitrators.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Under Romanian Law, neither the NCPC, nor the Rules of the Arbitration Court contain provisions in relation to third-party funding of arbitral claims.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Romania is part of the European Union and, accordingly, the provisions related to visas and work permits are those indicated by European legislation transposed into the national law. Attorneys from EU member states are also subject to the special regulations enacted in this respect. Attorneys from EU member states may represent and assist parties in arbitration.

Persons from third-party states require residence permits and must adhere to visa requirements, follow formalities with the National Bar Association and are subject to taxes imposed by the National Bar Association and by the tax authority for the performed activity. The activities of the lawyers and arbitrators undertaken on Romanian territory are subject to VAT rules.



STOICA & Asociații

SOCIETATE CIVILĂ DE AVOCAȚI - ATTORNEYS AT LAW

**Cristiana-Irinel Stoica
Andreea Micu
Daniel Aragea**

**istoica@stoica-asociatii.ro
amicu@stoica-asociatii.ro
daragea@stoica-asociatii.ro**

Opera Center II
2 Nicolae Staicovici Street
050558 Bucharest
Romania

Tel: +40 21 402 09 19
Fax: +40 21 402 09 31
www.stoica-asociatii.ro

Singapore

Edmund Jerome Kronenburg and Tan Kok Peng

Braddell Brothers LLP

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Singapore became a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) on 21 August 1986. The New York Convention has been in force in Singapore since 19 November 1986, with the reservation that the Convention will only be applied to the recognition and enforcement of awards made in the territory of another contracting state.

Singapore is a party to the International Convention for the Settlement of Investment Disputes between States and Nationals of other States, Washington 1965 (the ICSID Convention). The Arbitration (International Investment Disputes) Act was enacted to provide for the recognition and enforcement of arbitral awards under the ICSID Convention.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Singapore is a party to no less than 40 bilateral investment treaties (BITs) and almost 30 other international investment agreements (including free-trade agreements) with other countries, which generally provide for disputes between the investors and host states to be referred to binding international arbitration, including ICSID arbitration.

Singapore is also a party to multilateral investment treaties including the Association of South East Asian Nations (ASEAN) Comprehensive Investment Agreement signed on 29 February 2009, which entered into force on 29 March 2012. Singapore has also signed at least 18 free trade agreements (FTAs), with over 24 trading partners. Most of these FTAs contain chapters providing for investment protections typically found in BITs. The FTAs generally provide for disputes between investors and the host state to be resolved through binding international arbitration under the ICSID Arbitration Rules, UNCITRAL Arbitration Rules or rules of leading international arbitration centres.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Singapore has two principal arbitration statutes: the Arbitration Act (the AA), which governs domestic arbitrations, and the International Arbitration Act (the IAA), which governs international arbitrations. Pursuant to IAA, section 5(2), an arbitration is 'international' if:

- at least one of the parties has its place of business outside Singapore at the time of conclusion of the arbitration agreement;

- the agreed place of arbitration is situated outside the state in which the parties have their place of business;
- any place where a substantial part of the obligations of the commercial relationship is to be performed or the place to which the subject matter of the dispute is most closely connected is situated outside the state in which the parties have their place of business; or
- the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

Parties may also agree to opt into the IAA regime, notwithstanding absence of the elements above (IAA, section 5(1)).

The IAA essentially enacts (and incorporates as its First Schedule) the 1985 UNCITRAL Model Law on International Commercial Arbitration (Model Law) with some statutory modifications. Various elements of the 2006 UNCITRAL Model Law have since also been incorporated into the IAA. IAA, section 3 states that 'the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore'.

The greatest difference between the AA and IAA is the level of judicial intervention permitted. For instance, a stay of judicial proceedings is mandatory in an international arbitration (IAA, section 6 and Model Law, article 8) but discretionary in a domestic arbitration (AA, section 6). An appeal to the courts may be made against a domestic award for error of law (AA, section 49) but an international award cannot be challenged on that basis.

The IAA also gives effect to the New York Convention (reproduced in its Second Schedule) and provides for the recognition and enforcement of foreign arbitral awards in Singapore.

Apart from the IAA, the Arbitration (International Investment Disputes) Act provides for the recognition and enforcement of ICSID Convention arbitral awards.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The AA does not expressly incorporate the UNCITRAL Model Law. That said, it has undergone various modifications in line with many principles contained in the Model Law. As stated in question 3, the greatest difference between the AA and IAA is the level of judicial intervention permitted. In addition to the examples stated above, the court has power to extend contractual time limits for the commencement of arbitration (AA, section 10) but there is no equivalent power under the Model Law, and an appeal may be made to the court on a question of law arising out of a domestic award under the AA but there is no equivalent provision under the Model Law.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The AA and IAA do not set forth a specific list of mandatory provisions from which parties may not contractually deviate. They do, however, provide, inter alia, for the following:

- the immunity of arbitrators (AA, section 20 and IAA, section 25);
- a tribunal's competence to rule on its own jurisdiction (AA, section 21, and Model Law, article 16 (see IAA, First Schedule));
- a tribunal's duty to act fairly and impartially and allow the parties to present their case (AA, section 22 and Model Law, article 18 (see IAA, First Schedule)); and
- the parties' rights to challenge an award on grounds such as breach of natural justice, fraud and public policy (AA, section 48 and IAA, section 24).

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Section 32(1) of the AA provides that the arbitral tribunal shall decide the dispute in accordance with the substantive law chosen by the parties. If the parties have not chosen a substantive law then the arbitral tribunal will apply the law as determined by the application of conflict of laws rules (AA, section 32(2)). The tribunal may also decide the dispute, if the parties so agree, in accordance with 'such other considerations as are agreed by them or determined by the tribunal' (AA, section 32(3)). This allows the tribunal to disregard strict rules of law.

These provisions closely follow article 28 of the Model Law as enacted in Singapore through the IAA. Under article 28(1), the arbitral tribunal shall decide the dispute in accordance with the application of a substantive law or 'rules of law' (eg, *lex mercatoria*) chosen by the parties. However, if the parties have not designated any such applicable law or 'rules of law', then the arbitral tribunal shall apply a substantive law determined by conflict of laws rules that the arbitral tribunal considers applicable.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The most prominent arbitral institution in Singapore is the Singapore International Arbitration Centre (SIAC):

The Singapore International Arbitration Centre
32 Maxwell Road, 02-01 Maxwell Chambers
Singapore 069115
Tel: +65 6221 8833
Fax: +65 6224 1882
www.siac.org.sg

On the website of SIAC the following is stated:

[SIAC] was established in July 1991 as a not-for-profit, non-governmental organisation to meet the demands of the international business community for a neutral, efficient and reliable dispute resolution institution in Asia. SIAC is committed to complete neutrality and independence in its role as an international arbitral institution. Integrity, fair rules and procedures, efficiency and competence are key to SIAC's success.

The SIAC Rules 2016 (6th edition) (SIAC Rules), the primary rules of arbitration at the SIAC, took effect on 1 August 2016, superseding previous versions.

Parties arbitrating at the SIAC also have the option of adopting the UNCITRAL Arbitration Rules (as revised in 2010) (UNCITRAL Rules). While the UNCITRAL Rules were designed for use in ad hoc arbitrations, parties can, with special provision, enjoy the benefit of institutional administration of the arbitration by the SIAC. The SIAC Guide to UNCITRAL Rules Arbitration (see www.siac.org.sg/our-rules/62-our-rules/rules/311-uncitral-arbitration-rules) provides an explanation of how this may be achieved.

The SIAC also has its SGX-DT Arbitration Rules (first edition, 1 July 2005) and the SIAC SGX-DC Arbitration Rules (first edition, 27 March 2006). These are designed for the conduct of expedited arbitrations for disputes arising from derivative trading and derivative clearing respectively.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

All disputes may be resolved by arbitration unless it would be contrary to public policy to do so (IAA, section 11, and AA, section 48(1)(b)). Examples of disputes that are not regarded as arbitrable include custody disputes, grant of statutory licences, validity of registration of trademarks or patents and some anti-competition matters (eg, matters regulated under Singapore's Competition Act). Statutory minority oppression claims have been held to be non-arbitrable as a class (see *Maniach Pte Ltd v L Capital Jones Ltd and another* [2016] 3 SLR 801).

The Singapore Court of Appeal has held that claims involving an insolvent company may not be arbitrable when the substantive rights of other creditors are affected (see *Larsen Oil and Gas Limited v Petroprod Ltd* [2011] 3 SLR 414).

In a more recent case, *Tomolugen Holdings v Silica Investors Ltd* [2015] SGCA 57, the Singapore Court of Appeal held that the arbitrability of a dispute would be presumed so long as it fell within the scope of an arbitration clause, subject to that presumption being rebutted if it could be shown that Parliament intended to exclude a particular type of dispute from being arbitrated or if permitting the arbitration of a type of dispute would be contrary to public policy. Such non-arbitrable matters included claims arising upon insolvency or the liquidation of an insolvent company because they impinge on third-party rights. The Court of Appeal however noted that disputes involving section 216 of the Companies Act (Chapter 50) do not, generally, engage public policy considerations as they are essentially contractual in nature.

The Singapore High Court in *Piallo GmbH v Yafiro International Pte Ltd* [2014] 1 SLR 1028 has also held that actions on bills of exchange (eg, claims on dishonoured cheques), are arbitrable if the reason for the cheques being dishonoured (in this instance, the alleged breach of a distributorship agreement) arose from a dispute falling within the scope of the arbitration agreement.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

An arbitration agreement must be in writing. An agreement concluded orally or by conduct or any other means may also be a valid arbitration agreement provided that the contents of such an agreement are recorded in any form (IAA, section 2A).

For instance, in *R1 International Pte Ltd v Lonstroff AG* [2014] SGCA 56, the Singapore Court of Appeal had to consider whether a set of terms (which included an agreement to arbitrate in Singapore) set out in a contract note that was sent by R1 International to Lonstroff shortly after the deal had apparently been agreed, was incorporated as part of the contract between the parties and, if so, whether an antisuit injunction ought to be made against Lonstroff AG from pursuing a case in the Swiss courts. The Court of Appeal held that the contract note was part of the contract between the parties – it was improbable that the parties expected to contract purely on the bare bones of the prior email confirmations – and as such, those terms (including the agreement to arbitrate) would have, as regards the industry practice and size and scope of the subject matter of the supply contracts in question, probably expected terms such as the agreement to arbitrate in Singapore to be incorporated into the more detailed contract note.

Parties are also increasingly including, in their arbitration agreements, a specific statement as to their express choice of law to govern the arbitration agreement. In the absence of an express choice of law to govern the arbitration agreement, the Singapore High Court (see *BCY v BCZ* [2016] SGHC 249) has endorsed the approach of the English Court of Appeal in *SulAmérica Cia Nacional De Seguros SA and others v Enesa Engenharia SA* [2012] 1 Lloyd's Rep 671, holding that where the arbitration agreement is a clause forming part of a main contract, it is reasonable to assume that the contracting parties intend for the same system of law to govern both the arbitration agreement and the main contract.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

An arbitration clause or agreement contained in a contract will continue to be enforceable under the doctrine of separability, even if the contract is avoided, rescinded or terminated (Model Law, article 16, IAA, First Schedule and AA, section 21).

An arbitration agreement is not discharged by the death of any party to the agreement but continues to be enforceable by or against the personal representative of the deceased party (AA, section 5).

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Third parties, namely non-signatories to the arbitration agreement, are generally not bound by an arbitration agreement, subject to exceptions (see those listed below).

In *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832, the Singapore High Court stated that to permit enforcement of arbitral awards against a non-party to the arbitration agreement (who was also a non-party to the arbitration reference) would be anathema to the ‘internal logic of the consensual basis of an agreement to arbitrate’ as stated by the Singapore Court of Appeal in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372. It expressly rejected the ‘single economic entity’ concept that it said was conceptually difficult to reconcile with the established doctrine of separate legal personality and the narrow exceptions recognised at law for the piercing of the corporate veil. It also noted that the single economic entity concept has not been recognised in the case law from Singapore and other common law jurisdictions, and that it was not even a clearly established concept in international arbitration.

The exceptions to the above general rule include the following:

- Section 9 of Singapore’s Contracts (Rights of Third Parties) Act allows a third party to rely on an arbitration clause or agreement to enforce a term in a contract if the contract expressly provides that he or she may enforce that term in his or her own right or if that term purports to confer a benefit on him or her;
- the legal assignee of a contract may also, upon giving notice of assignment to the other party, be entitled to the rights of a party under the arbitration agreement;
- a principal, whether disclosed or undisclosed, of a party who acted as agent in the agreement, has rights as a party to the arbitration agreement; and
- the legal representatives of the estate of a deceased, and trustees in bankruptcy, are also entitled to that party’s rights under the arbitration agreement. An insurer claiming through a subrogated action is also bound by the terms of an arbitration clause by which the insured was bound.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

Third parties who are not parties to the arbitration agreement are not permitted to participate in the arbitration through joinder, third-party notice or otherwise, without the consent of all the parties to the arbitration. In line with this principle, SIAC Rules, rule 7.1 provides that a party or non-party to the arbitration may file an application for one or more additional parties to be joined as a claimant or a respondent, only if the additional party to be joined is prima facie bound by the arbitration agreement, or all parties, including the additional party to be joined, have consented to the joinder of the additional party.

In *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372, the Singapore Court of Appeal held that the tribunal’s joinder of the sixth to eighth claimants to the arbitration was wrong, namely, it was ‘predicated on a mistaken construction of the 2007 SIAC Rules’ (ie, that rule 24(b), as it then stood, allowed the joinder of consenting third parties to the arbitration against the wishes of

the respondents, even where those third parties were not privy to the arbitration agreement). The Court of Appeal therefore found that the awards made by the tribunal in favour of the sixth to eighth claimants ‘suffer[ed] from a deficit in jurisdiction’ and refused to enforce those awards in Singapore pursuant to its discretion under section 19, IAA.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the ‘group of companies’ doctrine?

The Singapore courts have not accepted the ‘group of companies’ doctrine. That said, one might attempt to argue that non-signatories could be considered a party to the arbitration agreement through a piercing of the corporate veil, for example, based on the alter ego principle, fraud or abuse of the corporate vehicle. However, there does not appear to be any Singapore case law on these areas in an arbitration context. Further, in *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832, the Singapore High Court expressly rejected the ‘single economic entity’ concept – see question 11.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

There are no specific provisions or restrictions in the AA or IAA relating to multiparty arbitration agreements.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

There are no statutory restrictions on who may act as an arbitrator. The IAA and AA both provide that no person shall be precluded by reason of his or her nationality from acting as an arbitrator unless otherwise agreed by the parties (Model Law, article 11(1), IAA, First Schedule and AA, section 13(1)). It is, however, not uncommon for parties to state specific requirements for their intended arbitrator, for example, a certain expertise or set of qualifications.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Where the parties cannot agree, the IAA and the SIAC Rules provide for the default appointment of a single arbitrator by the SIAC President as appointing authority (IAA, section 8(2), 8(3) and SIAC Rules, rule 10.2). Under the SIAC Rules, the default provision is for a single arbitrator, but the SIAC Registrar has discretion to appoint three arbitrators if the dispute warrants it (SIAC Rules, rule 9.1).

Section 9A(2) of the IAA and rule 11.3 of the SIAC Rules provide that where two of three arbitrators have been appointed by the parties, the third arbitrator shall be appointed by the SIAC President unless the parties have agreed upon a procedure for nominating the third arbitrator and if that procedure has resulted in a nomination.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

An arbitrator can be challenged where there are justifiable doubts as to the arbitrator’s impartiality or independence or the arbitrator does

not possess the qualifications agreed to by the parties (AA, section 14, Model Law, article 12; IAA, First Schedule and SIAC Rules, rule 14.1). In the absence of any challenge procedure agreed by the parties, the procedure set out in the AA, IAA or the agreed procedural rules apply.

Bias can take three forms: actual bias, imputed bias or apparent bias (see *PT Central Investindo v Franciscus Wongso and others and another matter* [2014] SGHC 190). The Singapore High Court held that 'actual bias' would obviously disqualify a person from sitting in judgment; 'imputed bias' arises where a judge or arbitrator may be said to be acting in his or her own cause (*nemo iudex in sua causa*) and this happens if he or she has, for instance, a pecuniary or proprietary interest in the case – in that situation disqualification is 'certain without the need to investigate whether there is likelihood or even suspicion of bias'; and finally, 'apparent bias' that was what the aggrieved party in that case accused the sole arbitrator of. The court held that the test for determining the bias of an arbitrator is whether a 'reasonable and fair minded person with knowledge of all the relevant facts would entertain a reasonable suspicion' that a fair hearing for the applicant was not possible. On the facts of the case, and applying the above 'reasonable suspicion test', the court held that the sole arbitrator was not guilty of apparent bias.

An arbitrator may also be replaced on his or her death or resignation, where the arbitrator is physically or mentally incapable of conducting the proceedings or where the arbitrator has failed to properly conduct the arbitration with reasonable despatch or in making the award or where substantial injustice has been or will be caused to a party.

Under the IAA, where the arbitrator is incapable of conducting the proceedings or where the arbitrator has failed to act without undue delay, either party may apply to the Singapore High Court for his or her removal in the absence of voluntary resignation by the arbitrator or any agreement by the parties to terminate his or her mandate.

In international arbitrations in Singapore, counsel and arbitrators often refer to the IBA Guidelines on Conflicts of Interest in International Arbitration for guidance on arbitrator challenges even though these guidelines are not strictly binding.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

The arbitrator must be independent of the parties to the arbitration. He or she must be impartial and should disclose any circumstance that gives rise to justifiable doubts as to his or her impartiality and independence. This obligation continues throughout the duration of the arbitration (Model Law, article 12; IAA, First Schedule, AA, section 14(1)).

The arbitrator should treat the parties with equality and allow each party a full opportunity to present its case (Model Law, article 18, IAA, First Schedule). In this context, 'full opportunity' means 'reasonable opportunity' (see *ADG and another v ADI and another matter* [2014] 3 SLR 481). In *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768, the Singapore High Court clarified that

there are two aspects to a party's reasonable opportunity to present its case: a positive aspect and a responsive aspect. The positive aspect encompasses the opportunity to present the evidence and advance the propositions of law on which it positively relies to establish its claim or defence, as the case may be. The responsive aspect encompasses the opportunity to present the evidence and advance the propositions of law necessary to respond to the case made against it ... The responsive aspect of presenting a party's case has itself two subsidiary aspects to it. The first is having notice of the case to which one is expected to respond. The other is being permitted actually to present the evidence and advance the propositions of law necessary to respond to it. A tribunal will therefore deny a party a reasonable opportunity to respond to the case against it if it either: (i) requires the party to respond to an element of the opposing party's case which has been advanced without reasonable prior notice; or (ii) curtails unreasonably a party's attempt to present the evidence and advance the propositions of law which are reasonably necessary to respond to an element of the opposing party's case.

But there is a third situation in which a tribunal will deny a party a reasonable opportunity to present its responsive case: when the tribunal adopts a chain of reasoning in its award which it has not given the complaining party a reasonable opportunity to address.

The parties are jointly and severally liable to pay the arbitrator's fees and expenses, which are set forth by the arbitrator and subject to party agreement in ad hoc arbitrations. If the arbitration is administered by an arbitral institution, some form of scale fees will usually apply.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators are immune against claims for negligence arising from acts or omissions done in the capacity of arbitrator and for any mistake in law, fact or procedure made in the course of the arbitral proceedings or in the making of an arbitral award (AA, section 20, and IAA, section 25). However, neither the AA nor IAA provides that arbitrators will be immune from liability for intentional breaches of duty or deliberate bad faith.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

The aggrieved party may apply to the court for a stay of the court proceedings; it must not take a step in the proceedings within the meaning of section 6 of the AA, or IAA, such that it is disentitled from seeking a stay.

A stay of judicial proceedings is mandatory in an international arbitration (IAA, section 6 and Model Law, article 8) but discretionary in a domestic arbitration (AA, section 6). However, even in an application for a stay under section 6 of the AA, the burden is on the party who wishes to proceed in court to 'show sufficient reason why the matter should not be referred to arbitration'. Assuming the applicant is ready and willing to arbitrate, the court will only refuse a stay in exceptional cases because of Singapore's strong policy in favour of arbitration (see *Maybank Kim Eng Securities Pte Ltd v Lim Keng Yong and another* [2016] 3 SLR 431).

Note however, that an application to the court for pre-action disclosure will not be stayed pursuant to section 6 of the AA, or IAA, as it would be premature – see *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25 (further details at question 28).

The Singapore Court of Appeal decision in *Carona Holdings Pte Ltd v Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460 provides guidance as to what the parties should do: the aggrieved party should file a stay application within 14 days from the service of the statement of claim (ie, the 14 days being the time allowed for the filing of the aggrieved party's defence under the Rules of Court) or within any extended time frame arising from a court order or the parties' agreement. Once this occurs, the opposing party should not press ahead to seek a judgment in default of defence, pending the hearing of the application for a stay. The aggrieved party should not file a substantive defence as this would constitute a 'step in the proceedings' disentitling it from a stay. However, the filing and serving a Notice to Produce Documents referred to in the statement of claim, pursuant to Order 24 Rule 10 of the Rules of Court, does not amount to a step in the proceedings – see *Amoe Pte Ltd v Otto Marine Ltd* [2014] 1 SLR 724.

In *Oei Hong Leong v Goldman Sachs International* [2014] 3 SLR 1217, the Singapore High Court had to consider whether to grant a stay under section 6 of the IAA where there was an arbitration clause in one contract between the parties and a (court) jurisdiction clause in another contract between them. The court held that it should ascertain which contract had the closer connection to the claims or which contract the claims arose out of, and in doing so, found that the parties' dispute was more closely connected with the contract containing the arbitration clause; it thus granted the stay.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The arbitral tribunal has the power to determine its own jurisdiction based on the Kompetenz-Kompetenz principle, including issuing a ruling on whether an arbitration clause is valid (Model Law, article 16; IAA, First Schedule).

If a party is dissatisfied with the tribunal's jurisdictional ruling (whether finding that it has jurisdiction or that it does not), it may appeal to the Singapore High Court within 30 days of receipt of the tribunal's ruling (IAA, section 10 and AA, section 21(9), Model Law, article 16(3)). Note however, that preliminary rulings on jurisdiction can only be challenged under Art 16(3) of the Model Law if they do not touch on the merits of the case. In *AQZ v ARA* [2015] 2 SLR 972, the Singapore High Court held that relief under article 16(3) was not available if the tribunal's ruling dealt in some way with the merits of the case, even though the ruling was predominantly on jurisdiction; in that case, the aggrieved party's proper recourse would be to challenge the ruling under the relevant limbs of article 34(2) of the Model Law.

A party who is thereafter dissatisfied with the decision of the High Court on a challenge brought under IAA, section 10 and Model Law, article 16(3) may then appeal to the Court of Appeal, provided that leave to do so is obtained from the High Court (IAA, section 10(4); AA, section 21A(1)).

If the court subsequently decides, upon an appeal from the tribunal's decision, that the tribunal does have jurisdiction, the tribunal shall continue the arbitral proceedings and make an award. If, however, the tribunal is unable or unwilling to do so, its mandate shall terminate and a new tribunal will be appointed (IAA, section 21A).

A plea that the arbitral tribunal does not have jurisdiction must be raised not later than the submission of the statement of defence.

The arbitral tribunal may, however, admit a later plea if it considers the delay justified (Model Law, article 16(2), IAA, First Schedule and AA, section 21(4)).

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Neither the IAA nor the AA provides for a default mechanism for determining the place of arbitration or the language of the arbitral proceedings in the absence of the parties' prior agreement. The procedural rules agreed to by the parties, however, often provide for such matters. In the absence of any other mechanism, the arbitral tribunal ultimately has the discretion to determine such matters.

23 Commencement of arbitration

How are arbitral proceedings initiated?

The IAA, which adopts the procedure set forth in the Model Law, provides that arbitration proceedings are commenced when a request to refer a dispute to arbitration is received by the respondent (Model Law, article 21). The AA also contains similar provisions.

Procedural rules usually specify what the request for arbitration (or notice of arbitration) should contain. As an example, the SIAC Rules require the claimant to file a notice of arbitration with the SIAC Registrar (SIAC Rules, rule 3.1). The notice of arbitration should comprise:

- a demand that the dispute be referred to arbitration;
- the names, addresses, telephone numbers, facsimile numbers and electronic mail addresses, if known, of the parties to the arbitration and their representatives, if any;
- a reference to the arbitration clause or the separate arbitration agreement that is invoked and a copy of it;
- a reference to the contract out of or in relation to which the dispute arises and where possible, a copy of it;
- a brief statement describing the nature and circumstances of the dispute, specifying the relief claimed and, where possible, an initial quantification of the claim amount;

- a statement of any matters that the parties have previously agreed as to the conduct of the arbitration or with respect to which the claimant wishes to make a proposal;
- a proposal for the number of arbitrators if this is not specified in the arbitration agreement;
- unless the parties have agreed otherwise, the nomination of an arbitrator if the arbitration agreement provides for three arbitrators, or a proposal for a sole arbitrator if the arbitration agreement provides for a sole arbitrator;
- any comment as to the applicable rules of law;
- any comment as to the language of the arbitration; and
- payment of the requisite filing fee.

The claimant shall also, at the same time, send a copy of the notice of arbitration to the respondent and it shall notify the SIAC Registrar that it has done so, specifying the mode of service employed and the date of service (SIAC Rules, rule 3.4).

24 Hearing

Is a hearing required and what rules apply?

Article 24(1) of the Model Law provides that an arbitral tribunal has discretion to decide whether to hold oral hearings, subject to the parties' agreement. In practice, oral hearings are usually held unless the parties opt to proceed with the arbitration on a documents-only basis. The arbitration agreement between the parties and the procedural rules adopted thereunder may contain express provisions as to the need for an oral hearing.

The SIAC Rules provide that the tribunal shall, unless the parties have agreed on a documents-only arbitration, hold a hearing for the presentation of evidence or the oral submissions, or both, on the merits of the dispute, including, without limitation, any issue as to jurisdiction (SIAC Rules, rule 24.1). The tribunal may also direct the witnesses to give evidence by videoconference.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

In a Singapore-seated arbitration, the tribunal is not bound to apply the Singapore law of evidence or rules of civil procedure. The tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence (Model Law, article 19, IAA, First Schedule; AA, section 23(3)). The SIAC Rules further provide that the tribunal is 'not required to apply the rules of evidence of any applicable law' (SIAC Rules, rule 19.2).

The tribunal has the power to order the discovery (disclosure) of documents and interrogatories, and the giving of evidence by affidavit from witnesses (IAA, section 12; AA, section 28(2)). Both the IAA and AA provide that the arbitral tribunal has wide discretion to conduct the arbitration in such manner as it considers appropriate (Model Law, article 19(2), IAA, First Schedule and AA, section 23(2)). The IBA Rules on the Taking of Evidence in International Arbitration are frequently referred to.

In practice, evidence is frequently given in the form of witness statements (sometimes made on oath, depending on the procedure agreed by the parties) that are subsequently orally verified at the evidentiary hearing, followed by cross-examination and re-examination of the witness. Cross-examination is usually not limited to scope of the witness statements, although the tribunal may exercise some control in preventing cross-examination from straying beyond the issues identified by the parties. Re-examination is permitted, but it is usually limited to matters raised in cross-examination. Re-cross-examination (permitted in some jurisdictions) is uncommon and does not usually occur. The tribunal may also adopt an inquisitorial process (IAA, section 12(3)). Witness conferencing (also called 'concurrent evidence' or 'hot-tubbing') is becoming increasingly popular as an alternative to the traditional examination, cross-examination and re-examination approach stated above.

In addition, the tribunal may appoint one or more experts if necessary. It can also require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents,

goods or other property for his or her inspection (Model Law, article 26, IAA, First Schedule and AA, section 27).

Officers or employees of the parties are not restricted from giving evidence in the arbitration. Such persons are in practice frequently called as witnesses.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

As opposed to the arbitral tribunal requesting assistance from the court to enforce its orders, the party in whose favour an order has been made may apply to the court to enforce that order. The effect of this is that subsequent non-compliance with that order would amount to a contempt of court.

Orders made by an arbitral tribunal may be enforced by the Singapore High Court 'as if they were orders made by the court' (AA, section 28(4) and IAA, section 12(6)). Such orders may include an order granting security for costs, discovery of documents and interrogatories, taking evidence by way of affidavit or measures for the preservation of evidence (AA, section 28; and IAA, section 12).

The court may also grant interim relief in aid of arbitrations that are seated outside Singapore (IAA, section 12A).

The orders of an emergency arbitrator in Singapore may also be enforced in Singapore as though they were orders of an arbitral tribunal (IAA, section 12(6) read with section 2(1)).

The court will generally not interfere with the exercise of the tribunal's discretion to make interlocutory orders. If the tribunal refuses to make such orders, the court will not compel the tribunal to make them. The court will also not set aside interlocutory orders made by a tribunal (see *PT Pukuafu Indah and others v Newmont Indonesia Ltd and another* [2012] 4 SLR 1157).

The court also has the power to issue subpoenas to witnesses within the jurisdiction to testify or produce documents at arbitral proceedings (AA, section 30 and IAA, section 13). It may also intervene on various grounds, such as deciding on a challenge as to the arbitrator's impartiality, independence, hearing an appeal against a tribunal's decision on its jurisdiction and setting aside the award (see questions 17, 21, and 42).

27 Confidentiality

Is confidentiality ensured?

Neither the AA nor the IAA imposes a statutory duty of confidentiality on the parties or the arbitral tribunal. Singapore courts have, however, ruled that there is an implied duty on the parties and the arbitrator not to disclose confidential information obtained in arbitration proceedings or use them for any purpose other than the dispute in which they are obtained (*Myanma Yaung Chi Oo Co Limited v Win Nu* [2003] 2 SLR 547 at [15] and *International Coal Pte Ltd v Kristle Trading Ltd & Anor* [2009] 1 SLR (R) 945 at [82]). In that regard, a party may apply to the Singapore High Court to seal court documents in court proceedings in order to preserve the confidentiality of a related arbitration.

The implied duty of confidentiality is, however, not absolute; much turns on the specific facts of the case. For instance, confidentiality may be lifted by the express or implied consent of the parties, where leave of court is obtained, where disclosure is reasonably necessary for the protection of a party's legitimate interests, where disclosure is in the interests of justice or where public interest so requires (see *AAY v AAZ* [2011] 1 SLR 1093 at [64]).

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

The Singapore courts have the power to grant many of the types of relief available to the tribunal under the IAA and AA, whether before or after arbitration proceedings have commenced, except for the granting of security for costs and the discovery of documents.

The Singapore High Court has confirmed that it had no power to grant an order for the discovery of documents prior to the

commencement of the arbitration (see *Equinox Offshore Accommodation Ltd v Richshore Marine Supplies Pte Ltd* [2010] SGHC 122).

If however, the potential claimant is still seeking to determine whether he or she has a cause of action, the court may, in appropriate cases, still be in a position to order pre-action discovery even where there is an arbitration clause in the contract between the parties (see *Navigator Investment Services Ltd v Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25). The Singapore Court of Appeal, however, cautioned that where an arbitration clause was prima facie applicable, absent exceptional circumstances, a court would not grant pre-action discovery or pre-action interrogatories, especially where both the parties involved as well as the issues in dispute between them were one and the same, on the grounds of abuse of process.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Neither the IAA nor the AA specifically provides for the appointment of an emergency arbitrator; they do, however, include emergency arbitrators within the definition of 'arbitral tribunal', with the result that any orders by an emergency arbitrator in Singapore can be enforced by the Singapore High Court (IAA, section 2(1)).

The SIAC Rules provide that a party in need of emergency interim relief may apply for the appointment of an emergency arbitrator prior to the constitution of the arbitral tribunal (SIAC Rules, rule 30.2 and Schedule 1).

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The tribunal has wide powers. For instance, it has the power to order a claimant to provide security for costs under section 12(1)(a) of the IAA, although that power is restricted by section 12(4), which provides that an order cannot be made only by reason of the fact that the claimant is an individual ordinarily residing outside Singapore or a corporation incorporated or controlled outside Singapore. Similar provisions are found in the AA (AA, section 28(2)).

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

There are no specific provisions in the IAA or the AA that allow the tribunal to issue sanctions against the parties or their counsel for such tactics. That said, a person may have recourse to a variety of provisions to provide some sanctions against a party adopting such tactics, for example, an appropriate order for costs (SIAC Rules, rule 35) or ordering some form of interim relief (IAA, section 12 and AA, section 28(2)). Where the 'guerilla tactics' amount to professional misconduct, an aggrieved party or the tribunal may consider making a professional complaint against the counsel in question to the Law Society of Singapore (if he or she is registered with the Singapore Legal Services Regulatory Authority). See also question 49.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Where the tribunal consists of more than one arbitrator, any decision shall be made by a majority of all its members, unless otherwise agreed

by the parties (Model Law, article 29, IAA, First Schedule). Questions of procedure, however, may be decided by the chairman or presiding arbitrator, if he or she is so authorised by the parties or all members of the arbitral tribunal. The SIAC Rules also provide that if there is no majority decision, the presiding arbitrator alone shall make the award for the tribunal (SIAC Rules, rule 32.7).

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

There is no prohibition on dissenting opinions in either the IAA or AA. Tribunal members who do not agree with the majority view in an award may therefore issue dissenting opinions.

34 Form and content requirements

What form and content requirements exist for an award?

The AA and IAA prescribe that the award must fulfil the following requirements (Model Law, article 31, IAA, First Schedule and AA, section 38):

- it must be made in writing and signed by the arbitrators (in the case of two or more arbitrators, by all the arbitrators or the majority of the arbitrators provided that the reason for any omitted signature of any arbitrator is stated);
- it must state the reasons for the award, unless the parties have agreed that no reasons are to be given or the award is one on agreed terms;
- it must state the date of the award and the place of arbitration; and
- a copy of the award shall be delivered to each party to the proceeding.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

While neither the IAA nor AA prescribe a time limit within which an award should be rendered, a tribunal should conduct the arbitration 'without undue delay' (article 14, Model Law). Similar provisions can be found in the AA (section 16). There does not appear to be any Singapore case law defining what would amount to 'undue delay'. In *Coal & Oil Co LLC v GHCL* [2015] 3 SLR 154, the Singapore High Court found that a 19-month delay in the release of the award did not violate any rule of natural justice. See question 42.

Under the SIAC Rules there is a default requirement for a tribunal to submit its draft award to the registrar within 45 days of the date on which the tribunal declares the proceedings formally closed. This deadline may be extended at the registrar's discretion or if the parties agree (SIAC Rules, rule 32.3).

If the expedited procedure under Rule 5.1 of the SIAC Rules is adopted, the tribunal must render its award six months from the date when the tribunal is constituted, unless the registrar extends that period due to exceptional circumstances (SIAC Rules, rule 5.2).

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The date of the award is relevant for enforcement purposes. An award must be enforced within six years (Limitation Act (Chapter 163), section 6(1)(c)). Further, under the Model Law, article 33, as enacted by the IAA:

- if a party wishes to request a correction or interpretation of the award, it may do so within 30 days of the party's receipt of the award;
- if the tribunal wishes to make corrections to the award (on its own initiative), it may do so within 30 days of the date of the award; and
- if a party wishes to challenge or set aside the award, the application must be made to the Singapore courts within three months from the date of the receipt of the award by the applicant (Model Law, article 34, IAA).

The AA has similar provisions (AA, section 43). The tribunal may, under the AA, also issue interpretations (on its own initiative) within 30 days of the date of the award (AA, section 43(3)).

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The IAA defines an award as any decision of the arbitral tribunal on the substance of the dispute. This includes an interim, interlocutory or partial award, 'but excludes any orders or directions made under section 12 (of the IAA)' (IAA, section 2(1)). The purpose of this phrase is to distinguish an award from procedural orders. This is significant because an award may be challenged but a procedural order may not (see *PT Pukuafu Indah v Newmont Indonesia Ltd* [2012] 4 SLR 1157).

The terms 'interim', 'interlocutory' and 'partial' are not statutorily defined. In *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364, the Singapore Court of Appeal held that a partial award finally disposes of part, but not all of the parties' claim in an arbitration, leaving some claims for further consideration and resolution in future proceedings in the arbitration. An interim award decides a preliminary issue relevant to the disposing of a particular claim. In contrast, a provisional award is effectively an order or direction made under section 12 of the IAA. It is issued to preserve a factual or legal situation so as to safeguard rights that one party is attempting to have the arbitral tribunal recognise; it does not definitely or finally dispose of either a preliminary issue or a claim in arbitration. Therefore, while partial or interim awards qualify as an award under section 2 of the IAA (and can be set aside), a provisional award does not qualify under section 2 of the IAA and is not capable of being revoked.

If the dispute is settled, the parties can record it by way of a 'consent award', that is, an arbitral award on agreed terms (Model Law, article 30, IAA, First Schedule and AA, section 37).

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Proceedings may terminate in one of several ways, for example:

- by the final award;
- by an order of the arbitral tribunal when the claimant withdraws his or her claim, or when the parties agree on the termination of the proceedings; or
- if the tribunal finds that the continuation of proceedings becomes unnecessary or impossible (article 32, Model Law).

The arbitral proceedings shall also be terminated by the arbitral tribunal if the claimant fails to serve its statement of claim within the prescribed time limit, without showing sufficient cause (article 25, Model Law).

If the parties settle the dispute, the tribunal can issue a 'consent award' on agreed terms to record the settlement and issue an order for termination of the arbitration by way of a procedural order (Model Law, article 32, IAA, First Schedule).

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

A Singapore-seated arbitral tribunal has a wide and general discretion to allocate and apportion costs in its awards, unless the parties have agreed otherwise.

The general rule, however, is that 'costs follow the event'. This rule derives from court proceedings and means that the losing party will be ordered to bear the legal costs and arbitration costs incurred by the successful party, in full or in part. The paying party has the right to apply to the registrar of the SIAC for taxation (assessment) of the costs to be paid under an award, unless the award directs otherwise (section 21(1), IAA). A tribunal need not take Singapore civil procedure principles on the allocation of costs into account (see *VV v VW* [2008] 2 SLR 929).

The SIAC Rules provide that most forms of costs are recoverable, including fees and expenses of the tribunal and the SIAC's

administration, as well as legal and expert fees and expenses (SIAC Rules, rules 35 to 37).

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

A Singapore-seated tribunal may award simple or compound interest on the whole or any part of sums awarded or costs awarded under an award for any period ending not later than the date of payment (IAA, section 20 and section 12(5)).

A sum directed to be paid under an award shall, unless the award otherwise directs, carry interest from the date of the award until date of payment and at the same rate as a judgment debt (IAA, section 20(3)).

The default rate for judgment debts in Singapore is at present 5.33 per cent per annum (Supreme Court Practice Directions, Part IX, paragraph 77).

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Any request for a correction or interpretation of the award must be submitted within 30 days of the party's receipt of the award (Model Law, article 33, IAA, First Schedule). Similar provisions exist in the AA (AA, section 43). If the tribunal wishes to make corrections to the award (on its own initiative), it may do so within 30 days of the date of the award (Model Law, article 33, IAA, First Schedule and AA, section 43(3)).

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

An award is challenged by making an application to the Singapore High Court to set aside the award. The grounds for setting aside are found in article 34 of the Model Law, supplemented by two additional grounds set out in section 24 of the IAA.

Article 34 of the Model Law provides that the award may be set aside on the following grounds:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement was not valid;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the proceedings and was unable to present its case;
- the award dealt with a dispute not falling within the terms of the arbitration agreement;
- the tribunal was improperly constituted;
- the subject matter of the arbitration was not capable of settlement by arbitration; or
- the award was contrary to public policy.

Under section 24 of the IAA, the two further grounds for setting aside an award are:

- the making of the award was induced or affected by fraud or corruption; or
- a breach of natural justice occurred in connection with the making of the award by which the rights of a party were prejudiced.

Under the AA, unless the parties have agreed otherwise, a party may appeal against an award on a question of law arising out of an award (AA, section 49). It should be noted that if the parties agree for any reason to dispense with the tribunal giving reasons for the award, that agreement should include a waiver of the right to appeal against the award on a question of law.

An award will not be set aside for breach of an agreed procedure if the non-observance is derived from the applicant's own doing, or if the challenge to the award is against the arbitral tribunal's procedural orders or directions that fall within the exclusive domain of the arbitral tribunal. See *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2014] SGHC 220.

In *Coal & Oil Co LLC v GHCL* [2015] 3 SLR 154, the Singapore High Court held that in order for an award to be set aside under article 34(2)(a)(iv) of the Model Law, the procedural breach complained could not be of an arid, technical or trifling nature; rather, it had to be a material breach of procedure serious enough that it justified the exercise of the court's discretion to set aside the award. This would often, though not invariably, require proof of actual prejudice. In that case, neither the tribunal's failure to declare the proceedings closed nor the 19-month delay in the release of the award violated any rule of natural justice. Further, such complaints did not rise to the level of gravity that the notion of public policy contemplated. The court also observed that an accusation against a tribunal for committing a breach of natural justice was a serious matter; as such, the Singapore courts take a serious view of such challenges, and that was the reason that those that had succeeded were few and far between and limited only to egregious cases where the error was 'clear on the face of the record'.

Further, in *ASG v ASH* [2016] 5 SLR 54, the Singapore High Court clarified that in order for an award to be set aside under article 34(2)(a)(ii) of the Model Law, the party alleging a breach of natural justice must demonstrate 'a clear and virtually inescapable inference that the arbitrator did not apply his mind at all to [an important] aspect of that party's submissions' and that this set a 'high bar' for the party making the assertion of a breach of natural justice. It is only if the aggrieved party can show either that the tribunal might have realised the issue for determination but deliberately avoided grappling with it, or the tribunal overlooked entirely the issue in question, that a breach of natural justice can be established. There is a 'crucial difference between a tribunal's decision to reject an argument, whether explicitly or implicitly, and its failure even to consider that argument. There will be no breach of natural justice if the tribunal reaches its decision implicitly, or reaches the wrong decision, or in fact fails to understand the argument.'

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

The application to challenge an award is made in the first instance to the Singapore High Court by way of an application to set aside the award. The application must be made within three months of the date of receipt of the award. If the application fails, a party, with leave of the High Court, may pursue an appeal to the Singapore Court of Appeal. Given that applications to set aside awards are court proceedings, the general rule that 'costs follow the event' applies (see question 39). In practice, a challenge is usually decided within three to six months of the application being filed in court.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Awards made in Singapore as well as awards made in countries that are parties to the New York Convention may be recognised and enforced in Singapore by application to the Singapore High Court.

The Singapore courts have developed a pro-arbitration reputation and generally favour the recognition and enforcement of awards, unless there are solid grounds upon which enforcement should be refused. In that regard, the Singapore Court of Appeal has in at least two cases, seen fit to allow a party's challenge to a tribunal's finding that it had jurisdiction and also allow a party's application to resist enforcement of multiple awards made in another SIAC arbitration (see *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130 and *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372).

The Singapore High Court in *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 opined, rejecting the 'single economic entity' concept, that it would not grant enforcement of arbitral awards against a non-party to the arbitration agreement (who was also a non-party to the arbitration reference). See question 11.

Update and trends

Singapore saw two major developments in the field of international arbitration in 2016:

- the facilitation of third-party funding for arbitration claims, which will be regulated primarily by the Civil Law (Amendment) Act and Civil Law (Third Party Funding) Regulations (draft legislation was passed by Parliament in early 2017, see question 50); and
- the release of the SIAC Rules 2016 (6th edition), which came into effect on 1 August 2016.

Among the improvements brought about by the new SIAC Rules 2016 are the following:

- a procedure for the early dismissal of claims and defence;
- measures to enhance the efficiency of the arbitral process; and
- a streamlined process for disputes involving multiple contracts and multiple parties, inter alia, enabling a party to file a single notice of arbitration in respect of claims under multiple contracts and enabling the consolidation of related disputes.

Investment arbitration: *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] SGCA 57

A special panel of five judges comprising the Singapore Court of Appeal upheld the jurisdiction of a Singapore-seated arbitral tribunal hearing an investment-related claim under the PRC–Laos bilateral treaty. The treaty claim had been brought against Laos by Sanum Investments, a Macao-based company that had made investments in Laos. Assisted by amicus curiae (J Christopher Thomas QC and Professor Locknie Hsu), the Court held that the treaty applied to Macao, notwithstanding

that Macao was not yet part of the PRC as at the date the treaty was entered into. The Court applied the ‘moving treaty frontier’ rule in customary international law – codified in articles 15 and 29 of the Vienna Convention on the Law of Treaties – providing for the automatic extension of a treaty to a new territory, as and when it becomes part of a contracting state, and held that the exceptions to that rule had not been established in the present case as there was nothing in the treaty to manifest any intention that it was not meant to apply to Macao and there was no evidence that otherwise established the parties’ intention not to apply the treaty to Macao. The Court accepted the ‘critical date doctrine’ as a rule of evidence under international law. In doing so, the Court held that letters between the PRC and Lao governments on the issue of the treaty’s non-application to Macao as a territory of the PRC should not be given any evidentiary weight as they only arose after the dispute between the parties had occurred. The Court also gave a broad interpretation to a phrase in the treaty (ie, ‘involving the amount of compensation for expropriation’), with the result that Sanum’s expropriation-related claim (which involved not just the quantum of compensation, but also whether there was liability to pay compensation) fell within the jurisdiction of the tribunal. This decision is significant not only because of the Singapore Court of Appeal’s application of international law, but also because of its adoption of the same standard of review for treaty arbitration, as for commercial arbitration, that is, that the court’s review of the tribunal’s jurisdiction should be undertaken de novo (ie, the exercise before the court was a complete rehearing, with the tribunal’s findings having no legal or evidential value in that context).

The Singapore Court of Appeal has upheld the enforceability of an ‘interim award’ in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

The Singapore courts are unlikely to recognise the enforcement of foreign awards that have been set aside at the place of arbitration. See, for example, the Patron’s speech of Singapore Chief Justice Sundaresh Menon at the Chartered Institute of Arbitrators London Centenary Conference on 2 July 2015 in which he stated the ‘traditional view’ as being that ‘... an award which is set aside at the seat of arbitration has no legal existence or effect because the force of an award comes from the law of the seat, ex nihilo nihil fit.’

This is one of the grounds upon which recognition and enforcement may be refused under the New York Convention, namely, that the award ‘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’ (article V, 1(e)).

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Such provisions exist in our arbitration legislation. An emergency arbitrator (appointed pursuant to the rules of arbitration agreed to by the parties) falls within the definition of an ‘arbitral tribunal’, see AA, section 2 and IAA, section 2. As such, in Singapore, orders and directions made by emergency arbitrators have the same standing as orders and directions made by actual tribunals and may, by leave of the High Court or a judge thereof, be enforceable in the same manner as if they were orders made by a court, and where leave is so given, judgment may be entered in terms of the order or direction (see AA, section 28(4) and IAA, section 12(6)).

47 Cost of enforcement

What costs are incurred in enforcing awards?

Court fees and legal fees will be incurred in the enforcement of awards.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Singapore arbitration is influenced by Singapore law and legal tradition. A website established to promote Singapore law, maintained by the Singapore Academy of Law, states as follows (see www.singaporelaw.sg/sglaw/ as accessed on 1 December 2016):

Singapore law, which has its roots in English law, has now evolved into a distinctive jurisprudence. It continues to absorb and modify the common law as well as best practices from other mature legal systems. Developments in Singapore law reflect an acute awareness of the need to recognise and accommodate current international business and commercial practices.

The legal system in Singapore has received numerous international accolades for its efficiency and integrity. As a consequence of this, there is now wide recognition of Singapore as a leading legal hub in Asia.

By reason of the close links between Singapore and English law, examples of case law from England and other British Commonwealth jurisdictions, while not binding, are generally regarded as being persuasive in the Singapore courts, provided that they are not inconsistent with Singapore statutes or case law. The higher the level of court the English or Commonwealth decision derives from, the greater its persuasive power before the Singapore courts. Singapore civil procedure also derives from English civil procedure prior to its reforms in 2000.

A Singaporean arbitrator can therefore be expected to be familiar with English law principles and civil procedure. Many Singaporean arbitrators have also obtained varying degrees of exposure to the legal systems of other countries (including civil law jurisdictions) and are therefore able to adapt to the needs, expectations and nuances of the parties appearing before them.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Counsel who are registered with the Singapore Legal Services Regulatory Authority are regulated by the Singapore Legal Profession Act (Chapter 161) and the rules made under it, in particular the Legal Profession (Professional Conduct) Rules 2015, as well as the Law Society of Singapore's Practice Directions. On 18 November 2015, the legal professional disciplinary framework in Singapore was extended to include all foreign-qualified lawyers registered to practise in Singapore law practices; a common set of professional conduct rules now applies to registered Singapore-qualified and foreign-qualified lawyers. Counsel who are admitted to practise law in jurisdictions outside Singapore are also subject to the legal and ethical standards applicable to their specific jurisdictions. As a matter of best practice, arbitration counsel also generally have regard to, and comply with, the IBA Guidelines on Party Representation in International Arbitration.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding for arbitral claims will be regulated by the Civil Law (Amendment) Act and Civil Law (Third Party Funding) Regulations, which came into force in 2017. These enactments will:

- clarify that the common law torts of champerty and maintenance are abolished in Singapore;

- provide that, in certain prescribed categories of dispute resolution proceedings (as set out in the Civil Law (Third Party Funding) Regulations), third-party funding contracts are not contrary to public policy or illegal;
- provide for conditions to be imposed on funders through subsidiary legislation; and
- provide that lawyers may recommend third-party funders to their clients or advise their clients on third-party funding contracts so long as they do not receive any direct financial benefit from the recommendation or facilitation.

Funding may only be provided by an entity that meets the criteria for a qualifying third-party funder. Related amendments to the Legal Profession (Professional Conduct) Rules 2015 are envisaged such that legal practitioners will be under a duty to disclose the existence of a third-party funding contract and the identity of the third-party funder to the Court or tribunal and to every other party to the proceedings, as soon as is practicable. Legal practitioners and law practices will also be prohibited from having interests in relevant third-party funders and from receiving referral fees and commissions.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

A person does not need to be admitted to legal practice in Singapore in order to represent a party or to sit as an arbitrator in an international arbitration in Singapore. For this purpose, foreign arbitrators and counsel may obtain a short-term visit pass to Singapore (see the Singapore Ministry of Manpower's website, www.mom.gov.sg, for more details).

Business-visit visas are required for foreign nationals holding travel documents issued by certain countries including China, but not Australia, the United Kingdom, the United States or most EU countries.

BraddellBrothers
1883

Edmund Jerome Kronenburg
Tan Kok Peng

ej.kronenburg@braddellbrothers.com
kokpeng.tan@braddellbrothers.com

11 Beach Road
#04-01
Singapore 189675

Tel: +65 6499 9490
Fax: +65 6499 9499
www.braddellbrothers.com

Slovakia

Roman Prekop, Monika Simorova, Peter Petho and Juraj Kunak

Barger Prekop sro

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Slovakia (as one of two successor states of Czechoslovakia) succeeded to the New York Convention as of 1 January 1993. For Czechoslovakia, the New York Convention entered into force as of 10 October 1959. At that time, Czechoslovakia made declarations under article I of the New York Convention, pursuant to which it would apply the Convention to awards made in the territory of another contracting state and to awards made in the territory of a non-contracting state to the extent that such states grant reciprocal treatment. Neither Czechoslovakia nor Slovakia made declarations or notifications under any other articles of the New York Convention.

Slovakia is a party to the following multilateral conventions:

- the Energy Charter Treaty, Lisbon (1998);
- the ICSID Convention (Convention on the Settlement of Investment Disputes between States and Nationals of Other States), Washington (1994);
- the European Convention on International Commercial Arbitration, Geneva (1964);
- the Protocol on Arbitration Clauses, Geneva (1931); and
- the Convention on the Execution of Foreign Arbitral Awards, Geneva (1931).

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Slovakia has entered into 55 bilateral investment treaties. Three of these treaties (with Iran, Kenya and Libya) have not yet entered into force.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The Arbitration Act (No. 244/2002, as amended) is the primary source of arbitration law in Slovakia, except for consumer arbitration. The Arbitration Act governs arbitral proceedings if the place of arbitration is in Slovakia, and recognition and enforcement of domestic and foreign awards in Slovakia. Since 1 January 2015, consumer arbitration has been governed by the Act on Consumer Arbitration (No. 335/2014). The Act on Consumer Arbitration significantly departs from commercial arbitration standards. The principles and standards of consumer arbitration are not addressed in this document, which focuses exclusively on commercial arbitration.

In addition, the newly adopted Civil Dispute Procedure Code (No. 160/2015) and the Enforcement Act (No. 233/1995, as amended) regulate certain key arbitration issues. These laws cover domestic and

foreign arbitral proceedings and awards and there is no special law dealing with purely domestic or foreign proceedings or awards.

The Arbitration Act does not provide for the definition of 'foreign arbitral proceeding'. It only provides that an arbitration award on merits issued within the territory of another state is considered a 'foreign arbitral award'. While preparing an amendment to the Arbitration Act (the 2014 Amendment), some practitioners suggested that a stand-alone act on international commercial arbitration (Swiss model) be adopted. However, this idea did not find adequate support.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

In 2014, the legislature adopted the 2014 Amendment, which became effective on 1 January 2015. The main purpose of the 2014 Amendment was to transpose the UNCITRAL Model Law, as amended in 2006. However, even after the 2014 Amendment, the Arbitration Act does not reflect certain important features of the UNCITRAL Model Law. For instance, the courts may only order interim measures or provisional orders before the arbitral tribunal has been appointed. After the arbitral tribunal has been appointed, courts may only order interim measures against third parties.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

Parties are free to agree upon the majority of issues related to a potential or existing arbitration proceeding. The Arbitration Act does not contain an explicit list of mandatory procedural provisions. However, the following provisions are mandatory:

- principal conditions of arbitration, which include arbitrability of dispute, form of the arbitration agreement, uneven number of arbitrators in the arbitral tribunal and personal requirements for arbitrators; and
- due process of law in the arbitration proceeding, which involves equal position of the parties, the right of parties to access documents and information submitted to the arbitrator or arbitral tribunal by the opposing party without undue delay and a tribunal's duty to order a hearing if requested by a party (see question 24).

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

In determining the substantive law, the rules differ slightly for purely domestic disputes and for disputes with international elements. Pursuant to the Arbitration Act, in domestic disputes the arbitral tribunal shall apply the rules of law (not necessarily the particular law of a certain country) agreed by the parties, to the extent that such agreement is permitted under conflict of law rules applicable in Slovakia. Failing such agreement, the arbitral tribunal shall apply the law determined by the conflict of laws rules applicable in Slovakia. In disputes

with an international element, conflict of laws rules applicable in Slovakia permit the parties to agree on the substantive law. Failing such agreement, the tribunal shall apply the substantive law determined by the conflict of laws rules which it considers appropriate.

Each agreement regarding applicable law is considered as agreement to use the substantive law of the respective state, excluding its conflict of laws principles, unless the parties agree otherwise.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

According to the official list published by the Ministry of Justice, there are almost 200 permanent arbitration courts in Slovakia. The 2014 Amendment introduced certain limits and obligations regarding establishing and operating permanent arbitration courts. Although it was expected that a number of permanent arbitration courts would decrease; this, however, did not happen because most arbitration courts adjusted to the new conditions. Therefore, the legislature adopted an amendment to the Arbitration Act in 2016 (the 2016 Amendment), which became effective on 1 January 2017. According to the 2016 Amendment, a permanent arbitration court may only be established by a national sport association, a chamber established by law or a specific legal entity explicitly set out in special laws. As a result, it is expected that the number of permanent arbitration courts in Slovakia will radically decrease.

Arguably, the most prominent permanent arbitration court is the Court of Arbitration of the Slovakian Chamber of Commerce and Industry in Bratislava (SCC Court of Arbitration):

The Court of Arbitration of the Slovakian Chamber of Commerce and Industry in Bratislava
Gorkého 9
816 03 Bratislava
Slovakia
<http://web.sopk.sk>

The usual place for hearings before the SCC Court of Arbitration is Bratislava. In addition to the personal requirements for arbitrator stipulated by the Arbitration Act, the arbitrator must have a university degree and a minimum of 10 years' professional experience. The SCC Court of Arbitration maintains the list of arbitrators; however, such list is not binding for the parties. The parties can agree on the language of the proceedings. The SCC Court of Arbitration requires that the minutes of the hearing and the award be in Slovak. The arbitration fees (the registration fee and the administrative costs) of the SCC Court of Arbitration are based on the amount in dispute. The arbitration fees are higher (by 75 per cent or 50 per cent) if the parties request expedited proceedings (see question 35).

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The 2014 Amendment significantly modifies provisions on arbitrability. Starting in 2015, arbitral tribunals may hear any dispute (including disputes involving claims for declaratory relief) to the extent that the parties can conclude a settlement. However, it remains unclear whether labour law matters are arbitrable.

The Arbitration Act provides a list of explicitly non-arbitrable disputes, which include real property disputes regarding creation, modification and termination of ownership rights or other rights in rem, disputes concerning personal status, consumer disputes and disputes relating to enforcement proceedings or arising in the course of bankruptcy or restructuring proceedings. Consumer disputes are only arbitrable under the Act on Consumer Arbitration.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

An arbitration agreement can be concluded as a separate agreement or can take the form of an arbitration clause in an agreement. The

arbitration agreement must be concluded in writing or it is null and void. The agreement is deemed to be in writing if it is:

- included in the parties' mutual written communications;
- concluded by electronic means that records the parties' will and identifies its author;
- included in a written accession to a memorandum of association of a limited liability company;
- included in by-laws of an 'interest association' or in other legal entity in which a person acquires a membership; or
- alleged in a statement of claim and the respondent does not deny it in its statement of defence submitted to the arbitral tribunal.

The reference in a contract or in written communication to any document containing an arbitration clause also constitutes a written arbitration agreement, provided that the reference makes that clause part of the contract. Arbitration clauses can also be included in general terms and conditions.

An arbitration agreement's failure to meet a formal requirement can be cured by the parties' joint declaration before an arbitrator and recorded in the minutes. Such declaration must contain the arbitration agreement. As of 1 January 2015, such declaration does not have to be made before the commencement of proceedings on jurisdiction.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The existence, validity and enforceability of arbitration clauses are governed by the principles of civil law and commercial law. Circumstances such as death or liquidation of a party to the arbitration agreement without a legal successor, termination of the underlying contract by agreement or passing of time in case of fixed-term arbitration agreements may result in arbitration agreements being no longer enforceable. In cases concerning invalidity and rescission from the underlying contract, the following severability principles apply: if the arbitration clause is part of an invalid underlying contract, the arbitration clause is invalid only if the reason for invalidity applies also to the arbitration clause; and in case the parties rescind from the underlying contract, the rescission does not affect the arbitration clause. The parties, however, may agree otherwise.

Insolvency may also have impact on the enforceability of the arbitration clauses. If the party is declared bankrupt, all proceedings to which it was a party are stayed. In addition, any disputes that have arisen after the declaration of bankruptcy are *ex lege* non-arbitrable.

Legal incapacity at the time of conclusion of the arbitration agreement renders such agreement invalid. Legal incapacity that occurs afterwards does not render the arbitration agreement unenforceable; however, the incapacitated party must be duly represented.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

In general, arbitration agreements bind the parties to the agreement. The legal successors of the parties are also bound, unless the parties specifically excluded such extension in the arbitration agreement. This rule applies to both universal and individual succession (eg, assignment). There is no case law available that would suggest that under Slovakian law an arbitration clause could be extended to a party's parent company.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The Arbitration Act contains no specific regulation concerning participation of third parties; however, in practice relevant provisions of the Civil Dispute Procedure Code are followed. The Civil Dispute Procedure Code allows third parties having an interest in the proceeding to join the proceedings, either on their own motion or upon a court's request. The courts decide whether to admit a joining party to the proceeding or not. The joining party has the same duties as any party to the

proceedings. In institutional arbitration, the rules of procedure usually address this question in detail, mostly following rules set out in the Civil Dispute Procedure Code.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the ‘group of companies’ doctrine?

There is no case law available that would suggest that the group of companies’ doctrine is recognised in Slovakia.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The Arbitration Act contains no specific provisions dealing with multiparty arbitration agreements or arbitration proceedings. However, the arbitration rules of several permanent arbitration courts (including the SCC Court of Arbitration) deal with multiparty arbitrations and provide for specific rules of arbitrators’ appointment.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

In general, any natural person of any nationality who has full legal capacity and no criminal record for intentional crime may act as an arbitrator. Certain exceptions are laid down for public officials, such as active judges or public prosecutors; such exceptions are addressed in legislation on protection of public interest. Permanent arbitration courts may provide for further requirements: for example, the SCC Court of Arbitration requires a university degree and 10 years of professional experience. One cannot exclude that requirements of parties relating to nationality, gender or religion of arbitrators would be viewed as controversial. Registration of arbitrators is generally not required, however, some arbitration courts may require registration. For instance, under the SCC Court of Arbitration rules, the parties are free to appoint any person meeting the above-mentioned criteria, however, such person must be registered as an ad hoc arbitrator with the SCC Court of Arbitration simultaneously with the appointment.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Parties may agree on a number of arbitrators. The number must be odd. Failing such agreement, the arbitral tribunal by default consists of three arbitrators. In case of a sole arbitrator, the parties appoint the arbitrator jointly. In case of three arbitrators, each party appoints one arbitrator and the appointed arbitrators subsequently appoint the tribunal’s chair. Failing to do the above within the prescribed time limits, the remaining arbitrator or arbitrators shall be appointed by a person upon which the parties have agreed (often an arbitration authority), or by the court. The agreed-upon person or the court must appoint an arbitrator who meets the relevant professional qualification (if agreed by the parties) and is independent and impartial. In institutional arbitrations, consequences of a failure by the party to actively participate in the process of appointment or requirements on arbitrators are usually addressed in the relevant procedural rules, for example, under the Procedural Rules of the SCC Court of Arbitration, the appointments are made by the president of the SCC Court of Arbitration from the official list of arbitrators maintained by the SCC Court of Arbitration. In ad hoc arbitrations, the appointment authority is the competent court.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

An arbitrator must inform the parties without undue delay of circumstances that give rise to doubts as to his or her independence or impartiality that involve his or her relationship to the subject matter of the dispute or to the parties (but not their counsel). Parties may agree on the details of the challenge procedure, except that they may not exclude a party’s right to final recourse to a court. Failing such agreement, the following default rules apply: First, a party notifies the arbitral tribunal of the reasons for a challenge. Notwithstanding the foregoing, the party may challenge the arbitrator it appointed or in whose appointing it took part only for reasons it became aware of after the appointment. Second, unless the arbitrator resigns or the other party agrees with the challenge, the arbitral tribunal shall decide on the challenge. If the challenge is not successful, the challenging party may request the court to decide on the challenge. Until the court decides on the challenge, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award. The court’s decision on the challenge is final and may not be appealed. If the challenge is upheld, the arbitrator’s mandate terminates.

A mandate of arbitrator further terminates if the arbitrator withdraws from office, upon removal of the arbitrator from office (reasons being failure to meet the conditions to be appointed as arbitrator or failure to act without undue delay after having been advised so by the parties). The arbitrator may be removed from office jointly by the parties or upon upholding the challenge by the arbitral tribunal or the court. The mandate of arbitrator further terminates if the arbitrator no longer has full legal capacity or in case of his or her death. Consequently, a substitute arbitrator must be appointed under the same rules for appointment of arbitrators.

The Arbitration Act contains several provisions that are similar to the IBA Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines); however, the Arbitration Act does not go into such detail (eg, as regards disclosure obligation of arbitrator, relationship of arbitrator to subject matter of dispute or to parties). There is no publicly accessible case law related to arbitrators’ conflict of interest or disclosure obligation expressly referring to the IBA Guidelines.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Slovakian law does not expressly regulate the relationship between parties and arbitrators. Some academics (advocating the contractual theory of arbitration) argue that a special contract exists between the parties and arbitrators; however, such contractual relationship is without prejudice to the requirement of arbitrator’s independence and impartiality. This requirement applies also to party-appointed arbitrators. Each arbitrator must perform the mandate with due care to ensure fair protection of parties’ rights and to avoid misuse and breaching of parties’ rights. Arbitrators must also proceed without undue delay. The remuneration and expenses of arbitrators are part of the costs of the proceedings. There is no statutory amount of remuneration. In ad hoc arbitration, the parties may agree on remuneration in the arbitration agreement; otherwise, the arbitral tribunal decides on its remuneration and expenses in the final award. In institutional arbitration, arbitrators’ remuneration and expenses are determined in accordance with the arbitration court’s procedural rules.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Unlike the liability of state courts, which is governed by a special legislation (Act No. 514/2003 on Liability for Damage Caused in the Exercise of Public Authority, as amended), the liability of arbitrators and permanent arbitration courts is not explicitly regulated and there is no publicly available case law addressing the issue. Further, the legal theory in this respect is not uniform. It seems that the prevailing opinion of legal commentators is that arbitrators in ad hoc arbitrations and founders of permanent arbitration courts in institutional arbitrations (permanent arbitration courts are not legal persons) are liable under the Civil Code (No. 40/1964, as amended) for damage incurred as a consequence of unlawful arbitral award or arbitration proceedings. To give rise to liability, a fault (intentional or negligent) must be established.

In 2010, Parliament approved a draft amendment to the Arbitration Act regarding liability of arbitrators but the amendment was vetoed by the president and is not effective.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

A party may challenge the jurisdiction of the court but such challenge must be made no later than in its first submission, irrespective whether procedural or on merits. The newly adopted Civil Dispute Procedure Code does not follow the previous rule, under which the parties were required to raise such jurisdictional challenge in the first submission on merits. Provided that the challenge is well founded, the court will suspend the proceedings. However, the court shall hear the case if:

- both parties agree on the court's jurisdiction;
- recognition of foreign arbitral award has been rejected;
- the subject matter of the dispute is not arbitrable; or
- the arbitral tribunal has refused to deal with the case.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The arbitral tribunal is entitled to rule on its own jurisdiction, including objections regarding the existence or validity of the arbitration agreement. If the arbitral tribunal concludes that it lacks jurisdiction, it suspends (terminates) arbitral proceedings by an arbitral order. If the tribunal concludes that it does have jurisdiction, it either issues a separate arbitral order to this effect or, unless the parties agree otherwise, continues with the proceedings and the decision on jurisdiction then forms part of the final award. In the former case, the party that challenged the tribunal's jurisdiction may request the court, within 30 days of delivery of the order, to decide on the challenge. Notwithstanding the ongoing review by the court, the arbitral tribunal may continue the proceedings, decide and issue the award. A decision by the court on the challenge is final and may not be appealed.

Time limits for raising objections vary. In particular, a challenge concerning validity or existence of the arbitration agreement must be filed no later than, or together with, the challenging party's first act in the merits of the case. A challenge that the subject matter of a dispute is not arbitrable under Slovak law or that the dispute must be determined under the Act on Consumer Arbitration may be filed until the end of the hearing (if there is no hearing, until the issuance of award). A challenge that the dispute goes beyond the tribunal's jurisdiction must be filed as soon as the challenging party, in the course of the proceedings, becomes aware of such fact.

We note, however, that it is possible, in as late a stage as the enforcement proceedings, to object to the arbitrability of the subject matter or existence of the arbitration agreement to avoid enforcement. The Supreme Court concluded that if an arbitral tribunal makes an award, despite no arbitration agreement having been concluded, the court

supervising the enforcement proceedings must not authorise enforcement. The fact that the obliged party failed to challenge the tribunal's jurisdiction or subsequently failed to file an action for setting aside the award was not found relevant. However, the 2014 Amendment is expected to limit the consequences of this decision as it assumes that an arbitration clause was concluded in writing if the respondent fails to challenge the tribunal's jurisdiction in its statement of defence submitted to the tribunal.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Failing agreement on place of arbitration, the arbitral tribunal determines the place of arbitration having regard to the character of dispute and interests of parties. In institutional arbitration, the procedural rules of respective permanent arbitration court determine such place. Unless parties agree otherwise, the arbitral tribunal may perform certain specific acts at any proper place (eg, for consultation among its members; hearing of witnesses, experts or the parties; or inspection of goods, property or documents) without prejudice to determined place of arbitration.

Failing agreement on language, the arbitral tribunal determines the language or languages to be used in arbitral proceedings. This determination applies to each written statement of a party and the hearing and award or other communication of the arbitral tribunal, unless the parties otherwise agree or the arbitral tribunal determines otherwise. The arbitral tribunal may order official translation of documents into the language of arbitration.

23 Commencement of arbitration

How are arbitral proceedings initiated?

Arbitral proceedings are initiated by filing a statement of claim. Unless the parties agree otherwise, the arbitral proceedings commence on date of receipt of the statement of claim by the other party, if the arbitrators have not been appointed yet; by the chair of the arbitral tribunal, if appointed; otherwise, by any member of the arbitral tribunal; or by the permanent arbitration court in institutional arbitration. The statement of claim must contain identification of parties, true description of decisive facts, specification of proposed evidence to be taken, specification of relevant provisions of law, relief sought and signature of the claimant or its representatives. Each respondent and the arbitral tribunal must receive a copy of the statement of claims. The Procedural Rules of the SCC Court of Arbitration lay down additional material requirements (eg, specification of dispute's value) and formal requirements (eg, the claimant must deliver sufficient copies for each respondent and member of the arbitral tribunal as well as the secretary of the SCC Court of Arbitration).

24 Hearing

Is a hearing required and what rules apply?

Failing agreement of parties, the arbitral tribunal decides at its own discretion whether to hold a hearing or to conduct a written proceeding; however, pursuant to the Arbitration Act the tribunal always orders a hearing at an appropriate stage if so requested by a party, unless the parties agree otherwise. The parties must be given sufficient advance notice (at least 30 days if the notice is being delivered outside of Slovakia) of any hearing. The parties participate in a hearing directly or through their representatives.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

In general, the arbitral tribunal must establish the facts of the case completely, quickly and effectively. Statutory procedure for the taking of evidence is fairly general and anticipates a wide range of discretion for the parties' agreement or for the arbitral tribunal.

First of all, the arbitral tribunal only takes evidence proposed by the parties. The arbitral tribunal, at its own discretion, considers the selection of evidence and the manner of taking of evidence (eg, hearing of witnesses, parties and experts, submission of documentary evidence, inspection of goods or real property). On the other hand, if there are mandatory provisions on taking of evidence, the tribunal must abide by them. For instance, if witnesses or experts are under a statutory confidentiality obligation (eg, classified information, commercial or bank secrets), they may be heard only if they have been exempted according to respective laws.

Under the Arbitration Act the arbitral tribunal cannot, unlike the courts in standard civil proceedings, enforce cooperation of third persons (eg, witnesses, experts or third persons possessing a relevant documentary evidence or property) in arbitration proceedings. As regards experts, the arbitral tribunal may appoint an expert if the decision depends on assessment of facts requiring special knowledge; however, it is not unusual that parties submit party-appointed expert opinions. Unlike the IBA Rules on the Taking of Evidence in International Arbitration, under which the tribunal-appointed expert may order a party to provide any relevant assistance, the Arbitration Act vests this competence in the arbitral tribunal.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

The arbitral tribunal may request assistance from a court in connection with enforcement of interim measures ordered by the arbitral tribunal and taking of evidence. During the arbitral proceedings, the court may intervene in relation to the appointment and challenging of arbitrators.

27 Confidentiality

Is confidentiality ensured?

Arbitrators must keep confidential all information of which they become aware during the arbitral proceedings. The arbitral awards are also kept confidential. The requirement for confidentiality, however, does not apply to effective decisions of state courts issued in proceedings on setting aside the award and proceedings concerning enforcement of arbitral awards. Since 1 January 2012, decisions of state courts have been mandatorily publicised, identifying the parties (if they are legal persons), counsel, designation of arbitral tribunal and arbitrators and subject matter of dispute, including amounts at stake. Exceptions apply only to the personal data of natural persons.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

The Arbitration Act provides that a party to the arbitration may request, and the court may order, interim measures before the arbitral tribunal has been appointed. After the arbitral tribunal has been appointed, a party may only request a court to order interim measures against third persons. Details of the court proceedings relating to interim measures are provided for in the Civil Dispute Procedure Code. In brief, the court may order interim measures if it is necessary to temporarily adjust relationships between the parties or if there is a risk that the enforcement of an award could be endangered. Interim measures may take various forms, including inter alia, a prohibition to dispose of immovable or moveable assets or rights, an obligation to deposit moveable assets or financial amounts with the court, or a general obligation to do something, to refrain from doing something or to bear something.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Under the 2014 Amendment, the Arbitration Act explicitly allows parties to agree that a permanent arbitration court can order an interim measure before the arbitral tribunal has been appointed. The

Procedural Rules of SCC Court of Arbitration partially address such situation, however, only in relation to the securing of evidence. In particular, if a party requests an urgent measure after the submission of a claim and prior to the constitution of an arbitral tribunal, the chair of the SCC Court of Arbitration can appoint an expert or make other appropriate arrangements to secure evidence.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The 2014 Amendment introduced numerous changes regarding interim measures ordered by arbitral tribunals. First, the Arbitration Act now clearly lists reasons for ordering interim measures. Pursuant to the Arbitration Act, upon request of a party to the arbitration, the arbitral tribunal may order interim measures if it is necessary to temporarily adjust relations between the parties or there is a risk that the enforcement of the award or preservation of evidence could be endangered. The arbitral tribunal may require the party requesting an interim measure to provide adequate security for damages that may occur as a result of the interim measure. If the party fails to pay such security, the arbitral tribunal must dismiss the request.

Second, pursuant to the 2014 Amendment the Arbitration Act now lists specific types of interim measures. This list is not exhaustive. Third, the 2014 Amendment also introduced ex parte interim measures. As opposed to the UNCITRAL Model Law, however, the parties must agree on the applicability of provisions on ex parte interim measures. Fourth, pursuant to the 2014 Amendment, the Arbitration Act now explicitly states when interim measures expire. In particular, an interim measure ceases to exist:

- if the claim on merits was rejected;
- if the claim on merits was upheld and 30 days lapsed following the date when the award became enforceable; or
- upon expiration of the time period for which it was ordered. Upon request of a party, the arbitral tribunal may also cancel the interim measure if it is no longer necessary.

Finally, pursuant to the 2014 Amendment, the Arbitration Act now provides that interim measures, except for ex parte interim measures, are directly enforceable. The 2014 Amendment indicates that foreign interim measures might also be enforceable. However, it remains to be seen whether enforcement courts would support this interpretation.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The Arbitration Act or the Procedural Rules of the SCC Court of Arbitration do not deal with the arbitral tribunal's competence to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration. Additionally, there is no case law suggesting that the arbitral tribunal is entitled to do so.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal is made by a majority of all its members. A unanimous vote is not required. If one or more arbitrators do not participate in a vote, the other arbitrators may decide without them. In case of a tied vote, the chair of the tribunal has a casting vote. The award must be signed by all members of the arbitral tribunal. If a tribunal member

refuses to sign the award or does not sign it for any reason, this must be noted in the award together with the reason.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

The Arbitration Act recognises existence of dissenting opinions. If an arbitrator has been outvoted, the dissenting opinion has no consequences for the award, provided that the required majority has been achieved. The arbitrator, however, may attach the dissenting opinion, together with reasons, to the award.

34 Form and content requirements

What form and content requirements exist for an award?

The 2014 Amendment introduced the concept that the award must be in hard copy format (as opposed to electronic form). The content requirements include:

- identification of the arbitral tribunal;
- names and surnames of the arbitrators;
- identification of the parties and their representatives;
- place of arbitration;
- date of the award;
- operative part – decision on the substance;
- reasoning – except where the parties have agreed that no reasoning is needed or the award is a consent order; and
- information on the possibility of filing an action with a court to set aside the award.

The operative part of the award does not have to include the decision on costs of the arbitration. The arbitral tribunal may decide on costs in a separate award, after it has rendered a final award.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The Arbitration Act does not specify any time limit within which the award has to be rendered.

Certain arbitral institutions (eg, the SCC Court of Arbitration), however, allow the parties to request expedited arbitral proceedings, within which the award is issued in a specific, relatively short time. The time limit is usually a couple of months (eg, for the SCC Court of Arbitration either one month or four months) and starts to run from the date of payment of the court fee. The fees for expedited proceedings are higher than standard fees. If the arbitral tribunal does not meet the expedited time limits, the fee is reduced to the standard amount; however, there are no further procedural consequences.

However, the parties do not seem to have an effective remedy if there is a delay in rendering awards. Recently, the Constitutional Court refused to hear a constitutional complaint concerning delayed arbitration proceedings, arguing that the private character of arbitration excludes its jurisdiction to intervene in the arbitration proceedings until the award has been issued.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The date of award is relevant for the time limits for correction of the award (see question 41). The date of delivery of the award is decisive for the time limits for interpretation of the award by the arbitral tribunal (see question 41), time limits for review of the award by other arbitrators and time limits for setting aside of the award (for both see question 42).

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The Arbitration Act differentiates between partial awards, final awards on merits, awards on costs and consent awards (awards on the agreed terms of the parties).

Besides standard relief for monetary and non-monetary performance, the Arbitration Act permits declaratory relief and relief for substituting will to enter into contract.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

The Arbitration Act provides that arbitral proceedings shall be terminated if parties after commencement of the proceedings agree on settlement, if the tribunal in deciding on jurisdiction concludes that it does not have jurisdiction to hear the case, and through default, for example, where a party fails to pay the deposit on the costs of arbitral proceedings or fails to amend or supplement the statement of claim, after having been required to do so, or if the statement of claim does not meet the legal requirements.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Arbitral tribunals decide on the allocation of costs of proceedings based on rules agreed by the parties in the arbitration agreement. In institutional arbitration, the arbitration courts apply their procedural rules. In the absence of such rules, the relevant provisions of the Civil Dispute Procedure Code apply, pursuant to which the court would order that the costs of the successful party are recovered by the losing party. If the success was only partial, the court may order that the costs be apportioned or that no costs be recovered. The above are the basic rules, however, further rules exist addressing specific situations (for example, taking into consideration behaviour of the parties during proceedings).

The parties are free to agree on the costs and the rules of their recovery. Lacking such rules, as a standard, recoverable costs include expenses of the parties and their representatives, costs of carrying out the evidence, fees for arbitration proceedings, remuneration of the arbitration court and expenses incurred by the court, remuneration of the experts and interpreters, and remuneration of the legal counsel. The tribunals tend to award statutory attorneys' fees (set out in the Decree No. 655/2004 on Remuneration and Costs of Advocates, as amended), as opposed to negotiated fees.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Interest for principal claims may be awarded. Whether and at what rate it is awarded depends on the substance and the subject matter of the claim. The rules are set out in the applicable substantive law governing the dispute and the claim.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The arbitral tribunal can correct any clerical or typographical errors or errors in computation and other errors of a similar nature within 60 days of the date of award, either on its own motion or upon request of a party. The tribunal delivers the corrected award to the parties. Time limits (eg, for setting aside the award) begin to run from the date of delivery of the corrected award. Any party may ask the arbitral tribunal to interpret any part of the award. Such request must be filed within 30 days of the receipt of the award.

Update and trends

New Statute and Rules of Procedure of the Arbitration Court of the Slovak Bar Association

In July 2016, the Slovak Bar Association adopted a new Statute and new Rules of Procedure of its Arbitration Court. The new Statute and Rules of Procedure follow modern practices and trends in international arbitration. As such, the Arbitration Court of the Slovak Bar Association aims to attract litigants seeking streamlined, independent and impartial resolution of domestic and international disputes.

Investment claim for banning the transport of water through an underground pipeline

In August 2016, Spółdzielnia Pracy 'Muszynianka', a Polish producer of mineral water, launched a €75 million UNCITRAL claim against Slovakia under the Poland-Slovakia BIT for banning the transport of water through an underground pipeline. According to recent press releases, the claimant argues that the Slovakian parliament passed an amendment to the Slovak Constitution prohibiting the transportation of water, which, according to Muszynianka, expropriates the company's investment in the water industry. This arbitration is in its early phases.

Investment claim for revocation of talc mining licence

In July 2014, EuroGas Inc and Belmont Resources Inc filed an ICSID investment claim against Slovakia under Slovakia's BIT with Canada. According to press releases, the claimants are seeking compensation of €2.3 billion for alleged wrongful revocation of their talc mining licence. The hearing on jurisdiction and merits took place from 12 to

16 September 2016. Following the hearing, the arbitral tribunal issued a procedural order in which it addressed certain document production matters, post-hearing briefs and costs submissions. It is expected that the arbitral tribunal will render a final award in 2017.

Healthcare reform arbitrations

Following the 2007 reform of the healthcare system in Slovakia, shareholders of the local health insurance companies brought several investment arbitration cases against Slovakia. According to publicly available information, only the *Achmea v Slovak Republic* dispute under Slovakia's BIT with the Netherlands seems to be open. In this dispute, the PCA arbitral tribunal ordered Slovakia to pay Achmea damages of approximately €22 million, plus interest, and costs of approximately €3 million. Slovakia brought a petition to set aside the final award before the German regional court that ruled in favour of Achmea. Slovakia has appealed to the German Federal Supreme Court, which stayed the proceedings and asked the Court of Justice of the EU for a preliminary ruling regarding the compatibility of the underlying BIT between Slovakia and Netherlands with EU law. The proceeding before the Court of Justice of the EU is pending. Notwithstanding the proceedings before the German courts and Court of Justice of the EU, Achmea started to enforce the final award in Luxembourg. According to the Slovak government's representatives, the Luxembourg enforcement court has frozen Slovakia's bank accounts holding approximately €30 million in Luxembourg pending the results of the German proceedings.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

The Arbitration Act provides for both the possibility to challenge an award and have it reviewed by another arbitrator or arbitral tribunal and the possibility to petition the court to set aside the award. The former is, however, available only if the parties in the arbitration agreement explicitly agreed so. Both remedies are only available with respect to domestic arbitral awards.

Review of an award is initiated by a party to the arbitration filing a request to review the award. Such request must be filed within 15 days of the delivery of the award. The procedural rules for revision proceedings are similar to the original proceedings.

An action to have an award set aside must be brought to the court within 60 days of the delivery of the award. The reasons for setting aside an award are listed exhaustively in the Arbitration Act. Under the 2014 Amendment, these reasons are practically identical to those set out in the UNITRAL Model Law. In addition, the court hearing an application to set aside an arbitral award must disregard the reasons which it cannot raise on its own (article 36 (1)(a) of the UNCITRAL Model Law) if the party failed to raise them in the arbitral proceeding within the stipulated time period or, failing such stipulation, without undue delay.

In addition, the Constitutional Court seems to have opened a new avenue for potential challenges of domestic arbitral awards. In 2011, the Constitutional Court for the first time reviewed the merits of an arbitral award issued in Slovakia and set it aside. The Court held that the tribunal manifestly erred in its application of substantive law and thus violated the complainant's right to a reasoned decision that clearly and comprehensibly addressed all relevant factual and legal issues. However, recent case law indicates that the Constitutional Court would set aside an arbitral award only in an identical situation.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

There are two levels of appeal in proceedings concerning the action to set aside the award. The first level – ordinary appeal – is available in all cases, the second level – extraordinary appeal – only if certain specific conditions set out in the Civil Dispute Procedure Code are met. The length of the proceedings varies. Based on statistics of the Ministry of Justice, the district and regional courts both decide within 14 months.

The costs mainly consist of the court fees and attorneys' fees. The court fees in connection with an action to set aside the award reach €331.50, the same fee applies to ordinary appeal and the fee for extraordinary appeal is €663. Attorneys' fees are recoverable only to the extent set out in Decree No. 655/2004 on Remuneration and Costs of Advocates, as amended. As a general rule, the costs are borne by the losing party.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Valid and effective domestic awards become enforceable automatically after expiry of the deadline for voluntary fulfilment of obligations stipulated in the domestic award. If an action for setting aside the award is filed, the award remains valid and effective. The court may, upon a motion of a party, postpone its enforcement. The enforcement rules are set out in the Enforcement Act.

Foreign awards must be recognised before they can be enforced. The requirements in the Arbitration Act that must be fulfilled for a foreign award to be successfully recognised are practically identical to those set out in the New York Convention. Slovakian courts do not issue individual decisions on recognition of foreign awards (exequatur), except for declaratory awards. Normally, however, the court deciding on enforcement, after having received the documentation required for recognition of an award, regards the foreign award as a domestic award. The recognition is regarded as a preliminary question in enforcement proceedings. The enforcement rules for foreign arbitral awards are set out in the Enforcement Act. They are identical to those for domestic awards.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

The Arbitration Act explicitly allows that a party to the arbitration that applied for the setting aside of a foreign award abroad files a motion requesting the relevant court in Slovakia to postpone enforcement until the setting aside is decided upon and provides that courts will not recognise and enforce awards that have been set aside by the courts at the place of arbitration. Nonetheless, there is no publicly accessible case law that would address the limitation set out in the European Convention on International Commercial Arbitration.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Orders by emergency arbitrators fall into the category of interim measures by emergency arbitrators. For enforcement of these measures, see question 29.

47 Cost of enforcement

What costs are incurred in enforcing awards?

The costs include court fees, fees of judicial executors and attorneys' fees. The basic court fee for commencement of enforcement procedure is €16.50. Objections against enforcement (by the debtor) are not subject to any court fee. The fees of judicial executors include remuneration and costs of the judicial executor. The remuneration of the judicial executor is 20 per cent of the enforced amount with a maximum of €33,193.92. If no amount is enforced, the judicial executor is entitled only to the remuneration for performed legal actions (fixed fee) with a minimum of €33. In addition, the judicial executor has a right to compensation for reasonably incurred costs. Attorneys' fees are set out in Decree No. 655/2004 on Remuneration and Costs of Advocates, as amended. As a general rule, the costs of enforcement are borne by the losing party.

Other**48 Judicial system influence**

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Arbitration practice in Slovakia is significantly affected by the Civil Dispute Procedure Code that is to be applied to questions not specifically addressed in the Arbitration Act. In particular, the Civil Dispute Procedure Code applies to procedural questions not addressed in the Arbitration Act, provided that the nature of the matter permits such application. The Arbitration Act does not provide for a US-style discovery or witness preparation. As a result, there is no apparent tendency to apply such tools to the arbitration in Slovakia. On the other hand, in general, arbitrators are free to set the procedural rules and, for example, may decide on applying special rules on evidence taking such as the IBA Rules on the Taking of Evidence.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are no specific professional or ethical rules applicable to counsel in international arbitration in Slovakia.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding of arbitral claims is regulated to the extent the funding is provided by an insurance house under 'legal protection insurance'. This insurance, in general, requires the insurance house to pay the insured party's costs of pursuing its claims or defending against third-party claims set out in the insurance policy. Among other regulatory requirements under the legal protection insurance, any restrictions on the insured party's right to choose its counsel are prohibited. This regulation does not apply to other instances usually falling within the concept of third-party funding. In particular, applicable laws explicitly provide that the legal protection insurance regulation does not apply to various forms of legal support provided by the insurance house to the insured parties in order to effectively defend against third parties' claims under a 'liability for damage insurance'. Finally, the area of third-party funding after the claim has arisen is a relatively new concept in Slovakia. For instance, there are several entities providing such funding in Slovakia, but they are not subject to specific regulatory requirements relating to this business activity.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

There are no unusual restrictions or rules applying to counsel and arbitrators from outside Slovakia appearing and sitting in Slovakia-seated arbitrations.

BARGER PREKOP

A T T O R N E Y S

Roman Prekop
Monika Simorova
Peter Petho
Juraj Kunak

rprekop@bargerprekop.com
msimorova@bargerprekop.com
ppetho@bargerprekop.com
jkunak@bargerprekop.com

Mostova 2
811 02 Bratislava
Slovakia

Tel: +421 2 3211 9890
Fax: +421 2 3211 9899
www.bargerprekop.com

Spain

Alfredo Guerrero, Marlen Estévez and Roberto Muñoz

King & Wood Mallesons

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Spain is a contracting state of the New York Convention of 1958, which has been in force since 10 August 1977. Spain did not make any reservations or declarations.

Spain is also party to the European Convention on International Commercial Arbitration of 1961, which has been in force from 10 August 1975 and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965 in force from 17 September 1994.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Spain has BITs in force with more than 70 countries, for instance, with most Latin and Central American countries, China, Turkey, Morocco, South Korea, Egypt, India, Iran, etc.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

According to the Spanish Arbitration Act (the SAA), an arbitration is considered foreign when, indistinctively:

- the parties are domiciled in different states at the time of entering the arbitration agreement;
- the place of the arbitration, where substantial part of the contractual obligations are fulfilled or closest to the dispute, is located outside the state where the parties are domiciled; or
- the relationship from which the controversy derives affects the interests of international trade.

Further, an award is considered foreign when it has been rendered out of Spain (article 46.1 SAA).

Having said that, the SAA does not generally differentiate between domestic and foreign arbitral proceedings. In fact, in its recitals it is recognised that the law has opted for a monistic system.

Primary domestic sources in arbitration are the SAA, international conventions, case law produced by national courts and arbitration tribunals and the scholars.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

Although the SAA is based on the UNCITRAL Model Law, it (primarily) presents the following differences:

- any matters that can be freely and legally disposed of by the parties are arbitrable (article 2.1);
- in international arbitration, states (or the entities controlled by them) cannot invoke prerogatives recognised under their national law to circumvent the obligations deriving from the arbitral proceedings (article 2.2);
- arbitral proceedings are considered foreign also if they affect the interests of international trade (article 3.1.c);
- in international arbitrations, arbitration agreements are valid provided that the requirements set forth in the legal rules chosen by the parties, the rules applicable to the merits of the dispute or the SAA (article 9) are met;
- the default rule is only one arbitrator (article 12);
- a particular procedure for the appointment of arbitrators in the case of several parties (article 15.2.b) is foreseen;
- if arbitrators do not confirm the appointment within the agreed period (default rule of 15 days from the nomination) it will be understood that it has been declined (article 16);
- arbitrators may incur liability in the event of bad faith, gross recklessness or wilful act (article 21); and
- arbitral proceedings are presumed confidential (article 24.2).

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The SAA gives primacy to party autonomy. Nonetheless, parties cannot deviate from due process. Article 24 states that parties shall be treated with equality and each party shall be given full opportunity to present its case.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

According to article 34 SAA, arbitrators shall resolve the dispute following the legal rules (including non-national laws) agreed by the parties (the only limitation is public policy). Failing an agreement, arbitrators shall apply those rules that they deem appropriate, considering that any reference to national laws (save any agreement otherwise) excludes conflict-of-laws rules.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

Some of the most prominent Spanish arbitral institutions are:

- Corte Civil y Mercantil de Arbitraje (CIMA) (<http://arbitrajecima.com/>), located at Calle Serrano 16 (2º Izqd) 28001 – Madrid; and
- Corte de Arbitraje de Madrid (CAM) (www.arbitramadrid.com/web/corte/home/), located at Calle de Las Huertas, 11 (3rd Floor) 28012 – Madrid.

Both CIMA and CAM utilise the assistance of lists of arbitrators and tariffs to fix the fees.

It is also noteworthy that CIMA rules foresee the possibility of challenging the validity of the award before the arbitral institution (based on limited grounds and provided that it is expressly agreed by the parties) and that CAM rules provide a summary procedure.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The SAA favours arbitrability. In fact it provides that any matters that can be freely and legally disposed of by the parties can be submitted to arbitration (article 2).

Notwithstanding, some matters remain not arbitrable, such as family law issues, the civil status and capacity of individuals, criminal liability and in general matters related to public policy.

According to article 2 SAA, any matters that can be freely and legally disposed of by the parties can be submitted to arbitration. This is a clear demonstration in favour of arbitration, following the premises of the Model Law and taking de non-arbitrability as an exception.

For instance, the possibility to submit intra-company disputes to arbitration is expressly recognised in article 11-bis. Further, securities transactions are considered as arbitrable, and Spanish case law has recognised the arbitrability of subjective rights related to competition law (judgment of the Madrid Appeal Court, 25 September 2015).

The SAA excludes labour disputes from its scope (article 1).

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The SAA sets forth the requirements of arbitration agreements (without determining any particularities for public entities).

According to article 9, an arbitration agreement has to be in writing, in a document signed by the parties or an exchange of letters, telegrams, telexes, faxes or other telecommunication methods (including electronic) that ensure a record of the agreement is kept. Additionally, where an arbitration agreement is accessible for subsequent reference on electronic, optical or other media, it will be regarded as compliant with this requisite.

Further, when construing these requirements, the Spanish Supreme Court has concluded that conclusive facts can evidence the consent to submit a dispute to arbitration even if the agreement is only signed by one party (ruling 24 November 1998). In the same vein, as stated in article 9, tacit consent is accepted when there is an exchange of statements of claim and defence and the existence of the arbitration agreement is alleged by one party and not denied by the other.

Lastly, pursuant to article 9.2, arbitration agreements can be contained in adhesion contracts. Their validity and interpretation will be governed by the rules applicable to such contracts.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

Arbitration agreements are considered a separate and independent agreement from the underlying contract (article 22 SAA). Therefore, they are not affected by the fate of the latter.

Additionally, according to the Spanish Insolvency Act, the mere declaration of insolvency does not affect the validity of arbitration agreements, unless the court considers that they could affect the

course of insolvency proceedings, in which case it can stay their effects (article 52.1).

Notwithstanding, in case the parties expressly submit the dispute to a particular individual who subsequently deceases or is declared unable to perform his or her duties, the validity of the arbitration agreement could be jeopardised.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Under the SAA, signature is not essential to confirm the consent to submit a dispute to arbitration.

Having said that, the SAA in article 11-bis allows the inclusion in an arbitration agreement of the articles of association if a qualified majority of two-thirds votes in favour. If so, those shareholders who have not voted in favour would nonetheless be bound by the arbitration agreement.

Additionally, in certain limited circumstances Spanish case law has extended its effects to non-signatory parties. For instance:

- in case of assignment of a contract that contains an arbitration agreement, it is generally accepted that the latter is transmitted to the assignee (judgment of the Madrid Appeal Court, 18 February 2002);
- the same outcome is achieved in cases of succession, including mergers and acquisitions and contractual subrogation (judgment of the Madrid Appeal Court, 26 October 2010); and
- with regard to mandate contracts, representation is recognised, and, therefore, an agent can bind the principal if he or she has enough power to do it (judgment of the Madrid Appeal Court, 16 January 2006).

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The SAA does not contain any special rule on joinder or notice to third parties. Thus, third-party participation will depend upon the arbitration rules chosen by the parties.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the ‘group of companies’ doctrine?

Spanish case law extends the effects of an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that certain requirements are met. The Superior Court of Justice of Valencia has set forth, in its judgments dated 19 November 2014 and 5 May 2015, that the essential elements to be considered are:

- the existence of a group of companies: paying attention to European legislation;
- effective participation of the non-signatory: in relation to the dispute and regardless of the stage in which participation took place; and
- application to the facts of a legal doctrine: among others, the estoppel or the piercing of the corporate veil.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The SAA does not have any special provision on the validity of multiparty arbitration agreements. It merely provides an arbitrators appointment procedure in case of several parties (see question 16).

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Any individual in full possession of his or her civil rights may be an arbitrator, provided that he or she is not barred from it by his or her professional rules. Unless otherwise agreed by the parties, nationality shall not be an impediment (articles 13 and 15.6 SAA), neither religion or gender.

Nonetheless, for arbitrations in which only one arbitrator is appointed, the arbitrator shall be a jurist (unless the parties have agreed otherwise or in *ex aequo et bono* arbitrations), and when arbitration is to be conducted by three or more arbitrators, at least one of them shall be a jurist.

For instance, lawyers, public notaries, scholars or ex judges can indeed be appointed as arbitrators (the SAA does not require a minimum experience). Conversely, active judges, magistrates and public prosecutors cannot be appointed as arbitrators, nor the person who has been previously appointed as the mediator in the dispute (article 17.4 SAA). Further, an internal body of one of the parties is not eligible (ruling of the Barcelona Appeal Court, 28 September 2012).

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

The default rule is to appoint only one arbitrator.

Regarding the procedure, failing an agreement article 15 SAA foresees an appointment procedure depending on the number of arbitrators:

- in case of a sole arbitrator, he or she will be appointed by the competent court upon request of the interested party;
- in case of an arbitral tribunal of three arbitrators, each party shall appoint one, and the two arbitrators appointed shall choose the chair. If a party does not appoint an arbitrator within 30 days of a request, appointment will be made by the competent court, upon request of the interested party. The same procedure will be followed in case the two appointed arbitrators do not reach an agreement as to the chair within 30 days of the last acceptance. When there are several claimants and respondents, each group shall appoint one arbitrator. Failing an agreement, all the arbitrators will be appointed by the competent court upon request of the interested party; and
- when arbitration is to be conducted by more than three arbitrators, all of them shall be appointed by the competent court upon request of the interested party.

In those cases where appointment shall be carried out by national courts, they will provide a list of three candidates for each arbitrator (taking into consideration any requirements agreed by the parties and trying to assure independence and impartiality). Appointment will take place by drawing lots, and it is not possible to challenge the final decision.

Lastly, note that similar appointment rules apply for both CIMA and CAM, although reference to the court should be substituted to the arbitral institution.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Arbitrators shall be, and maintain themselves as, impartial and independent throughout the whole procedure, being barred from having personal, professional or commercial relationships with the parties. In fact, arbitrators are under the obligation to disclose any circumstances that may affect their impartiality or independence (article 17 SAA). In

this sense, there is a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration, as well as the recommendations published by the Club Español del Arbitraje (the CEA).

Notwithstanding, being independent and impartial should not be compared with not incurring in any of the abstention or recusal causes provided for the judges and magistrates foreseen in the Spanish Organic Law of the Judicial Power. An arbitrator may only be challenged if there are grounded doubts concerning partiality or independence or if he or she does not hold the qualifications agreed by the parties.

Challenge proceedings can be agreed by the parties. Failing such agreement, arbitrators will hear the challenge, which shall be filed within 15 days of the interested party being aware of the acceptance by the arbitrator or of the circumstances that would ground the challenge. If the challenge is not upheld, the decision cannot be appealed, although the interested party could reiterate the arguments within the eventual challenge proceedings of the award.

Lastly, in case the arbitrator is legally or *de facto* impeded because of any circumstance (eg, illness, decease, declaration of disability, etc) in properly conducting the arbitration, he or she shall cease, unless there is a disagreement as to whether the arbitrator is impeded. In these cases, the competent authority to hear the challenge would be, failing any agreement, the court (in cases of a sole arbitrator) or the arbitrators not affected (in case of arbitral tribunals), and if no agreement is reached, the competent court (article 19 SAA).

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Once arbitrators accept the appointment, they have to faithfully fulfil the mandate given by the parties, with independency and impartiality. This relationship is equivalent to a mandate contract.

In institutional arbitral proceedings, remuneration is based on tariffs and it is paid (as well as the expenses) by both parties equally, save any agreement otherwise or an eventual condemn in costs.

Although the SAA does not govern communications between arbitrators and parties, it imposes the obligation to communicate any writs and documents filed for the arbitrators (article 30). Additionally, unilateral communications would be prohibited based on the obligation of the arbitrators to be impartial and independent (article 17) and to treat the parties equally (article 24.1).

The above is regardless of whether an arbitrator has been appointed by a party, court or arbitral institution.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators are not immune from liability (nor are arbitral institutions). In fact, according to article 21 SAA, arbitrators may incur in liability in case of bad faith, gross recklessness or wilful default. Thus, arbitrators will only incur in liability in those cases where damages are intentionally caused or when they have acted with gross negligence (judgment of the Supreme Court, 22 June 2009). Liability can be either civil or criminal.

Although with some caveats, Spanish case law has recognised that the procedure to be followed is similar to the one foreseen for judges and magistrates (judgment of the Seville Appeal Court, 30 April 2010).

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

When a valid arbitration has been entered into, parties are barred from filing a claim at national courts (positive effect) and national courts are prevented from hearing them (negative effect).

However, negative effect is not automatic (further, no anti-suit injunctions are foreseen). Accordingly, a party shall challenge the jurisdiction of national courts within 10 days of those provided to file the answer to the claim (staying the legal period to file the said answer), against which an opposition could be filed within five days of its notification. An appeal could be filed in case the court denies its jurisdiction. Otherwise, it would only be possible to file a challenge before the same court.

Challenge over jurisdiction does not impede commencement or continuation of arbitral proceedings.

In case no challenge to jurisdiction is filed, it would be considered as a tacit waive to arbitration (article 11 SAA).

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Article 22 SAA embraces the Kompetenz-Kompetenz principle (as expressly admitted in its recitals). Hence, arbitrators are also competent to rule on jurisdiction (either through a partial or final award), even in those situations when the validity or existence of the arbitration agreement itself is challenged.

These claims shall be made when filing the statement of defence at the latest. The fact of having participated in the appointment of the arbitrator does not bar from filing it. The claim grounded on the fact that the dispute falls out the jurisdiction of the arbitrator shall be made as soon as practicable during arbitral proceedings.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Pursuant to articles 26 and 28 SAA, when no agreement exists, arbitrators shall determine the place and language of arbitration, taking into consideration all the circumstances of the case. Further, when from the said circumstances a particular language cannot be agreed upon, arbitration will be conducted in any of the official languages of the place of the proceedings.

23 Commencement of arbitration

How are arbitral proceedings initiated?

Unless otherwise agreed, arbitration commences on the date upon which the notice of arbitration is served on the respondent (article 27 SAA).

Although the SAA does not develop the requirements of the notice of arbitration, CIMA and CAM rules stipulate in similar wording:

- the notice for arbitration shall include the arbitration agreement, the parties involved in the arbitration, the claimant's counsel, a description of the controversy and the reliefs sought, any comments as to the arbitrators, evidence of the payment of the provision of funds, etc; and
- the applicant shall submit copies for the institution, each party involved and the arbitrators.

24 Hearing

Is a hearing required and what rules apply?

Parties are free to decide on the particularities of arbitral proceedings (article 25 SAA). Failing such agreement, arbitrators may decide as they deem appropriate.

Additionally, failing any agreement otherwise, arbitrators shall decide on whether hearings take place (to make any pleas, take evidence or make conclusions). In practice, conclusions are in writing, and, although it is not common, it is possible to not schedule any hearings (unless the parties refuse, arbitrators generally fix hearings).

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Any evidence legally taken or obtained is admitted, upon which the facts of the controversy will be established. SAA is based on the premise that parties can agree on the particular procedure. In practice, guidance is sought (particularly in international arbitration) from the IBA rules on the Taking of Evidence.

Failing any agreement, parties should file all available documents along with their corresponding statements. Party officers can only testify if they are called by the counterparty (unless the *lex arbitri* provides otherwise), and party-appointed experts are more common than tribunal-appointed ones.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

The SAA states that, save in those cases where it is expressly foreseen, national courts shall not intervene (article 7).

Intervention is foreseen for the appointment or challenge of arbitrators (articles 15.3 and 19.1.a), the taking of evidence (article 33), application for interim measures (article 11.3), challenge of the validity of the award (article 40 et seq) or its enforcement (article 45).

27 Confidentiality

Is confidentiality ensured?

According to article 24 SAA, arbitrators, the parties and the arbitral institutions shall keep confidential any information received on occasion of the arbitration.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Both national courts and arbitrators are competent to order interim measures (articles 11 and 23 SAA). According to article 11.3, interim measures can be requested to national courts by any party either before the commencement or during arbitration proceedings.

This dual system is considered by the recitals of the SAA as alternative. Therefore, parties are free to choose to address its application to either arbitrators or courts.

Available interim measures are listed in article 726 of the Spanish Civil Procedure Code (SCPC), which is an open list. Courts will uphold an application for interim measures if security is provided and the following are evidenced:

- bonus fums iuris;
- periculum in mora; and
- proportionality.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The SAA does not govern emergency arbitrators. Conversely both the CIMA and CAM rules expressly foresee particular proceedings.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Following question 28, an arbitral tribunal may order any of the interim measures listed in the SCPC after it is constituted. Among them are interim freezing orders, appointment of a receiver, an order to cease a certain activity or to refrain from a particular behaviour, etc. As

expressly stated in the SAA, arbitrators may (ie, it is a matter of discretion) request the applicant to provide security.

Notwithstanding, note that if the affected party decides not to comply with the interim measure ordered by the arbitrators, the latter will have to seek judicial assistance.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The only sanction that can be imposed is the condemn in costs.

In any event, the behaviour shown by the counsel can also raise other liabilities (see question 49).

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Pursuant to article 35 SAA, it is sufficient if the decision is adopted by majority, unless the parties have agreed otherwise. In the event it is not possible, the chair will decide.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

If any arbitrator does not agree with the sense of the award, he or she may explain the reasons (article 37.3 SAA).

Although no guidelines are provided as to how to express them, dissenting opinions are generally used when arbitrators disagree with the opinion reached. Dissenting opinions will not benefit from the legal effects of the award, the effectiveness of which will not be affected.

34 Form and content requirements

What form and content requirements exist for an award?

Pursuant to article 37 SAA, awards shall be rendered in writing (electronic means are accepted), dated, expressing the venue of the arbitration and signed by the arbitrators, who may express their favour or dissenting opinion. For arbitral tribunals, it is enough if it is signed by the majority or even just the chair, provided that reasons are given justifying the lack of the absent signatures.

Further, the award shall be always reasoned, unless it is an award by consent.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

According to article 37 SAA, arbitrators have six months from the date when the statement of defence is or should have been filed. This period, however, and unless the parties have agreed otherwise, could be extended by the arbitrators for no more than two months by means of a reasoned decision. The rules on arbitration of both the CIMA and CAM echo the SAA.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The award is effective and binding on the parties from the date it is served.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

Under the SAA, final and partial awards are possible, as well as consent awards. Further, the award can condemn a party, declare any rights or create, modify or extinguish rights.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Aside from the award, arbitration proceedings terminate when:

- the claimant has withdrawn, save the defendant refuses and arbitrators recognise to the latter a legitimate interest;
- parties agree on the termination; or
- arbitrators verify that proceedings have become unnecessary or impossible (article 38.2 SAA).

The mere default does not imply termination of the proceedings, unless it is the claimant who does not file the statement of claim in time, without explaining such behaviour. In this case (failing an agreement otherwise), proceedings will be considered as terminated, save if the defendant shows an interest in making any plea (article 31 SAA).

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

As stated in article 37.6 SAA, arbitrators shall decide on the allocation of the costs. However (conversely to domestic litigation), there is no imposition of criteria to be followed. Therefore, failing an agreement, it is left to the discretion of the arbitrator.

The SAA expressly includes as costs:

- the fees and costs of the arbitrators;
- fees of the legal counsels;
- the costs of the arbitral institution; and
- any other cost originating from the proceedings (thus including experts).

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Interest is allowed under Spanish law. As to the principal amount, it will include the interest agreed by the parties or, failing such agreement, the legal interest rate published in the Official Gazette (the interest rate foreseen in the Spanish Act 3/2004, 29 December, combating late payment in commercial transactions, also applies to certain commercial transactions).

Once the award is rendered and until it is fully complied with, the interest resulting from adding two points to the legal rate interest will be included, unless the parties have agreed otherwise or any law provides a different interest rate.

Costs do not have interest. However, if a party is obliged to trigger enforcement proceedings the SCPC foresees an increase of 30 per cent of the amount for which enforcement is sought by way of interest and costs of the enforcement proceedings.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

According to article 39 SAA, any party may apply, within 10 days of the notification of the award (unless any other time limit has been agreed), to:

- correct any calculation, copies, typographical or similar mistakes;
- clarify part of the award;
- supplement the reliefs sought that were not addressed; and

- rectify partial exceedances, when it has decided on non-arbitrable differences or on those that were not submitted to arbitration.

Arbitrators on their own can only proceed to correct calculation, copies, typographical or similar mistakes, within the time limit of 10 days from the date when the award was signed.

Notwithstanding, the above-mentioned time limits are extended to one month for international arbitrations.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

The only possible grounds are expressly listed in article 41 SAA, which echoes article V of the New York Convention. In essence, an award could only be set aside if it is evidenced that:

- the arbitration agreement does not exist or it is not valid;
- appointment of the arbitrator or arbitral proceedings have not been properly notified or, for any reasons, a party has been impeded from presenting its case;
- arbitrators have decided on differences not contemplated by, or not falling within, the terms of the submission to arbitration;
- the appointment of arbitrators or the arbitral procedure was not in accordance with the agreement of the parties (unless the agreement was against public policy) or, failing such agreement, was not in accordance with the SAA;
- the subject matter of the difference is not capable of settlement by arbitration; or
- the award is contrary to public policy.

The application to set aside shall be brought, before the Superior Court of Justice of the autonomous community in which the award is rendered (article 8.5 SAA), within two months of the notification of the final award (ie, once, if so, the corresponding clarification, correction or supplement has been served on or the time to do it has elapsed).

Having said that, note that the SAA also provides particular review proceedings for awards with *res judicata* effects (article 43). These proceedings are for very limited scenarios (eg, the award was based on evidence that thereupon was considered false by a criminal judge), and the procedure is governed by the SCPC (article 509 et seq).

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Aside from the possibility to set aside the award based on very limited grounds, the SAA does not provide for any further appeal or challenge. Conversely, CIMA rules foresee the possibility of an agreed intra-arbitral challenge.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

In relation to enforcement of domestic awards, the SAA (article 44) refers to the SCPC, save certain provisions regarding the stay, dismissal and restart of the proceedings. The SCPC considers the award as an enforceable title (ie, it can be directly enforced), governs the procedure and provides very limited grounds for opposition to the enforcement.

The SAA provides in article 46 that recognition and enforcement of foreign awards shall be governed by the New York Convention, save any other more favourable international convention. Thus, the grounds for refusal are the same as those foreseen in the said international convention. The enforcement procedure will be the same as for domestic awards though (ie, under the SCPC).

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

In general, Spanish courts have a favourable attitude towards recognition and enforcement of foreign awards. However, enforcement of annulled award is disputed. In fact, there are reputable Spanish scholars who have rejected this possibility. Moreover, case law has not thoroughly addressed this particular issue, and, therefore, the outcome is uncertain.

Notwithstanding, for instance, the ruling of the First Instance court of Rubí, dated 11 June 2007, expressly recognised (referring to French cases *Hilmarton* and *Chromalloy*) the possibility of enforcing an award set aside by the courts at the place of the arbitration. Nonetheless, this possibility was envisaged assuming that, aside from the New York Convention, the European Convention on International Commercial Arbitration also applied (which is more lenient concerning enforcement of set aside awards). Additionally, it is specifically stated that, unlike the New York Convention, the annulment of an award in the state of origin does not imply as a 'necessary consequence' the impossibility of being recognised or enforced in another state.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Emergency arbitration is not governed under the SAA. However, most arbitral institution rules indeed govern it, and, although no publicity has been given to any decisions enforcing orders rendered by emergency arbitrators, its enforceability is widely accepted.

47 Cost of enforcement

What costs are incurred in enforcing awards?

The costs for the applicant directly depend upon the economic value of the award and include the solicitors, court agents and court fees. For the other party, the SCPC also foresees an increase of 30 per cent of the amount enforced.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Under Spanish Law neither disclosure nor discovery is recognised. Conversely, parties shall provide all available documents along with their corresponding statements.

However, this is not as stringent as it may seem. The SCPC allows a party to trigger preliminary proceedings aimed at obtaining essential documents for the controversy from the counterparty or any third party, and the production of specific documents related to the subject matter of the dispute or the evidence to be taken can also be requested during the proceedings.

Further, written witness statements are not usual, and party officers can only testify within the proceedings if their testimony has been requested by the counterparty (although some arbitral rules provide otherwise).

Notwithstanding, there is a tendency (particularly in international arbitration) to apply, or seek guidance from, the IBA rules on the Taking of Evidence.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

The SAA does not provide any guidance as to professional or ethical behaviour, beyond the obligation for arbitrators to be and stay impartial and independent.

Nonetheless, there are certain ethical rules for those who are qualified in Spain (such as the Spanish and European code of conduct for lawyers or the Spanish Statute of the Practice of Law), and reference is also made to the IBA and CEA recommendations in this regard, which are aligned.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

The SAA does not govern third-party funding. Although in practice this type of funding is being used (particularly after the prohibition of contingency fees was lifted), there is still scope for improvement and development.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

There are no noteworthy particularities aside from those developed in the questions above.

**KING & WOOD
MALLESONS**

**Alfredo Guerrero
Marlen Estévez
Roberto Muñoz**

**alfredo.guerrero@eu.kwm.com
marlen.estevez@eu.kwm.com
roberto.munoz@eu.kwm.com**

Calle Goya, 6
28001 Madrid
Spain

Tel: +34 91 426 00 50
Fax: +34 91 426 00 66
www.kwm.com

Sweden

Simon Arvmyren and Johan Kjellner

Advokatfirman Delphi

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

The New York Convention was ratified without reservations in 1972. The Washington Convention on the Settlement of Investment Disputes of 1965 (ICSID Convention) was ratified in 1966 and the Energy Charter Treaty in 1997. Since 1929 Sweden has also been a party to the 1927, seldom applied but still effective, Convention on the Execution of Foreign Arbitral Awards and the 1923 Protocol on Arbitration Clauses.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Sweden is party to some 70 bilateral investment treaties, which all contain arbitration clauses.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The Swedish Arbitration Act of 1999 (the Arbitration Act; online at www.sccinstitute.com/dispute-resolution/rules/) provides the primary legislative framework relevant to arbitration.

The Arbitration Act is applicable to both international and domestic arbitration but deals only with arbitral proceedings in Sweden. The Arbitration Act implements the New York Convention in respect of awards rendered outside of Sweden. Swedish arbitral awards are enforced according to the Swedish Enforcement Code.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

No, but the Arbitration Act draws much of its contents from the UNCITRAL Model Law. Important distinctions are that the Arbitration Act applies to domestic as well as international arbitration, that there is no requirement that the arbitration agreement should be in writing, that a claim dismissed without prejudice by the arbitrators on grounds of lack of jurisdiction is subject to review by the courts, that the parties if both are foreign can waive section 34 of the Arbitration Act concerning the setting aside of awards, and that the Arbitration Act has rules on fees and costs of the arbitration.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The Arbitration Act contains a few mandatory provisions. The most important ones are section 21 (the arbitrators must hear a case on a non-discriminative basis); section 24(1) (the arbitrators must allow the parties to plead a case as extensively as necessary in writing or orally); section 25(3) (the arbitrators are prohibited to use means of compulsion such as to swear somebody in or to impose fines); and sections 33 and 34 concerning invalid awards and the setting-aside of awards.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

No. If the parties have not agreed on the applicable law, the arbitrators will determine it. However, in relation to the arbitration agreement the governing law shall be decided by the arbitral tribunal pursuant to section 48 of the Arbitration Act. If it has not been determined that the Arbitration Act is applicable before such issues arise, inter alia, because the place of the arbitration has not yet been decided, a Swedish court or arbitration institute shall apply Swedish choice-of-law rules when deciding whether the arbitral proceedings are governed by Swedish law or not.

Mandatory laws of another jurisdiction within the European Union than the one chosen by the parties can be applied by the arbitral tribunal if allowed under the Rome I Regulation (EC 593/2008) (see Rome I articles 3 and 9). With respect to jurisdictions outside of the European Union Swedish choice-of-law rules will decide whether there are overriding mandatory provisions that the arbitral tribunal shall apply. As a minimum standard the arbitral tribunal will normally be bound by Swedish (if the arbitral proceedings are governed by Swedish law) and international public policy.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The most prominent arbitration institution is the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Institute). See www.sccinstitute.com. The SCC Institute has developed into one of the leading arbitration institutions in the world, and every year parties from as many as 30 to 40 countries use the services of the SCC Institute. There are also some much smaller arbitration institutes such as the West Sweden Chamber of Commerce and the German-Swedish Chamber of Commerce.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Disputes that the parties may not settle by agreement are non-arbitrable. This is generally the case when the dispute concerns a public interest or a third-party interest such as security rights in property. It

should be noted that arbitrators may determine the civil law effects of competition law as between the parties. Consumer disputes are arbitrable only if the arbitration agreement was made after the dispute arose.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Arbitration agreements become valid and binding as any other kind of consensual agreement. Thus, there is no written form requirement. For the arbitration agreement to be recognised, the agreement must however be made in respect of a specified legal relationship (eg, a contract). An arbitration agreement may be concluded by means of a reference to general terms and conditions containing an arbitration clause. However, case law has suggested that in situations where only a single reference to the general terms and conditions is made (containing an arbitration clause) – without further talks or negotiations on the matter – the arbitration clause in the terms and conditions could be found null and void although the remainder of the terms and conditions are valid and binding between the parties (see the Appeal Court of Övre Norrland, case RH 2012:8, decided on 19 January 2012).

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The validity of the arbitration agreement shall be determined separately from the validity of the main agreement. Ordinary Swedish contract law rules and principles apply in respect of determining the validity of an arbitration agreement (see also question 6). Further, a party may lose the right to invoke an arbitration agreement as a bar to court proceedings if it opposes a request for arbitration, omits to choose an arbitrator in time or omits to pay its portion of the security demanded by the arbitrators. It should be noted that a declaration of bankruptcy or liquidation does not terminate the arbitration agreement.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

There are no rules concerning this matter in the Arbitration Act and there is no clear-cut general answer in case law. Following a universal succession a successor is bound by an arbitration agreement. Following a singular succession the successor would normally be bound except when this would be unreasonable. See the *Emja* case (NJA 1997, page 866). The same principles seem to apply in respect of guarantors, etc.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

No. The possibility for third parties to participate in arbitration is subject to contractual dispositions in the arbitration agreement, either as a part of the main agreement negotiated at the outset of the parties' business relationship, or as a supplementing or separate arbitration agreement at the time of the dispute.

However, as will be explained further in 'Update and trends', a new article 13 in the SCC Rules (enacted from January 2017) introduces a possibility for additional parties to join an existing arbitration under certain circumstances.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The 'group of companies' doctrine is not recognised as such but a member of the same company group as the signatory may be or become

bound by an arbitration agreement owing to general rules and principles of Swedish contract law (see question 9).

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

There is no solution in the Arbitration Act to the different problems associated with multiparty arbitration and the parties must deal with these questions on a purely contractual basis. The validity of such an agreement is subject to the same requirements as ordinary arbitration agreements.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

No, provided that the person appointed as arbitrator has full legal capacity. Foreign nationality or lack of legal education is no impediment and there is no requirement that an arbitrator has to be selected from a list of arbitrators. No such official list exists. As concerns judges from a court of law, both active and retired judges may be appointed.

Contractual stipulated requirements are not accepted in relation to gender, sexual identity, ethnic affiliation, religion, disability or age. This follows from sections 1 and 3 of the Swedish Discrimination Act of 2008, which states that a contract that reduces somebody's rights or obligations according to the Discrimination Act is invalid. Thus, the Discrimination Act applies to all kinds of contracts, including arbitration agreements and also addresses indirect discrimination, meaning the effect that a contract might have on third parties. With regard to requirements in relation to nationality, it should be noted that nationality is not synonymous with ethnic affiliation and that if a requirement based on nationality can be objectively motivated such a requirement would be allowed.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

The Arbitration Act stipulates that there shall be three arbitrators. Each party has the right to appoint one arbitrator and the appointed arbitrators subsequently appoint the third who also becomes chairman of the arbitral tribunal. If one party fails to appoint an arbitrator, the other party may request that the district court makes the appointment. The court can also appoint the third arbitrator if the party-appointed arbitrators fail to do so.

According to the SCC Rules, the main rule is that three arbitrators should be appointed. However, the SCC Institute may determine that one arbitrator is sufficient. The parties may appoint one arbitrator each if the tribunal is to be made up of three arbitrators. If any party omits to appoint an arbitrator the SCC Institute will make the appointment. The SCC Institute always appoints the chairman and the same applies when the dispute shall be referred to a sole arbitrator. If the parties can agree on a chairman or sole arbitrator the SCC Institute would not normally oppose the parties' choice.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

A party may request that an arbitrator shall be removed if the arbitrator's impartiality can be questioned. Such a request must first be made to the arbitral tribunal and the party may recourse to courts only if the request is denied. The Swedish Supreme Court has confirmed the high standard of impartiality that is demanded. See *Jilkén v Ericsson*

AB (NJA 2007, page 841). In *Jilkén v Ericsson AB*, the Supreme Court made explicit reference to the IBA Guidelines on Conflict of Interest in International Arbitration.

A request to the tribunal must be made within 15 days of the date of the party's knowledge of the cause of his or her suspicions and a petition to the court must be made within 30 days of the tribunal's decision. A court may also remove an arbitrator if the arbitrator has delayed the proceedings. The court can then appoint a new arbitrator at the request of a party. The parties may agree that an arbitration institution shall determine all of these questions.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Most scholars argue that the relationship between the parties and the arbitrators is contractual, although the contractual relation is deemed to be of a procedural law nature. All arbitrators must be impartial, including party-appointed arbitrators.

The parties are obliged to pay reasonable remuneration and expenses. This obligation is joint and several unless otherwise agreed.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The liability of the arbitrators is subject to the general rule of liability for negligence in Swedish contract law, thus no explicit regulation exists. Failure to apply procedural rules would normally be considered negligent and the arbitrators' liability is in that sense equivalent to the liability of judges. However, the contractual relationship between the parties and the arbitrators may allow for more flexibility in terms of letting inter alia the parties' expectations on the arbitrators have an effect on the liability assessment. The contractual context also entail a burden to give notice of complaint within a reasonable time from the point that the party was aware of the negligent act or should have been aware of it. Failure to give notice of complaint will bar the party from invoking the negligent act as a basis for a claim against the arbitrator.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

For the arbitration agreement to be a bar to court proceedings a party must object to the court's jurisdiction at the first opportunity it has to plead the case before the court, otherwise the right to arbitration is considered waived. However, a party can always choose to petition to a court in order to try to obtain a declaration that the arbitration tribunal lacks jurisdiction (see section 2 of the Arbitration Act and the Swedish Supreme Court's decision in *Russian Federation v RosInvestCo UK Ltd*, NJA 2010, page 508), inter alia, because of an invalid arbitration agreement. If the arbitral tribunal has been formed the tribunal can order a stay of the arbitral proceedings pending the court's decision or, as is normally the case, choose to continue the proceedings despite the parallel court process.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The arbitral tribunal may decide on its own jurisdiction, but a party is still permitted to petition to a court to decide the question definitively (see question 20), although the arbitrators may continue the tribunal's proceedings awaiting the court's decision. A decision by the tribunal to dismiss a claim without prejudice owing to lack of jurisdiction may be altered by the Court of Appeal. Grounds to challenge the jurisdiction of

the arbitral tribunal are considered to be waived if the party has participated in the proceedings without presenting the objection.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

The arbitrators may decide the place and language at their own discretion unless the parties agree.

23 Commencement of arbitration

How are arbitral proceedings initiated?

The proceedings are initiated when the defendant party receives a request for arbitration, unless the parties have agreed otherwise. The request must be in writing and contain an express and unconditional request for arbitration, information about whether the question to be resolved is covered by the arbitration agreement and information about the claimant's choice of arbitrator.

If the SCC Rules apply, the proceedings are initiated when the SCC Institute receives a request for arbitration. The request must be in writing and contain information about the parties, their counsel and contact details, a summary of the dispute, preliminary information about the relief sought by the claimant, a copy of the arbitration agreement or arbitration clause, any comments on the number of arbitrators and the place of the arbitration; and, if applicable, information and contact details of the arbitrator appointed by the claimant. The claimant must also pay a registration fee.

There is no requirement of signature and the request for arbitration does not have to be provided in more than one copy, neither under the Arbitration Act nor under the SCC Rules.

24 Hearing

Is a hearing required and what rules apply?

No, but a party's request for a hearing must be granted unless the parties have agreed otherwise. According to the SCC Rules a hearing must be held if one of the parties so requests or if the tribunal finds it suitable.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Failing prior agreement of the parties, the arbitrators are free to assess all kinds of evidence, including written evidence, witness examinations, expert witnesses, legal opinions, inspections, etc. The parties shall provide the evidence and the arbitrators are prohibited from taking any own initiative in this respect with the exception of appointing expert witnesses.

Third persons, parties and party representatives, and employees may all testify. Witnesses cannot be sworn in by the tribunal. However, the tribunal can allow a party to petition to a court to hear a witness under oath. The IBA Rules on the Taking of Evidence in International Commercial Arbitration often serve as a guide in international arbitration proceedings.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

In addition to the answers to questions 17, 21 and 25, a court may also assist in the production of documents or other information that can be transferred in writing (eg, ADP-based information). A party must first have the arbitral tribunal's permission to petition the court. An order by the court to produce documents is enforceable. The courts have no general right to intervene in arbitral proceedings.

27 Confidentiality

Is confidentiality ensured?

The parties have no imperative duty of confidentiality unless the arbitration agreement expressly contains such a duty. However, it is customary that the parties in arbitration uphold a high level of confidentiality and it is often argued that this is part of the nature of the agreement (*naturale negotii*). The arbitral proceedings are private unless agreed otherwise and the arbitrators are obligated to handle the dispute confidentially. Counsel that are members of the Swedish Bar Association have a duty of confidentiality to their clients. Failing prior agreement, witnesses and experts have no duty of confidentiality.

If a duty of confidentiality exists it extends not only to the proceedings, but also to materials handed in during the procedure and the award. If an award is challenged at a court it will usually become a public document and the same applies in the case of enforcement.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

According to section 4(3) of the Arbitration Act, a court may decide on interim measures during and before the arbitral proceedings. Any such decision is enforceable. The court-imposed interim measures available include inter alia sequestration of specific property or property equal to the value of a claim and injunctions or orders under penalty of a fine against undertaking actions harmful to the applicant party's interests or to take certain actions. A court decision made prior to the initiation of the proceedings will be reversed if the claimant does not initiate arbitration within 30 days.

An arbitral tribunal may also order interim measures, hence there is no exclusivity for the courts of law in that sense. However, such an order by the tribunal is not enforceable unless the parties have agreed in the arbitration agreement that the tribunal shall have the authority to render separate awards on interim measures. Also the SCC Rules allow a party to request interim measures in a court. For interim measures prior to a request for arbitration the SCC Rules offers a procedure with an emergency arbitrator. For further information, see question 46.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Yes. The Arbitration Act does not provide any basis to appoint an emergency arbitrator and a claimant that has a need for interim measures must apply for such measures at the courts under Chapter 15 of the Code of Judicial Procedure.

On the other hand, the SCC Rules, has, since 2010, offered the possibility to request the appointment of an emergency arbitrator to deal with requests for interim measures. The procedure was implemented after a survey, where 82 per cent of counsels in SCC-administered arbitrations were of the opinion that interim measures should be available before the constitution of the arbitral tribunal or appointment of a sole arbitrator. As of 31 December 2014, the SCC Institute has seen a total of 13 emergency arbitrator cases and the general opinion is that this supplement to the SCC Rules has worked well. Parties cannot choose to opt out from the emergency arbitrator set of rules, which is distinctive from the ICC Rules of Arbitration, and others.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

An arbitral tribunal may order similar interim measures as a court, but not under penalty of a fine and such orders are not enforceable if they are not given in the form of a separate award (see questions 28 and 46).

It is customary that the arbitrators demand that the parties give security for the arbitrator's costs and fees in advance, as does the SCC

Institute. The parties normally pay half each. If a party fails to pay its share, the other party may decide either to pay the whole security amount to cause the commencement of the arbitral proceedings or petition its claim to the courts, since the non-paying party may not invoke the arbitration agreement as a bar to court proceedings.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Neither Swedish arbitration law nor the SCC Rules provide for any explicit rules to take down 'guerrilla tactics'. The arbitral tribunal must rely on its normal tool box, which is reduced to more common instruments such as, inter alia: setting time limits in procedural orders at the risk of the tribunal disregarding defaulting actions by a party (such as a late submission); drawing adverse inferences when assessing, for example, an unreasonable refusal of providing evidence or other kinds of counterproductive behaviour; and by taking regard to unnecessary or improper measures by a party when deciding on the allocation of costs. Counsels may not be subject to direct sanctions by the arbitral tribunal or the SCC Institute (see also question 49).

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Failing prior agreement between the parties, it is sufficient that the decisions of the arbitral tribunal are made by a majority of the arbitrators. In the case of equal votes, the opinion of the chairman prevails. If an arbitrator refuses to participate in a decision without valid cause, the other arbitrators can still decide on the matter.

It is enough that a majority of the arbitrators sign the award, on condition that the cause of the failure of having the signature of all the arbitrators is given in the award. It can be agreed between the parties that the chairman alone signs the award.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Dissenting opinions are allowed and the majority could normally not prohibit the minority to express a dissenting opinion in the award or as an appendix to the award. However, this right is not unconditional and a dissenting opinion could be excluded, for example, if the award has already been rendered or if the rendering of the award would be delayed awaiting the dissenting opinion. A commonly presented reason in favour of allowing dissenting opinions is that an arbitrator should be given the opportunity to protect him or herself from potential claims as a consequence of the majority's position.

A dissenting opinion has no direct consequence for the validity or enforceability of the award, but might provide the parties with insights on how to formulate a challenge of the award in the case that the dissenting opinion deals with procedural faults.

34 Form and content requirements

What form and content requirements exist for an award?

In addition to what is accounted for under question 31, the award must be in writing and the place of the arbitral proceedings and the date of the announcement must be specified. There is no legal requirement that the arbitrators give reasons for the award, but if the parties have not expressly renounced it, the arbitrators should presume that the parties want reasons and provide them.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

No, the Arbitration Act does not provide for a certain time limit for rendering the award and the issue is subject to agreement between the parties. Under section 21 of the Arbitration Act an agreement between the parties concerning the management of the arbitral proceedings, including any provision regarding the time limit for rendering the award, must be applied by the arbitral tribunal. However, if an obstacle can be foreseen as to the application of the agreement, exceptions are allowed. Such an obstacle may be that the arbitral tribunal estimates that it will be impossible or unreasonable to render the award within the time limit due to the scope or complexity of the dispute.

Under the SCC Rules the award shall be rendered six months after the dispute was referred to the arbitral tribunal. If necessary the board of the SCC Institute may extend the time limit.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The date of the announcement of the award is decisive in respect of the arbitrators' possibility to correct or supplement the award without a party's request. The arbitrators may correct obvious inaccuracies such as a slip of the pen, calculation errors or similar oversights. The date of delivery of the award is, among other things, decisive for the arbitrators' obligation to correct, supplement or interpret decisions in an award at a party's request. In both of the above-mentioned cases, the time limit is 30 days. A revision of the award shall be made within 60 days of the arbitrators' decision to correct or amend the award.

The date of delivery of the award is also decisive as to the time limits for challenging the award. A petition to a court to challenge the award should be made within three months from delivery or, if the award has been revised within three months, from the date of the delivery of the revised award. An award that does not examine an issue that has been brought forward during the arbitral proceedings may also be altered, wholly or partly, on the request of a party. Also in this case, the time limit is three months from the date of delivery.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The arbitral tribunal may grant relief in respect of unlimited types of affirmative acts such as the payment of monies, but also payments in kind such as the delivery of goods or the fulfilment of a construction project. A request for a party to refrain from an act is also seen as a type of negative action that can be granted. Further, it is possible to grant declaratory relief, including, but not limited to, the existence of a fact or a legal requisite.

The arbitral tribunal can give final awards, including consent awards, and separate awards such as interlocutory, provisional and partial awards.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

None. According to section 27(1) of the Arbitration Act, the termination of an arbitral proceeding must always be made by means of an award, as well as in the case of a dismissal without prejudice because of, for example, lack of jurisdiction. In the case of withdrawal of a relief sought, the tribunal must try the cause on its merits if requested by the other party. If the other party makes no such request, the tribunal must give what is known as a 'termination award' to dismiss the case. The termination award appears to be a Swedish oddity. In most jurisdictions the withdrawal of the parties' claims or an agreement to terminate the proceedings would result in a procedural order being issued (see article 32(2) of the Model Law).

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Normally the losing party must pay the winning party's costs, but if the parties win and lose a proportion of a claim the costs should be allocated on equity. As a rule, all kinds of costs attributable to the arbitral proceedings are recoverable provided that they are reasonable. Such costs include, but are not limited to, arbitrators' fees, counsel's fees, production of evidence, expenses and disbursements.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Yes. If requested by a party, interest may be awarded both for principal claims and for costs. The rate depends on the applicable substantive law. The current rate according to the Swedish Interest Act is 8 per cent plus the reference interest rate as determined by the Swedish National Bank. The rate before maturity of a debt may be 2 per cent above the reference rate.

Proceedings subsequent to issuance of award**41 Interpretation and correction of awards**

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Yes. Any decision to revise or interpret an award should be preceded by an opportunity for the parties to provide comments. See also question 36.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

The Arbitration Act makes a difference between grounds for invalidity and grounds for challenge. Grounds for invalidity can be invoked without time limit but are restricted to awards that violate Swedish public policy, awards that decides a matter that was not arbitrable or awards that was not delivered in written form or signed by a majority of the arbitrators. Grounds for challenge are broader in scope but have to be raised within three months from receipt of the award. The grounds available for a challenge are exclusively related to procedural faults. Thus, faults related to substantial law, as the merits of the case, do not form ground for challenge. Procedural faults that make an award challengeable are as follows:

- the matter is not covered by a valid arbitration agreement;
- the arbitrators have announced the award after the expiration of a period decided on by the parties or the arbitrators otherwise exceeded their mandate;
- the arbitral proceedings should not have taken place in Sweden;
- an arbitrator has been appointed contrary to the parties' agreement or the Arbitration Act;
- an arbitrator was not authorised to try the case; or
- there otherwise occurred a procedural irregularity that is presumed to have affected the outcome of the case and the petitioning party is not at fault.

An award may be declared invalid or set aside in part.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

The challenge of an award is made directly at the second instance at the Court of Appeal. If the Court of Appeal gives the parties permission to appeal its judgment and if the Supreme Court grants leave to appeal, thus if the case involves a question that needs to be clarified for future application of the law, the Supreme Court will try the case as the last

Update and trends

The Swedish Arbitration Act is undergoing reform with the objective to make a general review. As a first step of the legislative process, a public committee was formed and in 2015 the committee filed its report and proposal to the Swedish government. The report is called 'Översyn av lagen om skiljeförfarande' (SOU 2015:37) and can be found at www.regeringen.se/rattsdokument/statens-offentliga-utredningar/2015/04/sou-201537/ (only in Swedish). Some of the proposed changes are: introducing the possibility to refer a decision by the tribunal on its own jurisdiction to the Svea Court of Appeal for reconsideration (see questions 20 and 21 of this chapter); a rule regarding the consolidation of cases (see question 12); abolishment of the distinction between grounds for invalidity of an award and grounds for challenge (see question 42); giving the Svea Court of Appeal exclusive jurisdiction in relation to cases involving challenge of awards, with the Supreme Court still being the final instance (see question 43); and allowing challenge proceedings to be conducted in English. Currently the report is with the Department of Justice for review.

In 2016, the SCC Institute published new arbitration rules to come into force on 1 January 2017. The current draft wording can be found at http://sccinstitute.com/media/159828/final_draft_arbitration-rules-17112016.pdf. The new rules include a number of revisions and innovations. Among others are:

- a summary procedure intended to permit a quick dismissal of frivolous claims or untenable allegations is introduced. A request for summary procedure may concern jurisdiction, admissibility or the merits of the case, and can be made at any point during the arbitration;
- new rules on investment arbitration are introduced in an appendix to the new SCC Rules. Most notably the investment arbitration rules allow for third persons and non-disputing treaty parties to apply to an arbitral tribunal for permission to make a written submission in the arbitration. After consulting the parties, the tribunal may also, on its own initiative, invite third persons and non-disputing treaty parties to make a submission on material issues in the arbitration; and
- in complex multiparty disputes, a new article 13 provides for joinder of additional parties under certain circumstances. Article 14 allows parties to make claims arising out of more than one contract in a single arbitration (if the arbitration agreements are valid and compatible).

Further, new rules on security for costs and the possibility to appoint an administrative secretary in the arbitration are being adopted.

instance. A party challenging an award would have to consider that it takes between one to two years depending on the complexity of the case for the Court of Appeal to reach a decision and another year or so for the handling of the case by the Supreme Court. The costs are very hard to foresee. Concerning the apportionment of costs, see question 39.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

An award rendered in Sweden is enforceable according to section 3(1)(1)(4) of the Enforcement Code. Section 3(15) states that an enforceable award must be in writing and signed by a majority of the arbitrators. The bailiff must always give the adverse party the opportunity to comment on the enforcement application before taking any action.

Foreign awards that are covered by the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation) can be enforced by the Swedish Enforcement Agency directly. However in most other cases – before a foreign award can be enforced in Sweden – it is required that a court first decides that the judgment is enforceable in what is called a 'declaration of enforceability'. The application for a declaration of enforceability shall be made in the competent district court where the opposing party is domiciled. As soon as the declaration of enforceability has been obtained, the foreign award may be enforced through the Enforcement Agency. The court only reviews that the award meets the formal requirements (which are largely the same as set out in the New York Convention); it does not review the merits or substance of the award. Normally the opposing party is not given the opportunity to respond before the court declares the award enforceable in Sweden. Generally, it is believed that Swedish courts take a pro enforcement approach.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

As far as we know there exist a couple of lower instance cases where Swedish courts have denied execution on the basis that the award had been set aside by the courts of the place of arbitration, but no case where the court has granted execution in such circumstances. Furthermore, it has been argued by scholars that the Swedish rule on execution of arbitral awards is non-discretionary and that the wording of the rule prohibits any execution of an award that has been set aside. It could also be argued that the Swedish rule on execution must be interpreted

in accordance with article V(1)(e) of the New York Convention, which states that execution may be refused. While awaiting a precedent, it is our opinion that the open provision of the New York Convention would prevail over a narrow interpretation of the Swedish execution rule.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

There are no special rules under Swedish arbitration law or enforcement law that allow for enforcement of decisions by an emergency arbitrator. However, the parties can agree (in the arbitration agreement) to give an emergency arbitrator the authority to render his or her decision in the form of a separate award, such as an interlocutory or provisional award. If the decision is in the form of an award it can be enforced in the same way as an award that resolves the dispute.

The SCC Rules have incorporated provisions allowing emergency arbitrators to render separate awards (see article 32(1)–(3) of the SCC Rules in conjunction with Appendix II article 1). Such an award would thus be enforceable.

47 Cost of enforcement

What costs are incurred in enforcing awards?

With regard to foreign awards, an application for recognition and enforcement involves no application fee, but there may be costs for translating the award. After the court's decision to permit enforcement, the bailiff will charge a fee of 600 kronor to execute the measures necessary for the enforcement, such as distraint. If property has to be sold by way of public auction the bailiff will charge a percentage on the sale. The percentage depends on what kind of property is sold.

Concerning awards rendered in Sweden, the bailiff will charge the same fee to enforce the award (including any measures to be executed).

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Since Sweden and its capital, Stockholm, have been among the most frequently chosen venues for international arbitration for more than half a century, arbitral proceedings in Sweden display very few particularities in relation to the judicial system. Swedish practice, however, recommends flexibility and party autonomy. As to the various procedural issues that may arise during the arbitral proceedings, the Code of Judicial Procedure exercises some influence and is not infrequently applied analogously. The Code of Judicial Procedure thus influences

Swedish arbitral proceedings, but with important exceptions; for example, written witness statements are allowed and are frequently used particularly in international proceedings. US-style discovery is not practised unless the parties agree to it.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

No formal requirements exist for counsel under the Arbitration Act and there are no rules that would allow an arbitrator to reject an inappropriate counsel or other party representatives. However, general principles of contract law and procedural law may allow for an arbitrator not to accept the purported authority of a party representative, thus treating the party as being without representation and proceed with the arbitration on that basis. Such general rules can, inter alia, be found in Chapter 11 and 12 of the Code of Judicial Procedure.

If the counsel is a member of the Swedish Bar Association the Code of Conduct of the Bar Association applies. The Code of Conduct is available at www.advokatsamfundet.se/Advokatsamfundet-engelska/Rules-and-regulations/Code-of-Conduct. Good practice in Sweden with regard to international arbitration could be described as a mix between general principals deriving from the Code of Judicial Procedure and the Bar Association's Code of Conduct. Good practice is sometimes in accordance with the IBA Guidelines on Party Representation in International Arbitration, but sometimes not. On a general note, the IBA Guidelines goes somewhat further and gives more power to the arbitral tribunal than good practice in Sweden. Full application of the IBA Guidelines would require the parties' consent.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

There are no restrictions on third-party funding in Sweden, but the concept is not particularly well known, used or discussed.

However, since a majority of arbitration proceedings administrated through the SCC Institute are international in nature (57 per cent in 2015), and external funding for disputes is a global trend, it probably exists to some extent also in Sweden.

Although permitted, one should note the effect third-party funding could have on the distribution of costs and expenses in the arbitral proceedings. As explained in question 39, cost normally follows the event and the losing party pays for the winning party's costs and expenses. As a rule, all kinds of costs attributable to the arbitral proceedings are recoverable and include, but are not limited to, arbitrators' fees, counsel's fees, production of evidence, expenses and disbursements. In a case where the winner has external funding and the financier has incurred costs in the arbitration, such costs could be recoverable, although case law to that end is still to be seen.

However, if the losing side had external funding it is possible that the financier will be (jointly) liable for the winning side's costs and expenses in certain cases. Recent developments in case law suggest that the courts are willing to see beyond the principal party in the proceedings if that entity is just a 'vehicle' for the underlying financiers or benefactors.

In one recent court case (NJA 2014 s 877) two natural persons had interests in a company that lost substantial amounts of money because of alleged negligent advice from their accountant (from one of the big accountancy firms). In trying to recover the lost money the claim was transferred to a shelf company that brought forward a court action against the accountancy firm.

The company lost the case, which resulted in an obligation to pay for the accountancy firm's costs and expenses. Since the company was soon declared bankrupt (because it had no other assets or business apart from the claim), the accountancy firm filed suit against the financiers/benefactors, the two natural persons, for the full amount of costs and expenses. The Supreme Court found that the company was only a vehicle for the natural persons to commence legal proceedings against the accountancy firm without personal risk. The Supreme Court pierced the corporate veil and found the natural persons to be personally liable for the full amount of costs and expenses in the preceding court case (see also the SCC arbitration case *Quasar de Valores SICAV SA v The Russian Federation* from 20 July 2012).

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

See question 48. Arbitrators may be called upon to testify before a court in proceedings where the award is challenged, this may include what has been said during deliberation. Attorney-client privilege is not protected under Swedish law to the same extent as, for example, in the Anglo-American legal systems.

Delphi

Simon Arvmyren
Johan Kjellner

simon.arvmyren@delphi.se
johan.kjellner@delphi.se

Mäster Samuelsgatan 17
PO Box 1432
SE-111 84 Stockholm
Sweden

Tel: +46 8 677 54 00
Fax: +46 8 20 18 84
www.delphi.se

Switzerland

Xavier Favre-Bulle, Harold Frey and Daniel Durante

Lenz & Staehelin

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Switzerland has been a party to the New York Convention since 1965 and withdrew its reciprocity reservation in 1993.

Switzerland is also a party to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, as well as the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Switzerland has signed bilateral investment treaties with 116 countries.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

International arbitration is governed by Chapter 12 of the Federal Private International Law Act of 18 December 1987 (PILA; an unofficial English version is available on www.swissarbitration.ch/rules.php). Chapter 12 applies to any arbitration if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties to the arbitration had neither its domicile nor its habitual residence in Switzerland when the arbitration agreement was entered into.

Domestic arbitration is governed by Part 3 of the Federal Code of Civil Procedure (CCP). The CCP entered into force on 1 January 2011. Since then, domestic arbitration proceedings are no longer governed by the Inter-Cantonal Concordat on Arbitration of 27 March 1969.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The Swiss law of international arbitration is not based on the UNCITRAL Model Law, mainly for historical reasons. There are no fundamental differences between Chapter 12 PILA and the Model Law, although Chapter 12 is much shorter. Chapter 12 gives paramount importance to party autonomy for most issues and, in the absence of an agreement between the parties, it allows for wide discretion of the arbitral tribunal.

The rules on domestic arbitration are more elaborated than those in Chapter 12 PILA, but they are not based on the UNCITRAL Model Law either.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

As regards international arbitration, the PILA sets out two mandatory requirements of procedure: the arbitral tribunal shall ensure equal treatment of the parties and their right to be heard (due process) (article 182(3) PILA). Similar mandatory requirements also apply in domestic arbitration (article 373(4) CCP).

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

In international arbitration, the arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection. The parties may also authorise the arbitral tribunal to decide *ex aequo et bono* (article 187 PILA).

In domestic arbitration, the CCP provides that the arbitral tribunal shall decide according to the rules of law chosen by the parties or *ex aequo et bono* if so authorised by the parties (article 381(1)). Absent an agreement on the applicable law or an authorisation to decide the dispute *ex aequo et bono*, the arbitral tribunal must decide in accordance with the law that an ordinary court would apply (article 381(2)). Disputes without an international element will in principle be decided according to Swiss law. For international disputes, the arbitral tribunal will have to resort to the conflict of laws rules in the PILA.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

Switzerland is a preferred venue for ICC arbitrations and some other kinds of institutional arbitrations administered by institutions based abroad.

A prominent Swiss arbitration institution (Swiss Chambers' Arbitration Institution) has been formed by seven major Chambers of Commerce (Geneva, Zurich, Basel, Bern, Ticino, Vaud and Neuchâtel). The Swiss Chambers' Arbitration Institution administers arbitrations under the Swiss Rules of International Arbitration (the Swiss Rules, adopted in 2004). A revised version came into force on 1 June 2012. Arbitration proceedings under the Swiss Rules may be introduced before the secretariat at the addresses of any of the Swiss Chambers and are supervised by an Arbitration Court. Detailed information is available at www.swissarbitration.ch.

The Swiss Rules are a modernised version of the UNCITRAL Arbitration Rules (1976). The most important changes relate to the consolidation of arbitration proceedings (article 4), the procedural timetable (article 15(3)), jurisdiction over set-off defences (article 21(5)), the expedited procedure (article 42) and the emergency relief (article 43). The parties are free to choose their arbitrators and to determine a seat outside Switzerland. Fees are calculated on the basis of an *ad valorem* scale, but also taking into account the complexity of

the matter, the time spent by the arbitrators and other relevant circumstances (article 39).

Another prominent Swiss-based arbitration institution is the Court of Arbitration for Sport (the CAS), based in Lausanne. The CAS provides services in order to facilitate the settlement of sports-related disputes through arbitration or mediation. CAS arbitrations are governed by the Code of Sports-related Arbitration and Mediation Rules (the CAS Code). Detailed information is available at www.tas-cas.org.

The Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO), based in Geneva, offers dispute resolution services with a particular focus on disputes involving intellectual property and internet domain name disputes. It administers commercial arbitrations under the WIPO Arbitration Rules.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

In international arbitration, any dispute concerning an economic interest may be the subject matter of an arbitration (article 177(1) PILA), which is a very wide definition of arbitrability (disputes, inter alia, in intellectual property, competition law, securities transactions, inter-company disputes are therefore arbitrable). Debt enforcement and bankruptcy cannot be ordered by arbitral tribunals, but the underlying claims remain arbitrable.

In domestic arbitration, arbitrability is limited to rights of which the parties may freely dispose (article 354 CCP), which may limit the arbitrability of employment disputes.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

In international arbitration, an arbitration agreement is valid as regards its form if made in writing, by telegram, telex, telecopier or any other means of communication permitting it to be evidenced by a text (article 178(1) PILA). The rule for domestic arbitrations is similar: the arbitration agreement must be made in writing or any other means allowing it to be evidenced by a text (article 358 CCP). In both instances, a written document signed by all parties concerned is not required.

Arbitration agreements may be contained in the by-laws of a company or in general terms and conditions. There are no particular formal requirements in order for state entities to enter into arbitration agreements.

Where a party does not object to the jurisdiction of the arbitral tribunal in a timely manner, it will be barred from raising such objections at a later stage, including objections based on the formal invalidity of the arbitration agreement.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement is valid and enforceable if it conforms either to the law chosen by the parties, or to the law governing the subject matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law (article 178(2) PILA).

The doctrine of severability applies in Swiss law: the validity of the arbitration agreement cannot be objected to on the ground that the main agreement is invalid (article 178(3) PILA; article 357(2) CCP). The avoidance, rescission, termination, etc, of a contract will, in principle, not result in the arbitration clause contained in that contract becoming invalid. However, there may be instances in which both the main contract and the arbitration agreement are subject to the same grounds of invalidity.

Legal incapacity of a party is, in principle, determined by the law of the domicile or registered office of that party and may be a ground of invalidity of the arbitration agreement. If a party to the arbitration agreement is a state or state-owned entity, it cannot rely on its own domestic law in order to deny its capacity to enter into the arbitration agreement (article 177(2) PILA). The death of a party will usually not cause the arbitration agreement to become invalid or inoperative.

After insolvency proceedings have been commenced, the debtor cannot validly enter into an arbitration agreement in respect of claims falling in the estate.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Third parties or non-signatories may be bound by an arbitration agreement under general principles of contract law. A principal will be bound by the arbitration agreement entered into by his or her agent on his or her behalf. Arbitration agreements will generally be transferred to legal successors such as heirs, merged companies, assignees and transferees. Third-party beneficiaries enforcing their claims will be bound by arbitration agreements entered into between the parties. Finally, trustees in bankruptcy or the executors of a will are bound by arbitration agreements concluded by the debtor or deceased respectively.

Guarantors and sureties are not bound by the terms of the main contract and therefore not bound by any arbitration agreement contained in that contract if the agreements concerned are sufficiently independent.

The Swiss Federal Supreme Court further held that interference in the performance of a contract by a third party may cause such third party to be bound by the arbitration agreement. The piercing of the corporate veil doctrine would also apply in principle if the requirements are met.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

Neither Chapter 12 of the PILA (international arbitration) nor Part 3 of the CCP (domestic arbitration) contain any provisions in respect of third-party participation. Arbitral tribunals sitting in Switzerland would first have to determine whether the third party is bound by a compatible arbitration agreement. In the absence of a compatible arbitration agreement (or an agreement between all the parties involved), the interest of the third party in the outcome of the dispute would not per se be a ground for joinder.

The Swiss Rules contain a dedicated provision as regards joinder and third-party notice (article 4(2)).

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the ‘group of companies’ doctrine?

Swiss courts have not endorsed the ‘group of companies’ doctrine to date. Swiss law is based on the concept that different legal entities are independent legal subjects. There is no automatic extension of the arbitration agreement to other entities for the mere reason that they are part of the same group of companies. In 1996, the Swiss Federal Supreme Court rejected the extension of an arbitration agreement to entities of the same group under both the ‘piercing of the corporate veil’ and the ‘group of companies’ concepts.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

There are no specific requirements for multiparty arbitration agreements and no case law comparable to the French *Dutco* decision. Modern arbitration rules such as the ICC Rules of Arbitration (2012) or the revised Swiss Rules (2012) contain specific provisions dealing with multiparty situations, in particular the situation where the co-respondents (or co-claimants) cannot agree on the same party-appointed arbitrator.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The Swiss law of arbitration provides no restrictions as to who may act as an arbitrator, and arbitrators need not be selected from any list. Judges are, in principle, allowed to act as arbitrators. One exception exists for domestic arbitration proceedings with regard to disputes involving tenancy and lease of residential property: only the conciliation authority may be appointed as arbitral tribunal (article 361(4) CCP). The conciliation authority is an official body set up by the CCP.

Party autonomy is the overarching principle for arbitrations having their seat in Switzerland. Contractually stipulated requirements for arbitrators should therefore be complied with. The parties are not under a duty to provide reasons for any such requirements. Requirements of nationality are certainly not regarded as problematic. Even though Swiss courts have not yet been called upon to decide a challenge based on non-discrimination regulations, requirements based on gender or religion (which are fairly rare in practice) are likely to be declared unobjectionable.

If the dispute is referred to the CAS, the arbitrators must mandatorily be selected from a closed list of approximately 350 arbitrators.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

In international arbitration, failing provisions in the arbitration agreement or in the rules of arbitration referred to by the parties, the court at the place of arbitration has jurisdiction to appoint the arbitrators and shall do so by applying by analogy the provisions in point of the CCP (article 179(2) PILA). Under article 360(1) CCP, failing an agreement by the parties on the number of arbitrators, the number shall be three.

In the absence of an appointing authority or where such authority fails to make an appointment within a reasonable time, the court at the place of arbitration will appoint an arbitrator in the following instances:

- the parties cannot agree on a chairperson or on the sole arbitrator;
- a party fails to nominate an arbitrator within 30 days as of the day on which such party has been put on notice; and
- the appointed arbitrators fail to agree on the chairperson within 30 days following their nomination (article 362 CCP).

Under the Swiss Rules, if the parties did not agree on the number of arbitrators, the decision will be taken by the court (article 6(1)). As a rule, the matter will be referred to a sole arbitrator, unless the circumstances warrant a three-member arbitral tribunal (article 6(2)). If the parties fail to nominate an arbitrator, if they cannot agree on a sole arbitrator or on the presiding arbitrator, such appointments will be made by the court (articles 7(3) and 8(2)). In multiparty proceedings, where a group of claimants or a group of respondents fails to designate an arbitrator, the court may appoint all three arbitrators and shall specify the presiding arbitrator (article 8(5)).

The CAS Code contains similar provisions. In essence, failure by a party to nominate an arbitrator will cause the president of the relevant CAS division to make such appointment (articles R40.2, R53 and R54).

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

In international arbitration, an arbitrator may be challenged only:

- if he or she does not meet the requirements agreed by the parties;
- if the rules of arbitration agreed by the parties provide for a ground for challenge; or

- if circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality (article 180(1) PILA).

The same grounds are set out in article 367(1) CCP for domestic arbitration.

The arbitrators are under an obligation to disclose any circumstances that give rise to doubts as to their impartiality or independence. Any ground for challenge must be notified to the arbitral tribunal and the other party without delay (failure to do so would amount to a waiver of the right to challenge the arbitrator). In the event of a dispute and to the extent that the parties have not determined the procedure for the challenge, the court having jurisdiction at the seat of the arbitration shall make the final decision (article 180(3) PILA).

Swiss courts tend to apply a strict standard when called upon to decide whether an arbitrator is biased.

The arbitrators shall be removed or replaced (eg, in cases of illness or death) in accordance with the agreement of the parties. In the absence of such an agreement, the matter may be referred to the court where the arbitral tribunal has its seat: the court shall apply by analogy the provisions in point of the CCP (see below) concerning the removal or replacement of arbitrators (article 179(1) and (2) PILA).

In domestic arbitration, the provisions on the challenge, removal or replacement of arbitrators are more detailed (articles 367 to 371 CCP, which apply by analogy to international arbitration). If the parties did not agree on any specific procedure with respect to challenges of an arbitrator, a request for challenge must first be made to the challenged arbitrator. If such arbitrator refuses to step down, the party having made the request may file a challenge before the court of competent jurisdiction at the seat of the arbitral tribunal (article 369 CCP). In international arbitration, this court's decision is final (article 180(3) PILA). In domestic arbitration, the court's decision on the challenge may be reviewed in setting aside proceedings against the award (article 369(5) CCP).

In case an arbitrator is successfully challenged, resigns, or is removed, he or she will be replaced pursuant to the procedure applied for his appointment.

The Swiss Federal Supreme Court held that the IBA Guidelines on Conflicts of Interest in International Arbitration, although being an important working tool, do not constitute a binding instrument comparable to legislation.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

Under Swiss law, the parties and arbitrators are bound by an arbitral contract whereby the arbitrators shall adjudicate upon the dispute with due care, in person, and impartially; in return, the arbitrators are entitled to remuneration. The Swiss Federal Supreme Court held that all members of the arbitral tribunal are subject to the same degree of independence and impartiality, including the party-appointed arbitrators.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The Swiss law of arbitration does not contain any provision regarding the arbitrators' liability. The majority view of commentators is that arbitrators may be held liable only in case of wilful intent or gross negligence.

When certain arbitration rules apply (eg, the Swiss Rules), arbitrators benefit from an express exclusion of liability – they are only liable for damages if they have breached their contractual duties in an intentional or grossly negligent manner (article 45(1) Swiss Rules).

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If the parties have entered into an arbitration agreement with respect to an arbitrable dispute, any Swiss court before which such dispute is brought shall decline jurisdiction, unless:

- the defendant has proceeded on the merits without reservation;
- the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed; or
- the arbitral tribunal cannot be appointed for reasons that are obviously attributable to the respondent in the arbitration (article 7 PILA).

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The arbitral tribunal shall decide on its own jurisdiction (Kompetenz-Kompetenz principle) in general by a preliminary decision or, in certain circumstances, in the final award. Any plea of lack of jurisdiction must be raised prior to any defence on the merits. According to an amendment to the PILA in force since 1 March 2007, the arbitral tribunal shall make its decision on jurisdiction even if an action on the same matter between the same parties is already pending before a state court or another arbitral tribunal, unless there are serious grounds to stay the proceedings (article 186(1-bis) PILA).

An award on jurisdiction may be sought to be set aside before the Swiss Federal Supreme Court, unless the parties have expressly excluded such ground for challenge (article 190(2)(b) PILA).

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

If the place of arbitration has not been determined by the parties or by the arbitral institution designated by the parties, it shall be fixed by the arbitral tribunal (article 176(3) PILA; article 355(1) CCP). The parties' failure to determine the place of arbitration may cause difficulties for the constitution of the arbitral tribunal in case the assistance of local courts is needed (see question 23).

The language of the proceedings shall also be determined by the arbitral tribunal failing an agreement of the parties.

23 Commencement of arbitration

How are arbitral proceedings initiated?

Swiss law does not impose formal requirements for a notice of arbitration. Legal provisions exist only to determine when the arbitration proceedings are pending (article 181 PILA and article 372(1)(a) CCP). In the absence of an agreement as to how to initiate the proceedings, the claimant would appoint its party-appointed arbitrator and request the respondent to do the same. Assistance from the court of competent jurisdiction may be sought for the purpose of constituting the arbitral tribunal.

Under the Swiss Rules, arbitral proceedings are initiated by submitting a notice of arbitration to the secretariat at the address of one of the Swiss Chambers. The notice of arbitration shall be submitted in as many copies as there are other parties, together with an additional copy for each arbitrator and one copy for the secretariat. The minimum content of such notice is described in article 3(3) Swiss Rules. Signature is not required but standard in practice.

24 Hearing

Is a hearing required and what rules apply?

Hearings are usually held in practice, but there is no such requirement either under the Swiss law of arbitration (both international and domestic) or under the Swiss Rules.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The arbitral tribunal has to follow the procedural rules agreed upon by the parties, directly or by reference to arbitration rules. Where the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary. In general, there are no restrictions as to admissible types of evidence in international arbitration (eg, documents, witnesses, experts whether called by a party or appointed by the arbitral tribunal, inspection, etc; the arbitral tribunal also has wide discretion as to the admissibility and weight of witness evidence by party-representatives).

Although article 184 PILA provides that the evidence shall be taken by the arbitral tribunal, it very much depends on the arbitrators how the taking of evidence is conducted. No stringent requirements are fixed in Swiss law and wide discretion is left to tailor the procedure according to the specific needs of the parties (standard practice in international arbitration usually includes written witness statements, examination of witnesses by counsel and questions by the arbitral tribunal). It is not infrequent that arbitrators sitting in Switzerland seek guidance from (or even directly apply) the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

If the party concerned does not voluntarily comply with provisional or conservatory measures ordered by the arbitral tribunal, the arbitral tribunal may request the assistance of the court of competent jurisdiction (article 183(2) PILA; article 374(2) CCP).

The arbitral tribunal or a party with the consent of the arbitral tribunal may request the assistance of the court at the place of arbitration for the taking of evidence (article 184(2) PILA; article 375(2) CCP). The court at the place of arbitration also has jurisdiction for any further judicial assistance (article 185 PILA).

Interventions of the Swiss courts are very limited in international arbitration. This is one of the main features of Chapter 12 of the PILA, which favours party autonomy and grants wide powers to the arbitrators. Procedural orders made by an arbitral tribunal cannot be challenged before a Swiss court.

27 Confidentiality

Is confidentiality ensured?

The Swiss law of arbitration (both international and domestic) is silent on confidentiality and the extent to which arbitration proceedings are per se confidential remains unsettled. The arbitration agreement or any other agreement between the parties, as well as the arbitration rules chosen by the parties, may contain provisions on confidentiality.

Under the Swiss Rules (subject to a few exceptions and unless the parties expressly agree otherwise in writing), the parties, arbitrators, tribunal-appointed experts, the secretary of the arbitral tribunal, the members of the board of directors of the Swiss Chambers' Arbitration Institution, the members of the court and the secretariat, and the staff of the individual chambers undertake to keep confidential all awards and orders as well as all materials submitted by a party in the framework of the arbitration proceedings.

Interim measures and sanctioning powers

28 Interim measures by the courts**What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?**

In both international and domestic arbitration, courts have non-exclusive jurisdiction to order any provisional or conservatory measures before and after arbitration proceedings have been initiated.

29 Interim measures by an emergency arbitrator**Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?**

The Swiss law of arbitration is silent on the issue of emergency arbitration proceedings. Under the revised Swiss Rules (2012), the parties may seek interim relief before an emergency arbitrator (article 43 Swiss Rules).

30 Interim measures by the arbitral tribunal**What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?**

In both international and domestic arbitration, unless the parties have agreed otherwise, the arbitral tribunal may order provisional or conservatory measures at the request of a party (article 183(1) PILA; article 374(1) CCP). Types of interim relief are not limited by law, although the admissibility of some measures is debated (eg attachment of assets, *astreintes* or penal sanctions in case of non-compliance with the order of the arbitral tribunal, etc). Requirements for court assistance are described in question 26. The arbitral tribunal or the court may make the granting of interim relief subject to the provision of appropriate security (article 183(3) PILA; article 374(3) CCP).

Chapter 12 of the PILA (international arbitration) is silent on security for costs. According to some precedents and academic writings, arbitrators sitting in Switzerland have the power to grant security for costs, but only in very limited circumstances (in practice, security for costs is rarely granted). Article 379 CCP (domestic arbitration) provides that if the claimant appears to be insolvent, the arbitral tribunal may order security for costs.

31 Sanctioning powers of the arbitral tribunal**Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?**

Neither the Swiss law of arbitration nor the Swiss Rules contain any specific provisions serving as a basis for an arbitral tribunal or the Swiss Chambers' Arbitration Institution to sanction a party or its counsel in case of 'guerrilla tactics'. However, an arbitral tribunal may take into consideration the conduct of the parties in the proceedings (including counsel) when deciding on the allocation of the costs of the arbitration.

The arbitral tribunal's jurisdiction to sanction counsel directly appears doubtful.

Awards

32 Decisions by the arbitral tribunal**Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?**

In international arbitration, the arbitral award shall be made in conformity with the procedure and form agreed by the parties. In the absence of such an agreement, the award shall be made by a majority decision or, in the absence of a majority, by the presiding

arbitrator alone. The signature of the presiding arbitrator is sufficient (article 189 PILA).

The rules in domestic arbitration are similar. The award is made by a majority decision unless the parties agreed otherwise (article 382(3) CCP). In the absence of a majority decision, the award is made by the chairperson (article 382(4) CCP). The signature of the presiding arbitrator is sufficient (article 384(2) CCP).

33 Dissenting opinions**How does your domestic arbitration law deal with dissenting opinions?**

The issue of dissenting opinions is not addressed in the Swiss law of arbitration. The Swiss Federal Supreme Court held that dissenting opinions are not part of the arbitral award. They do not affect the findings or the operative part of the award.

34 Form and content requirements**What form and content requirements exist for an award?**

In international arbitration, the award shall be made in writing, reasoned, dated and signed (at least by the presiding arbitrator) (article 189(2) PILA; more detailed requirements apply in domestic arbitration – see article 384(1) CCP).

35 Time limit for award**Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?**

The Swiss law of arbitration does not require the award to be rendered within a certain time limit. The Swiss Rules are also silent on the matter, except if the dispute is referred to the expedited procedure, in which case the award shall be rendered within six months from the date on which the secretariat transmitted the file to the arbitral tribunal.

The operative part of CAS awards in appeal proceedings shall be notified to the parties three months after the transfer of the file to the panel; this time limit may be extended by the President of the Appeals Division (article R59(5) CAS Code).

36 Date of award**For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?**

The date of the award is not decisive for any time limits. The award becomes final when it is notified to the parties (article 190(1) PILA; article 387 CCP). The 30-day time limit to challenge the award starts running from that notification.

37 Types of awards**What types of awards are possible and what types of relief may the arbitral tribunal grant?**

Unless the parties have agreed otherwise, the arbitral tribunal may make interim, partial and final awards (articles 188 to 189 PILA; article 383 CCP), including an award by consent if so requested (article 385 CCP).

The possible types of relief are not limited by Swiss law. They mainly depend on the law applicable to the merits of the case.

38 Termination of proceedings**By what other means than an award can proceedings be terminated?**

In case of settlement or other circumstances giving rise to the withdrawal of the claims submitted to arbitration, the arbitral tribunal may make a termination order to declare that the arbitration proceedings are discontinued. Terminating the proceedings without an award requires, in principle, that the parties are consulted on such process. Rules of arbitration may provide for how proceedings can be terminated by other means than an award.

Update and trends

The consequences of not complying with pre-arbitration steps in a multi-tiered arbitration clause have fuelled much debate in past years. It was not settled whether the consequences should be a stay of the arbitration proceedings pending the completion of the pre-arbitration steps, the inadmissibility of the claim (as being premature), the lack of jurisdiction of the arbitral tribunal or even damages for breach of the arbitration agreement. In a landmark decision of 16 March 2016, the Swiss Federal Supreme Court held that the arbitration proceedings should be stayed until the parties have fully complied with the agreed steps (in the case at hand this meant that a true conciliation process had to take place before the arbitration could proceed, as agreed by the parties in their dispute resolution clause).

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Swiss law is silent on the assessment and allocation of costs in arbitration. The parties may make an agreement on that point, either in the arbitration agreement or by reference to arbitration rules. Failing such an agreement, the arbitral tribunal has wide discretion as to costs. As a rule, arbitrators tend to follow the principle of 'costs follow the event' and consider that reasonable legal costs are recoverable, at least in part.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Interest may be awarded in accordance with the law applicable to the merits of the case and other rules and principles which the arbitral tribunal may deem appropriate. In Swiss law, the legal interest rate is 5 per cent per year.

Proceedings subsequent to issuance of award**41 Interpretation and correction of awards**

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Although Chapter 12 of the PILA is silent on interpretation and correction of awards, this gap has been filled by the Swiss Federal Supreme Court. The arbitral tribunal has the power to correct clerical errors of its own motion and may correct or interpret an award upon request of a party. No specific time limits apply in Swiss law (such time limits may nevertheless be provided for in arbitration rules, such as the Swiss Rules). Undue delays in requests for correction or interpretation may be taken into account by the arbitral tribunal.

Domestic arbitration provisions are more detailed. A request for interpretation and correction must be made before the arbitral tribunal within 30 days following the discovery of the mistake or the passages to be interpreted, but at the latest within one year following the notification of the award (article 388 CCP).

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

Setting aside proceedings in international arbitration may only be brought before the Swiss Federal Supreme Court (article 191 PILA in its version in force since 1 January 2007) for the following exhaustive grounds (article 190(2) PILA):

- the arbitral tribunal has been incorrectly constituted (or the sole arbitrator improperly appointed);
- the arbitral tribunal has wrongly assumed or denied jurisdiction;
- the arbitral tribunal has decided beyond the claims submitted to it or failed to decide one of the claims;
- the principle of equal treatment of the parties or their right to be heard (due process) has been breached; or
- the award is incompatible with public policy.

In international arbitration, the parties may exclude all setting aside proceedings (or limit such proceedings to one or several of the grounds set out in article 190(2) PILA) by an express statement in the arbitration agreement or by a subsequent agreement in writing, provided that none of the parties has its domicile, habitual residence or place of business in Switzerland (article 192(1) PILA).

In domestic arbitration, setting aside proceedings must also be brought before the Swiss Federal Supreme Court, unless the parties agree to have setting aside proceedings before the court of competent jurisdiction at the place of arbitration (articles 389 and 390 CCP). The grounds to set aside an award are wider than for international awards (see article 393 CCP).

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level?

Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Unless otherwise agreed between the parties, there is only one level of appeal (ie, setting aside proceedings before the Swiss Federal Supreme Court (see question 42)). Statistics show that the Federal Supreme Court would normally render its decision within four to six months, which is a relatively short period.

The petitioner in setting aside proceedings will be required to pay an advance on costs based on an ad valorem scale depending on the amount in dispute. The general rule before the Swiss Federal Supreme Court is 'costs follow the event'. In addition to the court's fees, the successful party will in principle be awarded legal costs that are also determined pursuant to an ad valorem scale depending on the amount in dispute.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Domestic awards are enforced in all Swiss cantons in the same way as a judgment made by a Swiss court. Enforcement of foreign arbitral awards in Switzerland is governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention; article 194 PILA) (also if the arbitral tribunal had its seat in a non-member state).

When the prevailing party has been awarded a sum of money, the award is to be enforced within the framework of debt collection proceedings in accordance with the Federal Debt Collection and Bankruptcy Act and the applicable rules of the CCP. The Swiss court of competent jurisdiction would examine the requirements of the New York Convention in such proceedings if the award to be enforced is a foreign award.

Switzerland has a long tradition of arbitration-friendly courts. This is also reflected in the manner in which such courts look upon enforcing awards.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Recognition and enforcement of foreign arbitral awards are exclusively governed by the New York Convention (article 194 PILA). If a court of competent jurisdiction at the place of arbitration set aside an award, Swiss courts may refuse recognition and enforcement under article V(1)(e) of the Convention.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Neither the Swiss law of arbitration nor the Swiss Rules contain specific provisions on the enforcement of orders by emergency arbitrators. These orders would in principle be treated as standard orders on

interim relief issued by an arbitral tribunal. If a party does not comply with such orders, article 183(2) PILA and article 374(2) CCP provide that assistance may be sought from the competent state courts.

47 Cost of enforcement

What costs are incurred in enforcing awards?

Costs depend on the canton where enforcement is sought and the specific defences raised against enforcement. Whereas the rules of civil procedure have been unified in one code (ie, the CCP), each canton fixes the costs for the proceedings.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Swiss procedural rules clearly distinguish between the stage where the facts are presented to the court and the subsequent taking of evidence (at hearings). The admissibility of evidence aimed at proving facts that have not been alleged in the briefs could be put into question.

In court litigation, production of documents is possible only within narrow boundaries. Discovery does not exist in court litigation and, even in international arbitration, most Swiss arbitrators have no tendency towards US-style discovery. Written witness statements are common practice in international arbitration. Party officers cannot testify as witnesses proper in court litigation, but arbitrators may allow for more flexibility in international arbitration (see question 25).

A Swiss arbitrator would also be ready and willing to act as a settlement facilitator if the parties so wish.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Foreign counsel appearing in arbitrations in Switzerland are not bound by the local professional and ethical rules. Swiss-qualified lawyers are in principle bound by the Swiss Code of Conduct, but there are rules that do not apply to counsel acting in arbitration.

The IBA Guidelines on Party Representation in International Arbitration are extremely detailed if compared to the Swiss Code of Conduct or best practices in Switzerland. Whereas a number of provisions in the Guidelines are generally accepted rules of conduct in Switzerland, the Swiss arbitration community expressed general concerns about the need for such Guidelines and more detailed concerns over some provisions.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

There are no regulatory restrictions in Switzerland relating to third-party funding and there currently is no intention to regulate this segment.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Switzerland is a well-known pro-arbitration jurisdiction, which is characterised by the efficiency of its arbitration laws and practice. There are no adverse particularities of which a foreign practitioner should be aware.

Neither a foreign arbitrator nor the foreign counsel of a party in arbitration proceedings taking place in Switzerland need to be a lawyer or national or resident of Switzerland. The foreign arbitrators or counsel do not have to pay Swiss taxes on their fees. Local ethical rules do not generally apply in international arbitration.

LENZ & STAEHELIN

Xavier Favre-Bulle
Harold Frey
Daniel Durante

xavier.favre-bulle@lenzstaehelin.com
harold.frey@lenzstaehelin.com
daniel.durante@lenzstaehelin.com

Route de Chêne 30
1211 Geneva 6
Switzerland
Tel: +41 58 450 70 00
Fax: +41 58 450 70 01

Bleicherweg 58
8027 Zurich
Switzerland
Tel: +41 58 450 80 00
Fax: +41 58 450 80 01

www.lenzstaehelin.com

Taiwan

Helena H C Chen

Pinsent Masons LLP

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Taiwan is not a contracting state to the New York Convention.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

As of 1 December 2016, Taiwan has concluded bilateral investment agreements with mainland China and 31 countries. See www.dois.moea.gov.tw/asp/relation1_1_3.asp.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The Taiwan Arbitration Act (as last amended on 2 December 2015, formerly named the Commercial Arbitration Act, came into force on 24 December 1998, after the reform of the arbitration law in Taiwan. The Taiwan Arbitration Act (TAA) does not distinguish between domestic and foreign-related arbitration proceedings, except for the arbitration language, whereby in foreign-related arbitration cases, the parties may agree on the language of arbitration (TAA, article 25(1)).

An award is considered a foreign award if the award was rendered outside of the territory of Taiwan or was made pursuant to foreign arbitration law or regulation, the arbitration rules of foreign arbitration institutions, or the arbitration rules of international arbitration institutions. A foreign award will need to be recognised by a Taiwanese court before it can be enforced by a Taiwanese court.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

When the former law, titled the Commercial Arbitration Act, was reformed and renamed as the Arbitration Act, the legislators expressly specified in the legislative remarks that the Taiwan Arbitration Act was based on the UNCITRAL Model Law. Nonetheless, close scrutiny will reveal that there are some differences between the Taiwan Arbitration Act and the UNCITRAL Model Law. For example, articles 21(1) and (3) of the Taiwan Arbitration Act stipulate a time frame within which an arbitral tribunal shall render an award. If the tribunal fails to comply with such a time frame, except for cases subject to mandatory arbitration, any of the parties may launch a lawsuit with the court or request the court to resume the suspended litigation proceedings. In addition, the grounds for setting aside an award (TAA, article 40(1)) and the time

limitation for a party to launch an action to set aside an award (TAA, article 41(2)) as provided in the Taiwan Arbitration Act are not exactly the same as those provided in the UNCITRAL Model Law.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

While the Taiwan Arbitration Act acknowledges the principle of party autonomy, the Taiwan Arbitration Act provides certain mandatory provisions, such as:

- an arbitrator shall be a natural person (TAA, article 5) satisfying the qualifications and restrictions as stipulated under articles 6 and 7 of the Taiwan Arbitration Act. A qualified candidate may apply for registration with an arbitration institution as an arbitrator after having being trained and having obtained a certification unless otherwise provided by the Taiwan Arbitration Act (TAA, article 8(1));
- an arbitrator shall be independent and impartial and shall maintain the confidentiality of the arbitration (TAA, article 15(1)). An arbitrator has certain statutory duties to disclose any potential bias to the parties (TAA, article 15(2));
- the arbitral tribunal shall give each party a full opportunity to present his or her case (TAA, article 23);
- the deliberations for making an award by the arbitral tribunal shall be confidential (TAA, article 32(1));
- provisions related to the setting-aside of an arbitral award, for example, the time limitation (TAA, article 41(2)) and the grounds (TAA, article 40(1)) for a party to set aside an award, the revocation by the court of any enforcement order in the event where the court sets aside an arbitral award (TAA, article 42(2), etc); and
- provisions related to the recognition and enforcement of foreign arbitral awards.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The Taiwan Arbitration Act does not provide any guidance as to the choice of substantive law. The parties can freely decide on the law applicable to the merits of the case. In practice, if the parties do not have any agreement on the substantive law, the arbitral tribunal will decide on the law applicable to the merits of the case in accordance with the Law Governing the Choice of Law in Foreign-related Civil Matters.

The arbitral tribunal can decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorised the tribunal to do so (TAA, article 31).

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The most prominent arbitral institution in Taiwan is the Chinese Arbitration Association, Taipei (CAA), which provides a wide range

of dispute settlement administration services, including arbitration, mediation and other alternative dispute resolution proceedings.

The Chinese Arbitration Association, Taipei
 Floor 14, 376 Ren-Ai Road, Section 4
 Taipei 106
 Taiwan
 Tel: +886 2 2707 8672
 Fax: +886 2 2707 8462
 service@arbitration.org.tw
 www.arbitration.org.tw

The CAA keeps a panel of arbitrators but it allows arbitrators to be selected from outside the panel. The parties may appoint any arbitrator who meets the compulsory requirements stipulated in the TAA, regardless of whether the arbitrator is on the CAA panel. The fees levied by the CAA are calculated on the basis of the amount in dispute and already include the fees to be paid to the arbitrators. In comparison with the fees levied by some international arbitration institutions, such as ICC, SIAC, HKIAC, etc, the fees charged by the CAA are very moderate.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Only disputes that can be settled by the parties are arbitrable (TAA, article 1(2)). The following types of disputes are considered not arbitrable: family law matters, criminal law matters, antitrust law matters and competition law matters. Disputes over the validity of patent rights are not arbitrable either. Regarding disputes arising from securities transactions executed under Taiwan Securities and Exchange Act, the proviso of article 166(1) of the Taiwan Securities and Exchange Act requires mandatory arbitration: 'Any disputes arising between the stock exchange and securities firms, or between securities firms, shall be resolved by arbitration regardless of whether there is an agreement to arbitration between the parties or not.'

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The parties may conclude an arbitration agreement before or after the dispute arises. A valid arbitration agreement shall meet all of the following requirements (TAA, articles 1 and 2):

- the arbitration agreement shall be in writing, including any written documents, instruments, correspondences, facsimiles, telegraphs or other similar types of communications between the parties;
- the parties can only enter into an arbitration agreement in respect of a dispute that can be settled by the parties pursuant to the law, designating one or an odd number of arbitrators as the arbitral tribunal for the dispute; and
- the arbitration agreement shall relate to a specific legal relationship and the dispute arising therefrom.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

Article 4 of the TAA confirms that the arbitration agreement is independent of, and separated from, the underlying contract. Therefore, the avoidance, rescission or termination of the underlying contract does not affect the validity of the arbitration agreement.

After an arbitration agreement has been validly concluded between the parties, the insolvency, death or loss of legal capacity of the parties to the arbitration agreement thereafter does not invalidate the arbitration agreement. After a party is declared insolvent or legally incapable, an administrator will be appointed and the administrator, acting on behalf of the party, is bound by the arbitration agreement contained in the underlying contract entered into by the party.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

A third party can be bound by an arbitration agreement in exceptional situations, for example, assignment of contractual rights or obligations or succession. If an insurer is entitled to enforce an insured's rights against a third party, the insurer will be bound by the arbitration agreement concluded between the insured and the third party.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The Taiwan Arbitration Act does not expressly stipulate whether and how a third party may be joined in an existing arbitration proceeding. Since an arbitration is consensual by its very nature, if all the existing parties and the third party agree to the joinder of the third party to the existing arbitration proceeding, in principle, third-party participation would be allowed. Lacking such agreement, the majority view under Taiwan law is that a third party does not have the right to join an existing arbitration proceeding if any of the existing parties disagrees to the joinder; likewise, the existing parties cannot compel a third party to join an existing arbitration proceeding if the third party refuses to join.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The law and regulation related to arbitration does not recognise the option of extending an arbitration agreement to a non-signatory parent company or subsidiary companies of a signatory company on the basis of the 'group of companies' doctrine, nor has there been any court precedent recognising the extension of an arbitration agreement to a non-signatory parent company or subsidiary companies of a signatory company under such doctrine.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The Taiwan Arbitration Act does not expressly stipulate the requirements for a valid multiparty arbitration agreement. However, articles 9(5) and 18(3) of the Taiwan Arbitration Act anticipate the possibility of multiparty disputes by stating that:

- where a party to the arbitration consists of more than two persons, and they are unable to agree on the appointment of an arbitrator, the arbitrator shall be appointed by a majority vote. In the event of a tie, the appointment shall be decided by drawing lots (TAA, article 9(5)); and
- if there are several respondents, unless otherwise agreed by the parties, the arbitral proceedings for a dispute shall commence on the date when the first written notification is served on any one of the respondents (TAA, article 18 (3)).

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

According to a letter issued by the Judicial Yuan of Taiwan in 1993, government officers, including active judges, may not act as arbitrators. Article 6 of the Taiwan Arbitration Act provides for the qualifications with which an arbitrator shall comply, and article 7 of the Taiwan Arbitration Act stipulates situations where a person cannot act as an

arbitrator. Under the Taiwan Arbitration Act, arbitrators need not be selected from a list of arbitrators.

The parties' agreement on requirements for arbitrators based on nationality and professional skills will be recognised by the courts. It is not clear whether or not the parties' agreement on requirements for arbitrators based on religion or gender will be recognised by the courts or not owing to the lack of related precedents.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

In standard arbitration proceedings, if the parties do not agree on the choice of an arbitrator or the procedure for choosing an arbitrator, the default rule is to have a tribunal composed of three arbitrators: the claimant and the respondent shall each appoint one arbitrator, and the two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal (TAA, article 9(1); CAA Arbitration Rules, article 16(1)).

If the two party-appointed arbitrators cannot agree on the third arbitrator within 30 days from their appointment and the parties did not agree to submit their disputes to any arbitration institution, any of the parties may apply to the court for the appointment of the third arbitrator.

In expedited arbitration proceedings administered by an arbitration institution, the case shall be heard by a sole arbitrator appointed by the arbitration institution (TAA, article 36(1); CAA Arbitration Rules, article 44(1)).

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

A party may apply for the withdrawal of an arbitrator in any one of the following circumstances (TAA, article 16):

- where the arbitrator does not meet the qualifications agreed by the parties;
- the existence of any causes as stipulated under article 32 of the Taiwan Code of Civil Procedure that would require a judge to withdraw from a judicial proceeding;
- the existence or history of an employment or agency relationship between the arbitrator and a party;
- 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
- the existence of any other circumstances that raise any justifiable doubts as to the impartiality or independence of the arbitrator.

Article 17 of the Taiwan Arbitration Act further elaborates on the procedures for challenging an arbitrator as follows:

- a party intending to request for the withdrawal of an arbitrator shall do so within 14 days of knowing the cause for withdrawal. Such party shall submit a written application stating the reasons for the withdrawal to the arbitral tribunal;
- the arbitral tribunal shall make a decision within 10 days upon receipt of such application, unless the parties have agreed otherwise;
- where a party wishes to challenge a decision made by the arbitral tribunal, such party shall apply for a judicial ruling within 14 days of receiving notice of the arbitral decision. A party cannot further challenge the ruling rendered by the court;
- if both parties request for the withdrawal of an arbitrator, the arbitrator shall withdraw; and
- an application to withdraw a sole arbitrator shall be submitted to the court directly.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

The Taiwan Arbitration Act does not expressly stipulate the relationship between parties and arbitrators. Academics hold different views in respect to this issue, including status theory, contract theory and quasi-contract theory. Taiwanese court precedents on this issue are rare.

Article 15 of the Taiwan Arbitration Act requires that arbitrators (both the presiding arbitrator and the party-appointed arbitrators) shall be independent and impartial. In disputes involving property rights, the arbitration fee charged by an arbitration institution is based on the price or value of a claim and a certain percentage of the arbitration fee will be given to the arbitrators by the arbitration institution. Expenses of making copies, translation, arbitrators' transportation and accommodation and other necessary expenses will be charged separately based on actual costs (articles 25, 28 and 29 of the Rules on Arbitration Institution, Mediation Procedures and Fees jointly promulgated by the Executive Yuan and Judicial Yuan of Taiwan).

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

The Taiwan Arbitration Act is silent on the immunity of arbitrators from liability. There is also a lack of jurisprudence on this issue. However, the academics generally hold that arbitrators shall be responsible for intentional acts and gross negligence.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Before a defendant submits any arguments on the merits of the case, the defendant may file a motion with the court to stay the court proceedings (TAA, article 4(1)).

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The Taiwan Arbitration Act recognises the competence-competence doctrine. A party that intends to object to the jurisdiction of the arbitral tribunal shall submit the objection before he or she submits any arguments on the merits of the case (TAA, article 22). If the arbitral tribunal rules that it has jurisdiction and renders a final award, any of the parties may seek to vacate the award on the grounds that the arbitral tribunal does not have jurisdiction over the disputes and the court will conduct a final review of the jurisdictional issues. Should the court find that the arbitral tribunal does not have jurisdiction, the court will vacate the award on the grounds that the arbitral tribunal lacks jurisdiction.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

The place of arbitration, unless otherwise agreed by the parties, shall be determined by the arbitral tribunal.

In foreign-related arbitration cases, the parties may agree on the language of arbitration. Otherwise, the default language for the arbitral proceedings shall be Chinese.

23 Commencement of arbitration

How are arbitral proceedings initiated?

Article 18(2) of the Taiwan Arbitration Act explicitly stipulates that unless otherwise agreed by both parties, the arbitral proceedings for a dispute shall commence on the date when the written notice of arbitration is served on the respondent.

According to Article 8 of the CAA Arbitration Rules, a party wishing to request an arbitration proceeding to be administered by the CAA shall make an advance payment and submit the following documents:

- the request for arbitration for each of the arbitrators and respondents;
- copies of the arbitration agreement or the contract containing an arbitration clause;
- power of attorney, if a legal representative is appointed; and
- completed copies of the letter of appointment of an arbitrator, if one has been appointed.

24 Hearing

Is a hearing required and what rules apply?

The Taiwan Arbitration Act does not expressly stipulate whether a hearing is required. Unless otherwise agreed by the parties, the arbitral tribunal may decide to have a hearing or to make an award on the basis of written submissions and documentary evidence only. However, in practice, the arbitral tribunal will decide to have at least one hearing in most cases, unless otherwise agreed by the parties.

Article 49 of the CAA Arbitration Rules provides that in expedited proceedings, the parties may agree that the arbitral tribunal shall make an award on the basis of written submissions and documentary evidence only, without a hearing.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The Taiwan Arbitration Act is silent on the rules of evidence. The parties may agree on a set of rules of evidence, for example, the IBA Rules. However, in practice, the IBA Rules are rarely adopted by the parties in domestic arbitration. If there is no agreement between the parties regarding the rules of evidence, the arbitral tribunal may adopt the Taiwan Code of Civil Procedure *mutatis mutandis* or other rules of procedure that it deems proper. The parties and a party's officers are allowed to testify.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

The arbitral tribunal, if necessary, may request assistance from a court or other agencies in the course of the arbitral proceedings. For example, the arbitral tribunal may request a court to assist it in taking evidence (TAA, article 28(1)).

27 Confidentiality

Is confidentiality ensured?

Article 15(1) of the Taiwan Arbitration Act expressly requires that arbitrators shall keep all matters confidential. Article 6 of the CAA Arbitration Rules also requires that, unless otherwise agreed by the parties or required by the applicable law, the administrators of the CAA shall keep all matters confidential.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Before and after arbitration proceedings, any of the parties may apply to the court with proper jurisdiction for orders of interim measures. The court enjoys an exclusive jurisdiction to render such orders, except in the situation expressly provided in article 36(1) of the CAA Arbitration

Rules, where it should be emphasised that the parties must agree on the interim measures to be taken:

At the request of either party, the arbitral tribunal may take any interim measures as agreed by the parties in respect of the subject matter of the dispute for purposes of the conservation of the perishable goods or providing immediate protection, such as ordering the sale or their deposit with a third person of the goods or other interim measures as the tribunal considers appropriate.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Neither the Taiwan Arbitration Act, nor the CAA Arbitration Rules, provides for the mechanism of an emergency arbitrator prior to the constitution of an arbitral tribunal.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

See question 28.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The Taiwan Arbitration Act and CAA Arbitration Rules do not provide sanctioning powers to the arbitral tribunal nor the CAA. However, when awarding the costs of the arbitration, the arbitral tribunal may take into consideration, the parties' and their counsel's behaviour in the arbitration proceedings, including any delaying tactics (if any).

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

When there is more than one arbitrator, any award of the arbitral tribunal shall be made by a majority of the arbitrators (TAA, article 32(2)).

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

The Taiwan Arbitration Act is silent on whether an arbitrator may issue a dissenting opinion. An explanatory letter issued on 25 November 1996 by the Ministry of Justice of the Executive Yuan of Taiwan provided that an award shall not include any dissenting opinion. However, article 38(1) of the CAA Arbitration Rules provides that the dissenting opinion of an arbitrator may be recorded on the record of deliberation.

34 Form and content requirements

What form and content requirements exist for an award?

An award shall be in writing and signed by every arbitrator participating in the deliberation. If any arbitrator refuses to or cannot sign the award for any reason, the arbitrators who sign the award shall state the reason for the missing signature.

An award shall contain all of the following:

- the names and addresses of the parties. Where a party is a legal person or other organisation or government department, its name and place of office, place of business or place of public service;

- the names and addresses of the legal representatives or the authorised representatives in the arbitration, if any;
- the name, nationality and addresses of the interpreter, if any;
- the holding of the tribunal;
- the facts and reasons, unless the parties have agreed that no facts and reasons are required to be stated in the award; and
- the date on which and the place where the award was made.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The arbitral tribunal shall render an arbitral award within six months of the constitution of the tribunal. The arbitral tribunal may extend this period by an additional three months if the circumstances require it but cannot further extend the period without the consent of all the parties.

Article 33(1) of the Taiwan Arbitration Act and article 41(1) of the CAA Arbitration Rules both provide that the final award shall be made within 10 days of the closure of the hearings. Article 41(2) of the CAA Arbitration Rules further provides that if the arbitral tribunal fails to render a final award within one month of the closure of the hearings, the CAA may send a notice as a reminder. If the arbitral tribunal fails to render its final award within three months after the closure of the hearings, the CAA may make the names of the arbitrators public in the Arbitration Journal published quarterly by the CAA. Nevertheless, if the arbitral tribunal fails to render its final award within the time limit prescribed in article 21 of the Taiwan Arbitration Act or within the time limit as agreed by the parties, the CAA may make the names of the arbitrators public in its Arbitration Journal immediately without giving a prior notice of reminder.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

If any of the parties intends to set aside an arbitral award, the party shall initiate an action within 30 days from his or her receipt of the arbitral award (TAA, article 41(2)).

The arbitral tribunal may correct, on its own initiative or upon request, any clerical, computational or typographic errors or any other similar obvious mistakes in the award (TAA, article 35). No specific time limit is provided for such correction.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

An arbitral tribunal may issue a final award, partial award and interim award. If the parties reach a settlement before the arbitral tribunal renders an award, the arbitral tribunal will render a settlement agreement. The settlement agreement has the same effect as an award, namely the same effect as a final court judgment (TAA, article 44).

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Arbitral proceedings can be terminated under any of the following situations:

- when the parties reach a settlement before the arbitral tribunal renders a final arbitral award;
- in the circumstances set out by article 21(1) of the Taiwan Arbitration Act, which provides that: 'If the arbitral tribunal fails to render an arbitral award within the time limit specified in article 21(1) of the Taiwan Arbitration Act, except in the case of mandatory arbitration, any of the parties may refer the dispute to the court or proceed with the previously initiated (and suspended) litigation proceedings and the arbitral proceedings shall be deemed terminated thereafter.'; and
- in the event that a majority consensus of the arbitrators cannot be reached (TAA, article 32(4)).

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

In terms of cost allocation in arbitration, the arbitral tribunal usually follows the rules for cost allocation in domestic court proceedings, namely the 'loser pays' rule.

However, the 'loser pays' rule does not apply to attorneys' fees and in-house fees.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Interest may be awarded. Where the Taiwan Civil Code is applicable, the interest rate is 5 per cent per annum, unless otherwise agreed by the parties or provided by the applicable law (Taiwan Civil Code, article 203).

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The arbitral tribunal may correct, on its own initiative or upon request, any clerical, computational or typographic errors or any other similar obvious mistakes in the award (TAA, article 35). No specific time limit is provided for such correction.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

If any of the parties intends to set aside an arbitral award, the party shall initiate an action with the court with proper jurisdiction within 30 days from his or her receipt of the arbitral award (TAA, article 41(2)).

The grounds on which an award can be challenged include:

- the arbitral award concerns a dispute not contemplated by the terms of the arbitration agreement, or exceeds the scope of the arbitration agreement, unless the offending portion of the award may be severed and the severance will not affect the remainder of the award;
- the reasons for the arbitral award were not stated as required, unless the omission was corrected by the arbitral tribunal;
- the arbitral award directs a party to act contrary to the law;
- the existence of any circumstances provided in article 38 of the Taiwan Arbitration Act;
- the arbitration agreement is null, invalid or has yet to come into effect before the conclusion of the arbitral proceedings;
- the arbitral tribunal fails to give a party the opportunity to present its case before the conclusion of the arbitral proceedings, or if a party is not represented by a duly appointed and authorised representative in the arbitral proceedings;
- the formation of the arbitral tribunal or the arbitral proceedings does not comply with the arbitration agreement or the law;
- an arbitrator breaches the duty of disclosure and is obviously partial, or continues to participate in the arbitration after being requested to withdraw, provided that the request for withdrawal has not been dismissed by the court;
- an arbitrator violates an arbitration duty that constitutes a criminal offence in relation to the arbitration;
- a party or its representative has committed a criminal offence in relation to the arbitration;
- any evidence or translation, upon which the award is based, is forged or fraudulently altered or contains any other misrepresentations; or
- a civil or criminal decision or an administrative ruling, upon which the award is based, has been reversed or materially altered by a subsequent decision or administrative ruling.

Items (ix) to (xi) are limited to instances where the final conviction has been rendered or the criminal proceeding may not be commenced or

Update and trends

CAA Hong Kong International Arbitration Rules (draft)

The Chinese Arbitration Association, Taipei (the CAA) plans to establish a separate and independent organisation in Hong Kong and has prepared a set of draft Arbitration Rules for it (tentatively named as the 'CAA Hong Kong International Arbitration Rules', hereinafter referred to as the 'Draft Rules'). The first public version of the Draft Rules was presented during the round table discussion at the end of the tenth Taipei International Conference on Arbitration and Mediation on 30 August 2016. The Draft Rules specify Hong Kong as the default seat, unless otherwise agreed by the parties or the arbitral tribunal determines that another seat is more appropriate in the circumstances after consulting with the parties. This will signify the CAA's presence in Hong Kong – a New York Convention and Model Law jurisdiction, and will enable the enforcement of CAA-HK awards, made in Hong Kong, in other New York Convention jurisdictions.

Promotion of arbitration by the Financial Supervisory Commission

Taiwan's Financial Supervisory Commission (the FSC) issued a letter on 2 September 2016 addressed to the Taiwan's Bankers Association. Said letter is with regard to suggestions for means of dispute resolution between members of the Bankers Association and their customers in relation to disputes arising from complex, high-risk derivative transactions.

In this memorandum, the Commissions reminded the Bankers Association (and correspondingly, its members) that it is of the position that any disputes arising from such transactions should be resolved either by the Financial Ombudsman Institution (hereinafter referred to as the 'Institution') or by way of arbitration.

The FSC is of the position that members of the Bankers Association should proactively engage their customers with amicable negotiations to resolve any disputes arising from complex, high-risk derivative transactions. In the event that such disputes cannot be resolved by amicable negotiations, members of the Bankers Association should not refuse or deny the customer's choice of applying

to the Institution for resolution or submit a request for arbitration. If any member is found to have failed to resolve any such disputes appropriately, the failure to adopt the above dispute resolution mechanism shall also be taken into account when considering the appropriate penalty.

Any member of the Bankers Association that intends to have the customer provide security during dispute resolution proceedings should discuss options for such security with the customer such that parties can identify the most appropriate way to do so without affecting the customer's normal business operations.

Choice of arbitration institution under Model Contract for Project Management of Public Construction Projects and Model Contract for Technical Services of Public Construction Projects

Taiwan's Public Construction Commission announced the latest amendments to the Model Contract for Project Management of Public Construction Projects and the Model Contract for Technical Services of Public Construction Projects in January 2015.

If the parties are unable to achieve an amicable settlement, the disputes may be submitted to arbitration pursuant to an arbitration agreement between the parties. Pursuant to the amendments, if the arbitration agreement does not specify an arbitration institution and the parties cannot agree upon an arbitration institution, the arbitration institution shall be decided by the procuring entity.

Alternatively, lacking an arbitration agreement, the consultant may first refer the disputes to the Complaint Review Board for Government Procurement of the Public Construction Commission for mediation under article 85-1 of the Taiwan Government Procurement Act. The procuring entity is obliged to participate in the mediation. If the mediation is unsuccessful because the procuring entity does not agree to the mediation proposal or recommendation, the consultant may further submit the disputes to arbitration, and the procuring entity cannot refuse to arbitrate. In addition, under such situation, the arbitration institution shall be decided by the consultant.

continued for reasons other than insufficient evidence. Item (vii) concerning circumstances contravening the arbitration agreement and items (viii) to (xii) are limited to the extent that the circumstances are sufficient to affect the arbitral award.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level?

Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Arbitral awards are not appealable.

However, a party may launch a lawsuit to set aside an arbitral award with a district court if any of the grounds for setting aside exist. The decision rendered by the district court is appealable to the high court. If the amount in dispute is NT\$1.5 million or more, the losing party may appeal to the Supreme Court. Therefore, there are three levels in total, namely the district court, the High Court and the Supreme Court. The time required at each level varies depending on the complexity of the case concerned.

The amount of the court costs at the court of first instance is calculated in accordance with the following table. The following amounts are cumulative.

Below NT\$100,000	NT\$1,000
Up to NT\$1 million	NT\$110 for each NT\$10,000 inclusive
Up to NT\$10 million	NT\$99 for each NT\$10,000 inclusive
Up to NT\$100 million	NT\$88 for each NT\$10,000 inclusive
Up to NT\$1 billion	NT\$77 for each NT\$10,000 inclusive
Above NT\$1 billion	NT\$66 for each NT\$10,000 inclusive

In matters of appeal to a court of second or third instance, an additional five-tenths of the court costs charged by the court of first instance shall be taxed.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

An arbitral award can be regarded as a foreign award if: (i) it is made outside the territory of the Taiwan; or (ii) it is made within the territory of the Taiwan but in accordance with foreign arbitration law or regulation, the arbitration rules of foreign arbitration institutions, or the arbitration rules of international arbitration institutions.

The grounds for refusal of the recognition or enforcement of a foreign arbitral award are provided in articles 49 and 50 of the Taiwan Arbitration Act.

Article 49 of the Taiwan Arbitration Act provides that:

- the court shall issue a dismissal with respect to any application submitted by a party for recognition of a foreign arbitral award, if such award contains one of the following elements:
- the recognition or enforcement of the award would be contrary to the public policy of Taiwan; or
- the subject matter of the dispute is not capable of settlement by arbitration under the laws of Taiwan; and
- the court may issue a dismissal order with respect to an application for recognition of a foreign arbitral award if the court of the country where the arbitral award is made, or whose laws govern the arbitral award, does not recognise or enforce arbitral awards of Taiwan.

Under article 49 of the Taiwan Arbitration Act, the courts have the power to dismiss an application for recognition of a foreign arbitral award even in the absence of any request from the opposite party.

Article 50 of the Taiwan Arbitration Act further stipulates that if a party applies to the court for recognition of a foreign arbitral award, the opposite party may request the court to dismiss the application within 20 days from the date of receipt of the notice of the application on the following grounds:

- the arbitration agreement is invalid as a result of the incapacity of a party according to the applicable laws;
- the arbitration agreement is null and void according to the governing law as agreed by the parties or, in the absence of choice of

law by the parties, the law of the country where the arbitral award was made;

- a party is not given proper notice either 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;
- the arbitral award is not relevant to the subject matter of the dispute covered by the arbitration agreement or exceeds the scope of the arbitration agreement, unless the offending portion can be severed from, and will not affect, the remainder of the arbitral award;
- the composition of the arbitral tribunal or the arbitration procedure contravenes the arbitration agreement or, in the absence of an arbitration agreement, the law of the place of the arbitration; or
- the arbitral award is not yet binding upon the parties or has been suspended or revoked by a competent court.

Taiwanese courts tend to decide in favour of enforcing awards.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

The Taiwan Arbitration Act is silent on the enforcement of a foreign award that has already been set aside by the courts of the place of arbitration. The court's attitude in this regard is not clear because of the lack of relevant precedents.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

No.

47 Cost of enforcement

What costs are incurred in enforcing awards?

In matters arising from proprietary rights, if the amount or value of the enforcement is less than NT\$5,000, the cost for enforcement of an award is waived. If the amount or value of the enforcement is NT\$5,000 or more, the cost for enforcement of an award is 0.8 per cent of the amount or value of the enforcement.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

The Taiwan Arbitration Act recognises the doctrine of party autonomy. In the absence of an agreement on the procedural rules governing the arbitration, the arbitral tribunal shall first apply the Taiwan Arbitration

Act. If the Act is silent on a procedural matter, the arbitral tribunal may adopt the Taiwan Code of Civil Procedure *mutatis mutandis* or other rules of procedure that it deems proper. Although, literally speaking, there is no order of precedence between applying the Taiwan Code of Civil Procedure *mutatis mutandis* and applying other rules of procedure that it deems proper, in practice, the arbitral tribunal often refers to the provisions under the Taiwan Code of Civil Procedure. As such, in the absence of an agreement on the procedural rules governing the arbitration and where the Taiwan Arbitration Act is silent, in practice, the Taiwan Code of Civil Procedure would have substantial influence on the arbitration proceedings.

Unless otherwise expressly agreed by the parties, it is not likely that the arbitral tribunal will adopt US-style discovery. Written witness statements are not rare but, where possible, the arbitral tribunal would usually invite witnesses to attend the hearing so that the arbitral tribunal can have the opportunity to ask them questions directly.

A party's officers may testify but they are not required to take an oath.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

The Taiwan Bar Association promulgated the Code of Ethics for Counsel, which prohibits counsel from peddling influence to judges or arbitrators. Counsel are prohibited from expressly or implicitly telling the parties that they have the ability or connection to exert influence. Counsel are also prohibited from conducting any acts that may damage the impartiality of arbitrators.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

No.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Taiwan is not a signatory state to the 1958 New York Convention. Counsels are advised to take this into consideration if enforcement proceedings outside the territory of Taiwan might be required.

When the arbitration institution pays out the fees to an arbitrator, it will withhold 20 per cent of the arbitrator fees as withholding tax. However, the reimbursement of out-of-pocket expenses, including transportation and accommodation, etc, is not subject to withholding tax.



Pinsent Masons

品誠梅森律師事務所

Helena H C Chen

helena.chen@pinsentmasons.com

Unit 1008, 10th Floor, China Resources Building
No. 8 Jianguo Menbei Avenue
Beijing 100005
China

Tel: +86 10 8519 0011
Fax: +86 10 8519 0022
www.pinsentmasons.com

Thailand

Kornkieat Chunhakasikarn and John Frangos

Tilleke & Gibbins

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Thailand acceded to the New York Convention on 21 December 1959, which came into force on 20 March 1960. No declarations or notifications were made under articles I, X and XI of the Convention.

Thailand is also a party to the Geneva Convention on the Enforcement of Foreign Arbitral Awards 1927. It has also ratified agreements supporting programmes of the Overseas Private Investment Corporation (OPIC) and has signed but not ratified the Convention Establishing the Multilateral Investment Guarantee Agency (1985).

Thailand is a signatory to the International Centre for Settlement of Investment Disputes Convention 1965 (the ICSID Convention) but has not yet ratified it and is not likely to do so in the near future.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Thailand has entered into various bilateral and other investment treaties.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Thailand's arbitration law is the Arbitration Act BE 2545 (2002) (the Arbitration Act), which closely follows the UNCITRAL Model Law. The Arbitration Act applies to both foreign and domestic arbitration proceedings and to the enforcement of both domestic and foreign arbitral awards. The provisions of the Civil Procedure Code relating to evidence may also apply to arbitral proceedings.

In any case pending before a court of first instance, the parties may agree to submit the dispute, in reference to all or any of the issues, to arbitrators for settlement. If the court is of the opinion that such an agreement is not contrary to law, it shall grant the joint application (section 210 of the Civil Procedure Code).

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The Arbitration Act closely follows the UNCITRAL Model Law. While much of the Model Law is adopted verbatim, there are some distinct differences that are unique to Thailand. For example, while the Model Law allows parties to freely determine the number of arbitrators, the Arbitration Act requires an odd number of arbitrators; the Model Law allows arbitrators to take interim measures related to the subject of the dispute pending the outcome of the arbitration, and the Arbitration

Act requires a party seeking a temporary order to file a petition with a Thai court; the Arbitration Act sets a three-year deadline for petitioning the court to recognise an arbitral award, starting from the date that the award became enforceable, while the Model Law is silent on this.

In addition, the Arbitration Act exempts arbitrators from liability in performing their duties, except where they intentionally, or with gross negligence, injure a party. There are also criminal provisions whereby an arbitrator can be fined, imprisoned for up to 10 years, or both, for demanding or accepting bribes. These provisions, the purpose of which is to ensure impartiality, are absent from the Model Law, and have been the source of discussions and expressions of concern by local arbitrators who are apprehensive about the potential for abuse of the provisions by disgruntled disputants.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

There are few mandatory provisions, and the Arbitration Act generally allows the parties to agree on the specific rules to govern the arbitration but gives substitute provisions in the event that the parties are unable to agree.

The only mandatory provisions are as follows:

- the arbitration agreement must be in writing (see question 10);
- the arbitral tribunal must be composed of an uneven number of arbitrators;
- the arbitrators must be impartial, independent and possess the qualifications prescribed by the arbitration agreement or the institution administering the arbitration; and
- the arbitral award must be in writing and signed by the members of the arbitral tribunal, or a majority thereof.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The parties are at liberty to agree on the governing law, but in default of agreement, Thai law will apply.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The main domestic arbitration institutions in Thailand are:

Thai Arbitration Institute (TAI) of the Alternative Dispute Resolution Office
Office of the Judiciary
Criminal Court Building 5th–6th floor
Ratchadapisak Road, Chatuchak
Bangkok 10900, Thailand
Tel: +66 2541 2298 9
Fax: +66 2512 8432
www.adro.co.go.th
adro@coj.go.th

Office of the Arbitration Tribunal of the Board of Trade (BOT) of Thailand
 150/2 Ratchabophit Road
 Wat Ratchabophit, Phranakorn
 Bangkok 10200, Thailand
 Tel: +66 2622 1860 76
 Fax: +66 2622 4525
 www.thaichamber.org
 tcc@thaichamber.org

Thailand Arbitration Center (THAC)
 689 Bhiraj Tower Sukhumvit Road
 Khlong Tan Nuea, Vadhana
 Bangkok 10110, Thailand
 Tel: +66 2018 1615
 Fax: +66 2018 1632
 www.thac.or.th
 info@thac.or.th

Both the TAI and BOT committees are well respected, supervised by a diverse advisory board, have standard arbitration rules and maintain a list of qualified arbitrators. International arbitration at THAC is still untested, as the centre is fairly new. The THAC is currently branding itself as 'Thailand's first international dispute resolution centre'. The THAC is also strongly focusing on its mediation and conciliation services.

Under the TAI and BOT, parties are free to nominate outside professionals as arbitrators, and most often elect to conduct the proceedings in English or Thai. Many more cases are handled by the TAI than the BOT committee, largely because the former is managed by the Office of the Judiciary.

The TAI does not require any institutional fee. The parties are responsible for the arbitrator's remuneration and actual expenses. Arbitrator fees for arbitrations conducted through the TAI and the BOT committees are quite reasonable and have similar fee structures based upon claim amounts. These fees are considerably less than those charged by many international institutes.

The manner of appointment of arbitrators in the TAI's rules is slightly different to that of other international institutes with respect to appointment of a sole arbitrator. Each party may nominate three arbitrators by list. The TAI may add another three names to the list, and the whole list is issued to the parties. Each party may select nine names from the list and arrange them in order of preference. The TAI will then contact the most preferred person to be the arbitrator. For appointment of three arbitrators, each party will appoint one arbitrator and the two appointed arbitrators will choose the third arbitrator who will act as chairperson of the tribunal.

In addition to the above arbitration institutes in Thailand, the Department of Insurance has set up an Office of Arbitration to handle disputes relating to claims under insurance policies and the Security and Exchange Commission (SEC) and the Department of Intellectual Property also offer arbitration services.

Arbitrations in Thailand are also conducted under the supervision of the ICC, the LCIA, the HKIAC and the SIAC.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Section 40 of the Arbitration Act gives Thai courts the power to set aside an arbitral award if the award deals with a dispute not capable of settlement by arbitration under the law or where the recognition or enforcement of the award would be contrary to public policy.

It is generally accepted and recognised that criminal, family and certain types of IP or labour disputes are not arbitrable on account of being contrary to public policy. IP disputes involving commercial rights may be arbitrated, but it is rare for parties to such disputes to arbitrate, because they do not usually have a binding arbitration clause between them and often they are not able to agree on arbitration after the dispute has already arisen. In addition, on 28 July 2009, the Cabinet passed a resolution that prevents the use of arbitration clauses in all types of contracts between a governmental organisation and a private company unless Cabinet approval is obtained.

Disputes in relation to securities are generally considered to be arbitrable and many brokerage firms have unilaterally agreed to participate in SEC arbitral proceedings if their customers elect to arbitrate.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

To be binding, an arbitration agreement must:

- be in writing;
- be signed by the parties; and
- state unequivocally the parties' intent to submit all or certain disputes arising between them in connection with a defined legal relationship to arbitration.

An arbitration agreement can take the form of an arbitration clause in a contract or a separate arbitration agreement. Separate arbitration agreements can include an exchange between the parties by letter, facsimile, telegram, telex, data interchange with electronic signatures or other means that provide a record of the agreement. Therefore, the arbitration agreement could be contained in general terms and conditions if they are signed by both parties, or each party accepts, in writing, the general terms and conditions as forming part of the contract.

An agreement to arbitrate can also arise if the parties exchange statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. Therefore, this can cure any earlier failure to put the agreement to arbitrate in writing. A further safeguard is provided by the TAI and BOT committee, which draw up an agreement to appoint the arbitrators that includes a statement that the parties agree to arbitrate and the agreement is signed by both parties.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

Section 12 of the Arbitration Act provides that the validity of the arbitration agreement and the appointment of an arbitrator shall not be prejudiced, even if any party thereto is dead, ceases to be a juristic person, has a final receiving order issued against its property or has been adjudged incompetent or quasi-incompetent.

An arbitration clause forming part of a contract is deemed as a separate agreement independent of the main contract. Therefore, the termination of the underlying contract, or a decision by the arbitral tribunal that the underlying contract is null and void, will not affect the validity of the arbitration clause (section 24 of the Arbitration Act).

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Where there is any assignment of a claim or liability, the assignee will be bound by the arbitration agreement concerning such claim or liability (section 13 of the Arbitration Act). A receiver or trustee in bankruptcy will be bound by the arbitration agreement of the insolvent company or bankrupt person if they elect to defend or pursue the relevant claim. Likewise, the administrator of an estate will be bound by an arbitration agreement entered into by the deceased. A principal is bound by an arbitration clause or agreement entered into by its agent.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

The Arbitration Act is silent on the issue of third-party participation in arbitration. Therefore, a third party cannot be joined to the arbitration if it is not a party to the arbitration clause, unless all parties agree to the third party joining the arbitration. If so, all of the parties will need to enter into a new arbitration agreement.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the ‘group of companies’ doctrine?

Generally, companies in the same group will not be bound by an arbitration agreement entered into by a parent company, subsidiary company or another company in the same group in accordance with the principle that each company is a separate legal entity. In Thailand, the requirement for an agreement to arbitrate is strictly applied.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

There is no specific provision in the Arbitration Act for multiparty arbitration. The Arbitration Act will apply equally to multiparty arbitration as it does to bilateral arbitration. In respect of the constitution of the arbitral tribunal or the appointment of the arbitrators, the arbitration agreement or the rules of the particular arbitration institute selected by the parties will apply. The ICC rules provide for multiparty arbitration. The rules of Thailand’s two main domestic arbitration institutes do not have any specific rules for multiparty arbitration, but multiparty arbitration is not precluded. In default of agreement, the parties may apply to the court to appoint the arbitrators.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The Arbitration Act provides that arbitrators must be impartial, independent and possess the qualifications prescribed by the arbitration agreement or the institution administering the arbitration. The domestic arbitration institutes each maintain a list of arbitrators, but the parties are not required to select from the list and may appoint external arbitrators. Present judges may not act as arbitrators, as this is contrary to the rules applicable to judges. However, many Thai arbitrators in the lists of the domestic arbitration institutes are former judges.

Under the Royal Decree naming Occupations and Professions Forbidden to Aliens (No. 3) BE 2543 (2000), foreign nationals may act as arbitrators in any arbitration.

We are not aware of any Supreme Court precedent regarding the enforceability of contractual requirements for arbitrators based on nationality, religion or gender, and it is doubtful that a Thai court would refuse to recognise such provisions unless they are deemed offensive to public morality.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

If the parties are unable to agree on the number of arbitrators, a sole arbitrator shall be appointed. 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; or
- where the tribunal consists of multiple arbitrators, then each party must appoint an equal number of arbitrators and those arbitrators will jointly appoint an additional arbitrator (the chairman). If either party fails to appoint its arbitrators within 30 days of 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 arbitrators or the chairman, as the case may be.

In addition, a party may also apply to the court to appoint arbitrators if:

- a party fails to act as required under the above procedure;
- the parties, or the party-appointed arbitrators, are unable to reach an agreement expected of them under the above procedure; or
- a third party, including an institution, fails to perform any function entrusted to it under such procedure.

The above provisions are contained in sections 17 and 18 of the Arbitration Act.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Sections 19, 20 and 21 of the Arbitration Act deal with the challenge and replacement of arbitrators. Arbitrators can be challenged on the grounds of partiality, lack of independence and lack of agreed-on qualifications, provided such grounds are justifiable. Prospective arbitrators must disclose any circumstances likely to give rise to justifiable doubts as to independence or impartiality. The standard to be applied closely follows that for challenging a judge in the Thai court, which can only be done in limited circumstances, and a specific relationship must be shown that proves the conflict of interests. A party cannot challenge an arbitrator whom they appointed or if they participated in the appointment, unless they could not have been aware of the grounds for challenge at the time of the appointment.

The procedure for challenging an arbitrator is for the party to file a statement to the arbitral tribunal setting out the grounds for the challenge within 15 days of the appointment of the arbitrator or of becoming aware of the grounds for challenge. This period may be extended by the arbitral tribunal by up to 15 days where it considers it necessary to do so. Unless the challenged arbitrator withdraws or the other party agrees to the challenge, the arbitral tribunal shall determine the challenge.

If there is only one arbitrator, or if the challenge to the arbitral tribunal is unsuccessful, the challenge can be made to the court within 30 days of the appointment of the arbitrator, of becoming aware of the grounds for the challenge or of the arbitral tribunal’s decision rejecting the challenge. The arbitral proceedings may continue, pending the court’s decision, unless the court orders otherwise.

In addition, arbitrators must cease holding their office if they refuse to accept the appointment, become subject to an absolute receivership, fail to perform their duties within a reasonable time and in various other circumstances. In such circumstances, if the arbitrator does not withdraw or the parties do not agree to terminate the appointment, either party may apply to the court to do so. In that event, a substitute arbitrator must be appointed according to the rules that were applicable to the appointment of the arbitrator who is being replaced.

Arbitrators in Thailand may seek guidance from the rules of their particular arbitration institute, the ethical standards governing Thai lawyers, the Arbitration Act and the IBA Guidelines on Conflicts of Interest in International Arbitration.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

An arbitrator is required to be independent and impartial by section 19 of the Arbitration Act and this applies both to party-appointed arbitrators and to sole arbitrators.

Unless otherwise agreed by the parties, the arbitral tribunal shall stipulate the fees and expenses incidental to the arbitration proceedings and the remuneration of the arbitrator, excluding the attorneys’ fees and expenses. The Arbitration Act provides that an arbitration

institute may prescribe the fees, expenses and remuneration of the arbitrator (sections 46 and 47 of the Arbitration Act).

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Pursuant to the Arbitration Act, an arbitrator does not have any civil liability to the parties, unless he or she wilfully or with gross negligence causes damages to either party in the course of his or her duty as arbitrator. An arbitrator may be criminally liable for demanding or accepting bribes, the punishment for which is imprisonment for not more than 10 years, a fine not exceeding 100,000 baht, or both. Thai judges are subject to similar restrictions, although the punishment for such actions may differ.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If proceedings are started in court in breach of an arbitration agreement, the other party may request the court to 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 answer to the complaint. If the court considers that there are no grounds for rendering the arbitration agreement void and unenforceable, the court will issue the order striking out the case.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The Arbitration Act states that the arbitral tribunal is competent to rule on its own jurisdiction, including the existence or validity of the arbitration agreement, the validity of the appointment of the arbitral tribunal and the issues of dispute falling within the scope of its authority. For this purpose an arbitration clause is considered to be a separate contract, such that if the main contract is void, the arbitration clause survives.

An objection to the jurisdiction of the arbitral tribunal must be raised no later than the date for submission of the statement of defence. The arbitral tribunal can rule on its jurisdiction as a preliminary question or in the award on the merits. If the arbitral tribunal rules as a preliminary question that it does have jurisdiction, either party may apply to court to decide the matter within 30 days of receipt of the ruling on the preliminary issue. The arbitral tribunal may continue the arbitral proceedings and render an award, pending the court's decision.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Failing agreement of the parties, the language and place of arbitration are determined by the arbitral tribunal. In determining the place, the tribunal will consider the case's circumstances, including the convenience of the parties. Once the tribunal has determined the language of the proceedings, the language will apply to any statement of claim or defence, written statement by any party, hearing, award, decision or other communication by or to the arbitral tribunal, unless otherwise specified. The tribunal may also order that any documentary evidence shall be accompanied by a translation into the agreed or determined language (sections 27 and 28 of the Arbitration Act).

23 Commencement of arbitration

How are arbitral proceedings initiated?

Arbitral proceedings are deemed to have been commenced in one of the following circumstances (section 27 of the Arbitration Act):

- when a party receives a letter from the other party requesting that the dispute be settled by arbitration;
- when a party requests the other party, in writing, to appoint an arbitrator or to approve the appointment of an arbitrator;
- when a party sends a written notice of the disputed issues to the arbitral tribunal specified in the arbitration agreement; or
- when either party submits the dispute to the agreed arbitration institution.

24 Hearing

Is a hearing required and what rules apply?

In default of agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings by the presentation of evidence or oral argument, or whether the proceedings shall be solely conducted on the basis of documents or other evidence. The rules of both of the domestic arbitration institutes require a hearing.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The arbitral tribunal may determine whether to hear live witness testimony or have the witnesses submit written statements. The arbitral tribunal must give the parties sufficient advance notice of any hearing of evidence and of any meeting of the tribunal for the purposes of inspection of materials, places or documents. All statements of claim or defence, statements of request, documents or any other information supplied to the arbitral tribunal by one party must also be communicated to the other party. Any report of expert witness or documentary evidence on which the arbitral tribunal may rely in making its decision must also be communicated to the parties. There are no set time limits for the giving of advance notice or communications to the other party. However, section 25 of the Arbitration Act requires that the parties be given a full opportunity of presenting their cases in accordance with the circumstances of the dispute. Therefore, a reasonable period of advance notice should be given.

Parties and party officers are permitted to testify as witnesses. The parties are free to determine the rules on disclosure, and the most commonly used rules provide for at least some form of pretrial disclosure as essential to achieving a cost-effective and just outcome. Since Thai civil procedure does not generally provide for pretrial disclosure, an arbitration tribunal operating in Thailand should understand that a Thai court's willingness to compel disclosure requests may be limited. This also means that the scope of disclosure will usually be much wider in arbitration than litigation in Thailand.

The arbitral tribunal may appoint one or more experts to report on specific issues to be determined by the tribunal. The arbitral tribunal may require a party to give relevant information to the expert or to provide or allow access to documents, materials or places for inspection by the expert. If the tribunal considers it necessary, or if one party so requests, the expert shall also participate in a hearing in order that the parties may ask questions or present their own expert witnesses, unless the parties agree otherwise (section 32 of the Arbitration Act). There is a tendency towards party-appointed experts in proceedings under the rules of the domestic arbitration institutes.

The IBA rules on the taking of evidence are very similar to rules of evidence in Thailand's Civil Procedure Code, the Thai Arbitration Act and in the rules of the domestic arbitration institutions. Accordingly, there is a tendency to apply the substance of the IBA rules on the taking of evidence.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

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 documents 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 in accordance with the application, applying all relevant provisions of the Civil Procedure Code.

For court assistance in the appointment of and challenge of arbitrators or jurisdiction of the arbitral tribunal, see questions 16, 17 and 20.

27 Confidentiality

Is confidentiality ensured?

The Arbitration Act and the rules of the two main domestic arbitration institutes are silent on the issue of confidentiality, but normally the tribunal addresses confidentiality in the terms of reference. Regardless of those restrictions, the law provides that most civil proceedings are open and final civil court judgments are a matter of public record. Therefore, although the arbitration proceedings and awards are normally confidential, as far as disclosure by the parties is concerned, the arbitration award or a part of it may become public during or at the end of the enforcement proceedings, which are conducted in the Thai courts.

Interim measures and sanctioning powers**28 Interim measures by the courts**

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Any party to an arbitration agreement can file an application requesting the court to impose provisional measures to protect its interests either before or during the arbitral proceedings (section 16 of the 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 proceedings have begun, then the applicant 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. The provisions governing provisional measures under the Civil Procedure Code apply. Such provisional measures include orders for security for costs, freezing orders, attachment of property and restraining injunctions.

Thai courts enjoy the authority to enforce their orders through the Legal Execution Office or the assessment of punishment on the offending party. Arbitral tribunals enjoy no such authority in Thailand.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The Arbitration Act and the rules of the two main domestic arbitration institutions do not provide for an emergency arbitrator prior to the constitution of the arbitral tribunal. See question 28 for a discussion of interim relief by the courts.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The parties may agree to abide by interim measures assessed by the arbitral tribunal. In the absence of an agreement, the parties must seek interim relief from the courts. Note that the arbitral tribunal has limited authority to enforce its orders (see question 28).

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The Arbitration Act and the rules of the two main domestic arbitration tribunals do not give arbitral tribunals express authorisation to sanction counsel or the parties. However, the arbitral tribunal has the power to conduct proceedings under the agreed rules and the Act in any manner that it deems appropriate. The parties must be treated with equality and given a full opportunity to present their cases (see question 25).

Awards**32 Decisions by the arbitral tribunal**

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

The statutory default rule pursuant to section 35 of the Arbitration Act is that a majority vote will suffice for all decisions, orders and awards of the arbitral tribunal. If a majority of votes cannot be obtained, for example, because an arbitrator refuses to take part in a vote or sign the award, the chairman of the arbitral tribunal shall solely issue the award, order or ruling.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

If there is a dissenting opinion, the decision, order or award will be passed by a majority vote or the chairman of the arbitral tribunal according to section 35 of the Arbitration Act.

34 Form and content requirements

What form and content requirements exist for an award?

The award must be in writing and signed by the members of the arbitral tribunal or a majority thereof. Reasons must be given for the failure of any member of the tribunal to sign the award. Unless otherwise agreed by the parties, the award must clearly state the reasons for the decisions and must not determine matters outside the scope of the arbitration agreement or the relief sought by the parties, except for matters relating to costs and fees or an award rendered in accordance with a settlement. The date and place of the arbitration must be stated in the award and the award is deemed to be made at the place stated. A copy of the award must be sent to all parties.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

There is no statutory time limit within which an award must be issued. However, the rules of the TAI and BOT provide that the award must be issued within 180 days of the appointment of the last arbitrator (TAI) or of the chairman or sole arbitrator (BOT committee). The rules of the TAI do not provide for any extension of the time limit for issuing an award, but in practice, the tribunal in a TAI arbitration will allow extensions of time if the parties so agree. Under the BOT Commercial Arbitration rules, an extension of time for issuing the award may be agreed by the parties.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The date of receipt of the award is decisive for the time limit for motions to correct errors or mistakes, for interpretation or explanation

of specific points or parts of the award and for requests for additional awards as to claims presented in the proceedings but omitted from the award. The date of receipt is also decisive for the time limit within which to challenge an award.

The date of the award is decisive for the time limit within which the arbitral tribunal may correct any error or mistake of its own initiative. The time limit for enforcing the award commences on the day the award becomes enforceable.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The arbitral tribunal may award any final remedy that the court could order, provided the award is within the scope of the arbitration agreement and the relief sought by the parties. If the parties settle the dispute during the arbitral proceedings, the arbitral tribunal must terminate the proceedings. If the settlement is not contrary to law and the parties request an award, the arbitral tribunal must render an award in accordance with the settlement.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

In addition to a final award or a consent award, the tribunal can issue an order to terminate the proceedings if the parties agree to terminate the proceedings, if the claimant withdraws the claim and the respondent does not object or if the tribunal finds that the continuation of the proceedings has become unnecessary or impossible. The arbitral tribunal can also terminate the proceedings if the claimant does not communicate his or her statement of claim within the time agreed by the parties or determined by the tribunal.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Unless otherwise agreed by the parties, the fees and expenses of the arbitral proceedings and the arbitrators' compensation, but not the lawyer's fees and expenses, are paid according to the arbitral award.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

The tribunal can award any remedy that the court could award, including an award of interest, provided this is requested in the claim. Under Thai law, compound interest cannot be awarded. The rate of interest is in accordance with the parties' agreement; if not specified, a default rate of 7.5 per cent per annum will apply.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The arbitral tribunal may correct minor and insignificant errors, such as typographical errors or an error in computation, on its own initiative within 30 days of the date of the award. Either party may file a motion for the tribunal to correct minor errors, request an interpretation or explanation of a specific point or part of the award, or for an additional award as to claims presented in the arbitral proceedings but omitted from the award within 30 days of receipt of the award, on notice to the other party. If the tribunal considers the motion is justified, it will make the correction or give the interpretation or explanation within 30 days of receipt of the motion, and in the case of an additional award, it will make the additional award within 60 days of receipt of the motion. The tribunal may extend the time periods for making a correction, giving an interpretation or explanation and making an additional award (section 39 of the Arbitration Act).

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

An arbitral award may be challenged in Thailand via a proceeding to set aside an arbitral award issued in Thailand or to stop the enforcement of an arbitral award issued in Thailand or elsewhere.

A set-aside proceeding must be submitted no later than 90 days after receiving a copy of the award (or after a correction, interpretation or the making of an additional award). The court may set aside the award if the applicant proves any of the following:

- a party to the arbitration agreement was under some legal incapacity;
- the arbitration agreement is not binding under the governing law agreed to by the parties, or in the absence of such agreement, the laws of Thailand;
- the applicant was not given proper advance notice of the appointment of the arbitral tribunal, or of the arbitral proceedings, or was otherwise unable to defend the case in the arbitral proceedings;
- the award deals with a dispute outside the scope of the arbitration agreement or contains a decision on a matter outside the scope of the agreement. If the part of the award outside the scope of the agreement can be separated from the balance of the award, then the court will only set aside that part; or
- the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the arbitration agreement or, unless otherwise agreed by the parties, the Arbitration Act.

The court may also set aside an award if either:

- the award deals with a dispute not capable of settlement by arbitration under the law; or
- the recognition or enforcement of the award would be contrary to public policy or good morals.

A party may challenge the enforcement of an arbitral award on similar grounds.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

There is one level of appeal from the lower court judgment to enforce or set aside the award straight to the Supreme Court, Thailand's highest appeal court. The appeal process can take more than two years before the Supreme Court issues its judgment, depending on the court's backlog of cases. As there are normally no trial hearings at the Supreme Court level, the appeal is generally made in writing only. Therefore, the costs are ordinarily limited to drafting the appeal or an answer to appeal and attending the Supreme Court's judgment hearing at which the judgment is handed down. The Supreme Court has discretion to award costs to the prevailing party up to a maximum of 3 per cent of the amount in dispute. However, large legal fee awards are not common and it is more likely that only a small fraction of legal fees will be recovered.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

An arbitral award is recognised as binding on the parties irrespective of the country in which it was made, subject to provisions for enforcing and refusing enforcement of the arbitral award. However, an arbitral award made in a foreign country will only be enforced by the Thai court if it is subject to an international convention, treaty or agreement to which Thailand is a party, and the award is only applicable to the extent that Thailand has acceded to be bound by such an international convention, treaty or agreement. Foreign arbitration awards given in countries that are signatories to the New York Convention or the Geneva Protocol are recognised and enforceable in Thailand.

The party seeking enforcement must file a petition to the court of proper jurisdiction within three years from the date the award first became enforceable. However, to enforce an award related to an administrative contract, the party seeking enforcement must file a petition to the Administrative Court within one year of receipt of the award. The party also must submit the following documents:

- an original or certified copy of the arbitral award;
- an original or certified copy of the arbitration agreement; and
- a certified Thai translation of the award and the arbitration agreement.

The enforcement proceedings can take about 12 to 18 months to obtain the lower court judgment (which can be appealed directly to the Supreme Court).

When a party applies to the court to enforce an arbitration award, the court can refuse enforcement if the unsuccessful party proves any of the following:

- any of the grounds for the award to be set aside (see question 42);
- that the arbitral award has not yet become binding; or
- that the arbitral award has been set aside or suspended by a competent court or under the law of the country where it was issued.

Decisions of the court issued under the Arbitration Act cannot be appealed, except in any of the following circumstances:

- recognition or enforcement of the award is contrary to public order;
- the order or judgment is contrary to the laws concerning public order;
- the order or judgment is not in accordance with the arbitral award;
- one of the judges sitting in the case gave a dissenting opinion; or
- the order is an order concerning provisional protective measures under section 16 of the Arbitration Act.

The parties cannot exclude rights of appeal. Although many arbitration agreements purport to exclude the right to appeal, they are not enforceable, and the right to appeal is a statutory right.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

As noted in question 44, the court can (and usually will) refuse enforcement of the arbitral award where the arbitral award has been set aside by a competent court or under the law of the country where it was issued. Thai courts have no bias against any foreign award or party.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

No, Thai arbitration law and local rules do not provide for the enforcement of orders by emergency arbitrators.

47 Cost of enforcement

What costs are incurred in enforcing awards?

Enforcement of an arbitral award requires an additional set of proceedings, which has the potential to add one to three years to the arbitration process. Therefore, costs will be incurred in respect of attorneys' fees and the court fee for filing the enforcement proceedings. The court filing fee for enforcement of domestic arbitrations is 0.5 per cent of the claim amount up to a maximum of 50,000 baht plus 0.1 per cent of the amount exceeding 50 million baht. The court filing fee for enforcement of international arbitral awards is 1 per cent of the claim amount up to a maximum of 100,000 baht plus 0.1 per cent of the amount exceeding 50 million baht.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Thai civil procedure does not generally provide for pretrial disclosure and production of documents is generally limited to those documents that the party will rely on to support its case. The rules of the domestic arbitral institutes provide for some degree of pretrial disclosure and empower the arbitral tribunal to order production of documents, but the arbitral tribunal's willingness to do so often reflects the attitude taken by the Thai courts, which is that it is only likely to order production of specific documents requested by a party and it will not usually entertain 'fishing expedition'-style requests for production of documents.

Thai courts are increasingly willing to accept witness statements in respect of evidence, mainly to speed up the procedure, and witness statements are common in arbitral proceedings. Traditionally, Thai courts scheduled periodic hearings for taking evidence rather than consecutive hearings. Though the Thai courts now try to schedule consecutive hearings where possible, the TAI in particular continues to adopt the practice of scheduling periodic hearings, which can stretch the proceedings over several weeks or even months.

Tilleke & Gibbins

Kornkieat Chunchakasikarn
John Frangos

kornkieat.c@tilleke.com
john.fr@tilleke.com

Supalai Grand Tower, 26th Floor
1011 Rama 3 Road, Yannawa
Bangkok 10120
Thailand

Tel: +66 2056 5555
Fax: +66 2056 5678
www.tilleke.com

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

In Thailand, there are no rules or guidelines that are specific to counsel in international arbitrations. Best practices are reflected in the IBA Guidelines on Party Representation in International Arbitration. Note that the TAI has specific rules for arbitrators, but not for counsel.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

No. Thai arbitration law and local rules do not provide for third-party funding of arbitral claims.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Under the Royal Decree Naming Occupations and Professions Forbidden to Aliens (No. 3) BE 2543 (2000), foreign persons can represent a party in arbitration if the governing law is not Thai law or if there is no need to apply for enforcement of the arbitral award in Thailand. Foreign persons are generally subject to various visa and work permit requirements.

VAT in Thailand is 7 per cent. Foreign individuals working in Thailand are normally subject to Thai income tax. Foreign nationals who spend less than 180 days in a calendar year in Thailand are considered 'non-resident' and will be taxed at a flat rate of 15 per cent. Resident foreign nationals are taxed at a progressive rate varying between 5 and 35 per cent, subject to deductions for allowances. However, there may be an exemption for individuals from countries that have entered into a double taxation agreement with Thailand, depending on the specific provisions of the agreement.

Turkey

Ismail G Esin, Ali Selim Demirel, Dogan Gultutan and Yigitcan Bozoglu

Esin Attorney Partnership

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Turkey acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) on 2 July 1992. The Convention entered into force in Turkey on 25 September 1992. Turkey made two reservations. First, Turkey declared it will apply the Convention only if the award has been granted in a state that is a signatory to the Convention. Second, Turkey has limited the applicability of the Convention to conflicts arising from relationships categorised as commercial under Turkish law.

Additionally, Turkey ratified the 1961 European Convention on International Commercial Arbitration, which entered into force in Turkey on 23 September 1991, and the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force in Turkey on 27 May 1988. Turkey also acceded to the 1994 Energy Charter Treaty, which entered into force on 6 February 2000, and the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA), which entered into force on 27 May 1988.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Turkey has concluded many bilateral investment treaties; there are currently 76 in force: Afghanistan; Albania; Argentina; Australia; Austria; Azerbaijan; Bahrain; Bangladesh; Belarus; Belgium; Bosnia and Herzegovina; Bulgaria; China; Croatia; Cuba; the Czech Republic; Denmark; Egypt; Estonia; Ethiopia; Finland; France; Georgia; Germany; Greece; Hungary; India; Indonesia; Iran; Israel; Italy; Japan; Jordan; Kazakhstan; Kuwait; Kyrgyzstan; Latvia; Lebanon; Libya; Lithuania; Macedonia; Malaysia; Malta; Moldova; Mongolia; Morocco; the Netherlands; Oman; Pakistan; Philippines; Poland; Portugal; Qatar; Romania; Russia; Saudi Arabia; Senegal; Serbia; Singapore; Slovakia; Slovenia; South Korea; Spain; Sweden; Switzerland; Syria; Tajikistan; Thailand; Tunisia; Turkmenistan; Ukraine; United Arab Emirates; the United Kingdom; the United States; Uzbekistan; and Yemen.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Domestic and international arbitral proceedings are governed by two separate laws. Domestic arbitrations are governed by the rather recent Civil Procedure Law No. 6100 (the CPL), adopted on 1 October 2011. International arbitral proceedings, on the other hand, are governed

by the International Arbitration Law No. 4686 (the IAL), adopted on 5 July 2001.

The IAL is applicable to disputes with a 'foreign element' and where the place (seat) of arbitration is Turkey. Article 2 of the IAL states that a foreign element exists if:

- the domicile, permanent residence or place of business of the parties are in different states;
- the domicile, permanent residence or place of business of the parties are in a state other than the place (seat) of arbitration stated in the arbitration agreement or the place (seat) of arbitration determined pursuant to the arbitration agreement; or in a state other than where the substantial portion of the underlying agreement is performed, or to where the subject matter of the dispute is closely connected;
- at least one of the companies' shareholders, who is a party to the principal agreement underlying the arbitration agreement, has brought foreign capital to Turkey under the foreign capital encouragement regulations, or where it is necessary to enter into a loan or security agreement to provide foreign capital from abroad to implement the agreement; or
- the principal agreement or legal relationship underlying the arbitration agreement causes the movement of capital or goods from one country to another.

The IAL also applies if the parties have agreed it should be applied or if the arbitral tribunal itself has determined that the arbitral proceedings should be conducted pursuant to the IAL.

There are two main laws regarding the recognition and enforcement of foreign arbitral awards: the International Private and Procedural Law Act No. 5718 (the IPPL), which entered into force on 12 December 2007, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

In addition, the Law Regarding Principles to be Adhered to Upon Resorting to Arbitration in Disputes Arising from Concession Stipulations and Agreements Regarding Public Services No. 4501, adopted on 22 January 2000, regulates disputes between Turkey and project firms concerning build-operate-transfer projects.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The IAL and the provisions of the CPL regarding arbitration were modelled to a great extent on the UNCITRAL Model Law (Model Law). The main differences between the IAL and the CPL on the one hand, and the Model Law on the other, are as follows:

- unlike the Model Law, the IAL and the CPL provide that, unless otherwise agreed, the award must be rendered within one year from the appointment of the sole arbitrator or from the date the minutes of the meeting of the arbitral tribunal are drafted for the first time, in cases involving more than one arbitrator (articles 10(B) and 427, respectively). Upon expiry of this time limit, the arbitration agreement will cease to exist. The dispute will have to be resolved through the courts. This time limit can be extended by party agreement or by the court, upon application by either party;

- contrary to the Model Law, article 4(3) of the IAL states that the arbitral tribunal, in determining the law applicable when determining the validity of the arbitration agreement, must first determine whether the parties have agreed on the law applicable to the arbitration agreement. If they have, the arbitration agreement's validity is determined in light of the law agreed upon. If such an agreement does not exist, Turkish law is applied when determining the validity of the arbitration agreement. The CPL does not contain such a provision because, under the CPL, the applicable law is assumed to be Turkish law;
- article 34(2) of the Model Law states that an application to set aside an award must be made within three months, whereas the CPL sets down a one-month period for such an application, and the IAL a 30-day period (articles 439(4) and 15(4), respectively);
- article 16 of the Model Law states that if the arbitral tribunal rules preliminarily that it has jurisdiction, an application may be made by a party to the national court for the issue's conclusive determination. In contrast, the CPL and the IAL specify that the arbitral tribunal's decision as to its jurisdiction cannot be appealed, and can only be raised as a ground for setting aside the award (articles 422(5) and 439(2)(c), CPL; articles 7(H)(5) and 15(A)(2)(1)(d), IAL); and
- contrary to the Model Law, cost of arbitration provisions are in the IAL and not left for stipulation in the rules applicable to the arbitration proceedings (ie, articles 40 to 43 of the UNCITRAL Arbitration Rules). Further, according to article 43 of the UNCITRAL Arbitration Rules the arbitral tribunal, on its establishment, may request both parties to deposit an equal amount as advance for costs. The IAL, by contrast, provides that cost advances may only be requested from the claimant (article 16(C)(1)). Under the CPL, the provision on cost advances mirrors that of the UNCITRAL Arbitration Rules (article 442(1)).

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The IAL's mandatory provisions relate to:

- court applications to extend the arbitration period;
- IAL's scope of application;
- arbitrability of disputes;
- procedure concerning preliminary objections to courts as to the existence of arbitration agreement;
- interim measures; and
- fundamental principles of law, namely, equal treatment and the right to present one's case.

Similar, if not identical, provisions are contained in the CPL regarding domestic arbitration.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

For international arbitrations under the IAL, the arbitral tribunal must render an award in accordance with the law chosen by the parties. In the absence of an agreement, the arbitral tribunal must apply the law most closely connected to the dispute (article 12(C)).

The CPL does not contain a provision dealing with the choice of applicable law. The CPL, dealing with domestic arbitration, assumes that Turkish law is the applicable law, owing to the general principle that Turkish legal and natural persons cannot agree on the application of laws of another jurisdiction to their agreement. The only exception to this is the existence of a foreign element, for which article 24 of the IPPL (the law applicable to the agreement) becomes applicable. In general, Turkish courts are lenient when it comes to the foreign element requirement and are reluctant to find the applicable law clauses invalid.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The Istanbul Arbitration Centre (ISTAC) (<https://istac.org.tr/en/>), recently established by legislation (Law on Istanbul Arbitration Centre, Law No. 6,570), is currently the prominent arbitral institution in Turkey, both for domestic and international arbitrations. The ISTAC Arbitration and Mediation Rules entered into force on 26 October 2015. ISTAC consists of a general assembly, a board of directors, two separate courts of arbitration (domestic and international), a board of advisors, a board of auditors and, as always, a general secretary.

Another prominent arbitral institution in Turkey is the Istanbul Chamber of Commerce Arbitration Center (ITOTAM) (www.itotam.com/en/). Arbitration proceedings under ITOTAM are regulated under the ITOTAM Arbitration Rules. In order to choose ITOTAM as the arbitral institution, at least one of the parties must be a member of the Istanbul Chamber of Commerce.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Disputes relating to rights in rem over immovables (real property) in Turkey are non-arbitrable (article 1(4), IAL; article 408, CPL). However, disputes arising from the commercial lease of immovables are arbitrable. Disputes that cannot be subject to the parties' will are also non-arbitrable (article 1(4), IAL; article 408, CPL). Therefore, claims for the bankruptcy of an entity or disputes relating to family and employment law matters are non-arbitrable. In addition, arbitrators are not entitled to render awards concerning the registration of intellectual property rights with the relevant authorities. Further, the Court of Appeal has held that disputes arising from a company's articles of association are not arbitrable.

The arbitrability of disputes arising from competition law remains unclear under Turkish law. In any event, arbitrators are not entitled to issue exemption declarations or impose public law sanctions under Turkish competition law.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

An arbitration agreement must be in writing (article 4, IAL; article 412, CPL). An agreement is deemed to be in writing under the IAL and under the CPL if it is:

- contained in a document signed by the parties;
- made by an exchange of letters, telex, telegram, fax or other means of telecommunication or in electronic form; or
- made by way of an exchange of statements of claim and defence, in which the existence of an arbitration agreement is alleged and not denied by the other party in its reply.

The reference in an agreement to a document containing an arbitration clause constitutes an arbitration agreement, provided that the agreement is in writing and the reference states that the clause is to be considered part of the agreement.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement will be unenforceable where the conditions specified for its validity are not complied with (ie, the requirement that the agreement be evidenced in writing) or where the general principles of contract law deem the agreement null and void (ie, entered into because of fraudulent behaviour). Further, article 74 of the CPL provides that an attorney shall not execute an arbitration agreement unless specifically authorised by the client; thus, where no such authority is granted, the arbitration agreement will be unenforceable.

11 Third parties – bound by arbitration agreement**In which instances can third parties or non-signatories be bound by an arbitration agreement?**

Courts do not extend the effectiveness of an agreement to third parties with an agency relationship. However, it is accepted that a third party will be bound by the arbitration agreement where a full succession (this extends to insolvency) or a partial succession (ie, assignment) occurs.

12 Third parties – participation**Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?**

Notification of lawsuit to third parties exists as a matter of material Turkish law. Domestic procedural law also contains rules to that effect. However, relating to arbitration, no such rules exist nor are they recognised by the courts or legal scholars. Therefore, participation of third parties in arbitral proceedings depends on the approval of the parties to the arbitration and the third party concerned, any provision in the applicable institutional rules being highly relevant.

13 Groups of companies**Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the ‘group of companies’ doctrine?**

Although Turkish Commercial Code No. 6102 contains provisions setting forth certain principles regarding the group of companies doctrine, the predominant view among Turkish legal scholars is that the ‘group of companies’ doctrine will be extremely difficult to establish.

14 Multiparty arbitration agreements**What are the requirements for a valid multiparty arbitration agreement?**

There are no legislative provisions or judicial decisions regarding multiparty arbitration agreements under Turkish law. However, bearing in mind the key objective of an arbitration agreement (that is, giving effect to the will of the parties), if the parties agree on multiparty arbitration and provided that the equal treatment principle is adhered to, a valid multiparty arbitration may be conducted.

Constitution of arbitral tribunal**15 Eligibility of arbitrators****Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?**

The parties are at liberty to appoint arbitrators and to determine the qualifications for such arbitrators and are, therefore, not required to select arbitrators from an ‘approved’ list. Issues such as those that were the subject matter of the English Supreme Court’s decision in *Jivraj v Hashwani* (2011) UKSC 40 should not arise in Turkey. However, under Law on Judges and Prosecutors No. 2802, judges and prosecutors cannot participate in any kind of activity for private gain or take office for any public or private duties other than those specified in law. Retired judges, however, are not subject to these restrictions and may act as arbitrators.

16 Default appointment of arbitrators**Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?**

Under the IAL, if the number of arbitrators has not been agreed upon by the parties, the arbitral tribunal will comprise three arbitrators. Each party appoints an arbitrator and the party-appointed arbitrators appoint the third arbitrator to serve as the president.

If a party fails to give notice that it has selected its arbitrator within 30 days after receiving notice of the appointment of the other party’s arbitrator, or should the arbitrators appointed by the parties fail to agree on the nomination of the president, the competent court is to appoint an arbitrator on behalf of the parties or the party-appointed arbitrators, upon application by either party (article 7(A)–(B), IAL; see also articles 415–416 of the CPL containing similar provisions).

Where the arbitral tribunal is to consist of a sole arbitrator, the arbitrator (failing the parties’ agreement) will be appointed by the competent court upon either party’s application (article 7(B)(2), IAL; article 416(1)(b), CPL). In addition, article 7(B)(3) of the IAL stipulates that where the court appoints an arbitrator, the sole arbitrator shall not be of the same nationality as one of the parties where the parties are not of the same nationality. The rule applies equally to a case where the arbitral tribunal comprises three arbitrators; two of the arbitrators shall not be of the same nationality as one of the parties where the parties are of a different nationality.

17 Challenge and replacement of arbitrators**On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?**

There are three main grounds for challenging an arbitrator under article 7 of the IAL (see article 417 of the CPL to the same effect):

- the arbitrator does not possess the qualifications specified in the arbitration agreement;
- any reason specified by the parties as a ground for challenging an arbitrator exists; or
- there are justifiable reasons to doubt the impartiality of the arbitrator.

Under the IAL, the parties may determine the procedure for challenging an arbitrator. Failing such agreement, the party who intends to challenge an arbitrator must send a written statement to the other party, stating the reasons for the challenge, within 30 days of the arbitrator’s appointment or the constitution of the arbitral tribunal, or within 30 days from the date the party becomes aware of the circumstances prompting the challenge (for domestic arbitrations, this period is two weeks under article 418(2) of the CPL). The statement challenging one or more members of the arbitral tribunal may be submitted to the arbitral tribunal itself. If the challenge is dismissed, the challenging party may initiate a lawsuit before the competent court requesting the setting aside of this decision and the removal of the arbitrators within 30 days of receipt of the arbitral tribunal’s decision (one month under article 418(3) of the CPL for domestic arbitrations). A challenge against the sole arbitrator, the tribunal or the arbitrators constituting decision-making majority of the panel may only be initiated before the competent court. The court decision is final and binding (see article 418(3) of the CPL to the same effect for domestic arbitrations).

For the replacement of arbitrators, article 7(G) of the IAL provides that the procedure used to appoint the arbitrator replaced will apply to the appointment of the replacement arbitrator (see article 421 of the CPL to the same effect for domestic arbitrations).

There is indeed a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration when challenging arbitrators, particularly where the challenge is to be determined by the arbitral tribunal. Turkish courts, however, may be less inclined to consider the guidelines.

18 Relationship between parties and arbitrators**What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.**

The nature of the relationship between parties and arbitrators is not expressly defined by law. The majority of legal experts and judicial decisions suggest that an arbitration agreement establishes a proxy relationship between the parties and the arbitrators and, hence, it is

subject to the provisions of the Code of Obligations No. 6098, as well as procedural rules. All arbitrators, including party-appointed arbitrators, must be, and remain, independent and impartial. Indeed, an arbitrator is under an obligation to declare any information that calls into question his or her independence or impartiality (article 7(C), IAL; article 417(1), CPL).

Parties may agree on the remuneration of the arbitrators. If no such agreement is reached, the arbitrators' remuneration shall be determined pursuant to the fee tariff published annually by the Ministry of Justice.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Under article 7(E) of the IAL, unless otherwise agreed, an arbitrator is under an obligation to compensate the parties for the loss caused as a result of his or her failure to carry out the duties entrusted to him or her, without a valid reason. This seems to cover not only an intentional breach of duty but also negligence (see article 419 of the CPL to the same effect for domestic arbitrations).

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If a party applies to the court in breach of an arbitration agreement, the other party is entitled to raise a jurisdictional objection before the court: 'arbitration objection.' This is a preliminary objection under the CPL, which must be raised no later than two weeks from the date the statement of claim is received (articles 127 and 413, CPL). Article 5(1) of the IAL refers to the CPL and states that the provisions in the CPL relating to arbitration objections will apply. If the court is *prima facie* satisfied that an arbitration agreement exists, the case will be dismissed and will be referred to arbitration.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

According to article 7 of the IAL (see article 422 of the CPL to the same effect), the principle of *Kompetenz-kompetenz* is recognised under Turkish law. Hence, the arbitral tribunal has the authority to rule on its own jurisdiction. Unlike the Model Law, objections to the arbitral tribunal's decision regarding its jurisdiction may only be raised after the award has been rendered, as a ground for setting aside the award. The objection that the tribunal has no jurisdiction, however, is a preliminary challenge. Therefore, it must be raised before or with the first statement of defence. However, if the delay in raising the objection is justified, the tribunal may allow the delayed objection.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Under article 9(1) of the IAL, absent party agreement, the place of arbitration is to be determined by the arbitral tribunal, having regard to the circumstances of the case (see also article 425 of the CPL to the same effect).

Under article 10(C) of the IAL, absent party agreement, the arbitral tribunal is to determine the language of arbitration. There is no corresponding provision in the CPL.

23 Commencement of arbitration

How are arbitral proceedings initiated?

The commencement of arbitral proceedings must be made in accordance with the applicable rules. The IAL and the CPL only provide that a written statement must be submitted to commence arbitral proceedings (articles 10(D) and 428, respectively). Thus, if arbitration proceedings are to be conducted in accordance with the ISTAC Arbitration Rules, for instance, such rules will have to be complied with. Under the ISTAC Arbitration Rules, a party wishing to submit its dispute to arbitration must file its request for arbitration with the secretariat in the number of copies required (article 4). The registration fee must also be deposited together with the request for arbitration. The registration fee is currently 300 lira.

24 Hearing

Is a hearing required and what rules apply?

In line with the IAL, the CPL and the ISTAC Arbitration Rules, a hearing is not mandatory (articles 11, 429 and 30, respectively). A party, however, may request a hearing to be held, in which case the arbitral tribunal must conduct a hearing, unless there is an agreement to the contrary (article 11(A)(1), IAL; article 429(1), CPL) (note that the ISTAC Arbitration Rules grant the arbitral tribunal wide discretion whether to hold a hearing). If a party fails to attend a hearing, the arbitral tribunal may nevertheless proceed and render an award (article 11(C)(4), IAL; article 430(1)(c), CPL).

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

In general, parties or the arbitral tribunal may decide on the procedure for taking evidence. They may refer to a domestic procedural law or to institutional rules while doing so. The IBA Rules on the Taking of Evidence in International Commercial Arbitration are used by arbitral tribunals as a guide.

Not all aspects of taking evidence are specified in the IAL. However, there are some notable provisions. For example, unless otherwise agreed, a party or the arbitral tribunal may request, if deemed appropriate, that the experts attend the hearing after the submission of their written report, and questions may be directed to an expert during the hearing. Further, the arbitral tribunal may conduct field inspections at its discretion, or upon request (article 12, IAL; article 431, CPL).

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Intervention by the courts is possible only in certain circumstances permitted by the IAL (and the CPL for domestic arbitrations). The IAL permits judicial intervention in relation to:

- certain matters relating to the appointment or challenge of arbitrators;
- granting of interim injunctions and interim attachments by courts and decisions regarding compliance with orders issued by the arbitral tribunals;
- extensions of the arbitration period; and
- assistance in collection of evidence (upon request for assistance by the arbitral tribunal).

27 Confidentiality

Is confidentiality ensured?

There are no provisions in the IAL regarding confidentiality of arbitral proceedings. This issue is usually dealt with in the arbitration rules. For example, article 21(1) of the ISTAC Arbitration Rules explicitly provide for the confidentiality of arbitral proceedings, unless otherwise agreed by the parties. However, court hearings will be open to the public in cases where court assistance or intervention is required.

Interim measures and sanctioning powers

28 Interim measures by the courts**What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?**

The IAL states that before the commencement of or during arbitral proceedings, either party may apply for the granting of an interim measure from the competent court, and such application would not constitute a breach of the arbitration agreement (article 6). If the application is made before the commencement of arbitral proceedings, the party making the application must initiate arbitral proceedings within 30 days of the granting of the interim measure. Otherwise, the interim measure will cease to have effect (article 10(A)(2)). The arbitral tribunal is also authorised to order interim measures. There is no exclusivity for the courts or the arbitral tribunal on this matter.

The CPL differs to the IAL on some aspects. First, a party agreement or the arbitral tribunal's permission is required for an application to the court to be made for an interim measure or the determination of evidence following the commencement of arbitral proceedings, unless it appears from the facts that the arbitral tribunal or another person or body authorised by the parties cannot act promptly and effectively (article 414(3)). Second, where an interim measure is granted before the commencement of arbitral proceedings, the period within which arbitration proceedings must be commenced is two weeks (article 426(2)).

29 Interim measures by an emergency arbitrator**Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?**

Neither the CPL nor the IAL contains emergency arbitrator provisions. However, the ISTAC Arbitration Rules permit parties to seek interim measures of protection from emergency arbitrators (article 31).

30 Interim measures by the arbitral tribunal**What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?**

An arbitral tribunal may grant interim measures upon application by either party (article 6(2), IAL; article 414(1), CPL). However, an arbitral tribunal may not grant interim measures that are exclusively within the control of governmental institutions. Further, the arbitral tribunal cannot issue orders to be binding on governmental institutions or grant an interim measure against a third party. In summary, interim measures are not binding upon official authorities or third parties. Also, interim measures granted by arbitral tribunals are not enforceable before courts; an application would have to be made to the courts for assistance in implementation.

As to security for costs, under the IAL, the tribunal may ask the claimant to pay security for costs (article 16(C)). If an order is made for the payment of an amount as security for costs and the claimant fails to pay, the arbitral tribunal may stay proceedings for up to 30 days until payment is made. If payment is not made within the 30-day period, arbitral proceedings will come to an end (article 16(C)(1)-(2)). The security for costs under the CPL is to be paid in equal proportions by both parties, and if the parties fail to pay, the arbitral tribunal may stay proceedings for up to one month until payment is made. If payment is not made within the one-month period, the arbitral proceedings will be terminated (article 422(1)-(2)).

31 Sanctioning powers of the arbitral tribunal**Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?**

There are no specific provisions in the IAL, the CPL or the ISTAC Arbitration Rules equipping the arbitral tribunal with the competence

to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration. To do so, the arbitral tribunal would need to rely on general provisions contained in the laws. For instance, an arbitral tribunal may, if deemed appropriate, render an interim measure to refrain a party from employing 'guerrilla tactics' and the relevant party may seek the court's assistance in the event of failure to comply (article 6(3), IAL; article 414(2), CPL). The arbitral tribunal may also consider such actions when determining the costs of arbitration. Complaints to the applicable bar associations, with respect to the attorneys' conduct of the case, may be another option for arbitral tribunals.

Awards

32 Decisions by the arbitral tribunal**Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?**

Unless otherwise agreed, an arbitral award may be rendered by majority decision. If the parties or other members of the tribunal authorise so, the president may resolve certain issues relating to procedure on his or her own (ie, requests for time extensions) (article 13(A), IAL; article 433, CPL).

33 Dissenting opinions**How does your domestic arbitration law deal with dissenting opinions?**

If there are dissenting arbitrators, the award must include the dissenting arbitrators' opinion and the signature of such arbitrator (article 14(A)(4), IAL; article 436, CPL). In practice, some arbitrators who dissent refrain from signing the award. The refusal of a dissenting arbitrator to sign the award does not affect the award's validity.

34 Form and content requirements**What form and content requirements exist for an award?**

In line with article 14 of the IAL (article 436 of the CPL for domestic arbitrations), the award must include:

- name, title and address of the parties, their agents or attorneys (if any);
- legal grounds and the reasoning for the award and the amount of compensation, provided that such a claim has been made;
- place (seat) of arbitration and the date of the award;
- name, signature and dissenting votes of arbitrators; and
- statement in award that it is subject to challenge.

35 Time limit for award**Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?**

Unless otherwise agreed, the time limit within which an arbitral award must be rendered is one year from the sole arbitrator's acceptance of appointment, or, in the event of an arbitral tribunal, from the date the arbitral tribunal's meeting minutes are first drafted (article 10(B), IAL; article 427, CPL; and article 35(1), ITOTAM Arbitration Rules). The parties can agree on extension or a party can request the competent court to extend this period.

Under the ISTAC Arbitration Rules, the period is six months, and it commences from the date the terms of reference has been executed (article 33(1)). This period may be extended by party agreement or by the relevant court of arbitration, upon the arbitral tribunal's request or on its own initiative (article 33(2)).

36 Date of award**For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?**

For the award to become final, the tribunal must notify the award to the parties, thereby enabling a challenge against the award. A request to set aside the award can be made by the parties within 30 days of

Update and trends

A continuing hot topic in Turkey with respect to arbitration has been the establishment and operations of ISTAC. With its international court of arbitration made up of eminent arbitration practitioners around the world (Ziya Akinci, Jan Paulsson, Hamid Gharavi, Bernard Hanotiau and Candan Yasan), and national court of arbitration of equal eminence from Turkey (Ziya Akinci, Atilla Altop, Sabih Arkan, Cemile Demir Gokyayla and Candan Yasan), in addition to a board of advisors consisting of very respectable and reputable lawyers and academics, ISTAC shows great potential in becoming a centre for arbitration, joining the east and the west.

ISTAC kick-started its caseload with six arbitrations in its first couple of months of operations, five of which have been international arbitrations. Further, it is expected that most contracts negotiated with Turkish public bodies will encapsulate an ISTAC arbitration clause, thus raising the level of awareness with respect to ISTAC arbitration, both internally and externally. In fact, the Office of the Prime Minister issued a circular on 19 November 2016 (Circular No. 2016/25) directing Turkish public authorities to consider inserting ISTAC arbitration clauses into their national and international contracts.

notification of the award; this time limit cannot be altered by party agreement (article 15(A)(4), IAL; article 439(4), CPL (the CPL foresees a one month period)). Consequently, the delivery (notification) of the award is decisive for the purposes of a challenge being brought against the award.

The date of the award is decisive in determining whether the award has been rendered within the arbitration period (article 10(B), IAL; article 427, CPL).

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The tribunal may grant not only final awards, but also partial awards (article 14(A)(2), IAL; article 436(2), CPL). It is not clear, however, whether a tribunal may grant a consent order.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Under article 13(B) of the IAL (article 435 of the CPL for domestic arbitrations), in addition to final awards, arbitral proceedings may be terminated in the following instances:

- the claimant withdraws its claim, except where the defendant objects and the arbitral tribunal determines that the defendant has a legal benefit in the conclusive resolution of the dispute;
- the parties mutually agree to terminate the proceedings;
- the arbitral tribunal deems it unnecessary or impossible to continue the arbitral proceedings;
- a request to extend the arbitration period is denied by the court and the period expires;
- an award is not rendered with unanimity despite party agreement to that effect;
- arbitral proceedings cannot be continued because of absence of legal capacity to continue proceedings; or
- the claimant fails to pay the advance on costs, contrary to the arbitral tribunal's order.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Unless the parties agree otherwise, the party against whom the award is rendered will bear all costs of the arbitral proceedings. In the event of partial success on claims, the costs will be allocated among the parties to the extent their claims have been validated in the award. All administrative fees, attorney fees, in-house fees and costs, etc, are recoverable (article 16(D), IAL; article 442(4), CPL).

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

The IAL and the CPL contain no express provision relating to interest on either the costs of arbitration or principal claims. However, there are no legal obstacles against the awarding of interest. The tribunal must determine whether and what interest a party is liable to pay by considering the law applicable to the dispute.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

According to article 14(B) of the IAL (article 437 of the CPL for domestic arbitrations), the tribunal may interpret, correct or complete the award upon application or on its own initiative. A request for the correction of material errors relating to calculations, typing and other similar errors, interpretation of all or parts of the award or determination of issues raised during the arbitral proceedings, but not determined by the arbitral tribunal, must be made to the arbitral tribunal within 30 days of being notified of the award. The arbitral tribunal's interpretation or correction on its own initiative is also subject to the 30-day time limit.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

The only way to challenge an award under the IAL is an action to have the award set aside before the relevant competent court, within 30 days of the issuance of the award. The grounds for such an action are listed in article 15 of the IAL (article 439 of the CPL for domestic arbitrations). There are two types of grounds:

- grounds that must be considered by the court ex officio:
 - non-arbitrability of the dispute under Turkish law; and
 - violation of public policy; and
- grounds that require party proof:
 - invalidity of the arbitration agreement under the applicable law or, absent an applicable law, under Turkish law, or the legal incapacity of one of the parties;
 - non-compliance with the procedure agreed upon or set out in the IAL with respect to the appointment of arbitrators;
 - failure of the arbitral tribunal to render an award within the arbitration period;
 - unlawful determination by the arbitral tribunal as to its jurisdiction;
 - failure of the arbitral tribunal to decide on every claim raised during the proceedings or the rendering of an award outside the scope of the arbitration agreement;
 - failing to abide by the applicable procedural rules agreed upon by the parties or set out in the IAL, impacting the outcome of the decision regarding the merits of the case; or
 - violation of the principle of equal treatment.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

With respect to challenges mounted against arbitral awards, there are two levels of appeal. A party must challenge the award before the competent commercial court to have the award set aside within 30 days of being notified of the award (article 15(A)(1)). An appeal can then be brought before the court of appeal against the decision of the first instance court. The appellate court will decide in an urgent manner. A similar structure has been laid out in the CPL for challenges against domestic awards.

A set-aside action at first instance level should normally be concluded within one-and-a-half to two years, and the appeal within one

to one-and-a-half years. Generally, nominal fixed application fees are applicable to set-aside applications and appeals. Attorney fees with respect to court proceedings will only be awarded to the extent they do not exceed the maximum specified in the fee tariff published annually by the Ministry of Justice. The losing party will bear the costs at each level.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

As Turkey is a party to the Convention, the grounds for refusing recognition and enforcement listed in the Convention should be applied *lex specialis*. In theory, the Convention should apply where the foreign arbitral award falls within its scope. However, the IPPL sets forth almost the same grounds that will apply where the Convention does not apply. In any case, the procedural rules for an application for the recognition and enforcement of arbitral awards are in the IPPL.

In relation to the enforcement of domestic arbitral awards, the provisions of the IAL and the CPL will apply. An application will have to be made to the competent court for a certificate of enforceability to have the award enforced through the execution offices, unless a challenge has been mounted and requisite security deposited to postpone execution.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

An award set aside by a court located at the place (seat) of arbitration will not be enforced in Turkey, both under the Convention and the IPPL (article V(1)(e) and article 62(1)(h), respectively).

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Turkish arbitration legislation contains no express provision as to the enforcement of orders by emergency arbitrators. However, since orders by emergency arbitrators usually – if not always – concern interim measures of protection, the provisions concerning judicial aid for the enforcement of interim measures granted by arbitral tribunals should be applicable by comparison (article 6(3), IAL; article 414(2), CPL). As to domestic arbitration institutions, the ISTAC Arbitration Rules and the ITOTAM Arbitration Rules permit parties to seek interim

measures of protection from emergency arbitrators (articles 31(1) and 30(5), respectively).

47 Cost of enforcement

What costs are incurred in enforcing awards?

An application fee and a quarter of the proportionate decision announcement fee must be paid when filing a request for the enforcement of a foreign arbitral award. The application fee is approximately 30 lira; the decision announcement fee is 68.31 per thousand of the amount concerned (article 21 of Code on Fees No. 492 (Fees Code) and Tariff No. 1). The remainder of the decision announcement fee is paid by the defendant, as well as the one-quarter already paid by the claimant, if the request to enforce is accepted. If the request is dismissed, however, the one-quarter of the decision announcement fee paid is returned to the claimant. Further, the payment of stamp duty will be requested by the notary public when the award (and agreement, if not already satisfied) is being officially translated into Turkish, if not already in Turkish.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Arbitration proceedings in Turkey are likely to be influenced by the following features of the Turkish judicial system:

- there is likely to be a lack of the effective use of cross-examination since cross-examination is new to court practitioners in Turkey;
- written submissions are likely to be shorter than those submitted by practitioners from other jurisdictions in light of practitioners' tendency to submit short written statements to Turkish courts; and
- US-style disclosure of evidence does not exist in the Turkish judicial system, and this is likely to be the case where arbitration proceedings are being conducted by an arbitral tribunal that comprises arbitrators who are of Turkish nationality or the arbitration is seated in Turkey.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are no specific professional or ethical rules that are applicable to counsel in international arbitration.

**Esin
Attorney
Partnership.**

Member of Baker & McKenzie
International, a Swiss Verein

**Ismail G Esin
Ali Selim Demirel
Dogan Gultutan
Yigitcan Bozoglu**

**ismail.esin@esin.av.tr
ali.demirel@esin.av.tr
dogan.gultutan@esin.av.tr
yigitcan.bozoglu@esin.av.tr**

Ebulula Mardin Cad. Gül Sok. No. 2
Maya Park Tower 2
Akatlar – Beşiktaş
34335 Istanbul
Turkey

Tel: +90 212 376 64 00
Fax: +90 212 376 64 64
www.esin.av.tr

However, there are certain duties and obligations set forth in the Attorneyship Law No. 1136 (Attorneyship Law) and the Professional Rules of the Union of Turkish Bar Associations that are applicable to attorneys registered with a bar association in Turkey. These rules are considered applicable to conduct in international arbitration. Article 34 of the Attorneyship Law provides that attorneys are obligated to perform their duties with utmost care, honesty and honour, in compliance with the professional rules of conduct determined by the Union of Turkish Bar Associations. In fact, article 4 of the Rules provides that an attorney must not act in any manner that would harm his or her professional reputation. This obligation applies to an attorney's personal life as well as professional life.

50 Third-party funding**Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?**

There are currently no regulations dealing with third-party funding of litigation or arbitration proceedings in Turkey.

51 Regulation of activities**What particularities exist in your jurisdiction that a foreign practitioner should be aware of?**

Turkey requires visas for the citizens of many foreign countries. Visa exemption applies to nationals of certain countries. An (English language) updated list of the countries whose nationals are exempt from obtaining a visa can be found at: www.mfa.gov.tr/visa-information-for-foreigners.en.mfa. Foreign lawyers are entitled to represent their clients in arbitration proceedings in Turkey.

Ukraine

Serhii Uvarov, Anna Vlasenko and Ilhar Hakhramanov

Avellum

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Yes, Ukraine joined the New York Convention on 8 January 1961 (as the Ukrainian Soviet Socialist Republic). Ukraine made a reciprocity reservation, according to which Ukraine will apply the Convention only to the extent to which non-contracting states grant reciprocal treatment to Ukraine.

Because of the military situation in the east of Ukraine, on 20 October 2015 the government made a communication to the depositary of the Convention providing that implementation by Ukraine of the obligations under the Convention on the occupied and uncontrolled territory of Ukraine (Crimean peninsula and certain districts of Luhansk and Donetsk regions) is limited and is not guaranteed.

Ukraine is a party to

- the ICSID Convention;
- the European Convention on International Commercial Arbitration, 1961;
- the Moscow Convention on the Settlement by Arbitration of Civil Law Disputes Arising from Relations of Economic, Scientific and Technical Cooperation, 1972;
- several regional treaties on mutual legal assistance; and
- bilateral treaties on mutual legal assistance also providing for enforcement of arbitral awards (eg, agreements with China and the Czech Republic).

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Yes, Ukraine is a party to 73 bilateral investment treaties.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Ukrainian arbitration legislation includes two main laws:

- the Law of Ukraine on International Commercial Arbitration (the ICA Law) regulating disputes that involve a foreign party or Ukrainian entity with foreign investments; and
- the Law of Ukraine on Courts of Arbitration regulating disputes between purely Ukrainian parties.

The ICA Law is applicable to all international commercial arbitration proceedings having seat in Ukraine. However, certain of its provisions (eg, on arbitration agreements, recognition and enforcement of the arbitral awards) also apply to arbitration proceedings having their seat abroad.

The procedures for recognition and enforcement, as well as for setting aside arbitral awards, is set forth in the Civil Procedure Code of Ukraine. Certain provisions governing arbitrability of disputes can be found in the Commercial Procedure Code of Ukraine.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The ICA Law is, basically, a verbatim translation of the UNCITRAL Model Law. Apart from the sphere of its application, which extends to disputes involving Ukrainian entities with foreign investments, there are no major differences between them.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The parties cannot deviate from the procedure for appointment of arbitrators that would apply if, under the contractual appointment procedure, a party, parties or arbitrators fail to make an appointment, or a third party, including an institution, fails to perform any function entrusted to it.

In addition, the ICA Law contains a mandatory requirement that the parties must be granted equal treatment and afforded a full opportunity of presenting their case.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The ICA Law provides that the parties are free to choose the law applicable to the substance of the dispute. If no such agreement exists, the arbitral tribunal will apply the rules of law determined based on the conflict of law rules that it deems applicable.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

There are two arbitration institutions in Ukraine:

- the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (<http://arb.ucci.org.ua/icac/en/icac.html>) (the ICAC); and
- the Maritime Arbitration Commission at the Ukrainian Chamber of Commerce and Industry (<http://arb.ucci.org.ua/mac/en/mac.html>) (the MAC).

Both institutions are located at:

33 Velyka Zhytomyrska Street
01601 Kiev
Ukraine

The ICAC Rules of Arbitration (the ICAC Rules) do not provide for any restriction with respect to place of arbitration, language of arbitration or applicable law. In fact, it is not rare that the ICAC arbitral tribunals decide the disputes under foreign laws, English being the language of arbitration.

The ICAC has approved a recommended list of arbitrators. Though the ICAC Rules do not formally restrict the parties' choice of arbitrators to those from the list, on a number of occasions the ICAC clearly articulated its position that only the persons included in the said list may serve as arbitrators in the ICAC arbitration proceedings.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The ICA Law does not provide for the list of non-arbitrable matters. It generally provides that private law matters (both contractual and non-contractual) may be referred to arbitration.

The Commercial Procedure Code of Ukraine prohibits the referral to arbitration of corporate disputes (apart from disputes on sale and purchase of shares and participatory interest). There is debate among Ukrainian practitioners as to whether this provision applies only to domestic arbitration or to international arbitration as well. The prevailing practice, however, is that this prohibition does extend to international commercial arbitration. It is also generally recognised that bankruptcy-related matters are not arbitrable.

Arbitrability of IP, antitrust, competition law disputes, disputes arising out of securities transactions and disputes related to real estate objects is not clearly determined under Ukrainian law. In view of the aforementioned general provision of the ICA Law, private law aspects of such disputes may be resolved by arbitration under Ukrainian law. However, insofar as any public element is involved (eg, registration of the real estate or IP rights with the state registrar) such matters are not arbitrable.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Under Ukrainian law, an arbitration agreement must be in writing and must refer to specifically defined legal relations. The 'in-writing' requirement may not be waived in any instance. Lack of objections from the other party does not of itself cure formal defects of the arbitration agreement. However, such situation may be interpreted as a conclusion of the new arbitration agreement by an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another.

There are no particularities with respect to local or state entities. However, the court might require proof that respective individuals who consented to an arbitration agreement on behalf of respective entities were duly authorised to do so, in particular under their constituent documents. In certain instances, this might require co-signing or getting additional corporate approval.

An arbitration agreement may be set out in general terms and conditions if the other party clearly consented to such terms and, in particular, to the arbitration agreement.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

Because of the separability doctrine, avoidance, rescission or termination of the underlying contract does not necessarily lead to termination of the arbitration agreement.

Under general provisions of the Ukrainian law of contracts, an arbitration agreement, like any other agreement, may be terminated by agreement of the parties. Unless otherwise agreed by the parties, it cannot be terminated unilaterally by either party. Furthermore, an arbitration agreement will cease to exist upon death of an individual or liquidation of a legal entity that is party to the agreement.

The arbitration agreement becomes, in fact, unenforceable when bankruptcy proceedings are launched with respect to the Ukrainian entity that is party to the agreement. In such case, all claims against

such party must be consolidated in the Ukrainian court hearing bankruptcy case.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

A third party may become bound by the arbitration agreement if all rights and obligations of the contracting party are assigned to it under the assignment agreement. Furthermore, a third party may be bound by the arbitration agreement if it is a universal successor of the contracting party (eg, in the case of a merger).

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

A third party may be joined to the arbitration proceedings only upon consent of such third party and other parties to the arbitration agreement. According to the ICAC Rules, the parties may apply for a joinder of a third party. The ICAC Rules do not require that the third party be interested in the outcome of the arbitration in order to be joined to the proceeding.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Ukrainian law does not recognise the 'group of companies' doctrine.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The ICA Law does not regulate multiparty agreements and proceedings. There are no specific requirements for validity of a multiparty agreement.

From the practical perspective, the parties should agree in advance on the procedure for appointment of arbitrators and conduct of the proceedings involving more than two parties. If they fail to do so, or if the agreed mechanism fails to work for multiparty proceedings, the arbitral tribunal must be constituted in accordance with the default statutory mechanism as described below.

The ICAC Rules envisage specific rules for constitution of the tribunal in multiparty proceedings. They provide that if there are multiple claimants or multiple respondents, both claimants and respondents must jointly appoint one arbitrator from each side. In case of failure to make such appointment within 30 days of receipt of respective notice, the arbitrator must be appointed by the president of the Ukrainian Chamber of Commerce and Industry (the UCCI).

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

There are no such restrictions provided in the ICA Law. Retired judges may act as arbitrators. Active Ukrainian judges and other active Ukrainian public servants may not act as arbitrators because of anti-corruption and non-compatibility regulations.

The ICAC has approved a recommended list of arbitrators. Though the ICAC Rules do not formally restrict the parties' choice of arbitrators to those from the list, on a number of occasions the ICAC clearly articulated its position that only the persons included in the said list may be appointed as arbitrators in ICAC arbitral proceedings.

There has been no court practice on the discriminative provisions in arbitration agreements. However, given clear constitutional prohibition of any discrimination based on race, colour of skin, language, religion, political beliefs, gender, ethnic or social origin, any such requirements are very unlikely to be recognised by the Ukrainian courts.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Unless otherwise agreed by the parties, if an arbitrator is not appointed for any reason, such appointment must be made by the president of the UCCI. Acting in that capacity, the president of the UCCI must take into account any requirements for the arbitrators the parties agreed on, if any. The courts have no role in appointment of the arbitrators. The ICAC Rules provide for the same default appointment procedure.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Following the Model Law approach, the ICA Law envisages two grounds for challenging an arbitrator: existence of circumstances that give rise to justifiable doubts as to arbitrator's impartiality or independence and lack of qualifications agreed by the parties. The parties are free to agree on the procedure for challenging the arbitrators. Under the default procedure, such challenges must be considered by the arbitral tribunal. If the challenge is rejected by the tribunal, the party may refer this matter to the president of the UCCI. His or her decision shall not be subject to any appeal. Under the ICAC rules, the challenge must be, first, considered by the ICAC presidium and, if rejected, may be referred to the president of the UCCI.

Neither the ICA Law, nor the ICAC Rules specifically mention the IBA Guidelines on Conflicts of Interest in International Arbitration. However, in practice they are frequently relied upon or at least taken into consideration by the parties and the ICAC presidium. The parties may agree on obligatory application of the IBA Guidelines or other relevant guidelines.

Apart from a challenge, an arbitrator's mandate may be terminated if he or she becomes de jure or de facto unable to perform his or her functions or for other reasons fails to act without undue delay. Unless such arbitrator withdraws from the office or the parties agree on termination of his or her mandate, the president of the UCCI must decide on the termination of the arbitrator's mandate.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

The ICA Law contains no regulation as to the relationship between parties and arbitrators. Neither is there any contemporaneous court practice on whether such relationship is of public or purely contractual nature. It can be argued that general provisions on the law of contracts, in particular, on services contracts, apply to this relationship. However, such approach has never been tested in Ukraine.

The ICA Law expressly provides that arbitrators (including those appointed by the parties) must be impartial and independent.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

No special immunity is granted to arbitrators. Thus, general rules on civil liability apply to them. Arbitrators also bear criminal liability for corruption offences.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If a court proceeding is initiated despite an existing arbitration agreement, the court must terminate the proceeding and direct the parties to arbitration if any party so requests and unless the court finds that the arbitration agreement is invalid, inoperable or incapable of being performed. The respective party must file its jurisdictional objections before the first submission on the merits of the case.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Ukrainian law recognises the competence-competence doctrine. Following the Model Law, the ICA Law provides that the arbitral tribunal may rule on jurisdictional objections either as a preliminary question or in an award on the merits. The ruling of the tribunal that it has jurisdiction, if decided as a preliminary question, may be challenged by any party in court within 30 days of having received the notice of that ruling.

Under Ukrainian procedural legislation, an arbitral tribunal has no priority in deciding on its jurisdiction (in particular, if claims are brought in parallel before arbitration and state court).

The party must raise its jurisdictional objections not later than the submission of the statement of defence.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Under the ICA Law, if the parties fail to agree on the place of arbitration, it must be determined by the arbitral tribunal having regard to the circumstances of the case, including convenience for the parties. Despite the chosen place of arbitration, the tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.

Failing agreement between the parties, the arbitral tribunal shall also determine the language or languages to be used in the proceedings.

23 Commencement of arbitration

How are arbitral proceedings initiated?

According to the ICA Law, unless otherwise agreed by the parties, arbitration proceedings commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. There are no formal or substantive requirements for the request (notice) for arbitration under the ICA Law.

The ICAC Rules contain much more detailed regulation on this question. In order to commence the proceeding, the claimant must file a statement of claim. The statement of claim must include, inter alia:

- full names, postal addresses and other contact details of the parties;
- the bank details of the claimant;
- the amount of the claim;
- substantiation of the jurisdiction of the ICAC;
- the demands of the claimant;
- a description of the factual circumstances on which the claim is based;
- evidence to confirm such circumstances;
- substantiation of the claimant's demands with reference to the applicable law;
- a calculation of the amounts to be recovered or disputed; and
- a list of documents attached to the statement of claim.

Under the ICAC Rules, the statement of claim must be signed by an authorised person. Documentary evidence of his or her powers must accompany the statement of claim. Finally, the claimant must also enclose with the statement of claim:

- copies of the statement of claim and supporting documents for the respondents and the arbitral tribunal;
- evidence to confirm the circumstances on which the claim is based; and
- a proof of payment of the registration fee.

After the statement of claim is submitted, the ICAC proceedings are formally initiated by the order of the ICAC president.

24 Hearing

Is a hearing required and what rules apply?

Although the ICA Law does not require hearing, it is a standard practice. The parties are free to agree on whether to hold the hearing. In the absence of such agreement, the arbitral tribunal must hold the hearing upon request of either party.

A default rule under the ICAC Rules is that an oral hearing must be held. However, the parties may agree to consideration of the case on the basis of written materials only. Moreover, the tribunal is empowered to resolve the case without the oral hearing in the absence of such agreement between the parties, unless either party requests a hearing.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The ICA Law grants broad discretion to the tribunal in respect of the evidentiary matters, which includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

The general approach reflected in the ICAC Rules is that the parties must submit the evidence supporting their statements. However, the tribunal is also authorised to order production of evidence or expert examination. Within the ICAC proceedings, documents are the most frequently used type of evidence. Though witness and expert testimonies are possible, witnesses and experts are relatively rarely examined or cross-examined within the ICAC proceedings.

IBA Rules on the Taking of Evidence in International Commercial Arbitration will be applied if the parties so agree. They are rarely applied by the ICAC tribunals without express agreement of the parties.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

The courts have no power to assist the tribunal or to intervene in the arbitral proceedings.

27 Confidentiality

Is confidentiality ensured?

The ICA Law does not address this question and the parties are free to agree on it. Under the ICAC Rules, the chair of the ICAC, its deputies, arbitrators and the secretariat shall ensure confidentiality of the information that became known to them on the disputes heard by the ICAC. No such obligation is imposed upon the parties.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

The court has no power to order interim measures in support of arbitration (either before or after arbitration proceedings have been initiated).

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Neither the ICA Law or the ICAC Rules provide for an emergency arbitrator procedure. However, under the ICAC Rules, prior to the constitution of the tribunal, the chair of the ICAC is authorised to rule on interim measures. Such orders are binding upon the parties.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The arbitral tribunal has wide discretion in ordering the interim measures it considers necessary in respect of the subject matter of the dispute. Neither the ICA Law, nor the ICAC Rules set forth specific criteria for ordering interim relief.

Ukrainian legislation does not directly address the question of security for costs. Taking into account the wide discretion of the tribunal under the ICA Law to grant interim measures, the orders to provide security for costs are theoretically possible. Though court practice is quite limited, recent decisions suggest that interim awards, including, arguably, security for costs orders, are enforceable in Ukraine.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The ICA Law generally states that unless the parties agree otherwise, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate. This seems to encompass the power to order sanctions against the parties, as well as their representatives.

The ICAC Rules impose an obligation on the parties to make fair use of their procedural rights, refrain from abusing such rights and observe the time limits for exercising their rights. The ICAC Rules do not explicitly regulate the procedural sanctions that may be imposed on the party or counsel who fail to comply with the above-mentioned obligations. However, according to the Schedule of Arbitration Fees and Costs, the tribunal may allocate the costs and expenses in such a way as to reimburse any additional expenses incurred by the party because of inappropriate or bad faith conduct of the other party.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Unless otherwise agreed by the parties, an award shall be made by the majority of arbitrators. In such case, dissenting opinion of an arbitrator has no impact on the award.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

The ICA Law does not regulate the dissenting opinions. The ICAC Rules expressly allow dissenting opinions. In particular, any arbitrator whose opinion opposes the award may express such dissenting opinion in writing. The dissenting opinion is attached to the award.

In ICAC practice, dissenting opinions are relatively rare.

34 Form and content requirements

What form and content requirements exist for an award?

An arbitral award shall be made in writing and be signed by an arbitrator or by majority of arbitrators. In the case of majority decision, the reason for the absent signature must be stated. Any award shall specify the date of the award and seat of arbitration. The arbitral award must always state the reasons upon which the arbitrators based their decision, the claims granted and dismissed, the amount of arbitrators' fees and expenses and their allocation between the parties.

The ICAC Rules envisage further form and content requirements for an award: it must contain:

- the name of the ICAC;
- case registration number;
- full names of the arbitrators;
- names of the parties in dispute and other persons participating in the arbitral proceedings;
- the subject matter of the dispute; and
- a summary of the circumstances of the case.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The ICA Law does not establish any particular time limit for making an award. In accordance with the ICAC Rules, the award must be rendered within six months of constitution of the tribunal. Such deadline may be – and frequently is – extended by the ICAC presidium.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

After the award enters into force (the date of the award), the winning party has three years to submit it for enforcement in Ukraine.

The date of the delivery is decisive for filing an application for setting aside an award (three months after the date when a party received an award), for submitting a request for correction (30 days after the date when a party received an award) and for requesting to render an additional award (30 days after the date when a party received an award).

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

Both the ICA law and the ICAC Rules recognise final and additional awards, as well as arbitral awards on agreed terms (parties' settlement). The ICAC Rules also allows rendering separate awards on certain questions or on a part of the claims.

Types of relief that the arbitral tribunal may grant largely depend on the law applicable to the merits of the case.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Apart from rendering an award, the arbitral tribunal may terminate the proceedings with an order for termination. The list of grounds for termination of the proceedings is set out in article 23 of the ICA Law. They include:

- withdrawal of claim by the claimant, unless the respondent objects thereto and the arbitral tribunal recognises a legitimate interest on his or her part in obtaining a final settlement of the dispute;
- the parties' agreement on the termination of the proceedings; or
- conclusion of the arbitral tribunal when the continuation of the proceedings has for any other reason become unnecessary or impossible.

The ICAC Rules provide for additional grounds for termination of the arbitral proceedings prior to the constitution of the arbitral tribunal (for example, when the claimant fails to pay the arbitration fee within a fixed period of time). The ICAC Rules also provide that the arbitral

Update and trends

General statistics shows that majority of the arbitral awards are enforced in Ukraine. The very recent case *JKX Oil & Gas et al v Ukraine* confirmed that emergency arbitrator awards and other interim orders are in principle enforceable in Ukraine (though the final judgment in this case has not been rendered yet). At the same time, the *JKX Oil & Gas* case confirmed that Ukrainian courts tend to interpret public policy broadly.

A full-blown arbitration reform has been proposed recently. The draft law has already been submitted to Parliament. If adopted, it will introduce a much-awaited mechanism of judicial support to arbitration, including ordering interim measure and obtaining evidence.

In addition to *JKX Oil & Gas et al v Ukraine*, Ukraine is a party to at least six other investment arbitration cases.

tribunal shall issue an order for termination of the arbitral proceedings when it finds that it lacks jurisdiction to consider such dispute.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The award must specify allocation of arbitration costs and expenses between the parties. The 'loser pays' rule is generally applicable. Within the ICAC proceedings, the tribunal must order compensation of the arbitration fee paid by the claimant in proportion to the claims granted. In addition, the tribunal may order compensation of the costs incurred by the winning party, including its legal expenses, in the amount the tribunal considers justified and appropriate, if they are duly confirmed by documents and have already been incurred by the party. Recent practice of the ICAC is generally favourable to reimbursement of legal fees.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

The ICA Law does not cover this question. Availability of the interest and its rate is deemed to be a substantive rather than a procedural matter and shall be determined in accordance with the law applicable to the merits.

If Ukrainian substantive law applies, pre-award interest will be accrued if the parties so agree. In the absence of the parties' agreement, the defaulting party must pay 3 per cent interest in the case of breach of a monetary obligation. No statutory interest rate is established in respect of other types of obligations.

Post-award interest is very uncommon for Ukraine and in particular for ICAC practice. However, foreign arbitral awards ordering post-award interest are enforceable in Ukraine.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Either party may request the tribunal to correct any clerical, typographical errors or errors in calculations in the award within 30 days of receipt of the award. The correction shall be made within 30 days of receipt of the request if the tribunal finds it reasonable. A tribunal may also correct the award upon its own initiative.

If the parties so agreed, either party may apply for interpretation of the award. The same time limits apply.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

An exhaustive list of grounds for setting aside an arbitral award is set out in article 34 of the ICA Law. Those grounds are basically the same

as envisaged in article V of the New York Convention. The courts are specifically prohibited from reconsidering the case on the merits.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

There are three levels of appeal: before the appellate court, before the cassation court and, for limited grounds, before the Supreme Court of Ukraine. According to the procedural legislation, local and appellate courts must decide the case within two months and the cassation court and the Supreme Court of Ukraine must consider respective complaints within a month. However, in practice, such time limits are frequently exceeded.

The court fee for bringing an application for setting aside an award varies from approximately 320 hryvnas to 800 hryvnas (depending on whether an applicant is an individual or a legal entity). The amount of the court fee for submitting appeals to the court of appeal, the cassation court and the Supreme Court of Ukraine is 110 per cent, 120 per cent and 130 per cent of the initial court fee for setting the award aside, respectively.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Under the ICA Law, an arbitral award, irrespective of the country in which it was made, shall be recognised as binding and shall be enforced upon application in writing to the competent court. The requirements to such applications and grounds for refusing recognition and enforcement are basically the same as envisaged in article IV and article V of the New York Convention respectively.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Although article V of the New York Convention provides the courts with certain discretion in deciding whether to refuse to enforce the award, Ukrainian courts usually interpret the grounds set out therein as requiring refusal. We are not aware of the instances where Ukrainian courts enforced an award that had been set aside in the country of the seat.

It is worth noting that Ukraine is a party to the European Convention on International Commercial Arbitration. Taking into account article IX of the said Convention, there may be awards that can be enforced in Ukraine notwithstanding setting aside in the country of the seat.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The very recent case *JXX Oil & Gas et al v Ukraine* confirmed that emergency arbitrator awards are in principle enforceable in Ukraine (the local and appellate courts allowed enforcement of the emergency arbitrator award; however, the recent decision of the cassation court returned the case for reconsideration to the appellate court).

47 Cost of enforcement

What costs are incurred in enforcing awards?

The court fee for bringing an application for recognition and enforcement of an award varies from approximately 320 hryvnas to 800 hryvnas (depending on whether an applicant is an individual or a legal entity). The amount of the court fee for submitting appeals to the court of appeal, the cassation court and the Supreme Court of Ukraine is 110 per cent, 120 per cent and 130 per cent of the initial court fee for setting the award aside, respectively.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Ukraine is a civil law country. Arbitration in Ukraine is largely based on written evidence. Oral witness testimony is of much lower importance. Document production is used very rarely, and, if ordered, one should expect it to be quite narrow.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are no professional standards or ethical codes applicable to counsel in arbitration. Law practitioners admitted to the Ukrainian Bar should comply with the Rules of Advocate's Ethics as well as provisions of the Law of Ukraine on the Bar and Legal Practice.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding of arbitral claims is not subject to regulatory restrictions in Ukraine. Still, such tool is not widespread within arbitral proceedings in Ukraine.

AVELLUM

INTERNATIONALLY
UKRAINIAN

Serhii Uvarov
Anna Vlasenko
Ilhar Hakhramanov

suvarov@avellum.com
avlasenko@avellum.com
ihakhramanov@avellum.com

38 Volodymyrska Street
01030 Kiev
Ukraine

Tel: +380 44 591 3355
Fax: +380 44 591 3355
www.avellum.com

51 Regulation of activities**What particularities exist in your jurisdiction that a foreign practitioner should be aware of?**

There are no special particularities or restrictions that a foreign practitioner (whether as a counsel or an arbitrator) should be aware of while being engaged in an arbitration proceeding in Ukraine. A foreign practitioner may be required to obtain a visa to enter Ukraine. Taxation rules are subject to frequent changes and should be determined on a case-by-case basis.

United Arab Emirates

Robert Stephen and Joseph Bentley

Herbert Smith Freehills LLP

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

The UAE is a party to the New York Convention, which entered into force on 19 November 2006 following ratification on 13 June 2006 without declarations or reservations. In addition, the UAE is a party to the following multilateral conventions:

- Riyadh Convention on Judicial Cooperation between States of the Arab League (1983);
- GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications (1996); and
- Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965).

The UAE has also entered into a number of bilateral treaties relating to judicial cooperation, including:

- the Treaty on Judicial Cooperation in Criminal Matters, Extradition of Offenders, Cooperation in Civil, Commercial and Personal Matters with Morocco (2006);
- the Treaty on Mutual Legal Assistance in Criminal Matters, Extradition of Offenders, Cooperation in Civil, Commercial and Personal Matters, Service of Judicial and Extrajudicial Documents, Obtaining Evidence, Commissions and the Recognition and Enforcement of Foreign Judgments and Arbitral Awards with Sudan (2005);
- the Agreement on Legal and Judicial Cooperation with Syria (2002);
- the Agreement on Legal and Judicial Cooperation with Egypt (2000);
- the Agreement on Legal and Judicial Cooperation in Civil and Commercial Matters, and Mutual Legal Assistance in Criminal Matters and the Extradition of Criminals with India (2000);
- the Agreement on Legal and Judicial Cooperation with Jordan (1999);
- the Treaty on Judicial Cooperation, Recognition and Enforcement of Judgments in Civil and Commercial Matters with France (1992); and
- the Agreement on Legal and Judicial Cooperation with Somalia (1982).

A number of the international agreements regarding enforcement to which the UAE is a party (eg, the Riyadh and GCC Convention) permit the UAE to refuse to recognise or enforce a foreign judgment or award made against the UAE or an official of the UAE.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

The UAE has signed 53 bilateral investment treaties, 34 of which are currently in force.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The primary domestic source of law relating to both domestic and foreign arbitral proceedings is the UAE Civil Procedure Code (Federal Law No. 11 of 1992, as amended) (articles 203 to 218). The recognition and enforcement of domestic awards is addressed by article 215 of the Civil Procedure Code (CPC). Articles 235 to 237 deal with the recognition and enforcement of foreign awards.

The DIFC Arbitration Law (DIFC Law No. 1 of 2008, as amended) governs arbitration proceedings in the Dubai International Financial Centre (DIFC). The DIFC is a federal financial free zone situated in the Emirate of Dubai. It has its own legal system and courts distinct from those of the wider UAE, based on the common law system.

The ADGM Arbitration Regulations 2015 dated 17 December 2015 govern the arbitration of disputes in the Abu Dhabi Global Market (ADGM), a new financial free zone established in 2013 in the Emirate of Abu Dhabi. The ADGM is similar in scope to the DIFC inasmuch as it operates its own self-contained common law legal system, separate from the emirate in which it resides. However, rather than develop its own law as the DIFC has done, the ADGM directly incorporates by reference English common law and a list of English statutes into its legal system. This chapter focuses on the application of the arbitration provisions of the CPC.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The domestic arbitration law (set out in articles 203 to 218 of the CPC) is not based on the UNCITRAL Model Law. The differences between the two are too numerous to detail in this chapter.

By contrast, both the DIFC Arbitration Law and the ADGM Regulations 2015 are based on the UNCITRAL Model Law and will be familiar to the international arbitration community.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The mandatory domestic arbitration law provisions from which the parties may not deviate are:

- there must be an uneven number of arbitrators (article 206(2), CPC);
- the arbitrators must be independent and impartial (article 207(4), CPC);
- both parties have a right to a fair hearing (article 212(1), CPC);

- any fact or expert witness has an obligation to present his or her evidence on oath (article 211, CPC); and
- public policy considerations (article 212(2), CPC).

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

There is no rule in the domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law should be applied to the merits of a dispute; as a general rule, parties are free to decide on the law applicable to the merits of the case. Where parties fail to agree on the applicable law, the arbitral tribunal may take guidance from the conflict of laws rules contained in the UAE Civil Code (see article 10 and following) and the applicable arbitration rules.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The most prominent arbitration institutions in the UAE and their main features are:

DIAC

Dubai International Arbitration Centre (DIAC)
Level 14
Dubai Chamber of Commerce and Industry
Baniyas Road
PO Box 1457
Dubai
United Arab Emirates
Tel: +971 4 2028 343
Fax: +971 4 2028 668
www.diac.ae/idias

The DIAC currently administers arbitrations under the DIAC Arbitration Rules 2007 (the DIAC Rules); however, in August 2016, the DIAC issued draft revised rules for consultation (the Draft DIAC Rules). The proposed amendments to the DIAC Rules contain provisions relating to:

- expedited proceedings;
- alternative appointment of arbitrators;
- conciliation proceedings prior to arbitration proceedings with a mediator to be appointed by the DIAC Executive committee; and
- appointment of an emergency arbitrator for dealing with interim relief.

As these have been largely welcomed by the arbitration community, it is expected that many of the proposals will be formally introduced when the Draft DIAC Rules come into force, which is expected in early 2017.

It also serves as an appointment or challenging authority in ad hoc arbitrations.

The DIAC maintains a list of arbitrators from the Middle Eastern region and beyond, with domestic and international profiles.

The DIAC Rules have an expedited procedure for appointing the arbitral tribunal (article 12).

The DIAC charges a non-refundable registration fee, plus administrative fees fixed by reference to the sum in dispute and a cost schedule annexed to the DIAC Rules.

Arbitrators' fees are fixed within minimum and maximum limits by reference to the sum in dispute and the same schedule.

Parties can opt for a sole arbitrator or a three-member tribunal of their choice, provided the nominated individuals are independent and impartial.

The place of arbitration will be Dubai by default, unless otherwise determined by the parties.

The language of arbitration will be the language that is most suitable, taking into account all the circumstances, unless otherwise determined by the parties.

DIFC-LCIA

DIFC-LCIA Arbitration Centre
Ground Floor
Building 4
The Gate District
Dubai International Financial Centre
PO Box 211724
Dubai
United Arab Emirates
Tel: +971 4 427 3376
Fax: +971 4 4273380
www.difc.ae

Following the completion of the restructuring of the DIFC-LCIA Arbitration Centre by the LCIA and the DIFC Dispute Resolution Authority (the DRA) in November 2015 (to address previous concerns about the establishment of the Centre, and the jurisdictional reach of DIFC-LCIA arbitrations), the DIFC-LCIA Arbitration Centre issued a new set of rules applicable to all arbitrations commencing on or after 1 October 2016, the DIFC-LCIA Arbitration Rules 2016, intended to modernise the rules and increase efficiency (the DIFC-LCIA Rules). Of particular relevance are:

- the introduction of emergency arbitrator provisions;
- new rules concerning multiparty arbitration and conciliation; and
- a new regime for sanctioning poor conduct.

It also serves as an appointment or challenging authority in ad hoc arbitrations.

Supervision of DIFC-LCIA arbitration proceedings is vested in the LCIA Court.

The DIFC-LCIA Arbitration Centre primarily draws upon the LCIA list of arbitrators.

The DIFC-LCIA Arbitration Centre charges a registration fee, plus administrative fees on the basis of hourly rates.

Arbitrators' fees are computed on an hourly rate basis.

The parties can opt for a sole arbitrator or a three-member tribunal of their choice, provided the nominated individuals are independent and impartial.

The place of arbitration will be the DIFC by default, unless otherwise determined by the parties.

The language of arbitration will be English, unless otherwise determined by the parties.

ADCCAC

Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC)
Abu Dhabi Chamber of Commerce and Industry
Corniche Road
PO Box 662
Abu Dhabi
United Arab Emirates
Tel: +971 2 317599
Fax: +971 2 2311410
www.abudhabichamber.ae

The ADCCAC administers arbitrations under the ADCCAC Procedural Regulations (the ADCCAC Rules), which were introduced in October 2013.

It is not clear whether the ADCCAC will serve as an appointment authority; there does not appear to be anything to prevent it from doing so.

The ADCCAC maintains a register of members. Members may be shortlisted to serve as arbitrators in ADCCAC arbitration proceedings.

It charges a non-refundable registration fee, plus a proportional fee of 15 per cent calculated on the arbitrators' fees for its administrative services.

Arbitrators' fees are fixed by reference to the sum in dispute and a schedule of costs annexed to the ADCCAC Rules.

The parties can opt for a sole arbitrator or a three-member tribunal of their choice, provided the nominated individuals are independent and impartial.

The place of arbitration will be Abu Dhabi by default, unless otherwise determined by the parties.

The language of arbitration will be Arabic, unless otherwise determined by the parties.

There are other regional arbitration centres in the Emirates of Ajman, Sharjah and Ras Al Khaimah. The UAE also hosts the International Islamic Centre of Reconciliation and Arbitration, which was set up to hear cases governed by sharia law.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The following types of dispute are not arbitrable under UAE law:

- commercial agency and distributorship disputes, which are subject to the exclusive jurisdiction of the UAE courts;
- labour disputes, which are subject to the exclusive jurisdiction of the UAE courts following a first instance referral to the UAE Ministry of Labour and Social Affairs;
- disputes of a criminal nature; and
- matters that are incapable of being settled amicably (for example, family matters such as disputes relating to marriage, incapacity and guardianship).

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Under UAE law, an arbitration agreement must comply with the following formalities:

- the arbitration agreement must be in writing (article 203(2), CPC); and
- the signatory of an arbitration agreement must have special authority to sign it (article 58(1), CPC). This is because the UAE courts consider arbitration agreements as a specific carve-out from their residual jurisdiction, which requires a higher, specific degree of authority. If a party representative signs an arbitration agreement, he or she must be expressly authorised to do so pursuant to a power of attorney or proxy. There is a statutory presumption in favour of such a power on the part of the general manager of a limited liability company (see Dubai Court of Cassation, Petition No. 164/2008, judgment of 10 October 2008).

Recent case law in both the DIFC Courts (*Ginette PJSC and (1) Geary Middle East FZE and (2) Geary Limited*) and the Dubai Courts (Dubai Court of Cassation Case No. 547/2014) has suggested that, while ensuring that specific authority has been granted to a person seeking to bind a company to arbitration remains advisable, the stance may be softening with the result that arbitration agreements entered into by representatives with authority to bind the party to contracts, but without specific authority to arbitrate, may still be valid.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

An arbitration agreement ceases to be enforceable if a defendant to court proceedings fails to challenge jurisdiction and raise the existence of an arbitration agreement at the first court hearing (article 203(5), CPC).

However, an arbitration agreement will not cease to be enforceable upon the death of a party to it. As a matter of UAE law, it will become binding on the legal estate of the deceased. Similarly, where a party loses its legal capacity, an arbitration agreement will become binding on the party's legal guardian acting on behalf and in the interests of that party.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

As a matter of UAE law, third parties cannot be bound by an arbitration agreement. However, if the parties to an arbitration agreement agree that a third party can be joined then there is nothing to prevent this (for example, by formal assignment or by way of succession).

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

There are no specific joinder or consolidation provisions in the CPC. However, some arbitration institutions based in the UAE are willing to consolidate proceedings between the same or related parties in relation to similar disputes arising from the same or identical agreements, upon the request and agreement of the parties.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Under UAE law, there is no 'group of companies' doctrine. However, this does not prevent a tribunal from finding that a non-signatory parent or subsidiary company of a signatory company is bound by an arbitration agreement in circumstances where that non-signatory was involved in the conclusion or performance of the contract in dispute.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

The CPC does not specifically provide for multiparty arbitration.

However, the DIAC Rules specify that where there are multiple claimants or respondents and where a three-member tribunal is to be appointed, the multiple claimants or respondents must act together to jointly nominate one arbitrator respectively, failing which the DIAC Executive Committee will make the appointment (article 11, DIAC Rules).

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Under UAE law, an arbitrator may not be:

- a minor;
- a person under a legal disability; or
- a person deprived of his or her civil rights because of a criminal penalty or an unrehabilitated bankruptee (article 206(1), CPC).

Arbitrators can be recused or disqualified from sitting where their impartiality and independence is, or will be, compromised (see articles 114, 115, and 116 and 204, CPC).

There is no requirement under the CPC for arbitrators to be selected from a prescribed list.

UAE law does not contain any express or specific non-discrimination regulations (on the basis of gender or race or otherwise).

For DIAC arbitrations, the DIAC Rules currently restrict the appointment of a sole arbitrator or chairperson of the same nationality as one of the parties (articles 9.10 and 10.1, DIAC Rules). In the Draft DIAC Rules, it is proposed that article 10.1 be amended to remove this restriction and, subject to objection by one of the parties, allow for the sole arbitrator or chairperson to be the same nationality as one of the parties.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Under UAE law, the UAE courts have the power to assist with the appointment of an arbitrator in the absence of agreement of the parties.

If the arbitration is subject to institutional arbitration rules, these rules will likely provide a default mechanism for the appointment of arbitrators. For DIAC arbitrations, the DIAC Rules provide that where the parties have not agreed on the number of arbitrators, the tribunal shall consist of a sole arbitrator, except where the DIAC in its discretion determines that, in view of all of the circumstances of the dispute, a three-member tribunal is more appropriate (see article 8, DIAC Rules). Where the parties have agreed to nominate an arbitrator and a party fails to do so, the DIAC may proceed to appoint an arbitrator on behalf of that party (see article 9, DIAC Rules). The Draft DIAC Rules propose that, where the tribunal is composed of a sole arbitrator, the parties may jointly nominate the sole arbitrator. Where the parties fail to do so, the newly proposed DIAC secretariat, the DIAC's case management unit, may make the decision. Similarly, where there is a three-member tribunal, the parties may jointly appoint a co-arbitrator. If the parties do not agree a nomination, the DIAC executive committee will make the appointment.

In ad hoc arbitrations, the UAE courts are responsible for default appointments. It is not possible to challenge the decision of the courts (article 204, CPC).

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

In essence, the grounds for challenge of an arbitrator are the same as those for which a judge of a UAE court may be recused (article 207(4), CPC). The grounds for recusal of a judge include bias and where there is a conflict of interests arising from the judge's relationship to one of the parties (such as by marriage or family, guardianship, trustee, or a business relationship) or with counsel, witnesses or experts.

In addition, an arbitrator may be recused on the ground that he or she has wilfully neglected to act in accordance with the arbitration agreement or to comply with his or her mandate (article 207(3), CPC).

An application to remove an arbitrator must be made to the competent court within five days from the date of:

- notification of the arbitrator's appointment;
- the date on which the reason for disqualification arose; or
- the time it became known if subsequent to the notification of the appointment of the arbitrator.

The three main institutional rules provide that an arbitrator may be challenged by any party if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence (see article 13.3, DIAC Rules (article 14, the Draft DIAC Rules); article 10.3, DIFC-LCIA Rules; and article 11, ADCCAC Rules).

Under the DIAC Rules, a party who intends to challenge an arbitrator must serve a written statement of the reasons for its challenge on the DIAC (the DIAC Secretariat under the Draft DIAC Rules), the tribunal and all other parties within 15 days of the formation of the tribunal or becoming aware of any circumstances that give rise to justifiable doubts as to his or her impartiality or independence. The DIAC Executive Committee will then decide on the challenge.

The IBA Guidelines on Conflicts of Interest in International Arbitration may be used for guidance, but are not binding.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

The relationship between parties and arbitrators is contractual (article 203(1), CPC). The law requires all arbitrators to be impartial and independent.

The remuneration of arbitrators and the recovery of expenses are dealt with either by the applicable institutional rules or the CPC. In both cases, costs usually follow the event, though arbitrators retain some discretion to allocate costs and fix their own fees.

In ad hoc proceedings, the arbitrator's assessment of his or her fees or expenses is subject to review by the courts (article 218, CPC).

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Under UAE law, arbitrators are generally immune from liability for their conduct (to the same extent as a UAE court judge). This is also the case under the three main institutional rules (see article 40, DIAC Rules; article 31, DIFC-LCIA Rules; and article 32, ADCCAC Rules).

Notwithstanding, an arbitrator may have to compensate the parties where he or she withdraws from his or her mandate without good reason (article 207(2), CPC).

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

In order to challenge the jurisdiction of the courts on the basis of an existing arbitration agreement, the defendant must raise the existence of the arbitration agreement at the first court hearing, otherwise the court will assume jurisdiction (article 203(5), CPC).

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Under UAE law and the relevant rules of the three main institutions, a tribunal is competent to decide upon its own jurisdiction (see article 6, DIAC Rules; article 23.1, DIFC-LCIA Rules; and article 22.1, ADCCAC Rules).

The DIAC Rules require jurisdictional objections to be raised by the defendant at the latest with the statement of defence. Under the CPC, an award can be challenged on the basis of it having been rendered in breach of the tribunal's mandate during the ratification process (article 216(1)(a), CPC).

A tribunal is also obliged to defer to the courts if, during the course of the proceedings, a matter is brought to its attention that falls outside the scope of the tribunal's mandate (article 209(2), CPC).

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

In the absence of agreement of the parties, the three main institutional rules provide for a default place of arbitration (see question 7). Under UAE law, the default place of arbitration should be within the UAE (article 212(4), CPC); notwithstanding, hearings and the deliberations of the tribunal may take place at any other place.

The language of the arbitral proceedings in the absence of agreement will be determined in accordance with the applicable institutional rules, failing which the tribunal has discretion to determine the most appropriate language for the proceedings in the circumstances of the case provided always that the final award is translated into Arabic before its submission to the ratification process (article 212(6), CPC).

23 Commencement of arbitration

How are arbitral proceedings initiated?

Under UAE law, there are no particular rules about commencing arbitral proceedings, nor any time limits.

Arbitration proceedings are generally commenced by filing a request for arbitration with the applicable institution, or in ad hoc proceedings by serving a notice of arbitration upon the defendant.

Under the three main institutional rules, a request for arbitration must include the following information:

- the names, addresses and identity of the parties;
- the arbitration agreement (including the seat, language and the relevant procedural rules);
- an outline of the dispute and the factual background to the dispute;
- the relevant cause of action pleaded by the claimant;
- the name of the arbitrator nominated by the claimant (if the parties have agreed to a three-member tribunal) or the name of a suitable candidate for joint nomination by the parties; and
- a provisional statement of relief sought.

Generally speaking, a request for arbitration must be submitted in a number sufficient to provide copies for the defendant, the tribunal and the institution.

24 Hearing

Is a hearing required and what rules apply?

The CPC (article 208(1)) provides that the parties must be notified of the date and place of the first preliminary hearing within 30 days of the tribunal accepting its appointment. There are no further requirements under the CPC; further hearings can be held as directed by the tribunal or agreed between the parties.

Under the three main institutional rules, tribunals have a degree of procedural flexibility to determine whether further hearings are necessary or desirable.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The burden of proof is generally on the claimant, and in the absence of a court order, defendants are not obliged to disclose information that may be detrimental to their own case (article 18, the Law of Evidence (Federal Law No. 10 of 1992)).

The parties are free to appoint their own experts or agree on a tribunal appointed expert instead. Both expert and factual evidence must be supported by oral testimony under oath (article 211, CPC). As such, a witness statement without subsequent oral testimony under oath is of limited value.

The IBA Rules on the Taking of Evidence in International Arbitration are widely followed.

Under the three main institutional rules, the parties are free to agree on the procedure to be followed by the tribunal, failing which the tribunal may conduct the arbitration in the manner it considers appropriate, including by determining the admissibility, relevance, materiality and weight of any evidence.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Under UAE law, a tribunal can seek the assistance of the UAE courts to:

- penalise an absentee or non-cooperative witness (article 209(2)(a), CPC);
- order a third party to produce documents (article 209(2)(b), CPC); and
- grant interim measures, such as attachment orders.

In addition, the UAE courts may further intervene where parallel criminal proceedings are brought in relation to issues underlying the proceedings (article 209(2), CPC).

27 Confidentiality

Is confidentiality ensured?

UAE law does not contain any specific provisions that govern the confidentiality of arbitration proceedings. However, in practice, arbitration in the UAE is considered to be private and confidential (including any information and materials disclosed during proceedings).

Some of the institutional rules contain provisions to that effect and provide for the confidentiality of the award and evidence (see articles 37.9 and 41.1, DIAC Rules; article 30, DIFC-LCIA Rules; and article 33, ADCCAC Rules).

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

The UAE courts have a residual power to order interim measures before and after arbitration proceedings have been initiated that cannot be contracted out of (articles 22 and 24, CPC). The UAE courts' residual power is exclusive before arbitration proceedings have been initiated.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The CPC does not provide for the appointment of an emergency arbitrator prior to the constitution of the tribunal.

However, under the DIAC and DIFC-LCIA Rules, the parties can apply for the expedited formation of the tribunal (article 12, DIAC Rules; and article 9A, DIFC-LCIA Rules).

Under the DIFC-LCIA Rules, at any time prior to the formation of the tribunal, parties are able to apply for the immediate appointment of an emergency arbitrator to conduct emergency proceedings to determine urgent matters or order emergency or protective measures pending formation of the tribunal. The LCIA court must determine the application as soon as possible in the circumstances and appoint the emergency arbitrator within three days of receipt of the application (or as soon as possible thereafter), and the emergency arbitrator must decide the claim for relief as soon as possible and no later than 14 days following his or her appointment.

Under the Draft DIAC Rules, it is proposed that a party may make a reasoned application for interim emergency relief, if possible with notice to the other party or parties. If the DIAC executive committee accepts the application, it will seek to appoint an emergency arbitrator within three business days of receipt of the application, with a further two days allotted to convening the parties.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Under UAE law, there are no specific provisions on the tribunal's power to order interim measures after it is constituted. That being said, both the DIAC and the DIFC-LCIA Rules grant the tribunal the power to order certain interim and conservatory measures (see article 31, DIAC Rules (article 32, Draft DIAC Rules); and article 25, DIFC-LCIA Rules).

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The CPC does not expressly deal with the use of 'guerrilla tactics' in arbitration. However, a tribunal can always sanction a recalcitrant party, relying on its powers as a judicial body, to order interim measures of protection, to render inadmissible evidence obtained through improper means or to draw adverse inferences.

The DIFC-LCIA Rules contain provisions designed to increase efficiency and deter parties from engaging in dilatory or frustrating tactics. Neither the LCIA court nor the arbitration is to be impeded by any controversy between the parties relating to whether the request or response is sufficient (article 5, DIFC-LCIA Rules). In addition, the

tribunal has the power to reprimand or caution legal representatives in the event of poor conduct, defined as conduct constituting a breach of the General Guidelines for the Parties' Legal Representatives annexed to the DIFC-LCIA Rules. Failing compliance, the tribunal has a wide discretion to take any other measure necessary to fulfil within the arbitration the general duties required of the tribunal under articles 14.4(i) and (ii).

While there are no proposed articles relating to sanctions in the Draft DIAC Rules, under a proposed revision intended to deter vexatious or unmeritorious claims, claimants would require the permission of all parties to the proceedings before formally withdrawing their claims (article 37, Draft DIAC Rules).

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Under UAE law, an award is valid if it is signed by a majority of the tribunal (article 212(5), CPC). An award should record any dissenting opinion. If an arbitrator refuses to sign an award, this must be stated; however, the award will still be valid if signed by a majority.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

See questions 32 and 34.

34 Form and content requirements

What form and content requirements exist for an award?

Under UAE law, an award must:

- be in writing;
- be written in Arabic, unless otherwise agreed by the parties, in which case an official translation into Arabic must be submitted for enforcement purposes (article 212(6), CPC);
- be signed by a majority of arbitrators, with any dissenting opinion or refusal to sign the award recorded;
- include the full text of the arbitration agreement within the body of the award;
- contain a summary of the parties' respective cases and evidence;
- state the rationale for the award; and
- state the date and place of issue (article 212(5), CPC).

It is also best practice for the terms of reference to be appended to the award, and for the tribunal members to sign the award on every page.

The award must also be signed at the seat, since signing it outside may render the award invalid or would lead to it being considered a foreign award.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

Under UAE law, an arbitral award must be rendered within six months of the date of the first hearing in the arbitration, unless the parties agree otherwise (subject to extension by the parties' consent or order of the court) (article 210, CPC).

Under the DIAC Rules, the deadline for rendering the award is six months from the date of the tribunal's receipt of the file. This deadline can be extended by the tribunal of its own motion by another six months, which in turn may be further extended by the DIAC Executive Committee (article 36, DIAC Rules). However, the Draft DIAC Rules propose that the six month deadline may now be:

- extended if the parties implicitly or explicitly agree to an extension;
- further extended if the DIAC Executive Committee agrees to an extension following a reasoned request from the tribunal; or

- the DIAC Executive Committee decides that it is necessary to extend the deadline of its own motion.

There is no time limit by which an award must be rendered under the DIFC-LCIA Rules.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Under UAE law, the date of the award is not relevant to the arbitration process, including the correction or enforcement of the award.

Under the DIAC Rules, the tribunal may correct any clerical, typographical or, computational errors on its own initiative within 30 days of the date of the award. Within 30 days of receipt of the award, a party may, by written notice to the tribunal, DIAC and the other party or parties, request the tribunal to make an additional award in respect of claims or counterclaims presented in the arbitration but not dealt with in any award (article 38.3, DIAC Rules). Once the parties have been given an opportunity to be heard, if the tribunal considers the request to be justified, it shall, wherever reasonably possible, make the additional award within 60 days of receipt of the request (article 38.4, DIAC Rules).

Under the DIFC-LCIA Rules, within 28 days of receipt of any award, a party may by written notice to the registrar (copied to all parties) either:

- request the arbitral tribunal to correct in the award any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature. If the request is considered justified, the tribunal shall make the correction within 28 days of receipt of the request (article 27.1, DIFC-LCIA Rules); or
- request that the arbitral tribunal make an additional award relating to any claim or cross-claim presented in the arbitration but not decided in any award. If the request is justified, after consulting the parties, the tribunal shall make any additional award within 56 days of receipt of the request (article 27.3, DIFC-LCIA Rules).

Finally, the tribunal may correct any clerical or typographical error within 28 days of the date of the award, after consulting the parties, or also make an additional award, regarding any claim or cross-claim presented in the arbitration but not decided in any award, upon its own initiative within 28 days of the date of the award, after consulting the parties (article 27.4, DIFC-LCIA Rules).

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The CPC does not expressly state what types of awards are possible and what types of relief may be granted by a tribunal.

Under UAE law, a tribunal may render preliminary as well as final awards and may grant all kinds of relief, including damages (including loss of profit and loss of opportunity), interim measures and specific performance. It should be noted that damages assessments are subject to the influence of sharia principles.

The DIAC Rules expressly grant the tribunal the power to render preliminary, interim, interlocutory, partial or final awards (article 37.1, DIAC Rules), and awards by consent of the parties (ie, following the parties' settlement (article 39, DIAC Rules)).

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Parties are free to settle disputes at any stage; a settlement agreement is enforceable as a contract before the UAE courts.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

See question 18.

In the absence of agreement of the parties, a tribunal has no power to award legal costs (although it does have the power to award the costs of the tribunal and any institution used) as a matter of UAE law.

In practice, the main institutional rules allow for the recovery of costs, and if not, the parties still claim them, thereby implicitly giving consent to the tribunal to award costs.

However, it should be noted that the Dubai Court of Cassation has found against the recoverability of legal costs in arbitrations under the DIAC Rules because, in the Court's view, the cost provisions of the DIAC Rules do not make express reference to the recovery of legal and counsel fees. The Draft DIAC Rules propose an amendment to the Costs Appendix to the DIAC Rules that includes specific reference to legal representation fees. It remains to be seen whether the Dubai courts will alter their stance in the event this amendments comes into force.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Under UAE law, simple interest may be awarded for up to the statutory rate of 9 per cent per annum (or 12 per cent if the parties are merchants) on the total amount awarded. In contrast to the practice before the UAE courts, tribunals may award compound interest, rather than just simple interest.

However, the award of interest is generally considered contrary to sharia in other Middle Eastern jurisdictions. Enforcement may be rejected where an award includes an amount expressed to be in respect of interest. As such, it is prudent for parties to consider claiming a lump sum (rather than separately claiming interest) or requesting a separate interest only award.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Under UAE law, an arbitrator may only deal with omissions from or clarifications of his or her award upon a specific request from the court within three months of receiving such a request (article 214, CPC). In addition, the UAE courts may correct material errors of the award at the ratification stage (article 215(1), CPC).

See question 32 for the tribunal's powers and time limits under the rules of the relevant arbitration centres.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

An arbitral award can be challenged during the ratification process on the following grounds (article 216, CPC):

- the award was rendered without an arbitration deed or on the basis of an invalid document or the tribunal has stepped outside the boundaries of his or her mandate;
- the award as been rendered by a tribunal that has not been properly appointed or does not fulfil the legal requirements;
- the arbitration agreement was concluded by persons having no capacity to agree to arbitration;
- failure to observe due process and rights of defence;
- failure to administer oaths before hearing oral evidence; or
- the arbitration proceedings or the award are affected by other procedural irregularities.

In addition, an arbitral award can be challenged for potential violations of public policy as understood in the UAE. The principle of 'public policy' is wide ranging and includes matters such as 'marriage, inheritance, and lineage, as well as provisions relating to sovereignty, free trade, distribution of wealth, rules of private ownership and the other rules and foundations upon which society is based' (article 3 of the Civil Transactions Law (Federal Law No. 5 of 1985, as amended)). The UAE courts have, in the past, interpreted the principle widely.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Under UAE law, awards are final and binding, and cannot be appealed on the merits (article 217(1), CPC).

An award can only be challenged on the grounds of procedural irregularity; the award debtor must commence court proceedings during the ratification process. The judgment of the court of first instance may be appealed to the court of appeal and the court of cassation. The proceedings will be conducted in Arabic and may take between six months to over a year, depending on the complexity of a case.

The fees of the Dubai courts are listed below:

- 7.5 per cent of the amount awarded by the Court of First Instance, subject to a cap of 30,000 dirhams for the Court;
- 1.5 per cent of the amount awarded by the Court of Appeal; and
- a fixed fee of 1,520 dirhams for the Court of Cassation.

The Abu Dhabi courts charge a fixed fee of 3 per cent of the value of the claim.

It should be noted that, although the UAE courts follow the loser pays principle, legal costs are usually not recoverable in full.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

In order to be recognised and enforceable, domestic awards must be ratified by the UAE courts. An application for ratification must be filed with the court of first instance and the court will issue a recognition order upon ratification; however, the order is subject to the appeals process in the UAE courts (see question 43). There is no time limit for the commencement of the ratification process.

The recognition and enforcement of foreign awards is guided by the applicable bilateral or multilateral conventions listed in questions 1 and 2. Although there are certain examples of the UAE's lower courts applying the more extensive provisions of the CPC to foreign seated arbitral awards (which has led to the Dubai courts refusing enforcement and re-examining the merits of the dispute), in general, the UAE courts have held that the only grounds for challenging enforcement are those set out in article V of the New York Convention. An award should be enforced in the UAE provided it is final and binding in the country of origin and it is not contrary to the principle of public policy as understood in the UAE.

DIFC court case law has established that the DIFC courts have jurisdiction to recognise and enforce both domestic and foreign-seated awards, with the subsequent DIFC court enforcement order capable of being exported for execution in onshore Dubai under the reciprocal arrangements between the two jurisdictions. In order to apply for recognition and enforcement, a party should provide the original award (or a certified copy) and the original arbitration agreement. The grounds for refusing enforcement are limited to those set out in article V of the New York Convention (article 44, DIFC Arbitration Law).

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Subject to the application of a bilateral or multilateral convention (article 238, CPC) (see question 44), the enforcement of foreign awards follows the same rules as the enforcement of foreign judgments (article 236, CPC).

In summary, the UAE courts may refuse the enforcement of a foreign award on the following grounds (article 235, CPC):

- the award was issued in a country that does not recognise and enforce UAE awards;
- lack of proper jurisdiction of the tribunal at the place of arbitration;
- the award was not made in accordance with the laws of the place of arbitration;

Update and trends

A significant development is the recent amendment to the UAE Penal Code (Federal Law No. 3 of 1987), effective as of 29 October 2016, which provides that any person who issues a decision or gives an opinion (including an arbitrator or expert) and fails to 'maintain the requirements of integrity and impartiality' may be subject to temporary imprisonment and may be prohibited from taking further appointments.

This provision affects all arbitrations in the UAE, including those within the ADGM and the DIFC. We understand there have already been instances of arbitrator resignations citing this amendment and it is likely that the effect of the amendment will severely damage the reputation of the UAE as an arbitration-friendly jurisdiction.

In November 2015, the LCIA and the DIFC Dispute Resolution Authority (DRA) announced the completion of a restructuring exercise intended to address concerns about the independence of the DIFC-LCIA and the jurisdictional reach of DIFC-LCIA arbitrations, the LCIA and the DRA appointed a new director and registrar, Mohamed ElGhatit and completed the restructuring of the DIFC-LCIA Arbitration Centre. The Centre is operated on the basis of its constitution by the DIFC Arbitration Institute (DAI), established by Dubai Law No. 9 of 2004 (as amended by Dubai Law No. 7 of 2014).

Effective in relation to all DIFC-LCIA arbitrations commencing on or after 1 October 2016, the DIFC-LCIA issued a revised set of rules, the DIFC-LCIA Arbitration Rules 2016, implementing a series of changes intended to modernise the Rules, by harmonising them with the LCIA's 2014 Rules, increasing efficiency.

In addition, as discussed above, the DIAC has produced the Draft DIAC Rules with the intention of bringing its rules in line with modern arbitration practice and to ensure its offering remains competitive following changes brought in by a number of other arbitral institutions. These are expected to go into force in early 2017. Further, the DIAC has both entered into a memorandum of understanding with the DRA and inaugurated a new office in the DIFC. The memorandum of understanding expressly provides that it is intended to develop closer ties between the DIAC and the DIFC and expedite the procedure for recognition, ratification and enforcement of DIAC arbitral awards by the DIFC Courts. These actions are designed to make DIAC arbitration more attractive and are likely to result in more parties electing to have their arbitrations conducted under the DIAC Rules, but seated in the DIFC (as opposed to seated in onshore Dubai).

- the improper summoning or representation of the parties in the foreign arbitration proceedings; or
- the award conflicts with a UAE judgment or public policy.

Recognition and enforcement in the UAE is based on a principle of reciprocity, whereby the UAE courts will only apply the provisions under article 235 of the CPC in relation to awards issued in countries that, in turn, recognise and enforce UAE awards (article 235(1), CPC).

Although the UAE ratified the New York Convention without reservation, it is unclear whether enforcement of a non-convention award would be granted by a UAE court.

To our knowledge, the recognition and enforcement of an award that has been set aside at the seat of arbitration has not been tested in the UAE courts. However, given that article V(1)(e) of the New York Convention allows the enforcing courts discretion to refuse enforcement in these circumstances and article 235 of the CPC provides that an award should be final and binding in the jurisdiction it was handed down in before enforcement in the UAE, it is thought unlikely that the UAE courts would permit enforcement.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

See question 29.

47 Cost of enforcement

What costs are incurred in enforcing awards?

See question 43.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

There are a number of unique features and procedural quirks that may influence an arbitrator, many of which have been discussed in this chapter. Disclosure is limited in the UAE – there is no standard disclosure and inspection process in the UAE. Witness evidence must be submitted on oath. Unless agreed otherwise by the parties, officers are generally barred from giving evidence.

Importantly, a recent amendment (Federal Decree Law No 7 of 2016) to the UAE Penal Code (Federal Law No. 3 of 1987), effective as of 29 October 2016, provides that any person who issues a decision or gives an opinion (including an arbitrator or expert) and fails to 'maintain the requirements of integrity and impartiality' may be subject to temporary imprisonment and may be prohibited from taking further

appointments. What constitutes a failure to maintain integrity and impartiality is not defined.

As the provisions of criminal laws apply in the DIFC, this provision will affect arbitrations in the DIFC as well. Given the potential liability for arbitrators in the region, this is potentially a highly significant development that is likely to have a negative impact on the reputation of the UAE as an arbitration-friendly jurisdiction.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Although there are no specific professional or ethical rules applicable to counsel in international arbitration per se, Federal Law No. 23 of 1991 on the Regulation of the Legal Profession governs the rights and duties of lawyers before the UAE courts.

In 2009, the DIFC courts issued a Code of Professional Conduct for Legal Practitioners, which applies to all practitioners registered to appear before the DIFC courts. Practitioners who wish to acquire rights of audience before the DIFC courts have to demonstrate their registration as practising lawyers and rights of audience in their respective home jurisdictions.

In 2013, the DIFC courts issued a voluntary Code of Best Legal Professional Practice intended to set the standard for professional conduct of all lawyers operating within the DIFC, whether licensed to conduct business in the DIFC or authorised to appear as an advocate before the DIFC courts.

In 2016, the DIFC's Academy of Law, formed by the DRA, revised the voluntary Code and replaced it with a mandatory Code of Conduct for legal practitioners in the DIFC courts, to be read in conjunction with any Supplementary Code of Conduct Practice Direction issued by the Chief Justice of the DIFC courts from time to time.

In addition, Dubai-based lawyers must be licensed by the government of Dubai Legal Affairs Department, comply with the Code of Ethics and comply with the Department's continuing legal professional development requirements.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding is neither prohibited under UAE law, nor is there any legislation regulating the industry. In general, although arbitration has seen a proliferation in the region, owing in part to a perceived lack of certainty in the legal processes onshore including, in particular, issues surrounding the enforcement of any award, third-party

funding in relation to onshore UAE arbitration proceedings has not so far been commonplace.

However, the outlook is changing. In light of recent DIFC court case law, the position in relation to enforceability of arbitration awards in the UAE is now more certain and, consequently, arbitration in the UAE is now thought to be a more attractive prospect to third-party funders.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Foreign counsel must ensure that they have a valid power of attorney to represent their clients in the UAE.

For a power of attorney that is executed abroad to be recognised in the UAE, it must first be notarised by a notary public, legalised by the Ministry of Foreign Affairs in the country of execution and authenticated by the UAE embassy in that country. It must then be authenticated by the UAE Ministry of Foreign Affairs to ensure its validity before the local courts.

For a power of attorney to be executed in the UAE it must be notarised by a notary public.



**HERBERT
SMITH
FREEHILLS**

**Robert Stephen
Joseph Bentley**

**robert.stephen@hsf.com
joseph.bentley@hsf.com**

Dubai International Financial Centre
Gate Village 7, Level 4
PO Box 506631
United Arab Emirates

Tel: +971 4 428 6300
Fax: +971 4 365 3171
www.herbertsmithfreehills.com

United States

Timothy G Nelson and Jennifer L Permesly*
Skadden, Arps, Slate, Meagher & Flom LLP

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

The United States is a party to the New York Convention, effective 29 December 1970. The US took both the 'reciprocity' and 'commercial' reservations under article I of the Convention, such that the Convention applies to arbitral awards that:

- are made in the territory of another contracting state; and
- pertain to disputes considered to be 'commercial' under US law.

The United States is also a party to:

- the Inter-American Convention on International Commercial Arbitration (the Panama Convention), effective 27 October 1990. The text of the Panama Convention is similar to that of the New York Convention, and courts generally implement the two conventions in a manner designed to achieve consistent outcomes; and
- the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention), effective 14 October 1966.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

The United States is a party to bilateral investment treaties with 47 other countries, and to a number of bilateral and multilateral free trade agreements containing investor-state dispute settlement mechanisms (for example, the North American Free Trade Agreement (NAFTA)).

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The Federal Arbitration Act (the FAA), a federal statute, regulates both domestic and international arbitration in the United States. Chapter 1 of the FAA, 9 USC sections 1-16, governs domestic arbitrations between US citizens.

The New York or Panama Conventions (codified as Chapters 2 and 3 of the FAA, respectively) apply to 'foreign' or 'international' arbitrations - that is, where the arbitration is not wholly between citizens of the United States or has some other 'reasonable relation' to another New York or Panama Convention contracting state.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The FAA predates the UNCITRAL Model Law and is not based on that law. Nonetheless, it similarly supports the principles of party autonomy, the enforcement of arbitration agreements in accordance with their terms and limited judicial review of arbitral awards.

There are a few noteworthy differences between the FAA and the UNCITRAL Model Law. In general, the FAA is much less detailed than the UNCITRAL Model Law, leaving various matters of procedure and process to be determined by the parties, the arbitrators or the applicable institutional rules. The two regimes also provide somewhat different grounds for 'setting aside' (or vacating) an arbitration award. As another example, whereas the UNCITRAL Model Law does not grant national courts the power to modify or correct arbitral awards, the FAA does grant US courts the ability to do so in certain cases.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

US courts consider arbitration to be contractual in nature, and thus do not apply mandatory rules to conduct of arbitration proceedings.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

US-seated tribunals generally will honour the parties' choice of law applicable to the merits of a dispute. The FAA does not provide tribunals with any guidance as to which substantive law should apply to the merits of a dispute absent express agreement by the parties, and tribunals may exercise their discretion in this regard.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

Major US-based arbitral institutions include:

American Arbitration Association (the AAA)
120 Broadway, Floor 21
New York, NY 10271
www.adr.org

International Centre for Dispute Resolution (the ICDR) (the international branch of the AAA)
120 Broadway, Floor 21
New York, NY 10271
www.icdr.org

International Institute for Conflict Prevention and Resolution (the CPR)
30 East 33rd Street, 6th Floor
New York, NY 10016
www.cpradr.org

Judicial Arbitration and Mediation Services (JAMS)
620 8th Avenue, 34th Floor
New York, NY 10022
www.jamsadr.com

The ICDR is the prominent US-based organisation in the United States for international disputes. The ICDR respects the choice of the parties with respect to the place of arbitration, the selection of arbitrators and the language or applicable law of the arbitration (as do all of the US arbitration institutions). The ICDR calculates fees based on time spent.

JAMS and CPR have international rules that likewise respect party choice in these respects.

The International Chamber of Commerce (the ICC) has an office in the United States (New York), from which it administers its North American arbitrations. While the ICC is used frequently by US parties for international arbitration disputes, we have not included a discussion of its rules in this chapter as it is primarily a Paris-based institution.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

There are very few restrictions on the types of disputes that can be arbitrated under US federal law. Certain intrastate family, consumer and municipal matters may be considered non-arbitrable under state law, where applicable to the dispute.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The FAA and the New York Convention require arbitration agreements to be made in writing. However, US courts interpret this requirement in a commercially practical manner, and in appropriate cases have enforced arbitration agreements where, for example, the final contract was unsigned or where the agreement to arbitrate was entered into via email.

An agreement to arbitrate may be set out in a document other than the contract in dispute, such as when that document is incorporated by reference into the main agreement. Parties may also agree to arbitrate after a dispute has arisen.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

FAA section 2 permits challenges to arbitration agreements 'upon such grounds as exist at law or in equity for the revocation of any contract', such as mistake, lack of capacity, fraudulent inducement, incapacity, rescission and termination of the arbitration agreement. Nonetheless, US policy strongly favours the enforcement of arbitration agreements, and these challenges will be scrutinised closely.

It should also be noted that US courts respect the principle of 'separability', which requires that the arbitration agreement be treated as a distinct agreement that is not rendered invalid, non-existent or ineffective simply because the contract itself may be treated as such.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

Under US state and federal law, third parties or non-signatories may potentially be bound to arbitrate a dispute based on common-law contract and agency principles such as incorporation by reference, assumption, agency, veil-piercing or alter ego, estoppel, succession in interest or assumption by conduct. The law governing the contract (or

putative contract) is potentially relevant in such cases, as is the law of the place of incorporation and the law of the arbitral seat.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

Many institutional rules provide mechanisms for joinder or consolidation of arbitration proceedings.

US courts generally have respected such mechanisms.

Class arbitration may also be permitted, but only where the parties have expressly manifested their consent to such a procedure. See *Stolt-Nielsen v Animalfeeds Int'l Corp*, 559 US 662 (2010).

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Although US state and federal law does not recognise the 'group of companies' doctrine, a non-signatory parent, subsidiary or affiliate of a signatory company may be bound to an arbitration agreement pursuant to common-law principles of agency, contract, estoppel or veil-piercing as discussed in question 11. The specific terms of the arbitration clause can be important in determining such matters.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

A multiparty arbitration agreement must meet the same validity requirements as any arbitration agreement – that is, it must be in writing and manifest the parties' intent to be bound. US courts generally will enforce valid multiparty arbitration agreements.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The FAA is silent on arbitrator eligibility, and it is common for practising US attorneys, retired judges, non-lawyer industry experts and foreign lawyers to serve as arbitrators in US-seated proceedings. State and federal judicial ethics rules and codes of conduct generally prevent sitting judges from serving as arbitrators, however.

US state and federal law generally recognises the autonomy of the parties to require that the arbitrators have certain characteristics, and contractually stipulated requirements for arbitrators based on nationality or religion are regularly enforced.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

US courts will defer to the applicable institutional rules regarding appointment of arbitrators. Assuming no such rules apply (or other special circumstances prevent an appointment under such rules), FAA section 5 provides a mechanism by which the parties may request court appointment of the arbitral tribunal. In such cases, courts are directed to appoint a sole arbitrator absent contrary agreement by the parties.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

US courts will defer to the mechanisms provided in the parties' agreement or applicable institutional rules for challenge or replacement of an arbitrator. Absent such mechanisms, courts disagree as to the proper approach when an arbitrator dies or resigns: while some courts in the Second Circuit have required the arbitration to commence anew (eg, *Pemex-Refinacion v Tbilisi Shipping Co Ltd*, 2004 WL 194450 (SDNY 2004)), other circuit courts of appeal have permitted either party to request appointment of a replacement arbitrator under FAA section 5 (eg, *WellPoint, Inc v John Hancock Life Ins Co*, 576 F 3d 643 (7th Cir 2009)).

US courts have found the IBA Guidelines on Conflicts of Interest in International Arbitration to be a persuasive, but not binding, authority (eg, *Republic of Argentina v AWG Group*, 2016 WL 5928464 (DDC 2016)).

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

The FAA contains no particular requirements and defers to institutional rules and party agreement regarding the relationship between parties and arbitrators, neutrality of arbitrators and their compensation. Although arbitrators generally are required to be neutral and not engage in ex parte communications about the merits of the case, 'parties can agree to have partisan arbitrators' (eg, *Gambino v Alfonso*, 566 Fed App'x 9 (1st Cir 2014)). Some institutional rules applying solely to domestic arbitrations, such as the JAMS Comprehensive Arbitration Rules & Procedures (the JAMS Domestic Rules) and the AAA Commercial Arbitration Rules (the AAA Rules), expressly permit agreements that party-appointed arbitrators may be 'non-neutral'. However, absent such an agreement, the default under the rules is that party-appointed arbitrators must be neutral.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Arbitrators are immune from civil liability for acts undertaken within the scope of their authority pursuant to the common-law doctrine of arbitral immunity (eg, *Sacks v Dietrich*, 663 F3d 1065 (9th Cir 2011)).

Jurisdiction and competence of arbitral tribunal**20 Court proceedings contrary to arbitration agreements**

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Upon a finding that a dispute is properly 'referable to arbitration', US federal courts are empowered to stay the proceedings before them and to compel the defaulting party to 'proceed to arbitration in accordance with the terms of the [parties'] agreement' (9 USC sections 3-4). The existence of a valid arbitration agreement will be determined by the court unless there is clear and unmistakable evidence that the parties intended that the arbitrators resolve this question (*First Options of Chicago, Inc v Kaplan*, 514 US 938 (1995)).

Although no strict time limits exist for jurisdictional objections, in some instances parties may waive their right to enforce an otherwise valid arbitration agreement by waiting too long before filing a motion to compel arbitration. Whether such a waiver has occurred will depend on the length of the delay and the extent to which the party seeking to compel arbitration actively participated in the ongoing litigation.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

Courts may review the jurisdiction of the arbitral tribunal after the proceedings have commenced, unless there is clear and unmistakable evidence that the parties agreed to submit questions of arbitrability to the arbitrators (*First Options of Chicago, Inc v Kaplan*, 514 US 938 (1995)). An agreement to abide by institutional rules granting arbitrators authority to rule on their own jurisdiction, such as the AAA Rules, ICDR Arbitration Rules (the ICDR Rules) and CPR Rules for Administered Arbitration of International Disputes (the CPR Rules), has in many cases been considered sufficient evidence of consent to 'arbitrate arbitrability'.

US courts may preclude parties from raising jurisdictional objections if their conduct in the ongoing arbitration indicates a waiver of their right to challenge the arbitrators' jurisdiction, such as if a party failed to maintain its jurisdictional objection consistently throughout the arbitration proceedings.

Arbitral proceedings**22 Place and language of arbitration**

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

The FAA does not provide a default mechanism for the determination of the seat or language of the arbitration. Absent agreement by the parties, the language of the proceedings generally will be the same as the language of the contract containing the parties' arbitration agreement (subject to the tribunal's overriding discretion) (ICDR Rules, article 18; CPR Rules, rule 9.5).

Many US-based institutions grant the arbitral institution authority to determine the place of arbitration at the outset, which may later be overridden by the tribunal (AAA Rules, rule 11; ICDR Rules, article 17; CPR Rules, rule 9.5).

23 Commencement of arbitration

How are arbitral proceedings initiated?

The FAA is silent regarding the initiation of arbitration proceedings. Institutional rules contain specific provisions for initiating arbitration; for example, article 2 of the ICDR Rules requires the claimant to serve a copy of the notice of arbitration upon the counterparty (in addition to the ICDR administrator) and provides that the notice of arbitration shall contain a copy of the applicable arbitration clause, a description of the claim and the facts supporting it, and the relief or remedy sought, among other things.

24 Hearing

Is a hearing required and what rules apply?

The FAA contains no specific requirements for hearings, other than requiring tribunals to 'provide ... adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator' (*Gold Reserve Inc v Venezuela*, 146 F Supp 3d 112 (DDC 2015)). Tribunals may forego in-person hearings where the 'choice to render a decision based solely on documentary evidence is reasonable, and does not render the proceeding "fundamentally unfair"' (*In re Arbitration between Griffin Indus and Petrojam*, 58 F Supp 2d 212 (SDNY 1999)).

Most institutional rules grant wide leeway with respect to the timing and conduct of oral hearings (AAA Rules, rules 24-25; ICDR Rules, article 25; CPR Rules, rule 12). In general, tribunals must give the parties reasonable notice prior to hearings, and parties and their counsel have the right to attend them.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Tribunals seated in the United States are not bound by the rules of evidence that apply in US litigation (such as the Federal Rules of Evidence),

and are free to make procedural decisions to admit and consider the oral or written testimony of fact witnesses and expert witnesses, as well as documentary evidence (eg, *New Jersey Building Laborers Local 325 v Molfetta Industries*, 365 Fed. App'x 347 (3d Cir 2010)).

Generally speaking, the tribunal and the parties have autonomy to structure the taking of evidence as appropriate for the matter, as guided by the applicable institutional rules. For example, articles 20(6) and 22 of the ICDR Rules provide that '[t]he tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence' while 'tak[ing] into account applicable principles of privilege' such as the attorney-client privilege under US law. The International Bar Association's Rules on the Taking of Evidence in International Arbitration are utilised by many US-seated tribunals as guidance.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Section 7 of the FAA permits arbitrators to issue subpoenas for witness testimony at the hearing, including by third parties, and to compel the witness to bring documents to the hearing. Upon request, the US district court at the seat of the arbitration may compel compliance with arbitral subpoenas, or hold the recalcitrant party in contempt of court.

As to the territorial scope and timing of section 7 subpoenas, courts have held that section 7 does not allow for subpoenas to testify prior to a hearing (or at deposition). Courts have also expressed doubts as to whether section 7 allows subpoenas significantly beyond the vicinity of the arbitration; the scope and reach of such subpoenas must therefore be carefully considered in every case.

28 USC section 1782 permits US district courts to order persons within their territory to provide written or oral testimony, or to produce documents, 'for use in a proceeding in a foreign or international tribunal'. US courts are split as to whether this provision allows a party to seek discovery in aid of international commercial arbitration, and careful attention must be paid to the specific court precedents in the applicable jurisdiction.

27 Confidentiality

Is confidentiality ensured?

The FAA is silent with respect to confidentiality, and US courts do not impose an automatic duty of confidentiality in arbitration. They will, however, endeavour to uphold any specific agreement by the parties (or in the arbitral rules) to make their arbitration confidential. Parties to a confidential arbitration who seek enforcement of an arbitral award in US courts should be aware of the risk that their arbitration award will become public unless they obtain a specific 'sealing order' from the court prior to filing.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Several cases have held that the FAA permits courts to grant interim relief pending arbitration and in aid of an ongoing arbitration (eg, *Braintree Laboratories v Citigroup Global Markets*, 622 F 3d 36 (1st Cir 2010)). In limited circumstances, US courts may also issue anti-suit injunctions prohibiting parties from pursuing foreign lawsuits in breach of an arbitration agreement. Such orders are often provisional, and apply only until a fully-constituted tribunal has the chance to revisit the request for interim relief.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The AAA was the first institution to include the modern day version of the 'emergency arbitrator' in its institutional rules, and that approach has been followed by the ICDR, the CPR and JAMS International

Arbitration Rules (JAMS Rules) (AAA Rules, rule 38; ICDR Rules, article 6; CPR Rules, rule 14; JAMS Rules, article 3).

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Under the rules of US-based institutions, tribunals exercise broad discretion in ordering interim measures deemed to be necessary, such as preliminary injunctions and measures to protect or conserve property (AAA Rules, rule 37; ICDR Rules, article 24; CPR Rules, rule 13; JAMS Rules, article 32). US law recognises the right of arbitrators to issue partial or interim awards prior to the final award. US courts consider such awards to be 'final' and enforceable as long as they 'finally and definitely dispose' of at least one claim in the arbitration (even if other claims remain to be heard) (*Ecopetrol v Offshore Exploration and Production*, 46 F Supp 3d 327 (SDNY 2014)). US courts generally will respect an arbitral tribunal's interim awards, including for security for costs.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Tribunals have 'inherent authority to police the arbitration process and fashion appropriate remedies to effectuate this authority' (eg, *Hamstein Cumberland Music Group v Estate of Williams*, 2014 WL 3227536 (5th Cir 2013)). Some US institutions grant arbitrators express authority to impose sanctions for party misconduct, which may include fines, adverse inferences, withdrawing or revising a prior award and awards of costs and attorney's fees (AAA Rules, rule 58; ICDR Rules, article 20(7); JAMS Rules, article 33)). Other institutional rules are silent on sanctions, but allow arbitrators to award costs and fees in order to compensate a party for misconduct in the arbitration proceedings (CPR Rules, rule 19.2).

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Although the FAA is silent regarding whether a majority or unanimous vote is required when the tribunal consists of more than one arbitrator, US-based institutions provide that awards or other decisions by the tribunal shall be made by a majority of the arbitrators (AAA Rules, rule 46; ICDR Rules, article 29; CPR Rules, rule 15; JAMS Rules, article 34.2)).

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Dissenting opinions are not legally binding and do not impact the award's enforceability (eg, *In re Arbitration Between Associates Transport Line v Slebent Shipping Co*, 2004 WL 2093521 (SDNY 2004)).

34 Form and content requirements

What form and content requirements exist for an award?

The FAA does not expressly prescribe any formal requirements for awards. Unlike many national arbitration statutes, the FAA does not require 'reasoned awards' explaining the basis for the tribunal's decision, and US courts will uphold and enforce unreasoned awards so long as the parties' agreement or applicable institutional rules do not require a reasoned award (eg, *D H Blair & Co v Gottdiener*, 462 F 3d 843, 847 (2d Cir 2006)). Many institutional rules do require

reasoned awards absent contrary agreement by the parties (ICDR Rules, article 30(1); CPR Rules, rule 15.2; JAMS Rules, article 35.2). The AAA Rules, rule 46, on the other hand, disposes of any reasoned award requirement unless requested by the parties in writing prior to the formation of the tribunal.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The FAA does not impose any time limits for the tribunal to render an award. The AAA and ICDR Rules require the tribunal to issue its final award within 30 and 60 days of the date of the closing of the hearing, respectively (AAA Rules, rule 45; ICDR Rules, article 30(1)).

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The limitations period for parties to confirm 'foreign awards' falling under the New York or Panama Conventions is three years. The limitations period for parties to confirm domestic awards is one year (see FAA sections 9, 207 and 302). The limitations period for confirming an award, whether foreign or domestic, begins running on the date that the award 'is made' (that is, the date of the award itself).

FAA section 12 requires that petitions to vacate, modify, or correct an award be filed within three months 'after the award is filed or delivered'. This three-month time limit has been applied to the vacatur of international awards seated in the United States.

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

As discussed in answer 30, the tribunal enjoys broad discretion to issue interim or partial relief.

If the parties reach a settlement during the pendency of the arbitration proceedings, institutional rules permit the arbitration to terminate with the issuance of final and binding consent award. Such consent awards are regularly recognised and enforced by US courts.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

In the event that a party fails to appear in the arbitration, most institutional rules, such as article 26 of the ICDR Rules, permit the tribunal to issue an award, but only after hearing evidence from the party seeking relief and providing the defaulting party with notice and an opportunity to participate. Article 32(3) of the ICDR Rules further allows the tribunal to terminate the proceedings if their continuation 'becomes unnecessary or impossible'.

In some circumstances, proceedings may be terminated or suspended in the event that the parties default on payment of arbitrator fees or costs. When this happens, courts occasionally have permitted the defaulting party who was 'unable to pay for [its] share of arbitration' to pursue its claims in litigation; such accommodation is not afforded, however, where a party has 'refuse[d] to arbitrate by choosing not to pay for arbitration' despite having the resources to do so (*Tillman v Tillman*, 825 F 3d 1069 (9th Cir 2016)).

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

Absent express agreement by the parties, arbitrators have wide discretion with respect to the allocation of costs and fees, including administrative costs and attorneys' fees (AAA Rules, rule 47(c); ICDR Rules, article 34; CPR Rules, rule 19; JAMS Rules, article 37.4). Awards of costs and fees constitute part of the award and are enforceable in US courts. Generally speaking, contractual agreements for any 'fee-shifting'

(including agreements that the prevailing party may recover its attorneys' fees and costs) will be respected.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Institutional rules permit arbitrators to award pre or post-award interest at a rate they deem appropriate (AAA Rules, rule 47(d)(i); ICDR Rules, article 31(4); CPR Rules, rule 10.6; JAMS Rules, article 35.7). US courts generally will confirm and enforce such awards.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Most institutional rules grant tribunals a limited amount of time to correct or interpret minor clerical, typographical or computational errors (ICDR Rules, article 33; CPR Rules, rule 15.6; JAMS Rules, article 38.1). The ICDR and CPR Rules further grant arbitrators a short time period in which to make an 'additional award' on claims presented in the arbitration but not disposed of in the initial award.

FAA section 11 vests district courts with the power to 'modify[] or correct[]' the award where the award contained a material miscalculation or mistake, where the award ruled upon a matter outside of the tribunal's jurisdiction or where the award 'is imperfect in matter of form not affecting the merits of the controversy'. Nonetheless, courts may refuse to do so on the basis that the arbitrators already considered, and declined, such a request (eg, *Daebo Int'l Shipping Co v Americas Bulk Transport (BVI) Ltd*, 2013 WL 2149591 (SDNY 2013)).

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

FAA section 10 sets forth the standard and procedure for setting aside arbitral awards made in the United States. Many US courts have held that the section 10 standards for vacatur will also be applied to international or foreign awards seated in the United States. Under section 10, awards may be vacated:

- (i) where the award was procured by corruption, fraud, or undue means;
- (ii) where there was evident partiality of the arbitrators;
- (iii) where 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; or of any other misbehavior by which the rights of any party have been prejudiced or
- (iv) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Some US courts have interpreted the arbitrators' 'excess of powers' to permit vacatur on the basis that the tribunal acted in 'manifest disregard of the law'. In recent years, this standard has been considerably limited by many circuit courts of appeals, and it is rare for awards to be vacated on this basis.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Arbitral awards themselves normally are not subject to appeal on the merits by courts or by arbitral institutions. Parties to AAA, CPR, or JAMS arbitrations may opt in to those institutions' optional appeal procedures, however.

Update and trends

The recent election of Donald Trump to the presidency has brought the United States' multitude of international trade agreements (FTAs) into the spotlight. Many of these FTAs contain ISDS (investor–state dispute settlement) mechanisms providing for arbitration of disputes between investors and host countries, in addition to the general reduction of trade barriers. One of the central tenets of Trump's campaign was his promise to renegotiate the North American Free Trade Agreement (NAFTA). It remains to be seen to what extent the investor–state dispute mechanisms provided in NAFTA's Chapter 11, or in other US multilateral treaties, will be the focus of any renegotiations.

The availability of 'class arbitration' in consumer disputes remains a topic of ongoing debate. The rules of some arbitral institutions, such as the AAA, provide mechanisms for class arbitration. However, consumer contracts frequently contain arbitration clauses with 'class arbitration waivers' pursuant to which the consumer waives his or her right to class arbitration. The US Supreme Court has confirmed these waivers' enforceability in a series of decisions beginning in 2010,

when it held that imposing class arbitration on parties who had not expressly agreed to it amounted to a violation of the FAA (*Stolt-Nielsen v AnimalFeeds Int'l Corp*, 559 US 662 (2010)). The Court later confirmed the enforceability of class arbitration waivers in consumer contracts, even when the cost of pursuing such claims on an individual basis would be prohibitively expensive (*AT&T Mobility LLC v Concepcion*, 131 S Ct 1740 (2012); *American Express v Italian Colors Restaurant*, 133 S Ct 2304 (2013)). Most recently, in late 2015, the US Supreme Court overruled a decision by the California Supreme Court refusing to enforce class arbitration waivers on the basis of state contract law, finding that the California rule was pre-empted by the FAA (*DirectTV, Inc v Imburgia*, 136 S Ct 463 (2015)). These clauses continue to meet some resistance, however, with one lower court recently refusing to enforce the arbitration clause in Uber's online user agreement on the basis that consumers were not adequately notified of it (*Meyer v Kalanick*, 2016 WL 4073012 (SDNY 2016) (currently on appeal to the second circuit)).

On the other hand, court orders with respect to confirmation, vacatur or recognition and enforcement of awards are subject to the normal appeal procedures of US litigation. Parties wishing to challenge a final federal district court order can appeal to the federal circuit court of appeals in which the district court sits. In general, the circuit courts of appeals have the final word on the matters before them; in rare cases, the US Supreme Court may grant a request to review a circuit court decision.

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

US courts generally uphold arbitration awards, in line with the United States' strong public policy in favour of arbitration. Awards made by US-seated tribunals may be recognised and enforced (ie, 'confirmed') by any court agreed upon by the parties or, in the absence of such agreement, by a court sitting in the district in which the arbitration agreement was made, provided no ground for vacatur or modification exists under sections 10 or 11 of the FAA.

For foreign-seated arbitrations, the FAA incorporates the grounds for denial of recognition and enforcement of awards set forth in the New York and Panama Conventions (FAA sections 207 and 301). In limited circumstances, the US may also permit denial of recognition or enforcement of a foreign award on the basis of certain procedural defences, such as the court's lack of personal jurisdiction over the award debtor, or the doctrine of forum non conveniens.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

US courts usually do not enforce foreign awards set aside by the courts at the place of arbitration. However, several courts have held that they may enforce an award despite vacatur by the courts of the seat in 'extraordinary circumstances'. For instance, one recent decision upheld the enforcement of an award that had been vacated in Mexico on the basis of newly enacted legislation that had been applied retroactively by the Mexican courts, stating that to hold otherwise would be 'repugnant to fundamental notions of what is decent and just in this country' (*Commisa v Pemex*, 832 F 3d 92 (2d Cir 2016)).

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

The enforceability of awards issued by emergency arbitrators remains unresolved. Although US courts have enforced emergency awards on a number of occasions, some courts have refused to enforce emergency awards on the basis that they are not 'final' and therefore not reviewable

under the FAA (compare *Yahoo! Inc v Microsoft Corp*, 983 F Supp 2d 310, 319 (SDNY 2013) (enforcing emergency award) with *Chinmax Medical Sys, Inc v Alere San Diego, Inc*, 2011 WL 2135350 (SD Cal 2011) (refusing to enforce emergency award)).

47 Cost of enforcement

What costs are incurred in enforcing awards?

In general, each party bears its own costs and fees in connection with post-award litigation pursuant to the 'American Rule'. US court fees are quite minimal; the bulk of a party's costs for enforcement will be attorneys' fees, which generally will be borne by the enforcing party absent agreement to the contrary. As noted above (see question 39), however, the position may be different if the parties contractually agree to fee-shifting in post-award proceedings, or if a party opposes confirmation or enforcement on a ground deemed to be frivolous (in which case fees may be awarded as a sanction).

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

The scope of mandatory disclosure or 'discovery' is an important difference between judicial and arbitral proceedings in the United States. In US litigation, the Federal Rules of Civil Procedure and corresponding state practice rules allow parties to obtain wide-ranging discovery of documents or information that may be relevant to any claim or defence in the litigation. Disclosure in international arbitration generally is much less burdensome than discovery in US litigation, and it is relatively unusual for an international tribunal to permit multiple depositions or the type of broad-ranging document discovery contemplated by the Federal Rules.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Do best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Attorneys practising in the United States, including in international arbitrations, are bound by the rules of professional conduct of the state bars to which they are admitted. ABA Model rule 5.5, which has been implemented in many US jurisdictions (including New York), permits lawyers admitted in one US state to represent clients in arbitration proceedings seated in another US state; however, it is silent on the ability of lawyers admitted abroad to represent clients in US-seated arbitrations.

Counsel seeking to represent a party in a US-seated arbitration should consult with a local lawyer in the relevant state jurisdiction.

50 Third-party funding**Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?**

Third-party litigation funding has become increasingly common in the United States, including in arbitration. Parties exploring third-party funding options should be attuned to relevant state laws, such as laws directly regulating funders, the common law doctrines of maintenance, champerty, and barratry, and attorney ethics rules.

51 Regulation of activities**What particularities exist in your jurisdiction that a foreign practitioner should be aware of?**

Foreign parties, non-US counsel or arbitrators involved in an international arbitration seated in the United States should consult with local counsel well in advance of the arbitration to ensure compliance with federal visa requirements.

* *Former associate Audrey Feldman also assisted with the preparation of this chapter.*



Skadden, Arps, Slate, Meagher & Flom LLP
and Affiliates

Timothy G Nelson
Jennifer L Permesly

timothy.g.nelson@skadden.com
jennifer.permesly@skadden.com

4 Times Square
New York, New York 10003
United States

Tel: +1 212 735 3000
Fax: +1 212 735 2000
www.skadden.com

Venezuela

Fernando Peláez-Pier and José Gregorio Torrealba

Hoet Pelaez Castillo & Duque

Laws and institutions

1 Multilateral conventions relating to arbitration

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Venezuela is a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The New York Convention was ratified by the Venezuelan Congress on 8 February 1995 and entered into force on 9 May 1995 (the New York Convention). On the basis of reciprocity, and in accordance with article 1 of the Convention, Venezuela declared that the Convention would be applicable only for the recognition and enforcement of arbitral awards issued in the territory of another contracting state, and that the Convention would be applicable only to differences arising out of legal relationships, whether contractual or not, of a commercial nature under Venezuelan law.

Venezuela is a contracting state to the Inter-American Convention on International Commercial Arbitration (the Panama Convention), and the Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 15 January 1985 (the Montevideo Convention). On 24 February 2012, the government denounced the Convention on the Settlement of Investment Disputes between states and nationals of other states (the ICSID Convention). The denunciation was effective on 25 July 2012.

2 Bilateral investment treaties

Do bilateral investment treaties exist with other countries?

Venezuela has signed 30 bilateral investment treaties (BITs) and 27 are currently in force. At present, Venezuela has BITs in force with the following countries: Argentina, Barbados, Belarus, Belgium and Luxembourg, Canada, Chile, Costa Rica, Cuba, the Czech Republic, Denmark, Ecuador, France, Germany, Indonesia, Iran, Lithuania, Paraguay, Peru, Portugal, Russia, Spain, Sweden, Switzerland, the United Kingdom, Uruguay and Vietnam.

On 1 November 2008, the denunciation by Venezuela of the BIT with the Netherlands became effective. As a result of this denunciation, the investments made before 1 October 2008 are protected by the agreement for 15 years. Therefore, investors will be protected until 31 October 2023, while new investments made after 1 November 2008 will not be protected.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Arbitration has been recognised by the constitution as a valid mechanism for dispute settlement. Additionally, Venezuela has two main regulations on arbitration: The Civil Procedural Code 1986 (the CPC), which is currently subject to a reform by the Venezuelan parliament

were the arbitral proceeding included in the CPC is excluded, and the Commercial Arbitration Act 1998 (the CAA). The arbitration proceedings provided for in the CPC are characterised by a high level of intervention of local courts on the arbitral proceedings, while the CAA is based on the UNCITRAL Model Law. It is possible to find other references to arbitration in other pieces of legislation. According to the set of rules that regulates the oil and gas industries, arbitration is allowed in article 34 of the Hydrocarbons Organic Act (2006) and article 24 of the Gaseous Hydrocarbons Organic Act (1999), both of them related to joint venture agreements and possible disputes between the parties. Additionally, the Act for the Development of Petrochemical Activities (2009) also makes reference to arbitration as a dispute settlement mechanism for joint venture agreements incorporated for the exploitation of petrochemical activities. Against this positive trend, the regulation of the Public Procurement Act (2009) provides in article 133 that any doubts, disputes and claims that may arise out of a public contract, which are not settled by agreement of the parties, will be decided by the relevant courts in accordance with its laws and without any possibilities of foreign claims.

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

The CAA is based on the provisions of the UNCITRAL Model Law, with the following important differences:

- there is no distinction between national and international arbitration;
- the CAA does not include the possibility for the parties to apply for interim measures of protection before an ordinary tribunal as this situation has been favourably resolved by the Constitutional Chamber of the Supreme Tribunal of Justice;
- challenges to the arbitrators can only be based on the grounds provided for in the CPC and the proceedings for the challenge are also different;
- the CAA does not make a distinction between interim measures of protection and preliminary orders and there is no specific proceeding for enforcing interim measures ordered by the arbitral tribunal; and
- the CAA establishes that the time frame for the parties to challenge the award is five working days.

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

There are mandatory provisions of the CAA with which parties and arbitrators are obliged to comply. For instance, article 27 of the CAA provides that, in the arbitral proceedings, there is no place for incidences, while article 29 establishes that for the validity of the arbitral award, it would only be required for it to be signed by a majority of arbitrators as long as there is a statement explaining the reasons for the absence of one or more signatures and the dissenting opinions. Additionally, article 31 establishes that the arbitral award should be notified to the parties through a copy signed by the arbitrators. The

provision, contained in article 32, regarding the correction and completion of the arbitral award, as well as article 33, explain the grounds for which the arbitral tribunal may seize, and they are mandatory.

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

There is no provision in the CAA establishing any kind of guidance for the arbitrators to determine the law applicable to the merits of the dispute. According to the International Private Law Act and the CPC, parties are allowed to choose the law applicable to the dispute. If there is no agreement between the parties, the arbitrators are free to determine the applicable law.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

The most relevant arbitral institutions in Venezuela are:

Arbitration Centre of the Caracas Chamber (CACC)
Calle Andrés Eloy Blanco
Edif Cámara de Comercio
Piso 5, Los Caobos
Caracas 1050, Venezuela
Tel: +58 212 571 88 31/91 13
Fax: +58 212 578 24 56
www.arbitrajeccc.org

Business Centre of Conciliation and Arbitration (CEDCA)
2da Avenida de Campo Alegre
Torre Credival, Piso 6
Caracas, Venezuela
Tel: +58 212 263 08 33
www.cedca.org.ve

Both arbitral institutions modified their Rules in 2013 in order to modernise their proceedings. For CACC, the major changes had to do with the inclusion of the emergency arbitrator for ordering interim measures before the constitution of the arbitral tribunal, a feature already addressed in the CEDCA rules, which were modified with regards to the enforcement of the interim measures, multiparty arbitration and consolidation of claims.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

The types of disputes that are not arbitrable under arbitration law are outlined in article 3 of the CAA, which provides that any kind of dispute suitable to be settled by agreement of the parties may be submitted to arbitration. The only exceptions are those disputes that:

- are contrary to public policy rules or are over criminal matters, with the exception of quantum claims, unless already determined in a final judgment;
- are matters concerning the powers or functions of the state or public law persons and entities;
- are related to the status or legal capacity of individuals;
- deal with issues related to assets or rights of legality concerning disabled individuals without prior court authorisations; and
- have already been resolved by a final judgment, except for enforcement proceedings related to quantum determination, insofar as they only concern the parties to the proceedings and issues that are not decided in the final judgment.

IP disputes are arbitrable, with the exception of those matters reserved for the state authorities regarding the registration of IP rights. Regarding antitrust and competition law, the determination of an infringement to the Venezuelan antitrust and competition legislation has to be decided by the Competition Authority. However, if those infringements have caused damages to a third party, the claim for

damages could be submitted to arbitration. Securities transactions and intracompany disputes are also arbitrable under Venezuelan law.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

The CAA defines an arbitration agreement as a reciprocal statement of will, whereby the parties submit to arbitration all or any of the controversies that have arisen or that may arise between them in respect of a legal relationship, whether contractual or not.

The arbitration agreement can be contained in a clause that is part of a larger document and can also arise out of a separate arbitration agreement. Nonetheless, the arbitration agreement must be evidenced in writing in any document or set of documents that demonstrates the express consent of the parties to resort to arbitration. The reference made in a contract to a document that contains an arbitration clause will be considered as an arbitration agreement if the agreement was made in writing, and the reference entails that the clause is part of the contract.

When one of the parties is a state-owned company or a subsidiary, article 4 of the CAA requires the approval of the arbitration agreement by the corporate government body and the authorisation in writing by the ministry to which the state-owned company is attached to. In these cases, the arbitration agreements must specify the kind of arbitration and the number of arbitrators, which cannot be fewer than three.

Additionally, the Attorney General's Office Act 2008 (AGOA) establishes that any public officer that enters into an arbitration agreement directly related with the rights, assets and interests of the republic, must request a previous opinion from the attorney general's office.

Further, any contract to be executed by the republic establishing arbitration agreements must be submitted to the attorney general's office in order to obtain a previous opinion on the arbitration agreement. To this end, article 13 of the AGOA provides that the contract must be sent to the attorney general's office jointly, with the corresponding file and the opinion of the in-house counsel of the state entity.

The lack of formal requirements in a private contract could be cured if the party who could raise an objection does not object, and expressly declares having agreed to the arbitration clause at the relevant time. By the same token, if both parties agree to resort to arbitration post-dispute, they may do so. In the case of arbitration agreements with a state-owned company or its subsidiary, the lack of fulfilment of the formalities established in article 4 of the CAA would render the arbitration agreement null and void.

The lack of compliance with the requirements established in the AGOA will give rise to personal liability of the public officer, but would not affect the validity of the arbitration agreement.

Arbitration agreements contained in general terms and conditions are valid as long as there is clear evidence of the consent of both parties.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

The arbitration agreement will be enforceable unless it is declared null, void, inoperative or incapable of being performed.

As a consequence of the separability of the arbitration agreement, provided for in article 7 of the CAA, the avoidance, rescission or termination of the main contract may not necessarily affect the existence and validity of the arbitration agreement.

In the case of insolvency, death and legal incapacity, the arbitration agreement could survive as it could be transferred to the person that acquires the right and undertakes the obligations derived from the document that contains the arbitration agreement.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

In general terms, there is no possibility for third parties that are not a party to the arbitration agreement to be bound by it. However, where there has been a legal transfer of rights, it is possible for the party that is the new holder of the transferred right to be considered as a party to the

arbitration agreement; in particular, this would be the criterion applicable to an assignment, a succession and, in some cases, insolvency. However, this will not be the case with agents, who cannot be bound by an arbitration agreement to which they did not consent personally, but on behalf of their principal.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

No, there are no provisions in the CAA in respect of third-party participation in arbitration. The only parties entitled to participate in the arbitration proceedings are those that have mutually consented to do so.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the ‘group of companies’ doctrine?

The ‘group of companies’ doctrine is not applicable in Venezuela.

Courts and arbitral tribunals will not extend an arbitration agreement to a non-signatory parent or subsidiary company of a signatory company on the basis of a participation of the parent or subsidiary in the conclusion, performance or termination of the contract in dispute. The position would be different if there is an express acceptance of the parent or subsidiary company of the arbitration clause, which must be expressed in writing and unequivocally to demonstrate the intention to submit the dispute to arbitration.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

Since there is no special provision with regard to multiparty arbitration agreements, the requirements for the validity would be the same as those applicable to ordinary arbitration agreements. However, the rules of arbitration of CEDCA provide in article 23 the possibility of multiparty proceedings and the mechanism for the appointment of arbitrators. Additionally, article 40 of the Rules of Arbitration of the CACC also provides the method of appointing arbitrators in multiparty arbitration cases.

Constitution of arbitral tribunal

15 Eligibility of arbitrators

Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

There are no restrictions as to who may act as an arbitrator. However, because of the laws regulating the judiciary, active judges may not act as arbitrators since they are not allowed to engage in activities other than teaching while serving in office.

According to the Rules of Arbitration of the CACC and CEDCA, although they have adopted their corresponding lists of arbitrators, parties are allowed to choose arbitrators that are not included in those lists.

In principle, a requirement based on nationality should not raise major issues as far as it is an important element of the dispute. For instance, if the dispute is with a state, it would seem reasonable to require the arbitrators not to be a citizen of such state. Restrictions based on religion or gender would be scrutinised under the same criterion applicable to restrictions based on nationality. If the goal of the restriction is in favour of the independence and impartiality of the arbitrators, the requirements would be justified.

16 Default appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

If there is no agreement of the parties with regard to appointment of arbitrators, the CAA provides for each party to appoint one arbitrator, and these two will select the third that will be the chairman of the arbitral tribunal. This procedure is followed by the Rules of Arbitration of the CACC.

In CEDCA, the method for the selection of arbitrators consists in a list of possible arbitrators prepared by each party in order of preference. The parties have the right to reduce up to 30 per cent of the candidates included in the list of the other without being required to give any particular reason. The selection of the arbitrators is made under the following rules:

- in those cases where there are coinciding prospective arbitrators that exceed more than three, the parties will choose the members of the tribunal by mutual agreement;
- if three candidates are proposed coincidentally, they will compose the arbitral tribunal;
- when there are only two coinciding candidates, those candidates will be appointed and will appoint the third arbitrator;
- if only one of the candidates is coincident, he or she will be appointed and the parties will choose the other two arbitrators from the list of the other; and
- in those cases where there are no coincidences, each of the parties will appoint one of the candidates included in the list of the other party and the appointed arbitrators will designate the third member of the tribunal.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Arbitrators can be challenged and can disqualify themselves pursuant to the general grounds provided for judges in the CPC. These grounds include family relationships, close friendships or evident personal confrontation, bias, and anticipation of opinion about the issues in dispute.

In the ad hoc proceedings provided for in the CAA, arbitrators appointed by agreement of the parties may not be subsequently challenged for reasons that were known by the challenging party at the time of the designation. Arbitrators appointed by judges or third parties may be challenged within five days after the date of the constitution of the arbitral tribunal.

The CAA provides that in cases of illness, death, resignation or disqualification of an arbitrator, the designation of the new arbitrator will be made following the same rules applied for the original appointment.

As per the CACC rules, arbitrators can be challenged for lack of impartiality and on any further grounds. For their part, the CEDCA rules only provide that arbitrators can be challenged on the basis of lack of impartiality, and party-appointed arbitrators cannot be challenged for reasons that were known by the challenging party at the time of the appointment.

Both the CACC and CEDCA rules require the challenge to be made in writing, and to be motivated and presented before the secretariat. It can be presented within five days (CEDCA arbitrations) and 10 days (CACC arbitrations) after the notification of the appointment or after the challenging party becomes aware of the facts that justify the challenge. The centre’s executive committee will decide whether or not the challenge is founded.

The IBA Guidelines on Conflicts of Interest in International Arbitration have not been used frequently in domestic arbitrations, but parties may agree to apply them.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses of arbitrators.

The relationship between parties and arbitrators in ad hoc arbitral proceedings is regulated by the CAA. It requires party-appointed arbitrators to maintain neutrality, impartiality and confidentiality unless the parties agree otherwise. Additionally, arbitrators have the obligation to attend the hearings, and more than one unjustified absence is sufficient grounds to have an arbitrator disqualified. For their part, the parties have an obligation to pay arbitrators the agreed fees and expenses.

The contractual relationship between the parties and the arbitrators in institutional arbitrations is regulated by the centre's rules. The CACC rules provide guidance as to the maximum amount of fees that arbitrators can charge. In addition, the rules impose obligations on arbitrators related to ethics, confidentiality and impartiality. Failure to comply with the rules could mean the exclusion of the arbitrator from the centre's list. Similarly, the CEDCA rules also establish the maximum fees for arbitrators and contain provisions on ethics that must be observed by arbitrators. Upon notification of appointment, arbitrators must subscribe a declaration of impartiality and independence and must also disclose in writing any relevant information that could affect their impartiality or independence.

19 Immunity of arbitrators from liability

To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

As a general rule, arbitrators are not immune from liability, particularly in ad hoc arbitrations. The applicable regime would be that of liability and could be influenced by the one applicable to judges on the merits of the case. Under the mentioned regime, arbitrators are liable both for negligence and for intentional breach of duty.

Jurisdiction and competence of arbitral tribunal

20 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

If court proceedings are initiated despite an existing arbitration agreement, the interested party may challenge the jurisdiction of the court pursuant to the existence of the arbitration agreement. Once the claim has been filed with the court and service of the process has been properly effected on the defendant, a time period of 20 days will start for the presentation of defence submissions. Within this period, the defendant can challenge the jurisdiction of the court and does not have to present a plea on the merits until a decision on jurisdiction is rendered by the court. The court should render a decision on the challenge within the next five days following the elapsing of the 20 days mentioned before. In practice, the courts may take months to render a decision on this matter.

21 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The CAA has incorporated the Kompetenz-Kompetenz principle, according to which the arbitral tribunal can decide over its own jurisdiction. In CAA ad hoc arbitral proceedings, the time limit for jurisdictional objections is five days after the first hearing. Once this time period has elapsed the parties are precluded from raising jurisdictional objections.

The CACC rules also allow the arbitral tribunal to decide over its own jurisdiction and also on the existence or validity of the arbitration agreement. The issue of the lack of jurisdiction of the arbitral tribunal can be raised at any time before the constitution of the arbitral tribunal. Once the arbitral tribunal has been constituted, parties are precluded from raising jurisdictional objections.

The CEDCA rules do not contain any special provisions on disputes over jurisdiction, so that the rules of the CAA discussed above would apply, unless the parties had agreed otherwise.

Arbitral proceedings

22 Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

The parties can freely choose the place and language of the arbitration. Should they fail to do so, the CAC ad hoc arbitral tribunal would consider the particular circumstances of the case and decide on the language and venue. The same procedure is followed in the CEDCA rules, which also require the arbitral tribunal to pay special attention to the particularities of the matter, such as the language of the contract.

As for the CACC rules, the default venue of the arbitration is the office of the CACC in Caracas. With regard to the language, this would be determined by the arbitral tribunal if there is no prior agreement of the parties.

23 Commencement of arbitration

How are arbitral proceedings initiated?

In CAA ad hoc proceedings, as soon as the appointed arbitrators have accepted their designation, the arbitral tribunal will be constituted and notifications delivered to the parties. The arbitral tribunal should issue a notice for arbitration and should also schedule the first hearing. The CAC is silent as to any formal requirements of this notice.

Nonetheless, during the first hearing, the arbitral tribunal must read to the parties the document that contains the arbitration agreement, mention the disputes submitted to them and detail the parties' requests and the value of the claims. The parties may subsequently present their cases together with any supporting documents.

The CACC rules provide that the arbitral proceedings are initiated by a written request for arbitration delivered by the requesting party to the centre's secretariat. The same is provided for in the Rules of Arbitration of the CEDCA.

24 Hearing

Is a hearing required and what rules apply?

The CAA requires a hearing for ad hoc arbitration proceedings, as do the CACC and CEDCA rules. The arbitral tribunal is obliged to send a written notification to the parties or their representatives with the date, time and place of the hearing. Generally, in the ad hoc arbitration proceedings provided for in the CAA, the first hearing will be used for the organisation of the arbitration and, according to article 24 of the CAA, the document containing the arbitration agreement will be read and the positions and claims of the parties will be expressed jointly with an estimation of the quantum. During the first hearing, the parties may produce any relevant documentation or refer to them and other evidence to be produced during the proceedings.

25 Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Generally speaking, arbitral tribunals are bound to establish the facts of the case in line with the evidence presented to them by the parties. All types of evidence will be allowed unless contrary to public policy rules.

Witness evidence, experts (both party and tribunal-appointed), documents, inspections by the arbitral tribunal and party evidence (including the testimonies of party officers) are all commonplace. There is a 'control of evidence' principle in Venezuela, according to which a party has the right to control the evidence produced by the other. For example, a party has the right to cross-examine a witness brought by the other side.

The IBA Rules on the Taking of Evidence in International Commercial Arbitration are widely known in Venezuela. Arbitral tribunals are, nonetheless, not obliged to apply them or seek guidance from

them, and therefore are more likely to resort to them when the parties have agreed on their application.

26 Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

Broadly speaking, there is minimal intervention by local courts in arbitral proceedings. Nonetheless, local courts can provide assistance to arbitral tribunals with certain procedural matters. For instance, the arbitral tribunal or any of the parties (with the approval of the tribunal) can request assistance from local courts for the furnishing of evidence and the enforcement of precautionary measures.

Additionally, in CAA ad hoc proceedings, first instance courts might intervene upon the parties' request when they cannot agree on the appointment of an arbitrator. Recently, a judgment rendered by the Constitutional Chamber of the Supreme Tribunal established the possibility of resorting to local courts seeking interim relief before the constitution of the arbitral tribunal and, even afterwards, without being deemed as a waiver to the arbitration agreement (*Astivenca*, 3 November 2010).

27 Confidentiality

Is confidentiality ensured?

The CAA expressly imposes on the arbitrators the duty to keep the confidentiality of the dispute, the arbitral proceedings (including the award), any materials submitted by the parties, any information disclosed during the proceedings and generally anything related to the proceedings. This confidentiality right may, nonetheless, be waived by the parties.

Similarly, the CACC and CEDCA rules ensure confidentiality on the same terms provided in the CAA. Arbitrators nominated according to the CACC and CEDCA rules must sign confidentiality agreements before they can be appointed.

Interim measures and sanctioning powers

28 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Since the judgment rendered in *Astivenca* on 3 November 2010, it is possible to request interim measures of protection from local courts before the commencement of the arbitration and until the constitution of the arbitral tribunal, which is empowered to order interim measures of protection by article 26 of the CAA. Additionally, arbitral tribunals could request the assistance of local courts if need be, although in practice this is more common at the enforcement stage. Finally, there is no exclusivity for the local courts or for the arbitral tribunal on the ability to grant interim measures.

29 Interim measures by an emergency arbitrator

Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

The CAA is silent on the matter, but the emergency arbitrator is provided for in the CEDCA Rules of Conciliation and Arbitration. In the case of *Astivenca*, the Constitutional Chamber of the Supreme Tribunal of Justice backed the validity of the emergency arbitrator.

30 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

In CAA ad hoc proceedings, the arbitral tribunal can order any kind of interim measures that are necessary, depending on the controversy and the nature of the claim. The same power is given to CACC and CEDCA arbitral tribunals.

As a consequence, the above arbitral tribunals may order any kind of interim measures. These can be ordinary or special remedies, and

include attachments, seizures, embargoes and freezing orders, among others. Security for costs can also be ordered by the arbitral tribunal at its discretion. The arbitral tribunal or any of the parties (with the approval of the arbitral tribunal) may request the assistance of local courts for the enforcement of interim measures.

31 Sanctioning powers of the arbitral tribunal

Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

The CAA does not contain any express provision on the sanctioning powers of the arbitral tribunal. The arbitral institutions have issued some rules empowering the tribunal to cope with guerrilla tactics. For instance, the CEDCA Code of Ethics provides in Canon I that 'an arbitrator must defend the integrity and justice of the arbitral proceedings'. Letter G of Canon I establishes that 'an arbitrator must make any reasonable effort to avoid dilatory tactics, harassment of the parties by other participants or the abuse or interruption of the arbitral proceedings'. Additionally, Canon IV, letter C, provides that 'an arbitrator must be patient with the parties, their counsel and witnesses and must encourage similar conduct from all the participants in the arbitral proceedings'. However, there are no provisions regarding the possibilities for the arbitral tribunal to impose sanctions on counsel.

Awards

32 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

In CAC ad hoc proceedings, unanimous decisions are not required. When the tribunal is composed of more than one arbitrator, it is sufficient that the decision is made by a majority. The CACC and CEDCA rules include a similar provision. These rules also provide that where a majority decision cannot be reached, the vote of the chairman of the tribunal will prevail.

33 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

There is no particular provision with regard to dissenting opinions. Dissenting opinions are usually attached to the arbitral award and are considered to be part of it.

34 Form and content requirements

What form and content requirements exist for an award?

The CAA, CACC and CEDCA rules require awards to be made in writing and also to be signed by the arbitrator or arbitrators that form the arbitral tribunal. In arbitration proceedings with more than one arbitrator, the signature of the majority of the arbitrators will suffice.

Unless the parties have otherwise agreed, awards must set out reasons and must also provide the date of issue and place of the arbitration. The award will be deemed to have been issued at the seat of arbitration.

35 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

The CAA rules require an award to be made six months after an arbitration tribunal has been constituted and the CACC establishes the same time limit, but starting from the signing of the terms of reference. The rules of arbitration of the CEDCA provide that the arbitration proceedings should not last longer than eight months from the filing of the application for arbitration. The time limit can be extended by agreement of

the parties, by the arbitral tribunal in CEDCA arbitrations or by the executive direction in the case of CACC arbitrations.

36 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

The CAA, the CACC and the CEDCA rules do not provide a practical difference between the date of the award and the date of the delivery of the award. This is because all of them refer to the date of notification of the award as the decisive date. As per the CAA, a challenge of the award may not be filed before the date of notification.

As for the CACC rules, the parties can request clarification, correction and complementing of the award from the date of notification. Similarly, parties to a CEDCA arbitration, from the date of notification of the award, can request the correction or interpretation of the award or an additional award (if the original award omitted an issue).

37 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

All types of awards and relief are available unless contrary to public policy rules. There are no special provisions in the CAA and the CACC and CEDCA rules on the types of awards and relief that an arbitral tribunal may grant.

38 Termination of proceedings

By what other means than an award can proceedings be terminated?

Arbitral proceedings can be terminated by an award in default, settlement agreement and discontinuance by the parties. The parties are free to end the arbitral proceedings at any stage and can file a written petition before the arbitral tribunal for the proceedings to be terminated.

In addition, the CAA provides that, if the parties fail to pay the arbitrators' fees, the arbitral tribunal can suspend and even terminate the proceedings. Should this happen, the parties can resort to the local courts or reactivate the arbitral proceedings if the fees are paid. Similar provisions are included in the rules of CACC and CEDCA.

39 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The CAA, CACC and CEDCA rules provide that, unless otherwise agreed by the parties, the arbitration costs will be fixed by the arbitral tribunal in the award. The arbitral award should state the proportion in which the costs will be covered by the parties. All arbitration-related costs are, in principle, recoverable and these include arbitrators' fees, administrative fees and attorneys' fees. In court proceedings a maximum of 30 per cent of the value of the claim can be recovered as costs. In practice, this procedural rule may influence arbitrators.

40 Interest

May interest be awarded for principal claims and for costs and at what rate?

Interest is normally awarded for principal claims, but can also be awarded for costs. The CAA, CACC and CEDCA rules contain no special provision in this regard.

Proceedings subsequent to issuance of award

41 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

Awards can be corrected by the arbitral tribunal on its own and upon a party's request within 15 days for CAA ad hoc proceedings and CACC arbitrations or 10 days for CEDCA arbitrations from the date of notification of the award.

42 Challenge of awards

How and on what grounds can awards be challenged and set aside?

The only remedy available against awards in the CAA is the appeal for annulment, which must be filed in writing before a domestic court of appeal at the place where the award was made. Pursuant to the CAA, the appeal for nullity must be filed within five working days of the date of notice of the award or any further activities by the arbitral tribunal to correct, clarify or supplement the award. The filing of an appeal for nullity does not prevent or suspend the enforcement of the award. An arbitral award can be declared null and void when:

- the party against whom it is invoked proves that one of the parties was affected by an inability at the time of entering into the arbitration agreement;
- the party against whom it is invoked was not given proper notice of the appointment of an arbitrator or the arbitration proceedings being initiated, or for any reason was not able to assert its rights;
- the constitution of the arbitral tribunal or the arbitral proceedings did not conform to the CAA;
- the arbitral award deals with substantive issues not contained in the arbitration agreement or exceeds the agreement itself;
- the party against whom the arbitral award is invoked proves that the award is not binding on the parties or has been previously annulled or suspended according to the terms agreed by the parties for the arbitral proceedings; or
- the court before which the nullity of the award is requested proves that, as a matter of law, the object of the dispute is not capable of being resolved by arbitration or that its subject matter is contrary to public policy rules.

43 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

The only way to challenge an arbitral award is by the annulment action provided for in the CAA. A recent judgment of the Constitutional Chamber of the Supreme Tribunal of Justice, given in the case of *Van Raalte de Venezuela, CA* on 30 November 2011, clearly revoked the criterion applied by the Civil Cassation Chamber, which allowed the use of cassation remedies against judgments of the superior courts in charge of the annulment of arbitral awards. However, in the same judgment, the Constitutional Chamber admitted the possibility of challenging the judgment of the superior courts through an application for constitutional review or by the use of constitutional injunctions or *amparos* (an extraordinary action for the protection of constitutional rights).

44 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

As ordered in the CAA, awards must be recognised and enforced by Venezuelan courts as final and binding, regardless of the country where they were made. Thus, upon the filing of a written petition before a first instance court, the award will be enforced without the need to follow the exequatur procedure established in the CPC for foreign decisions. This petition should be accompanied by a certified copy of the award translated into Spanish if necessary. According to the CAA, recognition and enforcement of an arbitral award, whether domestic or foreign, can only be denied when:

- the party against whom the award is enforced demonstrates that one of the parties was affected by some incapacity at the moment the arbitration agreement was entered into;
- the party against whom the award is enforced was not properly notified of the designation of an arbitrator or any act of the arbitrator or the right to due process was violated;
- the appointment of the arbitral tribunal or the proceedings themselves violated the laws of the country where the proceedings were conducted;

- the award addresses an issue that was not within the scope of the arbitration agreement or includes a decision exceeding such agreement;
- the party against whom the award is enforced demonstrates that the award is not binding or has been declared void by a competent authority according to the agreement of the parties;
- the court before which the award is presented to be enforced demonstrates that the subject matter of the dispute is not arbitrable or that it is against public policy rules; or
- the arbitration agreement is not valid according to the law chosen by the parties.

45 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Article 48 of the Law for Commercial Arbitration expressly states that foreign awards are recognised as binding by ordinary courts. Once a written request is filed before the court, it is possible for the court to enforce the award without an exequatur, pursuant to the stipulations on the compulsory enforcement of decisions established in the Code of Civil Procedure. Also, the party that brings the enforcement of a foreign award via domestic courts shall present a copy of the award that must be certified by the arbitral tribunal with the corresponding translation into Spanish, if necessary.

46 Enforcement of orders by emergency arbitrators

Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Yes. Article 28 of the CAA establishes that either the tribunal or the parties may request the assistance of the national courts in order to enforce interim measures in general. Emergency arbitrators are considered an arbitral tribunal and the local courts have enforced their orders.

47 Cost of enforcement

What costs are incurred in enforcing awards?

Costs of enforcing awards mostly comprise attorneys' fees, court costs and disbursements. Costs may vary depending on the time that it takes to fully enforce the award.

Other

48 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

The procedural rules contained in the CPC can exert influence on arbitrators and particularly those who are lawyers. Written witness

statements are used on a regular basis depending on the complexity of the case. The default way to obtain a witness statement is by bringing the witness before the arbitrators and giving the other party the right to cross-examine. US-style discovery is uncommon.

49 Professional or ethical rules applicable to counsel

Are specific professional or ethical rules applicable to counsel in international arbitration in your country? Does best practice in your country reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

Counsel are subject to the Lawyers Act and the Code of Ethics for the Venezuelan Federation of Bar Associations, which regulate the ethical behaviour of any counsel registered in a local bar association. Although the Code of Ethics does not address international arbitration in particular, the practice does reflect the IBA Guidelines on Party Representation in International Arbitration.

50 Third-party funding

Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

There is no regulatory restriction to third-party funding. The legal opinion on the matter establishes that, in order to prevent any possible conflict of interests before the arbitrator, the beneficiary party must disclose relevant information on the matter. In practice this is not required.

51 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Foreign practitioners may require a visa to enter the country. It would be advisable for them to check with the Venezuelan consulate of the place where they will be before coming to Venezuela. This is not just for the possible visa requirement but also to check whether they can work and earn money in this country. Only attorneys licensed to practise law in Venezuela can act as lawyers and provide legal advice. This is important to bear in mind, although arbitrators are not always lawyers. Foreign practitioners engaging in economic activities within the territory of Venezuela will be subject to the payment of taxes, especially income tax, unless the practitioner is a national of a state that has signed a double taxation treaty with Venezuela, and pays income taxes in that state. VAT is 9 per cent, and foreign nationals will also have to pay this tax.

Currently, there is an exchange control regime in Venezuela, according to which all the activities of currency exchange are controlled by the state. According to Venezuelan ethical rules for the practice of law, lawyers cannot engage in advertising activities for their legal services.



Fernando Peláez-Pier
José Gregorio Torrealba

fpelaez@hpcd.com
jtorealba@hpcd.com

Av Venezuela, Edificio Atrium, piso 3
El Rosal
Caracas 1060
Venezuela

Tel: +58 212 201 8611
Fax: +58 212 263 7744
www.hpcd.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally



Online

www.gettingthedealthrough.com



Arbitration
ISSN 1750-9947



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law