International Arbitration

2019

Fifth Edition

Contributing Editor:
Joe Tirado

glg global legal group

GLOBAL LEGAL INSIGHTS - INTERNATIONAL ARBITRATION

2019, FIFTH EDITION

Contributing Editor
Joe Tirado, *Garrigues UK LLP*

Production Editor
Andrew Schofield

Senior Editors
Caroline Collingwood
Rachel Williams

General Consulting Editor
Alan Falach

Publisher
Rory Smith

We are extremely grateful for all contributions to this edition.
Special thanks are reserved for Joe Tirado for all of his assistance.

Published by Global Legal Group Ltd.
59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 207 367 0720 / URL: www.glgroup.co.uk

Copyright © 2019
Global Legal Group Ltd. All rights reserved
No photocopying

ISBN 978-1-912509-68-3
ISSN 2056-5364

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations. The information contained herein is accurate as of the date of publication.

Printed and bound by CPI Group (UK) Ltd, Croydon, CR0 4YY
May 2019

CONTENTS

Preface	Joe Tirado, *Garrigues UK LLP*	
General chapter	*In parallel with UNCITRAL* Zhang Mei & Xu Beibei, *King & Wood Mallesons*	1
Country chapters		
Andorra	Miguel Cases, *Cases & Lacambra*	10
Angola	Nuno Albuquerque, Conceição Manita Ferreira & Luísa Castro Ferreira, *N-Advogados & CM Advogados*	20
Austria	Dr Christian W. Konrad & Franziska Mensdorff-Pouilly, *Konrad Partners*	31
Brazil	Fernando Eduardo Serec, Antônio Marzagao Barbuto Neto & Lucas Britto Mejias, *TozziniFreire Advogados*	41
British Virgin Islands	Andrew Pullinger, Matthew Freeman & Charlotte Walker, *Campbells*	49
Canada	Julie Rosenthal, Brad Halfin & Tamryn Jacobson, *Goodmans LLP*	62
Cayman Islands	Andrew Pullinger & Shaun Tracey, *Campbells*	83
China	Ning Fei, Shengchang Wang & Jing Liu, *Hui Zhong Law Firm*	95
England & Wales	Joe Tirado, *Garrigues UK LLP*	109
Finland	Markus Kokko & Vilma Markkola, *Borenius Attorneys Ltd.*	128
France	Christophe Dugué, *Avocat au Barreau de Paris*	136
Germany	Catrice Gayer & Thomas Weimann, *Herbert Smith Freehills Germany LLP*	154
Hong Kong	Barbara Chiu & Crystal Luk, *King & Wood Mallesons*	169
Hungary	Zoltán Faludi, Artúr Tamási & Enikő Lukács, *Wolf Theiss Faludi Erős Attorneys-at-Law*	177
India	Ganesh Chandru & Prashant Kumar, *Lakshmikumaran & Sridharan*	187
Ireland	Kevin Kelly & Heather Mahon, *McCann FitzGerald*	206
Italy	Micael Montinari & Filippo Frigerio, *Portolano Cavallo*	216
Japan	Yuko Kanamaru & Yoshinori Tatsuno, *Mori Hamada & Matsumoto*	226
Kenya	Collins Namachanja, *Namachanja & Mbugua Advocates*	235
Kosovo	Dr Christian W. Konrad, *Konrad Partners* & Virtyt Ibrahimaga	242
Liechtenstein	Dr Manuel Walser, *Walser Attorneys at Law Ltd.*	252
Malaysia	Gan Khong Aik, Foo Joon Liang & Kang Mei Yee, *Gan Partnership*	265
Morocco	Amin Hajji, *Hajji & Associés – Avocats*	276
Netherlands	Richard Woutering & Ingmar Wassenaar, *Lemstra Van der Korst*	286
North Macedonia	Kristina Kragujevska, *Konrad Partners*	295
Norway	Erlend Haaskjold, *Arntzen de Besche Advokatfirma AS*	302
Oman	Omar Al Hashmi & Syed Faizy, *Al Hashmi Law*	308
Portugal	Nuno Albuquerque, Luís Paulo Silva & Maria Amélia Mesquita, *N-Advogados & CM Advogados*	316
Russia	Sergey Kovalev, Sergey Kislov & Evgeny Lidzhiev, *Kovalev, Tugushi & Partners*	327
Singapore	Margaret Joan Ling, *Allen & Gledhill LLP*	338
Spain	Luis Cordón Procter & Diana del Moral Bernal, *Cases & Lacambra*	345
Sweden	Pontus Scherp & Fredrik Norburg, *Norburg & Scherp Advokatbyrå AB*	358
Switzerland	Michael Bösch, Patrick Rohn & Simon Hohler, *Thouvenin Rechtsanwälte KLG*	369
UAE	Daniel Brawn & Maria Palmou, *Galadari Advocates & Legal Consultants*	379
USA	Martin Jackson, Sam Choi & Daniel R. Perez, *Sidley Austin LLP*	388
Zambia	Joseph Alexander Jalasi, Eric Suwilanji Silwamba & Lubinda Linyama, *Eric Silwamba, Jalasi and Linyama Legal Practitioners*	400

PREFACE

Following the success of the fourth edition we are pleased to present the fifth edition of *Global Legal Insights – International Arbitration*. The book contains 36 country chapters and one general chapter, and is designed to provide general counsel, government agencies and private practice lawyers with a comprehensive insight into the realities of international arbitration by jurisdiction, highlighting market trends and legal developments as well as practical, policy and strategic issues.

In producing *Global Legal Insights – International Arbitration*, the publishers have collected the views and opinions of a group of leading practitioners from around the world in a unique volume. The authors were asked to offer personal views on the most important recent developments in their own jurisdictions, with a free rein to decide the focus of their own chapter. A key benefit of comparative analyses is the possibility that developments in one jurisdiction may inform understanding in another. I hope that this book will prove insightful and stimulating reading.

Joe Tirado

Garrigues UK LLP

In parallel with UNCITRAL

Zhang Mei & Xu Beibei
King & Wood Mallesons

History of China's arbitration system and later developments

In the 1950s, China (refers to Mainland China as a separate jurisdiction in this chapter unless otherwise defined) started to develop its arbitration system to be similar to modern arbitration. Two arbitration commissions were established by the State Council, both under the China Council for the Promotion of International Trade (CCPIT). One was named the Foreign Trade Arbitration Commission and was created to arbitrate disputes in foreign trade but is now known as the China International Economic and Trade Arbitration Commission (CIETAC). The other was named the *Maritime Arbitration Commission of China Council for the Promotion of International Trade* but was later renamed the *China Maritime Arbitration Commission* (CMAC).

China's *Arbitration Law* assimilated some of the elementary principles of the *UNCITRAL Model Law*; for example, those of party autonomy and separability of arbitration agreements. However, the *UNCITRAL Model Law* has not been adopted as a whole and China cannot be called an *UNCITRAL Model Law* country. Among others, the provisions regarding *ad hoc* arbitration, interim measures and emergency arbitrators are not incorporated into the *Arbitration Law*. The *Arbitration Law* is scheduled to be amended but it is unlikely that *ad hoc* arbitration will be introduced.

The Supreme People's Court (SPC) uses judicial interpretations and replies to regulate and guide lower courts' in assistance, judicial review and enforcement of arbitration proceedings and awards. Some important systems were created by SPC, such as *ad hoc* arbitration under limited circumstances.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and China's *Civil Procedural Law* are the general regimes for recognising and enforcing non-mainland China arbitral awards.

SPC also signs arrangements and/or issues judicial interpretations to assist arbitration proceedings, and recognises and enforces arbitration awards seated in Hong Kong, Macau and Taiwan. The application procedures/requirements and the review standards generally reflect those in the *New York Convention*.

On 2 April 2019, Hong Kong SAR and Mainland China signed the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the Hong Kong Special Administrative Region. "Hong Kong becomes the first jurisdiction outside the Mainland where, as a seat of arbitration, parties to arbitral proceedings administered by its arbitral institutions would be able to apply to the Mainland courts for interim measures" (Press Release of Department of Justice, Hong Kong SAR).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Prosperous and innovative activities of arbitration institutions in China

With the promulgation of the *Arbitration Law* in 1994, more than 200 arbitration institutions were newly established, all of which were authorised to hear both domestic and international cases, although many international cases are still going to CIETAC which can also accept domestic cases.

In recent years, arbitration institutions have begun to resolve disputes outside their geographical boundaries and gain international fame, one example being the *Beijing Arbitration Commission* (BAC), also called the *Beijing International Arbitration Center* (BIAC); many arbitration institutions have established branches or offices in other cities. The South China International Economic and Trade Arbitration Commission (Shenzhen Court of International Arbitration) and the Shenzhen Arbitration Commission have been merged into the *Shenzhen Court of International Arbitration* (Shenzhen Arbitration Commission) (SCIA).

Some arbitration institutions are exploring innovative or more user-friendly rules; SCIA can administer cases using UNCITRAL Arbitration Rules and are exploring optional appellate arbitration proceedings if it is allowed in the seat of arbitration (Article 68 of SCIA Rules). BIAC recently provided a hearing assistance service to an *ad hoc* arbitration seated in Hong Kong and arbitration institutions in China are expected to become more diversified arbitration service providers.

Many arbitration institutions are also customising rules or proceedings to meet the needs of parties to contracts, especially loan contracts entered into/performed via the internet, and the arbitration itself can also be conducted online (so-called online arbitration). Some online arbitrations are quite controversial as the awards are made *before* the disputes arise, and SPC has issued an interpretation requesting courts not to enforce such awards.

Four foreign arbitration bodies, i.e. the *ICC International Court of Arbitration* (ICC), the *Hong Kong International Arbitration Centre* (HKIAC), the *Singapore International Arbitration Centre* (SIAC) and the *Korean Commercial Arbitration Board* (KCAB) have established representative offices in the Shanghai Pilot Free Trade Zone.

Arbitrability: are PPP agreements arbitrable or reserved for courts' exclusive jurisdiction?

Regarding the matters which can be arbitrated, China excludes two types of disputes from the scope of arbitration, i.e.: (1) disputes concerning marriage, adoption, custody, fostering and inheritance; and (2) administrative disputes which must, in accordance with the law, be dealt with by administrative bodies (Article 3 of the *Arbitration Law*).

One of the controversial issues is whether disputes under Public-Private Partnership (PPP) agreements between a local government and a private enterprise can be resolved by commercial arbitration.

PPP agreements can be categorised as concession agreements, which in turn can be treated as an administrative agreement. Whether administrative agreements fall under exclusive jurisdiction or are arbitrable is still an undecided matter; some judges in SPC tend to treat administrative agreements as having ostensible civil and commercial characteristics as in civil/commercial contracts, and therefore consider that disputes arising out of which can be arbitrated. Parties should consult experienced lawyers to see whether to seek reliefs in commercial arbitration, investment arbitration or administrative proceedings in courts should they deem themselves to be aggrieved.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Simple and clear drafting of arbitration agreements is advisable

Arbitration agreements shall be in writing. The *Arbitration Law* may be stricter than the *UNCITRAL Model Law* in the sense that the *Arbitration Law* and practice in China generally does not recognise arbitration agreements reached orally or by conduct and merely recorded in writing (Article 16 of the *Arbitration Law*, Article 1 of the *Interpretation of the Supreme People's Court on Certain Issues relating to Application of the Arbitration Law of China*).

Further, a valid arbitration agreement in China shall include the parties' expression of their intention to arbitrate, the matters to be arbitrated and a chosen arbitration commission.

The inclusion of a fixed arbitration institution in the arbitration agreement shall also be highlighted, as China traditionally does not recognise the validity of *ad hoc* arbitration. If no specific arbitration institution can be identified, the arbitration agreement may be held invalid under Chinese laws (Article 18 of the *Arbitration Law*).

Parties are advised to include the *exact* name of the arbitration institutions in the arbitration agreement to have an enforceable agreement under Chinese law, although China's courts might try to save the arbitration agreement if a specific institution can be inferred or determined.

Arbitration agreements providing that disputes can be resolved by arbitration or by court are not advised as they can be deemed void as such wording is too vague or uncertain. Giving one party the option to choose court or arbitration may be invalidated.

Arbitration agreements providing for more than one arbitration institution can be invalidated unless the parties can agree to choose one of them. If the arbitration agreement is well drafted and more than one arbitration institution is agreed but each institution will have jurisdiction over non-overlapping matters or under different circumstances (for example, the arbitration agreement may provide that whoever initiates the arbitration must go to the arbitration institution where the other party resides – this has been upheld by a Chinese court), the agreement can be upheld as it is specific enough.

Arbitration agreements not contemplated by arbitration law: effective or not?

Usually, two Chinese entities may not submit purely domestic disputes to arbitration outside mainland China; such arbitration agreement can be invalidated or the awards may not be enforced; additionally, an agreement between two wholly foreign-owned enterprises will not be an exception. Meanwhile, courts may try to save such arbitration agreement if there are factors such as the main contract being entered into between enterprises registered in free-trade zones (FTZs) or performed in relation to FTZs.

Whether parties can agree to arbitration at a foreign arbitration institution with the seat of arbitration in mainland China is still controversial. However, SPC has upheld the validity of such agreements and is expected to enforce such awards, although it is still yet to address the recognition/setting-aside/enforcement issues.

It is worth mentioning that, in recent years, China has gradually been opening its gate to ad hoc arbitrations under limited circumstances. For example, on 23 March 2017, the *Management Committee of Hengqin New Zone and Zhuhai Arbitration Commission* jointly published the *Ad hoc Arbitration Rules of (Guangdong) Pilot Free Trade Zone Hengqin Area of Zhuhai*, which apply when two companies registered in any free-trade zones agree to arbitration under the rules. On 19 September 2017, the China Internet Arbitration Alliance in Guangzhou issued the *Rules for Bridging Ad Hoc Arbitration and Institutional Arbitration*. On 20 November 2017, the alliance accepted its first *ad hoc* arbitration case under the Bridging Rules.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Arbitration by incorporation and in subrogation is strictly scrutinised

Chinese courts adopt a strict view as to consent to arbitration. Usually a specific knowledge of the arbitration clause is required. *Cf.* SPC's reply (2017) Zui Gao Fa Min Ta No. 116, in which an arbitration clause was incorporated into a notice but there was no evidence that the plaintiff had knowledge of the arbitration clause or expressed any intention to be bound by the same; SPC opined that such arbitration agreement did not bind the plaintiff.

Whether the arbitration agreement (or the contract containing the arbitration agreement) entered into by or in the name of the agent will bind the principal shall be determined considering all the evidence and circumstances.

In several arbitration cases applying Arts 402 and 403 of the *Contract Law* of China (regarding an agent concluding a contract in the agent's own name), the tribunals concluded that a sales contract and the arbitration clause contained therein would bind the principal even if only the name of the agent appeared on the contract.

In SPC's reply (2017) Zui Gao Fa Min Ta No. 36, SPC specifically opined that the court shall only decide whether the agent had the specific power to bind the principals to arbitration without touching on whether the agent had the authority to bind the principals with the substantive rights and obligations.

China's courts adopt a strict view as to incorporation of charter party arbitration agreements into bills of ladings to protect bill of lading holders and enhance the jurisdiction of China's courts.

As to whether insurance companies will be bound by the arbitration agreements between the insured and a third party who might be responsible to pay the insurance companies in a subrogation suit, the courts are generally of the view that insurance companies will have to arbitrate in a domestic dispute, while insurance companies are not bound by arbitration agreements in foreign-related disputes.

Who gets to say what regarding validity

Chinese law recognises the separability doctrine; a tribunal (in the name of arbitration institutions) may make a decision in its jurisdiction and may decide on the validity of contracts.

If parties wish to challenge the validity of the arbitration agreement, the following different strategies may be involved.

One party may appeal to the arbitration institution and the other may petition a court to decide whether an arbitration agreement is valid, the jurisdiction for which falls to an intermediate level court. If one party chooses the court and the other party chooses the arbitration institution to decide the validity of the arbitration agreement, the court shall have the power to decide. Usually, the arbitration institution would stay the proceeding and defer to the decision of the court. Once a party has petitioned an arbitration institution to make the decision, that party cannot go to the court and ask the court to make a decision on the same matter.

One party might also go to court directly and initiate a substantive suit, and the opponent party can contend before the first hearing that the court has no power to hear the case and the case shall not be accepted in the first place. A court can then decide whether the court proceeding shall continue after deciding the validity (in its broad sense) of the arbitration agreement. Such court can include first-instance courts and SPC is trying to concentrate the

© Published and reproduced with kind permission by Global Legal Group Ltd, London

arbitration judicial review power to certain special tribunals within the courts and unify the standards for such review.

Different courts have divergent opinions as to whether a court can decide, in an arbitration agreement validity challenge proceeding, that there is no arbitration agreement. Many courts adopt a strict view that the court shall not decide the issue in such proceeding, one of such courts being the influential Beijing Fourth Intermediate People's Court. Some courts will decide the existence issue as a preliminary matter.

Even if the existence of the arbitration issue has not been decided by the court in an early stage, parties may preserve their rights by attending the arbitration with reluctance and challenging the award or its enforcement at a later stage.

Notification, evidence to be presented and examined at hearings, multiple hearings and other specific elements of the arbitration procedure

China's arbitration institutions will circulate the notice of arbitration and other submissions/evidences in the proceeding. The claimant usually does not serve or send any documents directly to the respondent. In some international arbitration proceedings, the arbitration institution, with the agreement of the parties, will arrange the submissions and evidence to be exchanged by email between the parties directly while copying the institution.

Notification can be very important in the challenge of an award; claimants are advised to pay special attention to the address/contacts/personnel to be served, and it would be best to have an active email/correspondence address to be served both for contract performance notices and for a possible arbitration.

Aside from the issue of validity of the arbitration agreement, if the parties challenge the jurisdiction of the arbitration institution from other perspectives, most arbitration institutions will delegate the power to determine jurisdiction to the arbitral tribunal. The arbitral tribunal may either make a separate decision on jurisdiction during the arbitral proceedings, or incorporate the decision in the final arbitral award.

Differently to most common law jurisdictions, only national courts in Mainland China have the power to order interim relief. When a party applies for interim relief in arbitration, it shall submit the application to the arbitration institution, which will then forward the application to the competent court for review (Articles 28, 46 and 68 of the *Arbitration Law*). Interim relief ordered by arbitral tribunals cannot be enforced in Mainland China but may be enforced in other jurisdictions like Hong Kong. Hong Kong courts may also grant relief upon application to support a Mainland China arbitration proceeding without an order from the institution, *cf. Chen Hongqing v Mi Jingtian & Others* (HCMP 972/2017)

The rules on evidence set in the *Arbitration Law* are quite general. Arbitration institutions normally include evidence rules in their respective rules of arbitration. In the arbitral proceedings, parties also have the right to agree on the application of certain rules on evidence, such as the IBA Rules on the Taking of Evidence in International Arbitration (*IBA Evidence Rules*). Disclosure of evidences/documents and cross-examinations of witnesses are rare in a Chinese arbitration. Parties are to be reminded that the authenticity of any evidence must be examined during hearings unless parties agree otherwise.

It is common in an arbitration in China that more than one hearing will be held; supplementary evidence can be induced after the first hearing and parties may amend or supplement their claims or counterclaims even after the hearings so long as the tribunal deems it is not too late.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Similar to provisions under the *UNCITRAL Model Law*, the *Arbitration Law of China* also requests the arbitration award to be rendered in writing and signed by the arbitrators, but there are awards that carry arbitrators' printed names only. As China traditionally does not recognise *ad hoc* arbitrations, the arbitration award shall also be affixed with the seal of the arbitration commission (Article 53 and 54 of the *Arbitration Law*).

Arbitrators as mediators: Biased? Tainted?

It is customary for arbitrators to mediate the dispute as authorised by Article 51 of the *Arbitration Law*. Many arbitrators will ask the parties whether they want the tribunal to mediate before the closing of the hearing and many parties will agree, as at least they can obtain some information and/or thoughts of the tribunal. Few practitioners consider it to be inappropriate or are concerned that the arbitrators will be biased.

To address the concerns of some of the international users, Article 67 of *BIAC Rules* provides that parties may request the replacement of an arbitrator on the ground that the outcome of the award may be affected by the conciliation proceedings if the mediation is unsuccessful. And the resulting additional costs shall be borne by all the parties.

Challenges to arbitrators may not be immediately reviewable

To give parties a wider choice of arbitrators, some of the arbitration institutions allow parties to nominate arbitrators from outside its panel of arbitrators, subject to the confirmation of the arbitration institution (e.g. Article 26 of *CIETAC Rules* and Article 64 of *BIAC Rules*).

More and more foreign arbitrators have become involved in Chinese arbitration, but parties will need to consider the language and legal knowledge barriers before deciding to appoint a foreign arbitrator.

Parties may also apply to the arbitration institution for removing certain arbitrator(s) in the arbitral proceedings, but the decisions of the institutions are not immediately reviewable by courts; the parties must proceed with their rights reserved and use it as a reason to set aside or not enforce the arbitration award.

Fair chance to present the case becomes a focal point in reviewing the awards

Like most jurisdiction in the world, arbitration awards in China are final and cannot be appealed. However, the *Arbitration Law* grants parties with the right to apply for setting aside arbitration awards.

China's courts usually require the arbitration proceedings to adhere strictly to the *Arbitration Law* and the relevant arbitration rules. Courts might also consider any irregularities have been waived or the implication of such irregularities upon the outcome of the award.

Some courts have begun to consider whether the parties had been given fair chance to contest their cases. In some cases, the courts found that the arbitral tribunal failed to explain/enunciate important issues/factual findings of the case, like finding the contract to be void and disposing accordingly when no party argued that the contract was void; in such cases the courts ordered the arbitration institution to reconsider the case or refused to enforce the award.

According to the annual reports on international commercial arbitration in China issued by CIETAC (http://www.cietac.org.cn/index.php?m=Article&a=index&id=255&l=en), less than 0.15% of the awards were set aside in a four-year period (2014–2017), and only 0.07% were set aside in 2017.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

When enforcing a foreign arbitration award, courts respect the autonomy of the parties and strictly interpret public policy

The general trend in China is pro-arbitration. According to the 2018 *CJO (China Justice Observer) Report*, Chinese courts have heard a total of 25 cases in relation to recognition and enforcement of foreign arbitral awards in 2018. Of the 25 cases, only one arbitral award was refused to be recognised and enforced.

According to an article authored by Judge Gao Xiaoli, the deputy director of the 4th Civil Division of the SPC, the SPC currently emphasises that only if at least one of the grounds listed in Article V of the *New York Convention* is satisfied, Chinese courts may refuse recognition and enforcement of the foreign arbitral award, and each ground should be strictly interpreted, the aim being to support recognition and enforcement of foreign arbitral awards.

In *Noble Resources International Pte. Ltd v. Shanghai Good Credit International Trade Co., Ltd*. (2016) Hu 01 Xie Wai Ren No. 1 (see also SPC's reply (2017) Zui Gao Fa Min Ta No. 50), the Shanghai First Intermediate People's Court refused recognition and enforcement of an SIAC arbitral award under the *New York Convention*, as SPC and the court found the composition of the arbitral tribunal and/or the arbitral procedure not to be in accordance with the agreement of the parties (the parties agreed on three arbitrators, while SIAC appointed one arbitrator using an expedited procedure). The case was heavily discussed in China and the latest SIAC rules have been amended (before the court ruling) to say that an expedited procedure will be used even if parties agree otherwise; China's courts are yet to have the chance to address any contest that may arise under the said amendment.

In another similar case to *Noble Resources,* a court recognised an SIAC award, and reasoned that the party that challenged the award participated in the appointment of the sole arbitrator and failed to object to the appointment of the sole arbitrator (Ningbo Intermediate People's Court, (2015) Zhe Yong Zhong Que Zi No. 3).

China's courts limit public policy contentions in the recognition and enforcement of foreign awards. In one case, the courts found that foreign exchange rules violations do not necessarily constitute a public policy violation. Enforcement of the award will not violate the basic legal principles of China or social and public security; see Chengdu Intermediate People's Court's ruling, (2017) Chuan 01 Xie Wai Ren No. 1.

SPC rules promulgated regarding fabricated and concealed evidence, and tackling "sham" arbitration

Mainly to address the issues in enforcement of domestic awards, SPC issued the *Provisions on Several Issues Concerning the Enforcement of Arbitral Award* (Fa Shi (2018) No. 5).

The *Provisions* clarify what kind of evidence can be found to be "fabricated" or "fake" so that a court can refuse to enforce an award:

(1) it has to be admitted by the award;

(2) it has to be a major/main evidence to find a fundamental fact of the case; and

(3) it has been found certain that it is illegally formulated or acquired.

The *Provisions* also provides for what constitutes "concealing to the arbitration institution evidence sufficient to impair a just award":

(1) it has to be a major/main piece of evidence to find a fundamental fact of the case;

(2) it has to be possessed solely by the party concealing the evidence; and

© Published and reproduced with kind permission by Global Legal Group Ltd, London

(3) the existence of the evidence was known in the arbitration proceeding and the production was requested but the party possessing the evidence failed to produce it without justification.

The *Provisions* creates a relief for parties whose legitimate interest was harmed by so-called "sham" arbitrations: a party who was not a party to the arbitration may petition the court to refuse the enforcement of the award if that party can prove that the parties to the arbitration made up the legal relationship and/or fabricated facts in the arbitration and the petitioner's genuine and legitimate interest is harmed by the award erroneously disposing of the parties' civil rights and obligations. As the *Provisions* have been newly promulgated, there are not many jurisprudence and arbitration practitioners expecting courts to develop the use of the relief.

Chinese arbitration institutions test the water in investment arbitration

Since acceding to the ICSID Convention in 1992, China has only been involved in eight investment arbitrations before ICSID so far, among which three arbitrations were raised against China and five were raised by Chinese investors.

The first arbitration against China was brought by a Malaysian company, Ekran Berhad, regarding the rights of its subsidiary under a 70-year lease over 900 hectares of land in Hainan Province (*Ekran Berhad v. PRC*, ICSID Case No. ARB/11/15). The parties settled in 2011 before the constitution of a tribunal.

The second arbitration against China was brought by a Korean company, Ansung Housing, in relation to Ansung's investment in the construction of a golf and country club and luxury condominiums in Sheyang, Jiangsu province (*Ansung Housing v. PRC*, ICSID Case No. ARB/14/25). Early on, the ICSID tribunal dismissed all the investor's claims in 2017.

The third and most recent arbitration against China was raised by a German investor, Hela Schwarz, on the ground that the real estate of its subsidiary in Ji'nan, Shandong Province was requisitioned by local government (*Hela Schwartz GmbH v. PRC*, ICSID Case No. ARB/17/19). This case is still pending.

Of the five arbitrations raised by Chinese investors, one arbitration against Peru was decided in favour of the Chinese investor (*Tza Yap Shum v. Peru*, initiated in 2007); two arbitrations against Mongolia and Belgium were decided in favour of the States (*Beijing Shougang and others v. Mongolia*, initiated in 2010 and *Ping An v. Belgium*, initiated in 2012); one arbitration against Yemen was settled (*Beijing Urban Construction v. Yemen*, initiated in 2014); and the latest one against Lao People's Democratic Republic is still pending (*Sanum Investments v. Laos* (II), initiated in 2017).

To support the Belt and Road Initiative, CIETAC launched its investment arbitration rules and BIAC is currently seeking comments for its draft investment arbitration rules; it remains to be seen whether cases will be initiated under those rules.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Zhang Mei
Tel: +86 10 5878 5725 / Email: zhangmei@cn.kwm.com

Zhang Mei is a partner of King & Wood Mallesons' Beijing Office, having more than 19 years' experience in commercial litigation and arbitration, and alternative dispute resolutions for commercial disputes.

Ms. Zhang Mei has represented various domestic and foreign clients in hundreds of domestic and cross-border commercial litigation and arbitration cases. Her spread of knowledge and expertise spans diverse sectors and fields, including trade and contract, corporate investment, mergers and acquisitions, foreign investment, private equity, banking and finance, PPPs, equipment procurement, construction projects and contracts, real estate, intellectual property, product liability, and recognition and enforcement of foreign arbitration awards in China, etc. She is very experienced in handling litigation cases before PRC courts at all levels and arbitrations at international arbitration institutions.

Xu Beibei
Tel: +86 10 5878 5742 / Email: xubeibei@cn.kwm.com

Xu Beibei is a counsel of King & Wood Mallesons' Beijing Office, specialised in foreign-related litigation and arbitration.

Ms. Xu Beibei is experienced in handling cross-border disputes in the areas of investment, trade, product liability, aviation and banking. Her recent experience includes representing a Swiss company in a joint-venture dispute in retrial proceedings before the Supreme People's Court, advising an aviation company in a dispute arising out of a private jet management contract, representing a Chinese WFOE (wholly foreign-owned enterprise) in a share pledge dispute related to VIE structure before BAC and representing a foreign company in its application for recognition and enforcement of an ICC arbitration award in China.

King & Wood Mallesons

18th Floor, East Tower, World Financial Center 1 Dongsanhuan Zhonglu, Chaoyang District, Beijing 100020, P. R. China. Tel: +86 10 5878 5588 / Fax: +86 10 5878 5566 / URL: www.kwm.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Andorra

Miguel Cases
Cases & Lacambra

Introduction

Law on arbitration

The Andorran Arbitration Act 47/2014 of 18 December 2014 (hereinafter "**AAA**") is not specifically based on the United Nations Commission for the International Trade Law (**UNCITRAL**) model law, but has been inspired by it, based on the need to foster commercial relationships and have a faster and specialised alternative dispute resolution mechanism.

New York Convention

On 11 February 2015, the Andorran Official Gazette declared the adherence of the Principality of Andorra to the International Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The Principality of Andorra ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 19 June 2015, and it entered into force on 17 September 2015 without any reservations.

Recognition and enforcement of arbitration awards

No other conventions concerning the recognition and enforcement of arbitral awards have been signed by the Principality of Andorra.

International arbitration

The AAA governs both domestic and international arbitration. International arbitration has a special section (articles 62 to 73) where the main differences with domestic arbitration regulation are set out:

- Domestic form requirements do not apply to international arbitration agreements.
- The validity of the international arbitration agreement will be analysed according to the law selected by the parties, the law applicable to the controversy, or the Andorran law.
- An application for the setting-aside of a domestic award must be made within three months of the date of notification, whereas for international awards, applications must be made within two months of the date of notification.

Overview of arbitration bodies

On 31 May 2018, the Arbitration Court published the Act, "*Llei del Tribunal d'Arbitratge del Principat d'Andorra*" (hereinafter "**ACA**"), in order to establish an arbitration institution that encourages arbitration as an alternative mechanism for conflict resolution, and that administers arbitrations, national or international, based in the Principality of Andorra.

The Andorran Parliament is currently working on the approval of the internal regulation of the Andorran arbitration tribunal, whose draft has been already submitted, in order to provide jurisdiction with all the necessary legislative developments, similarly to neighbouring countries.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Special national courts

As of the date of writing, no special national courts for international arbitration exist in Andorra.

Arbitration agreement

What formalities are needed for the arbitration agreement?

Requirements needed for the arbitration agreement and the drafting of arbitration clauses are:

- The arbitration agreement must express the parties' willingness to submit to arbitration all or certain disputes arising between them in respect of a given legal relationship, whether contractual or otherwise.
- The arbitration agreement must directly express the procedure for appointing an arbitrator, or arbitrators, or indirectly express the procedure by reference to the appointment procedure contained in an arbitral institution rule.
- The arbitration agreement may adopt the form of a clause in an agreement.
- If the arbitration agreement is contained in an adhesion contract, its validity and interpretation will be governed by the rules applicable to such contracts.
- Whatever form it takes, the arbitration agreement must be in writing, in a document signed by the parties.
- The arbitration agreement will be deemed to exist if, in an exchange of statements of claim and defence, the existence of an agreement is alleged by one party and not denied by the other.
- The arbitration agreement will also be valid if the exchange of letters, telegrams, telexes, faxes or other telecommunication methods ensure a record of the agreement is kept.

What disputes are arbitrable?

The AAA establishes that consumer and labour arbitration are excluded from its scope. At the same time, it is established that arbitration under AAA is allowed for all matters of which the parties are free to dispose.

Rules for joinder/consolidation

The AAA does not contain any specific provision on joinder or consolidation of a third party and nor does it provide a regulatory framework for consolidation of arbitral proceedings.

Competence-competence and separability

The principle of competence-competence is expressly recognised in the AAA, which clearly states that arbitrators may rule on their own jurisdiction, including any pleas with respect to the existence or validity of the arbitration agreement, or any others the acceptance of which would prevent consideration of the merits of the case. Their decision may only be challenged by means of an application to set aside the final or a separate award on jurisdiction.

Under the AAA, the principle of competence-competence includes the separability principle in the sense that the validity of the arbitral agreement established as a clause of a contract, does not depend on the validity of the contract itself, the arbitrator having competence to judge and declare the validity of the arbitral agreement even if the contract is declared null.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Arbitration procedure

Commencing arbitration proceedings

Unless otherwise agreed by the parties, arbitration will commence on the date on which a request to submit the dispute to arbitration is received by the respondent, as stated in the AAA, meeting the requirements established in the arbitration agreement.

Hearings outside of the seat of arbitration

The parties may freely determine the place of the arbitration. Failing such agreement, it will be determined by the arbitrators, taking into consideration the circumstances of the case and the convenience of the parties. Arbitrators may, unless otherwise agreed by the parties and only after notifying them, meet at any place they deem appropriate for hearing witnesses, experts or the parties, inspecting goods or documents, or examining persons.

Rules on evidence

At the beginning, the parties are free to choose the applicable rules on evidence, subject in any case to the requirements of the institution at which the arbitration will take place as well as observing the principles of equality, review and rebuttal. The AAA briefly regulates this matter in articles 44 and 45 by which, subject to any contrary agreement by the parties, the arbitrators will decide whether to hold oral hearings for the presentation of statements or evidence and the issuance of conclusions, or whether the proceedings will be conducted in writing only. Unless the parties have agreed that no hearings will be held, they will be announced by the arbitrators at an appropriate stage of the proceedings, if so requested by a party.

Applicable rules regarding privilege and disclosure

There are no rules or laws providing for an arbitrator's privilege or immunity. Nevertheless, the AAA establishes the arbitrator's liability for damages in case of improper performance of their duties based on bad faith, temerity or wilful misconduct.

With regard to disclosure rules, according to articles 5.2.c and 39.2 of the AAA, the arbitrators, the parties, the experts and the arbitral institutions are bound to honour the confidentiality of the information received on the occasion of arbitration according to the confidentiality principle, unless the parties agree otherwise. This principle is one of the main advantages of the arbitration system and one of the reasons for its success, since it allows the parties to protect their public reputation. However, in case of international arbitration, parties must expressly stipulate the confidentiality of the arbitration in the arbitration agreement (article 67.2).

IBA Rules on the taking of evidence in international arbitration

IBA Rules are not positive law in Andorra. Consequently they are merely indicative, not binding; arbitrators are not obliged to follow the IBA provisions. As of today there is no case law of the Andorran courts on this issue; it can only be supposed that the IBA Rules may be taken into account in the same way they are considered in neighbouring jurisdictions.

Rules regarding expert evidence

The AAA establishes that, unless otherwise agreed by the parties, arbitrators may, at their own initiative or at the request of either party, appoint experts to advise them on specific matters, as well as request any of the parties to provide documents or goods to the expert for inspection. Parties may also provide reports of experts appointed by them.

Unless otherwise agreed by the parties, if one party requires or the arbitrators deem it

© Published and reproduced with kind permission by Global Legal Group Ltd, London

necessary, the expert, after presenting the report either orally or in writing, may participate in the proceeding and answer the questions of the parties.

New LCIA and IBA guidelines

Currently, there are no guidelines to take into consideration the new LCIA and IBA guidelines, beyond the consideration of their principles as mere inspirations for international arbitrations held in Andorra. These rules are not considered as positive law in the jurisdiction.

Confidentiality of evidence and pleadings

The arbitrators, the parties, the experts and the arbitral institutions are bound to honour the confidentiality of the information received on the occasion of arbitration, unless the parties agree otherwise. However, in the case of international arbitration, the parties must expressly stipulate the confidentiality of the arbitration in the arbitration agreement.

Arbitrators

Appointment of arbitrators

According to the AAA, in arbitration not to be decided *ex aequo et bono* and conducted by a single arbitrator, such person will be required to be an attorney if acting as such, unless otherwise agreed by the parties. When arbitration is conducted by three or more arbitrators, at least one must be an attorney.

Additionally, the parties are free to agree on a procedure for appointing the arbitrator or arbitrators, providing the principle of equality is honoured. Failing such agreement, the AAA establishes some rules for the appointment of an arbitrator:

- In an arbitration with a sole arbitrator, he will be appointed by the court (*Secció Civil de la Batllia*) at the request of a party.
- In an arbitration with three (3) arbitrators, each party may appoint one arbitrator, and the two (2) arbitrators thus appointed may appoint the third arbitrator, who may preside the proceedings. If a party fails to appoint the arbitrator within thirty (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 thirty (30) days of the latest acceptance, the appointment will be made by the court at the request of a party.

Where more than one claimant or respondent is involved, the arbitration must consist of three arbitrators: the respondent may appoint one arbitrator, and the former another, and the two (2) arbitrators thus appointed may appoint the third arbitrator, who may preside the proceedings. The system of appointment is the same as explained above.

If a party does not comply with the established proceeding, the parties or arbitrators do not reach an agreement in accordance with the established proceeding, or a third party does not perform its functions, any party may apply to the competent court to appoint the arbitrators or, as appropriate, to adopt the necessary measures therefor. When arbitrators have to be appointed by the court, it will draw up a list of three names for each arbitrator to be appointed, and appoint them by lot.

Challenging arbitrators

An arbitrator may be challenged only in the event that justifiable doubts affecting their impartiality or independence arise, or if they do not meet the qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he/she becomes aware after the appointment was made.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The procedure under which the challenge of an arbitrator shall take place is established in the AAA. The parties may agree on a procedure for challenging arbitrators but, in the absence of such agreement, a party who intends to challenge an arbitrator must state in writing the grounds for the challenge within fifteen (15) days after becoming aware of the acceptance, or of any circumstances that may give rise to justified doubts about the arbitrator's impartiality or independence.

Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitrators – excluding the challenged arbitrator – shall decide on the challenge. If a challenge under any of the precedent procedures is not successful, the challenging party may submit the challenge as grounds for objecting to the award.

Are the IBA Guidelines on conflict of interest taken into account?

As happens with respect to the IBA Rules on evidence, the IBA Guidelines on conflict of interest are not positive law in Andorra. Consequently, they are merely indicative, not binding; arbitrators are not obliged to follow the IBA Guidelines. As of today there is no case law of the Andorran courts on this issue; it only can be supposed that the IBA Rules may be taken into account in the same way they are considered in neighbouring jurisdictions.

Terminating an arbitrator's mandate

An arbitrator's mandate is terminated when the arbitral proceedings terminate, either if it is with a final award or if: (i) the claimant withdraws his claim, unless the respondent takes exception thereto and the arbitrators acknowledge a legitimate interest on his part in obtaining a final settlement of the dispute; (ii) the parties mutually agree on the termination of the proceedings; or (iii) the arbitrators find that continuation of the proceedings is unnecessary or impossible.

Immunity of arbitrators

As previously indicated, arbitrators are not afforded immunity from suit. They are subject to a very high standard of liability, which means they could be responsible for damages and prejudices caused when acting in bad faith, temerity or wilful misconduct, as determined in article 25.1 of the AAA. Arbitrators or arbitral institutions acting on their behalf will be bound to take liability insurance or equivalent security for the amount established in the specific arbitral institution rules.

Secretaries to the Arbitral Tribunal

The AAA establishes that the arbitrators, under the parties' agreement, may appoint one secretary and fix his/her administrative functions and remuneration. The draft of creation of the Arbitration Court establishes that the bylaws of the entity shall fix the requirements and the proceeding to become General Secretary.

Interim relief

What types of interim relief are available to parties?

Article 28 of the AAA establishes that, unless otherwise agreed by the parties, arbitrators are allowed to grant any interim measures deemed necessary in connection with the object of the dispute, at the request of any party. In such cases, the arbitrators may order any party:

- to maintain or restore the *status quo* until the dispute is resolved;
- to adopt measures to avoid any current or imminent damage in the arbitration proceeding or refrain from carrying out certain acts that may cause damages or interference in the arbitration proceeding;

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- to provide some means to preserve the necessary goods to allow the execution of the final award; or
- to keep evidence that may be relevant to resolve the dispute.

Can the parties apply to both courts and tribunals for such interim relief?

Parties may apply to both courts and arbitral tribunals in order to be granted any interim measure.

With regard to the interim reliefs adopted by arbitral tribunals, the AAA provides that those interim measures must be connected to the subject matter of the dispute, being enforceable before any court. Regardless of the form adopted by arbitral decisions on interim measures, the rules on setting-aside and enforcement of the awards will apply to them.

In addition, the arbitration agreement does not prevent the parties, prior to or during the arbitral proceedings, from applying to a court for interim relief, or the court from granting such measures.

Can and do national courts order anti-suit injunctions in aid of international arbitration?

The Andorran law does not provide for the granting of any form of anti-suit injunctions and, as of today, no court has granted an anti-suit injunction in support of an agreement to arbitrate.

Can and do national courts order anti-arbitration injunctions in aid of domestic litigation?

The Andorran law does not provide for the granting of any form of anti-arbitration injunction and, as of today, no court has granted an anti-arbitration injunction in support of an agreement to arbitrate.

Security of costs

The AAA establishes that arbitrators may, at the request of the parties, adopt any interim measures deemed necessary in connection with the object of the dispute, requiring the claimant to furnish sufficient security.

Arbitration award

Formal requirements for an arbitration award

An arbitration award must fulfil the following formal requirements in order to be valid and enforceable:

- It must be issued within six (6) months (extendable for a further two (2) months by reasoned resolution of the arbitrators) of the date of submission of the statement of defence or of the expiration of the deadline therefor, unless otherwise agreed by the parties.
- It must be issued in writing and signed by the arbitrators. Arbitrators may specify the sense of their votes.
- It must explain the grounds upon which it is based unless the award is issued as a way of termination by mutual agreement of the parties.
- It must contain the date, the name, address of the parties, their attorneys and the arbitrators, the place of arbitration, a concise summary of the claims of the parties, and the evidences and the decision.
- It must contain a decision regarding the costs of the arbitration, subject to the agreement of the parties.
- It must be expressly notified to the parties on arbitration, according to the form and within

© Published and reproduced with kind permission by Global Legal Group Ltd, London

the time frame agreed by them or, failing that, by delivering a signed copy of the award to each party.

Time frame for the arbitration award

Subject to any contrary agreement of the parties, the arbitrators must deliver the award within six months of the date of submission of the statement of defence or, failing that, the deadline for its submission. Unless otherwise agreed by the parties, this term may be extended by the arbitrators for a period of no longer than two months under a duly justified ground. Additionally, the failure to deliver the award on time will not affect its validity, unless otherwise agreed by the parties.

Can an arbitral tribunal order costs for the parties? If yes, under what criteria?

An arbitral tribunal may order costs for the parties. The AAA establishes that the award shall express, subject to agreement by the parties: the arbitrators' decision on arbitration costs, to include the arbitrator's fees and expenses and, as appropriate, the fees and expenses of the parties' defence or representatives; the cost of the service rendered by the institution conducting the arbitration; and all other expenses incurred in the arbitral proceedings.

Can interest be included in the award and/or costs?

The AAA does not expressly regulate the possibility of claiming interest on arbitration costs. However, there is no legal impediment to including interest in the final award but only regarding the principal amount claimed in the proceedings.

Challenge of the arbitration award

Can an arbitration award be appealed in your jurisdiction?

As a general rule, an arbitration award cannot be appealed before the ordinary courts in Andorra. An arbitration award constitutes *res judicata*, which means that there are no other actions against it except for those seeking to set it aside or, as appropriate, the object of a request of review under provisions on final sentences established in our Procedural Law (Article 30 *bis* of the Transitory Act on Judicial Proceedings of 21 December 1993).

On what grounds can an arbitration award be challenged?

The AAA provides a restricted list of grounds under which an award can be challenged before the Supreme Court of Justice (*Tribunal Superior de Justicia*). All of such reasons must be demonstrated, in any case, by the applicant party:

- The arbitration agreement did not exist or was not valid.
- The applicant party did not properly receive notice of the appointment of an arbitrator and/or of the arbitration proceedings, or otherwise was not able to present their case.
- The arbitrators decided on questions not subject to their jurisdiction.
- The arbitrators did not observe the agreement of the parties regarding their appointment and/or the arbitral proceeding, unless such agreement does not respect any imperative provision of the AAA, or, failing such agreement, the arbitrators have proceeded against the AAA.

Please note that the challenge of an award must be submitted by the parties within three (3) months from the date of notification of the award.

On the other hand, the Supreme Court, at its own initiative or at the request of the Public Prosecutor, may challenge the arbitration award if it verifies that the award decided on non-arbitrable matters or violated public policy.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Modifying the arbitration award

The AAA establishes that the parties are entitled to apply for the correction, rectification and clarification of the award and/or the issuance of an additional award within thirty (30) days after its notification, unless another time is agreed by the parties. A party may apply for this modification of the arbitration award when some of the following circumstances apply:

- miscalculation or clerical, typographical or similar errors in the arbitration award;
- need of clarification of a specific point or part of the award;
- need of an additional award to resolve the claims made and not resolved in the award; or
- overreach of the award to non-arbitrable matters or matters not submitted to arbitration.

Once the application is made, the arbitrators shall make the correction or rectification, clarify the interpretation or issue an additional award within sixty (60) days.

Recent examples of successful and unsuccessful attempted challenges of arbitral awards

Due to the recent coming into force of the AAA and the fact that as of today an arbitration institution does not exist in Andorra, case law on challenges of arbitral awards remains unexplored.

Enforcement of the arbitration award

Under what convention can an international arbitration award be enforced in your jurisdiction? What formal requirements are needed?

The enforcement of international awards is regulated in article 61 of the AAA, which refers to the application of the Convention on Recognition and Enforcement of Arbitral Awards made in New York on 29 April 1977.

In order to enforce an international arbitration award, the formal requirements needed in Andorra are established in our Procedural Law (article 19 of the Qualified Act on Justice of 3 September 1993, and articles 47 and subsequent of the Transitory Act on Judicial Proceedings of 21 December 1993), by reference to the Andorran legal system on the recognition and enforcement of international judicial sentences.

Can an arbitration award be enforced if it has been set aside at the courts of the seat of arbitration?

No, it cannot be enforced. In accordance with the article V.1.E of the Convention of New York and article 61 of the AAA, recognition and enforcement of the award may be refused if the party against whom it is invoked proves that the award has been set aside at the courts of the seat of arbitration. Articles 47 and subsequent of the Transitory Act on Judicial Proceedings of 21 December 1993 regulate the proceeding on the recognition and enforcement of international judicial sentences and arbitral awards. Once the Supreme Court of Justice receives the demand of exequatur, it will notify the party against whom execution is sought and this party will have thirty (30) days to oppose the enforcement and prove that the award has been set aside.

Trends of enforcement − pro arbitration or anti arbitration

There are no trends of enforcement in the Andorran jurisdiction.

Investment arbitration

Bilateral investment treaties (BITs)

Andorra signed one bilateral investment treaty (BIT) with the United Arab Emirates in 2017.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Multi-lateral investment treaties (MITs)

It has not yet signed any multilateral investment treaties (MITs).

Recent investment arbitration cases

To the best of our knowledge, there have not been any investment arbitration cases against Andorra. Nor does the Principality have any experience in investment arbitration.

Treatment of investment arbitration by the courts

The Principality of Andorra does not have any experience on investment arbitration.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Miguel Cases
Tel: +376 728 001 / Email: miguel.cases@caseslacambra.com

Miguel Cases is the managing partner of Cases & Lacambra. He leads the Corporate and Banking & Finance practice and is qualified to practise both in Spain and the Principality of Andorra, where he is the resident partner.

He has extensive experience as an arbitrator and in arbitration proceedings, being regularly appointed as a specialised arbitrator in financial instruments. He is a regular lecturer in international business schools in its specialty areas and in particular financial instruments which simulate or replicate cash flows.

Cases & Lacambra

C/ Manel Cerqueda i Escaler 3-5, AD700 Escaldes d'Engordany, Andorra
Tel: +376 728 001 / URL: www.caseslacambra.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Angola

Nuno Albuquerque, Conceição Manita Ferreira & Luísa Castro Ferreira
N-Advogados & CM Advogados

Introduction

Angola has become one of the fastest-growing economies in the world, being now positioned to become an active member of the global economic community, since it has a privileged geographic location on the coast of the Atlantic Ocean, and abundant natural and human resources. Its economic development policies are focused on private investment, so Angola is perfectly placed to provide interested investors with financial incentives that increase potential for return on capital.

In the last few years, Angola has been undertaking deep legal reforms in order to modernise its legal system so it can foster investment projects in the country.

Given the evolving process of political and economic opening-up of Angola, it has become necessary to provide more security, certainty and juridical predictability in regard to the resolution of eventual conflicts arising from internal and external relations.

Since Angola is experiencing exponential economic growth and an increase in international transactions and foreign direct investments involving Angola and/or Angolan parties, the practice of international arbitration in Angola is also growing. Nevertheless, to date there have only been a small number of domestic arbitration cases. However, given the reforms of the last few years, it is expected that the use of arbitration for domestic cases with a foreign element will increase (i.e., where a party has foreign shareholders). Also, there are an increasing number of arbitrations relating to Angolan parties where recognition and enforcement in Angola are important issues to consider, while an increasing number of investment arbitration cases relating to Angola or Angolan parties can be seen as well.

Currently, Arbitration in Angola is regulated by Law no. 16/03, of 25 July 2003, the "Voluntary Arbitration Law" (VAL).

The VAL was, for the most part, inspired by the Portuguese Arbitration Law from 1986. This law does not strictly follow the UNCITRAL Model Law; however, it includes many solutions that are common to the ones found in that Model Law. In contrast to the Model Law, we can point out the following aspects:

- the VAL contains no provision on definitions;
- it does not provide for rules on interpretation;
- it adopts the disposable rights criterion in regard to arbitrability;
- it does not address the issue of preliminary decisions;
- it does not distinguish between different types of awards; and
- it permits appeal on the merits in domestic arbitrations, unless the parties have agreed otherwise.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Also regarding this matter, Decree no. 4/06, of 27 February 2006, has the purpose of promoting institutional arbitration in Angola, and deals with the licensing procedures for the incorporation of arbitration centres. The Ministry of Justice is the entity empowered to authorise the incorporation of arbitration centres in Angola.

Until this date, the Ministry of Justice has authorised the creation of six arbitration centres:

- Harmonia – Integrated Center for Studies and Conflict Resolution;
- Arbitral Juris;
- CAAL – Angolan Center of Arbitration of Conflicts;
- Center of Mediation and Arbitration of Angola;
- CEFA's Arbitration Centre; and
- CREL – Extrajudicial Resolution of Conflicts Centre.

Arbitration is also foreseen in other legislation, namely the following:

- Private Investment Law (Law no. 14/15, of 11 August 2015);
- the Mobile Values Law (Law no. 22/15, of 31 August 2015);
- the Petroleum Activities Law (Law no. 10/04, of 12 November 2004); and
- the Public Procurement Law (Law no. 20/10, of 7 September 2010).

However, the majority of arbitration cases conducted in Angola continue to be *ad hoc*.

Normally, the Angolan state and companies in the public sector accept, without any complaints, the use of arbitration to resolve disputes with foreign investors.

Also, in 2016, Angola took another major step on international arbitration, by signing the New York Convention on the Recognition of Foreign Arbitral Awards. On 6 March 2017, Angola deposited its instrument of accession to the Convention with the UN Secretary General. Under Article XII(2), the Convention will enter into force in Angola on 4 June 2017, 90 days after the deposit of its instrument of accession.

Arbitration agreement

According to Article 1 of the VAL, the parties may opt to use arbitration for disputes regarding disposable rights (i.e., those rights that the parties can construct and extinguish by act of will and those which parties can renounce).

Only the disputes reserved by law to the State Courts or to some other type of proceedings cannot be submitted to arbitration. Therefore, all commercial disputes can be subject to arbitration.

First of all, in order to resort to arbitration and while celebrating a contract, the parties must establish an arbitration clause (in the contract or in the form of a separate agreement for future disputes arising from a defined legal relationship) or an arbitration agreement (signed by the parties to resolve an immediate dispute), which states that any dispute must be resolved using arbitration, instead of seeking judicial courts.

In order to be valid and effective, the arbitration agreement must comply with several requirements. The arbitration agreement must be in written form (article 3 of the VAL) and will be void if:

- it is not made in writing;
- it goes against the provisions stated in article 1 of the Law; or
- the object of the arbitration is not specified and there is no other way to specify it.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The VAL only includes rules on the expiration of the arbitration agreement, and does not include rules on the modification and revocation of the arbitration agreement. Thus, the Arbitration Agreement and the Arbitration Clause expire when:

- any of the arbitrators dies, is excused, becomes disabled for the exercise of the arbitration and is not replaced;
- a majority cannot be reached in the deliberations (in cases where the arbitration is collective); and
- the award is not rendered by the established deadlines.

However, according to section 4 of article 2 of the Law, the arbitral clause or convention is not automatically void when the contract where it is inserted is void, if it is clear that the will of the parties is to have an arbitral clause or convention regardless of the validity of the contract.

Regarding the competence of the arbitral tribunal, article 31 states that the arbitral tribunal may decide on its own jurisdiction (the principle of competence-competence). This decision can only be syndicated in impugnation or opposition to the execution of the Arbitral Award.

This means that the award of the arbitral tribunal by which it rules on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, can only be appreciated by the judicial court after the arbitral tribunal has rendered the award.

This legal provision gives a letter of law to the fundamental principle of arbitration, the principle of competence-competence: that the arbitral tribunal has full competence to resolve all questions raised in the arbitral proceedings relating to it, whether of a substantive nature relating to the merits of the case, or of a procedural nature. The principle of competence-competence preserves the autonomy of the arbitral tribunal in relation to the jurisdiction of the state courts.

Arbitration procedure

The parties are free to agree on the procedural rules (directly or by reference to an institution). In the absence of that agreement, the tribunal will have the power to determine the rules (as stated in article 16). The same reasoning applies to the place of arbitration (as stated in article 17).

The arbitration begins when the request for submission of the dispute to arbitration is received by the Respondent – if nothing otherwise is stipulated by Agreement of the parties. This request for submission of the dispute to arbitration is generally named "notice to arbitration". The notification can be made by any means, as long as it is possible to prove its receipt by the other party.

The notification must contain:

- the identification of the parties;
- the indication that they wish to submit the conflict to arbitration;
- the indication of the Arbitration Agreement; and
- the subject of the conflict, if that isn't already stated in the Arbitration Agreement.

Also, if the parties are due to nominate the arbitrators. The claimant party must indicate the arbitrator chosen by them in the notice to arbitration, and must invite the other party to indicate their arbitrator. If the arbitration procedure is to be commanded by a single arbitrator, the notifying party must suggest an arbitrator, and invite the other party to accept that suggestion. However, the nomination can also be made by a third party. If that happens,

© Published and reproduced with kind permission by Global Legal Group Ltd, London

the notifying party must also notify that third party to appoint and communicate the appointment of the arbitrator to both parties.

As article 16 of the Law states, the parties can agree about the rules of the arbitration. However, if those rules aren't defined until the acceptance of the first arbitrator, the arbitrators must define the rules of the arbitration.

The seat of the arbitration is also determined by agreement of the parties in the Arbitration Agreement or later. In common with the rules of arbitration, if the parties do not agree on the seat of the arbitration until the acceptance of the first arbitrator, the seat of arbitration must also be chosen by the arbitrators.

The arbitration procedure must respect the following principles and rules:

- the principle of equal treatment of the parties;
- the right to response must be granted in all phases of the procedure; and
- both parties must be heard, orally or by writing, before the rendering of the award.

These are the fundamental principles and rules that must be respected in any procedure. The breach of these principles and rules may lead to the setting-aside of the award.

Also, the parties must be represented by a constituted lawyer (i.e. an Angolan lawyer). In effect, the National Council of the Angolan Bar Association decided on 31 March 2014 that only lawyers with a valid registration may intervene as a lawyer in arbitration proceedings.

According to article 24 of the Law, in national arbitration, the arbitral court must decide in accordance with the national law, unless the parties establish that the conflict is to be solved by referring to equity. However, if the parties agree on the decision by the rules of equity, they automatically renounce the ability to appeal the award.

On the other hand, in international arbitration, the parties are free to designate the applicable law, and may do so by referring to a specific national law or state legal system. If the parties do not agree in this matter, the arbitral court must decide what substantive law to apply, resorting to the conflict rule which it considers applicable to the dispute.

Regarding the production of proof, in arbitration all means of proof allowed by law are accepted. There is no specific rule in Angolan law establishing limits to the permissible scope of disclosure or discovery. If the proof depends on a third party and that third party refuses to collaborate, the parties or the Arbitral Court can request the Judicial Court to carry out the procedure so that proof is produced.

The procedure ends when the award is deposited or after the award becomes definitive, if a withdrawal happens, since the withdrawal is free at any time of the procedure.

If the arbitral award is not rendered within the applicable time limit or if for some reason the tribunal becomes incomplete and a new arbitrator is not appointed, the proceedings will not be dismissed, but the arbitral agreement itself will be deemed to have lost its validity (for that specific dispute) (article 5 of the Law).

The law allows the parties to agree on a time limit to render the award, but if nothing is said until the acceptance of the first arbitrator, the said time limit will be of six months and will only be extended by agreement of the parties (article 25 of the Law). Instead of agreeing on a specific limit, the parties may refer the dispute to institutional arbitration (providing that the rules of the institution contemplate the extension of the time limit to render the award).

After all the diligences on the process are made, the arbitrators must decide and render an award, which is to be notified to the parties and deposited in the secretariat of the Provincial Court of the place of arbitration.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Arbitrators

The arbitral tribunal may be composed by a single arbitrator or several, but there must always be an odd number of arbitrators (article 6, paragraph 1 of the Law).

Appointment

The arbitrators are appointed by the parties in the Arbitration Agreement or in posterior writing. However, the VAL establishes supplementary criteria to be used in cases where the parties have not established the means of designating a single or several arbitrators. Indeed, if the parties do not agree on the designation of the arbitrators, or on the way they are to appoint the arbitrators, each of the parties appoints one arbitrator, and the arbitrators appoint the third arbitrator, which completes the composition of the arbitral court (article 8, paragraph 1 of the Law).

The VAL is silent as to the means of constituting the arbitral tribunal in the case of multiple parties.

Requirements

The arbitrators must be singular persons who have the full enjoyment and exercise of their civil capacity (article 9, paragraph 3 of the Law). The arbitrators must be independent and impartial.

They are free to accept the designation but, once accepted, the excuse of functions is only admissible if it is justified by a supervening cause that makes it impossible for the arbitrator to exercise its functions.

Any person invited to exercise the functions of arbitrator has to reveal immediately all circumstances that may cause doubts about their impartiality and independence. If any circumstance causes a founded doubt of the impartiality and independence of the arbitrator, they may be refused the right to arbitrate. However, the party that appoints the arbitrator can only refuse the designation if the motive is subsequent to the appointment.

In case of failure to appoint one arbitrator, and unless the parties have agreed on another appointing authority, the missing arbitrator will be nominated by the president of the local State Court (article 14 of the Law).

Replacement

An arbitrator can be replaced in cases of death, refusal, permanent disability for the performance of its duties, or if the appointment becomes void.

The motives for the refusal are very similar to the ones established by the UNCITRAL Law. They are contemplated in article 10 of the VAL.

The VAL addresses the matter of challenging the arbitrator when there is reasonable doubt about his or her impartiality or independence, or when he or she manifestly does not possess the qualifications that were previously agreed upon by the parties (article 10, paragraph 2 of the Law).

If the arbitrators do not step down, the decision on this is made by the Tribunal, with appeal to the State Courts (article 10 of the Law).

Interim relief

Interim relief may be granted in arbitration, unless otherwise stated by the parties. Any of the parties may require that the court orders interim measures, related to the object of the conflict, namely the provision of guarantees that it considers necessary. Interim relief is

© Published and reproduced with kind permission by Global Legal Group Ltd, London

stated in article 22 of the Law, which is inspired by article 17 of the UNCITRAL Model Law. However, it does not specify what kind of measures are admitted.

This does not, however, prevent the parties from requesting from the Judicial Court, in terms of the Civil Procedure rules, any procedure they deem necessary to prevent or protect the injury of rights.

It is essential that the petitioner alleges and proves two requirements: the *periculum in mora;* and the *fumus bonus iuris*.

Arbitration award

The law contains a number of provisions regarding the award and its preparation (articles 24 to 33 of the Law).

Unless the parties agree otherwise, under article 25 of the Law, the Arbitration Award must be rendered in the timeline of six months after the acceptance of the last arbitrator. Any extension to that timeline must be agreed by the parties and cannot be decided unilaterally by the arbitrators. There is also the possibility for the parties to agree that, if any instruction measure is necessary, the timeline can be suspended during that period of time for which the instruction is in course. The decision must be rendered with the presence of all of the arbitrators, by simple majority, except if the parties have stipulated a larger majority. The parties can also establish that, if the arbitrators cannot reach an agreement, the decision can be made by the president of the court.

Under article 27 of the Law, the Arbitration Award must be made in writing and must contain the following information:

- the identification of the parties;
- reference to the Arbitration Agreement;
- the object of the conflict;
- the seat of arbitration;
- the location and date on which the award was rendered;
- the decision and justification for the decision;
- signature of the arbitrators; and
- indication of the expenses associated with the process and their distribution between the parties.

However, the statement of a decision given in accordance with the rules of equity is sufficient, with a statement of the facts that are considered proved.

If any arbitrator disagrees with the decision, the reasons for the disagreement must also be stated in the decision.

Also, under article 23 of the Law, the fees and costs of the process and their division between the parties must be agreed by the parties, unless this decision results from regulations of arbitration chosen under article 16 of the Law.

The decision is to be notified to the parties, who can ask for the correction of material errors, obscurities or clarification of doubts, within 10 days. The court has 30 days to respond to such requests.

Throughout the process, the parties can also reach an agreement regarding the subject of the conflict. Under article 28 of the Law, the agreement must be submitted to the court for homologation.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The withdrawal is also admitted, as long as the other party agrees with it, according to paragraph 4 of article 20 of the Law. The withdrawal must also be homologated by the court.

Challenge of the arbitration award

For domestic arbitrations, the Arbitration Award can be challenged in two ways:

- annulment of the award; or
- appeal of the award.

The appeal can be waived by the parties, but not their right to request the award to be set aside.

The **annulment** of the award can happen in the following cases:

- when the conflict is not sought to be solved through arbitration;
- when the court that rendered the award is incompetent;
- when the arbitral agreement has expired;
- when the arbitral court has been irregularly constituted;
- when the decision doesn't contain the justification;
- when the decision has violated the principles of equality of response and that fact has influenced the resolution of the conflict;
- when the court has decided on questions that were not to be decided or when it did not decide on questions that it should decide; or
- when the arbitral court, in cases where it decides through equity and custom, did not comply with the public order or with the Angolan legal order.

The arguments of incompetence of the court and irregularity of the constitution of the court can only be invoked if, during the process, the exception of incompetence of the court or irregularity of its constitution have been also invoked and the court declared itself competent to resolve the conflict, or if the irregularity had influence on the final decision.

Omitting to pronounce can only be admitted if it is demonstrated that the lack of decision on a certain question or issue was determinative of the final decision.

The annulment must be addressed to the Supreme Court and the deadline to submit the annulment is 20 days from the date of notification of the Arbitral Award. The right to require the annulment of the award cannot be waived.

On the other hand, the award can also be **appealed** in the same way that a judicial award can be appealed.

The appeal is to be addressed to the Supreme Court and the deadline to submit the appeal is 15 days from the date of notification of the Arbitral Award.

However, there is a slight difference in the Law when it comes to international and domestic arbitration.

When we come across **international arbitration**, the principle is of non-appeal (as stated in article 44 of the Law), except when the possibility of appeal is expressly agreed by the parties.

On the other hand, when it comes to **domestic arbitration**, the principle is of the admissibility of the appeal, except if the parties expressly renounce that right (as stated in article 36 of the Law).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Enforcement of the arbitration award

National awards

Article 33 of the Law states that the award has to be fulfilled in 30 days. If this does not happen, the non-lacking party may coercively execute/enforce the award.

Awards rendered in Angola (i.e., awards rendered within domestic arbitrations and awards rendered in Angola, within international arbitrations) are enforceable exactly as if they were decisions rendered by the State Court (article 37 of the VAL).

If the deadline given by the Court to voluntarily accomplish the award is over, or if such deadline isn't fixed by the Court, the interested party has 30 days after the notification of the award to enforce it before the Provincial Court, in the terms stated in the Civil Process Law.

The requirement for the enforcement must be accompanied by the arbitral award, its rectification or clarification, and the proof of notification and deposit of the award.

The summoned party has the right to give opposition to the enforcement, with grounding on the motives stated in articles 813 and 814 of the Angolan Civil Procedure Code:

- unenforceability of the award;
- falseness of the process or transfer or infidelity of the latter, when one or the other influences in terms of the enforcement;
- illegality of the claimant;
- illegality of the defendant;
- undue accumulation of executions;
- unlawful coalition of claimants;
- fault or nullity of the first summons to the action, when the defendant has not intervened in the proceedings;
- uncertainty, illiquidity or unenforceability of the obligation;
- *res judicata* prior to the sentence that is to be enforced;
- any fact that extinguishes or modifies the obligation, provided that it is after the close of the discussion in the declaration process, and is proved by a document. The prescription of the right or obligation can be proven by any means; or
- any fundament that is sufficient to annul the award.

The opposition must be filed within eight days from the date the defendant is notified of the enforcement process. The decision on the opposition to the enforcement is not appealable.

International awards

Angola has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958) via Resolution no. 38/2016, which was published in the Official Gazette of the State on 12 August 2016. Following its ratification, on 6 March 2017 Angola deposited its instrument of accession to the New York Convention with the Secretary General of the United Nations. In light of article XII (2), the New York Convention entered into force on 4 June 2017, 90 days after the instrument has been deposited with the UN Secretary General.

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.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Among the main differences that are anticipated in relation to the old regime (in which all foreign arbitral awards had to be subject to a process of foreign decision recognition, before the judicial courts), we underline the future inapplicability of article 1096 of the Angolan Civil Procedure Code regarding the requirements for foreign award confirmation, which will be replaced by articles IV and V of the New York Convention.

To provide certainty that foreign arbitral awards are practically enforceable in the country, Angola may need to harmonise both the provisions of the Voluntary Arbitration Law and the Angolan Civil Procedure Code with its Convention obligations.

Investment arbitration

Investment arbitration is not specifically regulated under Angolan law. Therefore, unless more favourable rules have been adopted in international instruments, the Voluntary Arbitration Law applies to investment arbitration.

The New Private Investment Law of Angola prescribes, under paragraph 3 of article 46, that conflicts and their interpretation can be resolved by arbitration. However, paragraph 4 of the same article states that that arbitration must take place in Angola, and the governing law applicable must be Angolan Law.

This Law also has the aim to foresee the main guarantees granted to foreign investors in the scope of public international law or established by the international jurisprudence of the most various arbitration institutions, namely:

- the Angolan State shall ensure, irrespective of the origin of capital, fair, non-arbitrarily discriminatory and equitable treatment of incorporated companies and companies and the foreign investor's assets (article 15);
- payment of a fair compensation, prompt and effective in the case of expropriation or requisition for weighty and justified reasons (article 16, paragraph 3);
- protection of intellectual and industrial property rights;
- protection of acquired rights over possession;
- non-interference in the management of private companies, except in cases expressly provided for by law; and
- non-cancellation of licences without judicial or administrative proceedings.

Also, as stated above, Angola became a signatory country of the New York Convention in 2016.

Additionally, the Bilateral Investment Treaties provide for the authorisation or consent of the Angolan State to arbitration in terms that allow the foreign investor immediate recourse to international arbitration, without the need to enter into any subsequent arbitration agreement.

In these cases, the arbitral tribunal shall consist of three arbitrators, each party being responsible for choosing one arbitrator and the third arbitrator being the arbitrator-president chosen by agreement between the other two. In the absence of an agreement for the choice of the third arbitrator, the latter, under the most diverse investment contracts, shall be appointed by one of the following entities:

(i) the General Secretariat of the Paris International Chamber of Commerce (ICC);

(ii) a designation authority appointed by the Secretary General of the Permanent Court of Arbitration of The Hague, under the UNCITRAL Regulation; and

(iii) the President of the Provincial Court of Luanda, at the request of either party.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Angola has the following Bilateral Treaties with other States:

- the United Kingdom of Great Britain and Northern Ireland (2000);
- Germany (2003);
- Namibia (2005);
- South Africa (2005);
- Italy (2006);
- Portugal (2009);
- Switzerland (2009); and
- Russia (2009).

They all refer to the arbitration of disputes for the International Centre for the Settlement of Investment Disputes (ICSID) and the Complementary Mechanism for the Administration of Conciliation, Arbitration and Inquiry Procedures (CIRDI), as well as for the Arbitral Tribunal of the International Chamber of Commerce (ICC), or even for an international arbitrator or tribunal to be designated by special agreement or established in accordance with the UNCITRAL Rules of Arbitration.

In summary, it can be said that Angola does indeed protect foreign investments through arbitration, namely in the private investment sector, and has taken steps to reduce bureaucracy and facilitate international arbitration and investment arbitration; namely and most importantly, by ratifying one of the most important arbitration conventions that was missing from the Angolan legal system, the New York Convention of 1958.

Third-party funding

No regulation on third-party funding of arbitration exists in Angola. Given the fact that there is no regulation on third-party funding, it would seem prudent for arbitration agreements to include certain provisions to ensure less uncertainty in potential claims, and in particular: (1) the obligation to disclose the existence of funding agreements in the event of disputes, and the content to be disclosed; and (2) acknowledgment by the parties that, as a security measure to avoid a potential annulment of the award or refusal of its recognition and enforcement under the 1958 New York Convention, the funder's eventual uplift should not comprise any recovery of costs or indemnity due to the prevailing party in the arbitration or litigation.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Nuno Albuquerque
Tel: +244 926 227 178 / 928 391 751 / Email: nunoalbuquerque@nadv.pt

Born on July 19, 1964, in Angola. Nuno has a law degree, University of Coimbra (1988). Nuno has been inscribed in Portugal's bar association, as a lawyer, since 1990; in Angola's bar association, since 2008; and in Paris' bar association, since 2014. He is an insolvency administrator, inscribed in the official list since 1995. Nuno is the executive director of CAAL – Angolan arbitration centre for litigation, since 2012. He is a certified mediator – public and private mediation ICFML, Catholic University, Oporto, 2014. Arbitrator for CAAD – Administrative Arbitration Centre; for TAD – Sports Arbitral Court (where he is also Vice-President) since 2015; for the Arbitration Centre for Property and Real Estate, since 2016. Nuno was the founding partner of "N-ADVOGADOS – Nuno Albuquerque, Deolinda Ribas, Sociedade de Advogados, RL" (now N-Advogados & CM Advogados).

Conceição Manita Ferreira
Tel: +244 222 735 332 / Email: mdcmanita@gmail.com

Born on February 16, 1959. Conceição is member no. 559 of the Angolan Bar Association. Conceição graduated in Law from Agostinho Neto University (2005), and has a Masters Degree in Legal and Economic Sciences, by the same University. She also completed a course in Social Research and Economic Analysis; in Emergency and Disaster Management; and in Basic Financial Management and Control for Managers. From 1983 to 1999 she was in the UNHCR; from 1995 to 1999 as Representative for Middle and Lower Juba Regions in Somalia. From 2005 to 2011 she worked at RGT Law Firm, Luanda, as Executive Director/Head of Labour/Family Law Departments. In 2007 she worked in the UNHCR, Luanda, as National Protection Officer. She is currently a Consultant, Mediator and Lawyer, Head and main partner of N-Advogados & CM Advogados.

Luísa Castro Ferreira
Tel: +244 926 227 178 / +351 253 609 330/310
Email: luisacastroferreira@nadv.pt

Born on September 23, 1989. Luísa has a law degree, University of Minho (2011), and a Masters in Administrative Law, University of Minho, 2014. Luísa is legally qualified to give professional training, 2017. Luísa has been inscribed in Portugal's Bar association, as a lawyer, since 2014, and has worked at N-Advogados & CM Advogados since 2015. She was a speaker at the Study Session on European Public Procurement Law, University of Minho, March 2013, and at the 1st Public Procurement Congress of Cape Verde, November 2014. She is co-author of the article, "e-Procurement and Public e-Procurement", in *The New Code of Administrative Procedure* – for Professor Cândido de Oliveira, and author of the article, "The Electronic Public Procurement", in *Minutes of the First Congress of Public Purchases of Cape Verde*, 2015.

N-Advogados & CM Advogados

Rua Domingos do Ó, n.º 61, 1.º andar, escritório 13, Edifício Acácias Place, Benguela, Angola
Tel: +244 926 227 178 / +351 253 609 330/310 / Fax: +351 253 609 311 / URL: www.nadvogados.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Austria

Dr Christian W. Konrad & Franziska Mensdorff-Pouilly
Konrad Partners

Introduction

Austria has a long-standing tradition of fostering arbitration as a method of dispute resolution between commercial parties that goes back to the codification of arbitration law in 1895. Over the years, the consistency of a well-established legal framework, together with the arbitration-friendly case law of the local courts, have served Austria well in establishing itself as a major arbitration hub in Europe, particularly for disputes involving parties from CEE and SEE.

The Austrian arbitration law is governed by Sections 577–618 of the Austrian Code of Civil Procedure (**ACCP**), which does not distinguish between national and international arbitration proceedings. With the 2006 revision, Austrian arbitration law was aligned with international developments and the requirements and standards of more recent international arbitral practices. The ACCP's provisions were brought in line with the widely recognised UNCITRAL Model Law on International Commercial Arbitration (**UNCITRAL Model Law**).

With the 2013 revision of the ACCP, the Austrian Supreme Court became the first and final instance for the majority of arbitration-related matters. As a result, challenges of arbitral awards are now dealt with directly by a special division of the Austrian Supreme Court. This reform aimed at shortening the proceedings before state courts in annulment matters and ensures high-quality decisions by specialised Supreme Court judges.

The Vienna International Arbitral Centre (**VIAC**), which is attached to the Austrian Federal Economic Chamber, was established in 1975 and has since maintained its position as one of the leading arbitration institutions in Europe. As of today, more than 1,600 arbitral proceedings have been administered under its rules. VIAC's recent statistical reports show that disputes relating to financial services and banking, manufacturing, business ownership as well as aerospace and defence, currently account for the largest share of its caseload.

VIAC has been cautious to preserve its traditions while also keeping pace with recent trends in international arbitration. In 2013, it amended its arbitration rules by introducing, among others, new provisions on multi-party arbitration, expedited proceedings and advance on costs in order to meet the demands of the international arbitration community.

An updated version of the Vienna Rules entered into force on 1 January 2018, applying to proceedings commenced after 31 December 2017. *Inter alia*, VIAC now also administers purely domestic cases and has introduced an electronic case management system. Moreover, it is now explicitly provided that arbitrators and parties as well as their representatives shall conduct the proceedings in a cost-effective and efficient manner – which may also be taken into consideration when determining the arbitrators' fees and costs. In addition, a respondent

© Published and reproduced with kind permission by Global Legal Group Ltd, London

may now request security for costs if it shows cause that the recoverability of a potential claim for costs is, with a sufficient degree of probability, at risk. Furthermore, the registration fees and administrative fees for low amounts in dispute have been reduced and at the same time, the administrative fees for very high amounts have been slightly increased.

In line with recent trends to increase transparency regarding the appointment of arbitrators, VIAC has introduced a list indicating the names of arbitrators acting in VIAC proceedings which were pending on or filed after 1 January 2017. The list called "*VIAC Arbitral Tribunals*" is available on the institution's website and provides information *inter alia* with regard to the role of the arbitrator (sole arbitrator, chairman, co-arbitrator), the mode of appointment (by the parties, the co-arbitrators or the VIAC-Board), the date of the transfer of the file to the arbitrator, and whether or not the arbitration is still pending.

Apart from VIAC, ICC Austria contributes to promoting arbitration in Austria by, *inter alia*, organising seminars, nominating arbitrators and advising on arbitration and mediation clauses.

Austria is also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (**New York Convention**), to which it no longer maintains reservations, and the European Convention on International Commercial Arbitration 1961 (**European Convention**). In addition, Austria has signed and ratified the ICSID Convention and the Energy Charter Treaty (**ECT**).

Arbitration agreement

The definition of an arbitration agreement contained in Section 581(1) ACCP follows Article 7(1) UNCITRAL Model Law. For an arbitration agreement to be valid, certain minimum requirements have to be met. First, the parties thereto must be definable. In principle, these are the parties to the main contract. It has to be noted, however, that under certain circumstances, third parties may also be bound by an arbitration agreement. Second, the arbitration agreement has to indicate the parties' will to have their dispute finally resolved in arbitration proceedings; and third, the arbitration agreement has to make reference to a "specified legal relationship". The parties may choose to refer only a specific dispute to arbitration or, generally, any potential dispute arising from a specified legal relationship. However, an agreement in general terms that "all disputes that may arise between two parties for any reason shall be submitted to arbitration" would be invalid due to insufficient specificity.

Parties may agree to submit their dispute to arbitration before or after it has arisen. The arbitration agreement may be concluded in the form of a separate contract, as well as in a contractual clause.

The form that an arbitration agreement must comply with can be fulfilled in two ways. First, it can be met by the signature of the parties on the document containing the arbitration agreement. This arguably includes every adequate form of electronic signature. The second means to conclude an arbitration agreement is by exchange of letters, faxes, emails or other forms of communication exchanged by the parties that provide "proof of the existence of the agreement". In other words, the parties must choose a mode of transmitting the information that evidences the text of the agreement. It is not sufficient for a letter, fax or email to be accepted orally; on the contrary, the acceptance must also be in writing. Electronic storage, such as on a CD-ROM or computer hard disc should, however, suffice.

The question of agency in relation to the formation of arbitration agreements is a particularly

© Published and reproduced with kind permission by Global Legal Group Ltd, London

controversial issue under Austrian law. Officers (such as managing directors) authorised to act for commercial entities, as well as persons acting under commercial power of attorney (within the scope of Section 54 of the Austrian Commercial Code), are entitled to conclude arbitration agreements unless the corporate charter or statute provides otherwise. However, in a recent decision, the Austrian Supreme Court has held that a commercial power of attorney, which has been granted orally, does not meet the formal requirements to enter into an arbitration agreement based on such power of attorney. Rather, the commercial power of attorney also has to comply to the formal requirements of an arbitration agreement.

Outside the scope of the Austrian Commercial Code, Austrian law imposes special requirements on agents who conclude arbitration agreements on behalf of a principal. In such cases, the principal is only bound by the arbitration agreement if the agent had a written power of attorney (mirroring the form requirements for arbitration agreements). In addition, this power of attorney is required to specifically include, and to refer to, the power to conclude an arbitration agreement according to Section 1008 Austrian Civil Code (**ABGB**).

Section 583(2) ACCP addresses separate arbitration agreements (as opposed to arbitration clauses included in a contract). When an agreement which fulfils the form requirements set forth above refers to a document which contains an arbitration agreement, it shall constitute an arbitration agreement if the reference is such that it makes the arbitration agreement part of the contract. This provision clarifies that the arbitration agreement does not have to be attached physically to the signed document. This is particularly relevant for arbitration clauses contained in general terms and conditions.

The consequences of a formally invalid arbitration agreement are severe, as they are considered to have no legal effect and, as a result, the arbitral tribunal lacks jurisdiction.

Any formal defect of the arbitration agreement, however, shall be cured in the arbitration proceedings by entering an appearance in the case, if no objection is raised at the latest with the respective first submission on the merits. If a party fails to raise a timely objection, it is generally barred from raising this defence at a later stage. This facilitates legal certainty and helps to reduce dilatory tactics.

Special form requirements apply to arbitration agreements between entrepreneurs and consumers, and to certain employment matters. Such agreements with consumers are only valid if concluded after the specific dispute has arisen. In addition, both the consumer and the employee have to receive written legal advice on the differences between arbitration and court proceedings. Furthermore, the arbitration agreement must be contained in a separate document signed by the consumer or employee, and such a document must only comprise agreements relating to the arbitral proceedings. Importantly, if the arbitration agreement provides for a seat of arbitration in a state that is different from the state of the consumer's or employee's domicile, residence or place of work at the time the contract was concluded or at the time of commencement of the arbitral proceedings, such an agreement is only binding if it is invoked by the consumer or employee. These special requirements, however, do not apply to members of the boards of stock corporations and managing directors of limited liability companies. Whether a shareholder of a company is to be considered a consumer should be assessed from a commercial point of view, taking into account, in particular, to what extent the shareholder can control management decisions of the company.

Unlike the UNCITRAL Model Law, the ACCP expressly governs objective arbitrability in its Section 582 and provides that all pecuniary disputes may be the subject of an arbitration agreement. Such disputes include, among others, corporate disputes, disputes over anti-trust claims and competition law claims that are generally arbitrable. Non-pecuniary claims are

© Published and reproduced with kind permission by Global Legal Group Ltd, London

arbitrable if the law allows the parties to conclude a settlement on the subject matter. Claims involving family law, as well as all claims arising out of contracts that are even only partially subject to the Landlord and Tenant Act or the Limited Profit Housing Act, are expressly excluded and may not be validly referred to arbitration.

The principle of competence-competence – the arbitral tribunal's power to decide on its own jurisdiction – is widely acknowledged and provided for under Section 592 ACCP. Austrian arbitration law expressly stipulates that the decision on jurisdiction can be made either jointly with the ruling on the merits or by a separate arbitral award (an arbitral tribunal may not render its decision on jurisdiction in the form of a procedural order). If the jurisdictional question is factually and legally detached from any decision on the merits, this often results in a bifurcation of the proceedings and hence leads to a separate award that may be challenged before the Austrian Supreme Court like any other award.

Unlike Article 16 UNCITRAL Model Law, the separability doctrine is not expressly enshrined in the ACCP. This doctrine refers to the principle that an arbitration agreement is at the outset treated as separate from the underlying contract in which it is contained, or to which it refers. The doctrine of separability is widely accepted by Austrian scholars, although it has only been applied on a case-by-case basis by the state courts. In most cases, the Austrian Supreme Court has confirmed that the invalidity or voidness of the main contract does not automatically result in the invalidity or voidness of the arbitration agreement. Austrian law approaches the issue of separability as a matter of contract interpretation. Which disputes are covered by an arbitration agreement must be determined on the basis of the scope of the arbitration agreement and interpreted in accordance with the intention of the parties.

Joinder of third parties and consolidation of proceedings are not expressly governed by statutory provisions of the Austrian arbitration law. However, where parties have agreed to apply the Vienna Rules, Articles 14 and 15 provide a clear and comprehensive framework in relation to these aspects. A joinder may be requested at any stage of the proceedings, by either party or by the third party. The decision on whether the request is granted and to what extent is within the discretion of the arbitral tribunal, whereby the tribunal has to hear the parties to the arbitration and the third party to be joined. Consolidation of two or more proceedings may be granted, provided that the place of arbitration is the same for all proceedings. Moreover, unless the same arbitrators have been appointed to serve in all relevant proceedings, all parties must consent to the consolidation. The request for consolidation is decided upon by the VIAC Board. The Board has to hear – by way of written submissions – all parties to the proceedings to be consolidated as well as the arbitrators that have already been appointed considering all relevant circumstances, such as, for instance, the stage of the respective proceedings and the compatibility of the respective arbitration agreements.

Arbitration procedure

The ACCP does not contain a list of mandatory provisions and allows the parties to deviate from most of its provisions by agreement, for example, by reference to institutional arbitration rules. The statute uses wording such as "unless otherwise agreed", or "if nothing else has been agreed upon", and thereby clarifies that these provisions are within the disposition of the parties, and are therefore non-mandatory. Mandatory provisions comprise, for example: the right to be heard; the right to fair and equal treatment; the competence-competence of the arbitral tribunal; the parties' right to notification of the proceedings and

© Published and reproduced with kind permission by Global Legal Group Ltd, London

of representation; the uneven number of arbitrators and a party's right to challenge an arbitrator; and provisions on actions for setting aside the award.

Apart from such mandatory provisions, parties are allowed to freely agree on the rules of the procedure. Where the parties have failed to determine the applicable procedural rules, the arbitral tribunal has wide discretion in the conduct of the proceedings. Where the parties have not agreed upon a specific substantive law, the arbitral tribunal has to apply such rules as it considers to be appropriate.

The same interplay between the principle of party autonomy and the arbitral tribunal's wide discretionary powers characterises the evidentiary procedure. Parties are free to agree on the applicability of the IBA Rules on the Taking of Evidence in International Arbitration. However, the parties' freedom to determine the rules of the proceedings is restricted by mandatory law authorising the arbitral tribunal to carry out the taking of evidence, to rule upon the admissibility of evidence and to freely evaluate its results.

Arbitral tribunals do not have any coercive powers. Where such coercive powers are necessary, an arbitral tribunal may request judicial assistance. Notably, a request for judicial assistance is not limited to the measures of enforcement existing under Austrian law. Rather, an arbitral tribunal may request the enforcement of any measure which does not violate Austrian public policy.

Thus, in principle, a court will enforce a tribunal's order against a third party to produce a document if the third party is under a civil law obligation to do so. An arbitral tribunal's request for court assistance regarding document production on the part of a party to the arbitration is, however, less likely to be granted, since it could lead to the party in question adversely affecting its own position in the proceedings.

As there is no express statutory regulation in the ACCP, in principle the parties are free to agree whether and to what extent an obligation exists to keep the proceedings themselves, and the documents pertaining to it, confidential. However, party autonomy in this regard is limited by the parties' rights to protect and/or pursue their rights and claims. Hence, a confidentiality agreement cannot restrict a party in relation to the initiation of enforcement proceedings, or to commence setting-aside proceedings even if these proceedings are public, as is the case in Austria. If the parties have not concluded an express agreement concerning the duty to keep the proceedings confidential, it is questionable whether the conclusion of an arbitration agreement implies such a duty. Austrian scholars are mainly of the opinion that such an implied duty of confidentiality has no basis in Austrian law. Hence, parties are well advised to include an explicit confidentiality agreement in their arbitration clause.

Arbitrators

In principle, parties are free to appoint whichever arbitrators they choose, and are not restricted to necessarily selecting lawyers. Whilst there are no statutory requirements regarding the qualification of an arbitrator, parties may agree on specific prerequisites, skills and qualifications which the arbitrator must meet. In principle, active Austrian state court judges are excluded from acting as arbitrators. Violation of this prohibition, however, has only disciplinary consequences and does not lead to the invalidity of the arbitration or the arbitral award. The ACCP does not comprise any rules on the use of administrative secretaries to arbitral tribunals. They are, however, frequently used to support the arbitral tribunal with administrative tasks; of course, no decision-making power may be delegated to the administrative secretary.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Naturally, arbitrators must be independent and impartial. Whether an arbitrator meets these criteria is decided by applying an objective third-party test. Prior to their appointment and throughout the proceedings, arbitrators are under the obligation to disclose any circumstance which may give rise to doubts as to their impartiality or independence (Section 588(1) ACCP). Although the IBA Guidelines on Conflict of Interest in International Arbitration do not have the force of law in Austria (or elsewhere), they are also taken into account in arbitration proceedings conducted in Austria.

If a party has doubts as to the arbitrator's impartiality or independence, it may challenge the arbitrator. In the absence of an alternative agreement, the deadline for challenging an arbitrator is four weeks from the constitution of the arbitral tribunal or the moment the challenging party became aware of the circumstances giving rise to doubts as to the arbitrator's impartiality or independence (Section 589(2) ACCP). Unless the arbitrator resigns from office or the other party agrees to the challenge, the arbitral tribunal including the challenged arbitrator is required to decide upon the challenge. If the challenge is unsuccessful, the challenging party may, within four weeks upon receiving the decision refusing the challenge, refer the case to the Austrian Supreme Court for its review. Only in disputes involving consumers and in labour law disputes are courts on the Regional Court level deemed competent. Whilst the challenge is pending with the Austrian Supreme Court, the arbitral tribunal, including the challenged arbitrator, may continue the proceedings and render an award (Section 589(3) ACCP).

Under Austrian law, an arbitral tribunal must consist of an uneven number of arbitrators. Thus, where the office of a member of an arbitral tribunal is terminated before the proceedings end, a new arbitrator must be appointed. An arbitrator's office ends upon: (i) his or her death; (ii) a successful challenge; (iii) a voluntary resignation; (iv) whenever the parties jointly agree on the termination of his or her mandate; and (v) a decision of the Austrian Supreme Court that the arbitrator is unable to fulfil his or her duties, or to do so within a reasonable period of time (Section 590 ACCP).

Interim relief

Interim measures may only be ordered against a party to the arbitral proceedings and shall not interfere with the rights of third parties. For a request for interim or protective measures to be granted, such a measure must be necessary to avoid the frustration or considerable impediment of future enforcement proceedings, or the risk of irreparable harm. Further, the party against which the measures are directed must be heard.

The ACCP follows the UNCITRAL Model Law allowing parties to arbitral proceedings to request a state court to issue interim measures, even where the arbitral tribunal has already been constituted. This also applies if the seat of the arbitration is not within Austria. As this is a matter of mandatory law, parties may not validly waive their right to turn to a state court with a request for interim measures. As statutory provisions grant such powers also to the arbitral tribunal, parties to arbitral proceedings are free to choose the forum for their application.

However, since arbitral tribunals have no coercive powers, once granted but not complied with, interim measures may only be enforced by the competent district courts. Thus, even though arbitral tribunals have the authority to grant interim or protective measures of types which are unknown under Austrian law, at the enforcement stage state courts may have to adapt the interim relief granted to enforcement measures known under Austrian law which closest reflect the measures ordered by the tribunal.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Arbitral award

Since the ACCP does not set time limits for rendering the final award, parties are free to agree on a maximum duration. The parties may, for example, agree on an expedited procedure under the Vienna Rules. This provides that a final award shall be rendered within six months starting from the transfer of the file to the arbitral tribunal.

The arbitral award must be in writing and signed by the arbitral tribunal. Where an arbitrator is prevented from signing the award, it is sufficient if the award is signed by the majority of the members of the arbitral tribunal (a note written on the award itself must explain the reasons for any missing signature). The award must indicate the seat of the arbitration and the date on which it was issued. In the past, it was the prevailing opinion among Austrian scholars that an award that is not reasoned, although unlawful, does not permit the challenging of the award. In a recent decision of the Austrian Supreme Court it was held, however, that an award may be challenged if its reasoning is incomprehensible from an objective viewpoint, or if it contains phrases which are meaningless within their respective context.

Remedies possibly granted by the arbitral tribunal depend on the parties' agreement. As a result, arbitrators are not limited by Austrian arbitration law when choosing remedies. In principle, arbitrators are vested with wide-reaching powers to grant any form of relief. However, an arbitral tribunal seated in Austria arguably may not grant any form of punitive damages, as such an award may possibly violate public policy.

The decision on costs must be made in the form of a separate award or together with the final award. Besides the outcome of the arbitral proceedings, the arbitrators may take into account other circumstances which had an impact on the course of the proceedings. Thus, while generally the principle "costs follow the event" applies, tribunals are free to exercise discretion in determining to what extent either party shall bear the costs.

Although the ACCP is silent on issues regarding interest on the principal claim, it is recognised that arbitral tribunals have the power to award interest. Under Austrian law, this aspect is a question of substantive, not procedural law. As a result, the parties' right to, and the amount of, interest is governed by the law applicable to the substance of the dispute.

Challenge of the arbitration award

Section 611 ACCP allows for a very narrow scope of judicial control of arbitral awards where the seat of arbitration is in Austria. Such control is limited to an exhaustive list of grounds. Austrian courts are not allowed to conduct a *révision au fond* of an arbitral award, meaning that courts cannot revise the legal and factual basis of the arbitral tribunal's decision. Parties may not validly agree to waive grounds for setting aside or to expand the scope of grounds. The ACCP limits the extent to which an award may be challenged even further than the UNCITRAL Model Law, by excluding mere violations of the arbitral procedure as agreed by the parties.

The following types of grounds require party action to set aside the award:

- grounds concerning the right to be heard;
- grounds concerning the scope of the arbitration agreement;
- grounds concerning the arbitral tribunal;
- procedural *ordre public*; and
- certain grounds which, in state court proceedings, are required for a revision of a court judgment to re-open the court proceedings.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Grounds based on the substantive *ordre public* and grounds concerning objective arbitrability may be invoked by the parties as well as *ex officio* by the courts.

Since January 2014, the Austrian Supreme Court is the first and final instance to hear and decide upon challenges of arbitral awards. Generally, an action to set aside an arbitral award may be filed within three months starting from the day on which the award is served upon the party acting as claimant in the annulment proceedings. A different time period must be observed where the ground invoked for setting aside an award is based on Section 611(2) No. 6 ACCP. This provision refers to provisions where an appeal for resumption against a judgment of a state court can be filed. In this case, the time period within which the action for setting aside the award must be brought has to be determined in accordance with the respective provisions on the action for resumption. Thus, in such cases, the time period requirements as set out by the respective provisions governing the re-opening of state court proceedings apply to challenges based on Section 611(2) No. 6 ACCP, and not the general time period requirement of three months.

In case an award is successfully challenged, it is set aside *ex tunc*. According to Section 584(4) ACCP, if an award is set aside due to the arbitral tribunal's lack of jurisdiction, the statute of limitations remains interrupted provided the claim is immediately brought before the competent forum. The party challenging the award may request the postponement of the enforcement of the award. If the setting-aside procedure is successful, the enforcement must be discontinued.

In addition to the grounds listed above, Articles 617 and 618 ACCP provide for grounds to set aside an arbitral award which apply only to consumer arbitration and to certain employment disputes. Such grounds concern violations of mandatory law, lack of written advice on the differences between arbitration and litigation before consenting to arbitration on the part of the consumer/employee, and further grounds which would justify re-opening state court proceedings.

Enforcement of the arbitration award

If the seat of arbitration is in Austria, the award is "domestic" and may be enforced like any other judgment by a state court. If the seat of arbitration is outside Austria, the arbitral award is "foreign" and subject to recognition and enforcement under the New York Convention. The applicant for enforcement of a foreign award must seek a declaration of enforcement (exequatur) and an authorisation for enforcement.

The party seeking a declaration and an authorisation for enforcement must provide the court with the arbitral award and – if so requested by the competent court – the arbitration agreement and certified translations thereof. The court that grants the enforcement authorisation will not review any legal matters relating to the arbitration proceedings, but will only examine certain form requirements, with the exception that the grounds for setting aside an award due to the lack of objective arbitrability and the violation of Austrian substantive public policy have to be examined *ex officio* and may ultimately lead to the denial of enforcement.

The competence to issue a declaration of enforceability and an enforcement authorisation rests with the district court in whose territorial jurisdiction the opposing party has its seat or domicile, or where immovable or movable assets against which enforcement is sought are located. The first instance district court decision is an *ex parte* court order, i.e. made without holding a hearing or hearing the opposing party. In principle, the decision may be appealed by both parties within four weeks.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

It is important to note that even where a foreign arbitral award has been set aside at the seat of the arbitration on grounds of public policy, Austrian courts would not automatically refuse enforcement but would examine the grounds on their own.

Investment arbitration

Austria is a party to more than 60 bilateral investment treaties (**BITs**): 2015 saw the first and, to date, only investment treaty claim brought against the Republic of Austria. In this case, the majority shareholder of an Austrian bank sought redress for damages allegedly caused through state court proceedings and investigations involving the bank and some of its executives. The claim was rejected by the ICSID tribunal on the basis that it lacked jurisdiction to hear the dispute.

Austrian companies, on the other hand, have made more frequent use of the country's BITs. In total, 22 investor-state arbitrations have been initiated by Austrian investors, 10 of which are still pending. Notably, the finance sector accounts for approximately one quarter of these claims. In fact, the ICSID-case introduced by Austrian investors in 2018 concerns renewable energy generation. Twelve of the Austrian BITs are intra-EU BITs, i.e. investment agreements with other Member States of the European Union.

In a recent judgment of 6 March 2018 in case C-284/16, *Achmea v Slovak Republik* (the **Achmea judgement**), the European Court of Justice (ECJ) ruled that investor-State arbitration clauses in intra-EU BITs are unlawful. Based thereon, the European Commission has called on the Member States taking action to terminate the intra-EU BITs given their incompatibility with EU law and pursuant to the principle of legal certainty. On 15 January 2019, the EU Member States – falling in line with the European Commission – issued a political declaration addressing the consequences of the Achmea judgement. In particular, the signatories pledged to terminate all intra-EU BITs by 6 December 2019. Two additional declarations (one by Finland, Luxembourg, Malta, Slovenia and Sweden, and another by Hungary) depart from the main declaration, in respect to the application of the Achmea judgement to the ECT. How the Achmea judgement and the subsequent declarations of the EU Member States will affect investor-state dispute settlement in general and (pending) arbitration proceedings remains to be seen.

In April 2016, Austria, Germany, Finland, France and the Netherlands submitted a so-called "non-paper" to the Council of the European Union, suggesting a compromise solution in the form of a single agreement between all EU Member States. The proposal foresees a phasing-out of existing intra-EU BITs, followed by appropriate investment protection through other means. Such means to protect intra-EU investment could either involve conferring jurisdiction to hear investment disputes to the European Court of Justice or, alternatively, establishing an entirely new system for investment protection, modelled after the Unified Patent System. As a third alternative, the "non-paper" suggests relying on the Permanent Court of Arbitration to administer intra-EU investor-state disputes, based on a special agreement concluded between all EU Member States. Whether, in light of the recent developments, any of these proposed solutions will become reality remains to be seen.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Dr Christian W. Konrad
Tel: +431 512 95 00 / Email: c.konrad@konrad-partners.com

Dr Christian W. Konrad is the founding and managing partner of Konrad Partners. He is an advocate in the fields of international arbitration, international litigation and public international law. He has extensive experience in arbitral practice, procedure and advocacy both in civil and common law systems. His practice covers inter-state, international and commercial disputes. He has represented international organisations and businesses in a broad range of cases involving, *inter alia*, long-term energy contracts, concession agreements, and entitlement to natural resources, immunities from jurisdiction, infrastructure projects, mergers and acquisitions. He also advises clients on the protection of their investment and enforcement of arbitral awards and court judgments. He frequently acts as arbitrator and is a member of panels of various arbitral institutions worldwide. He also serves as Vice-President of the Kosovo Permanent Tribunal of Arbitration.

Franziska Mensdorff-Pouilly
Tel: +431 512 95 00 / Email: f.mensdorff-pouilly@konrad-partners.com

Franziska Mensdorff-Pouilly is counsel at Konrad Partners. She focuses her practice on international commercial arbitration and multi-jurisdictional disputes. She has represented clients in disputes governed by various substantive and procedural laws and has acted as counsel in *ad hoc*, as well as institutional arbitrations including under the ICC, LCIA and VIAC Rules. She has advised companies across a broad range of commercial and industrial sectors including insurance and reinsurance, chemicals and pharmaceuticals, corporate & M&A, engineering & construction, oil and gas, energy & natural resources.

Konrad Partners

Rotenturmstrasse 13, 1010 Vienna, Austria
Tel: +431 512 95 00 / URL: www.konrad-partners.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Brazil

Fernando Eduardo Serec, Antônio Marzagao Barbuto Neto
& Lucas Britto Mejias
TozziniFreire Advogados

Introduction

Legal background

Federal Law no. 9.307/96 ("Brazilian Arbitration Act") reflects the influence of the UNCITRAL Model Law on Commercial Arbitration and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), but at the same time contains specific features that harmonise Brazil's legislation with modern trends in arbitration.

Brazil has ratified both the New York Convention and the Inter-American Convention on International Commercial Arbitration (the Panama Convention). Our country is also a party to the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (the Montevideo Convention), as well as the Geneva Protocol of 1923 on arbitration clauses. Finally, the confirmation of foreign arbitral awards rendered in member states of MERCOSUR (Brazil, Argentina, Uruguay and Paraguay) is regulated by the Protocol on Jurisdictional Assistance in Civil, Commercial, Labour and Administrative Matters, also known as the *Las Leñas Protocol*.

On the other hand, foreign investors doing business in Brazil do not benefit from the arbitration framework set by the 1965 Convention on Settlement of Investment Disputes between States and National of Other States (ICSID Convention). Although Brazil has entered into fourteen (14) Bilateral Investment Treaties, there is no ratification of such treaties yet. Consequently, they are not enforceable.

Recent changes in the Brazilian legal system

With the enactment of the Federal Law 13,129/2015, which came into force in July of 2015, the Brazilian Arbitration Act was modernised. The main changes were:

- *Arbitration letter*: the arbitration letter consists of a specific procedure of cooperation in which an arbitral tribunal may request the aid of the judicial courts for acts that demand the use of force, such as: (i) the conduct of a reluctant witness to a hearing; (ii) the enforcement of an interim relief granted by the arbitrator; and (iii) the collection of a document or information that is in power of a third party.
- *Interim reliefs*: even before the enactment of the Federal Law 13,129/2015, scholars and case law already recognised the possibility of interim reliefs granted by judicial courts while the constitution of the arbitral tribunal was still pending. The new Law confirms this possibility, establishing that an interim relief may be temporarily granted by the courts and should be reviewed by the arbitral tribunal as soon as its formation is completed. The granting of an interim relief by the courts demands demonstration of a probable cause and a risk of damage.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- *Possibility of partial arbitration awards*: the possibility of granting partial arbitration awards was also already recognised by scholars even without any specific legal provision in our Arbitration Act. The Federal Law 13,129/2015 confirmed this possibility, which is commonly used for solving preliminary issues (such as jurisdiction matters), and for deciding claims that do not demand a deep production of evidence.
- *Arbitration involving public entities*: the Federal Law 13,129/2015 confirms the possibility of arbitration for disputes involving public entities. The new Law also establishes that the proceedings of arbitrations as such should not be subject to confidentiality.

Similarly to the Federal Law 13,129/2015, the new Brazilian Code of Civil Procedure (Federal Law 13.105/15), which was enacted in 2015 and came into force in 2016, also brought innovations in the arbitration field:

- *Confidentiality*: any court proceedings related to an arbitration protected by confidentiality should be also be treated as confidential.
- *Allegation of arbitration agreements before the courts*: the existence of an arbitration agreement only prevents the courts from deciding a case if the matter is raised by the defendant in its defence. If no objection is raised, it is understood that the defendant has waived its right to resort to arbitration and the court cannot refrain from deciding the case.
- *Annulment claims in defences against enforcement procedures*: the nullity of an arbitral award may be claimed in the defence against the procedure for the enforcement of an arbitration award. As will be seen below, only procedural violations authorise the setting-aside of an arbitral award. A review on the merits is not authorised in accordance with Brazilian Law.

Brazilian arbitration centres

The five most-used arbitration centres in Brazil are: the International Chamber of Commerce (ICC) (with a brand new headquarters in São Paulo); the Chamber of Commerce Brazil-Canada (CCBC); the Business Chamber of Arbitration (CAMARB); the AMCHAM Center for Arbitration and Mediation; and the Center of Mediation and Arbitration CIESP/FIESP. These five centres offer: (i) a qualified and professional staff, with a good understanding of our arbitration system; (ii) modern procedural rules; and (iii) speed in the conduct of the proceedings.

Arbitration agreement

Arbitrability

Arbitrability is the essential condition for a conflict to be submitted to arbitration. The Brazilian Arbitration Act allows "persons capable of contracting" to "settle through arbitration disputes related to patrimonial rights over which they may dispose". The act's broad scope of arbitrability, however, excludes from the scope of arbitration issues that cannot be contracted away, such as criminal, antitrust and patent matters.

Formalities of the arbitration agreement

Pursuant to the Brazilian Arbitration Act, arbitration agreements must be made in writing and usually signed by the parties. However, signing may be waived if consent to arbitration has been unequivocally expressed in writing by other means, such as specific reference to the arbitration clause by email or fax. While arbitration clauses are only subject to the requirements above, post-dispute arbitral submissions must comply with specific formalities.

Arbitral agreements: Arbitral clauses and post-dispute submissions

Brazilian Arbitration Law provides for two types of arbitration agreements, pre-dispute

© Published and reproduced with kind permission by Global Legal Group Ltd, London

arbitration clauses ("*cláusula compromissória*") and post-dispute submissions to arbitration ("*compromisso arbitral*"). Both the pre-dispute arbitral clauses and the post-dispute submissions to arbitration should be agreed in writing by the parties and they are enforceable pursuant to the Brazilian Arbitration Act.

It is important to note, however, that under the Brazilian Arbitration Act, a *compromisso arbitral* is only required when the parties' contract contains no arbitral clause at all, or when said clause is open, vague or fails to provide the details referring to applicable arbitral rules, appointment of arbitrators and so on (so-called 'empty arbitration clauses').

Therefore, the so-called 'full arbitration clauses' do not require a *compromisso arbitral* to set aside the jurisdiction of the courts. That is the case, for example, when the parties agree on a self-executing procedure for setting in motion the arbitral process by referring to the rules of any administering organisation, or any *ad hoc* rules, such as the UNCITRAL Rules.

The vast majority of the Brazilian case law dispenses the *compromisso arbitral* if the parties have indeed agreed ahead of time on the form for instituting the arbitral procedures through a full arbitration clause. Pre-dispute arbitral clauses (*cláusulas compromissórias*) are legally binding on the parties as long as they are in writing. Arbitral clauses may be inserted in the underlying agreement itself or in a separate document which makes reference to it. In adhesion contracts, on the other hand, the arbitral clause will only be enforceable if the adhering party initiates arbitral proceedings, or expressly agrees to it, as long as the clause is written in a separate document or in bold type, duly signed or initialised by the adhering party.

Arbitration procedure

Language

As a rule, arbitration proceedings may be conducted in any language. There are exceptions in specific acts regulating relationships with public entities, such as the Public-Private Partnership Law of 2004, and the Amendment to the Concessions Law of 2005, which require the proceedings to be conducted in Portuguese.

Rules for producing evidence

In the arbitration procedure, the parties are authorised to produce all evidence considered necessary by the arbitral tribunal. The arbitral tribunal is also free to request the production of any supplementary evidence deemed necessary, and may determine that the parties clarify the facts or bring documents to form its conviction.

There is no order for the production of evidence in the arbitration procedure, and the production of the evidence must take place according to the convenience of the arbitral tribunal. In the course of the evidentiary stage, the arbitral tribunal may deny requests on the production of evidence whenever it finds that the evidence is not useful to its conviction.

Confidentiality of arbitration proceedings

The Brazilian Arbitration Act does not provide for confidentiality in any form, leaving to the parties the possibility to agree in that respect. In practice, the overwhelming majority of arbitrations are confidential, confidentiality being one of the main advantages of arbitration. Further, the rules of the most commonly used arbitration centres contain provisions in the sense that, unless otherwise agreed by the parties, the proceedings will be confidential.

As discussed above, Federal Law 13,529/2015 determines that arbitrations involving public entities are subject to the principle of publicity, which means that, in principle, they should be not confidential.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Guiding principles of arbitration in Brazil

Principle of kompetenz-kompetenz

The *kompetenz-kompetenz* principle empowers arbitrators to rule on their own jurisdiction, including any objections related to the existence or validity of the arbitration agreement. Brazilian Arbitration Law recognises the principle of *kompetenz-kompetenz* by which the arbitral tribunal is the first entity with jurisdiction to analyse matters involving the nullity and the scope of an arbitral clause. Brazilian courts have generally followed these principles, and many judicial precedents confirm such practice.

Principle of the independence and separability of the arbitration clause

The Brazilian Arbitration Act expressly recognises the principle of separability of the arbitration clause, whereby challenges to the validity of the main contract will not affect the arbitration clause. This principle has generally been followed by Brazilian courts, particularly in association with the principle of *kompetenz-kompetenz*.

Principle of private autonomy

The use of arbitration is voluntary; as an expression of the parties' freedom of choice.

Having fulfilled the assumptions for its choice (capacity to contract related to patrimonial rights over which they may dispose), the wishes of the parties will be paramount in arbitration, beginning with the freedom to choose arbitration as a way of solving the litigation; and continue with the faculty to indicate all the matters that gravitate around this option. Thus, they establish who and how many will be the arbitrator(s) appointed, directly or indirectly, and how the arbitration procedure will be developed (for example, regarding deadlines, places for the practice of acts, etc.)

Even the applicable Law for the dispute may be defined by the parties, and they may agree that arbitration shall be by equity, or "be based on the general principles of law, customs and international trade rules" (Article 2 (1) and (2) of Law 9,307/1996).

Arbitrators

Who can be an arbitrator?

Arbitrators may be "any legally capable individual", and Brazilian Law does not carry any citizenship or qualification requirement. Therefore, arbitrators in both domestic and international proceedings may be foreigners and non-lawyers.

Pursuant to Section 13 (6) of the Brazilian Arbitration Act, arbitrators must exercise their functions with impartiality, independence, competence, diligence and discretion and must disclose any facts likely to give rise to justified doubts as to their impartiality and independence.

Appointment of arbitrator

Section 13 of the Brazilian Arbitration Act establishes that parties can nominate a sole arbitrator or a bench composed of an odd number of arbitrators. Should the parties nominate an even number of arbitrators, the arbitrators will choose, through majority vote, an additional panel member to act as chairman.

Interim relief

Law No. 13,129/15 brought a new chapter to the Brazilian Arbitration Act in articles nº 22-A and 22-B, which provide specifically for the concession of interim measures. As already mentioned, the new law makes it clear that parties may request interim relief to judicial courts at any point before the constitution of the arbitral tribunal. However, the effects of court-

© Published and reproduced with kind permission by Global Legal Group Ltd, London

awarded interim relief will cease if the interested party does not start arbitration within 30 days from the date that the judicial decision comes into effect. Once arbitration is started, the Arbitral Tribunal will be empowered to maintain, modify or overrule the court decision.

After the constitution of the arbitral tribunal, the parties may request such measures directly to the arbitral tribunal. Once the order is granted, if necessary, the arbitrators themselves may request aid from the judicial court with the purpose of enforcing the order.

Arbitration award

Formal requirements for an arbitration award

Article 26 of Brazilian Arbitration Act establishes that the arbitration award must have the following requirements: (i) report, which will contain the names of the parties and a summary of the dispute; (ii) grounds of the decision, where the issues of fact and of law will be analysed, expressly mentioning whether the arbitrators judged by equity; (iii) conclusion of judgment, in which the arbitrators will resolve the questions submitted to them and establish the deadline for enforcement the decision, if applicable; and (iv) the date and place where it was rendered.

Timeframe

In accordance with article 23 of the Brazilian Arbitration Act, the arbitration award shall be rendered within the period stipulated by the parties. If nothing is agreed upon, the deadline for submitting the award is of six months, counting from the constitution of the arbitral tribunal or the substitution of the arbitrator.

Costs and interest

Article 27 of the Brazilian Arbitration Act determines that the arbitration award will decide on the responsibility of the parties for the payment of the costs and expenses with the arbitration procedure.

Challenge of the arbitration award

Possibility of filing an appeal against the arbitral award

In accordance with the determination of article 18 of the Brazilian Arbitration Act, the arbitration award is not subject to appeal. This means that, in principle, the parties do not have the right to protest against the arbitral award through the filing of the appeal.

Requests for clarifications

The Brazilian Arbitration Act provides the possibility for the parties: to submit a request for clarification against the arbitral award; to correct a material error and to remedy obscurity, doubt or contradiction of the arbitral award; or to adjudicate on the omitted point in respect of the decision (Article 30, items I and II of Brazilian Arbitration Act).

Nullity of the arbitration award

Article 33 of the Brazilian Arbitration Act authorises the parties to plead before the state court the declaration of nullity of the arbitration award. The plea is authorised exclusively under the situations provided for in article 32 of the same law: (i) nullity of the arbitration agreement; (ii) a judgment rendered by a person who could not be an arbitrator; (iii) the requirements of the arbitration award provided for in article 26 of the Brazilian Arbitration Act have not been fulfilled; (iv) a judgment rendered outside the scope of the arbitration agreement; (v) it is proved that the sentence was pronounced for prevarication or corruption; (vi) late delivery; or (vii) violation to principles set forth by article 21, Paragraph 2 of this law.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

A review on the merits of the award is not authorised in accordance with Brazilian law. Only procedural violations justify the annulment of the award.

The parties must file a complaint for declaration of nullity of an arbitral award within a period of up to 90 days after receiving notification of the respective (partial or final) decision or the decision on the request for clarification.

It is worth mentioning that Brazilian courts continue to maintain a pro-arbitration approach when reviewing annulment actions, i.e., actions to vacate arbitral awards rendered within the Brazilian territory. A study conducted by the Brazilian Arbitration Committee (CBAr) concluded that Brazilian courts rarely annul arbitral awards; in the rare situation when they do, the grounds are consistent with article 32 of the Brazilian Arbitration Act and usually deal with the nullity of the arbitration clause itself. That was the case, for example, where the dispute resolution clause provided for a "mediation" instead of an arbitration.

Enforcement of the arbitration award

Domestic arbitral awards

In accordance with the Brazilian Arbitration Act, a domestic arbitral award produces the same effects as of a judicial award. Accordingly, the Brazilian Code of Civil Procedure provides that the enforcement of an arbitration award should follow the same procedure designed for the enforcement of judicial awards.

The enforcement procedure takes place before the first-level courts. The party seeking the enforcement should file a submission briefly explaining what was decided in the arbitration and present a copy of the arbitral award. If the submission is in order, the court will summon the debtor to pay the amount defined in the arbitration award within 15 business days, under the penalty of: (i) a fine of 10% of the unpaid amount; and (ii) attorney fees fixed in 10% of the unpaid amount. If no payment is made, the assets of the debtor will be subject to seizure and afterwards to liquidation.

Under very specific situations, the debtor may file a defence against the enforcement. In summary, the debtor may claim that: (i) the arbitral award is null (under the situations addressed above); (ii) he is not the actual debtor in accordance with the arbitration award; (iii) the seizure of his assets has not followed the applicable procedural rules or their court evaluation is incorrect; (iv) the amount claimed exceeds the actual debt; (v) the court lacks proper jurisdiction for the enforcement of the award; or (vi) the obligation was modified or fulfilled after the termination of the arbitration (i.e. by a payment or setting-off of amounts).

As a rule, the defence does not stay the enforcement procedure. Under exceptional circumstances, a stay order may be granted if the debtor: (i) deposits the amounts claimed in a court-administered bank account or posts a bond; and (ii) demonstrates a probable cause and a risk of damage.

Foreign arbitral awards

In order to be enforced in Brazil, a foreign arbitral award must be previously submitted to a confirmation proceedure before the Superior Court of Justice (STJ). The award does not have to be recognised by the courts of the seat before being submitted to the confirmation proceeding.

An application for confirmation should contain: (i) the original foreign arbitration award or a certified copy thereof, duly notarised by the Brazilian consulate – or by the Apostille Convention – and translated into Portuguese by a sworn translator in Brazil; (ii) the original arbitration agreement or a certified copy thereof, duly translated into Portuguese by a sworn

© Published and reproduced with kind permission by Global Legal Group Ltd, London

translator; and (iii) proof that the party was served of process in the proceeding and that the final decision became *res judicata*.

The standards for the enforcement of a foreign arbitration award in Brazil are consistent with article V of the New York Convention. According to the Brazilian Arbitration Act, the enforcement of a foreign arbitration award can only be denied if: (i) the parties to the arbitration agreement lack capacity; (ii) the arbitration agreement is invalid under the applicable law or the law of the seat; (iii) the respondent was not given proper notice of the appointment of the arbitrator or of the arbitration, or was otherwise unable to present its case and unable to exercise its right of defence; (iv) the award exceeds the limits of the arbitration agreement; (v) the institution of the arbitration proceeding has not followed the rules of the arbitration agreement; (vi) the arbitration award is not binding on the parties, or has been annulled or suspended by a court of the seat of arbitration; (vii) the object of the dispute is not arbitrable under Brazilian law; or (viii) the award violates Brazilian public policy.

Once the confirmation request is filed, the defendant will be served of process and may submit a challenge/defence. The defence should be limited to the verification of the requirements set forth above. As a rule, the STJ will not review the merits of the award.

The STJ's internal rules authorise the court to issue preliminary injunctions during confirmation proceedings, such as freezing assets while an application for confirmation is pending, and granting partial recognition to foreign arbitration awards.

In general, the "confirmation procedure" takes around six months to be ruled if no defence/challenge is presented by the defendant. If a defence/challenge is filed, the procedure may take between two to three years to be decided.

Once the foreign arbitration award is confirmed by the STJ, the judgment creditor is entitled to enforce the now "nationalised" award in the same way as a domestic award; that is, before a competent first instance judicial court.

Investment arbitration

Investment arbitration is practically non-existent in Brazil, since the country has chosen not to participate in the dispute-settlement system between investor and state. This option led Brazil not to subscribe to the 1965 Washington Convention establishing the International Centre for the Settlement of Investment Disputes (ICSID) system, and to the decision not to ratify the bilateral investment protection and promotion agreements signed in the 1990s, withdrawn from Congress in 2002, before ratification.

The isolation of Brazil from the investment arbitration system is in the process of change. Although the inflow of direct investments has remained at a high level in the last 50 years, in recent years the Brazilian government has initiated an alternative model of bilateral agreement – the Investment Facilitation and Cooperation Agreement (ACFI) – presented in 2014 as the Brazilian model for regulation of foreign investments.

Between the main innovations brought by the new Brazilian model, the prediction of a Joint Committee can be cited; the establishment of Focal Points; the provision of information exchange between the parties; the encouragement of private sector involvement, as well as provisions regarding corporate social responsibility, transparency and the development of thematic agendas.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Fernando Eduardo Serec
Tel: +55 11 5086 5264 / Email: fserec@tozzinifreire.com.br

Fernando Serec is head of the litigation and arbitration practice groups of TozziniFreire Advogados, with experience of 25 years in the litigation area and over a decade in arbitration. He has practised in international arbitrations conducted according to the rules of the ICC, ICDR and LCA, and a large number of local arbitration proceedings carried out under the rules of the CCBC, CMA (CIESP), CAMARB and FGV-RJ. He also acts as an attorney in *ad hoc* arbitrations, court cases and widely known arbitration proceedings in a large variety of areas.

Antônio Marzagao Barbuto Neto
Tel: +55 11 5086 5264 5245 / Email: abarbuto@tozzinifreire.com.br

Barbuto is a partner of TozziniFreire's dispute resolution practice group, having joined the firm as an intern. Tony is qualified to practise law in Brazil and in New York and regularly represents clients in complex arbitrations seated in Brazil and abroad.

Lucas Britto Mejias
Tel: +55 11 5086 5234 / Email: lmejias@tozzinifreire.com.br

Partner in the Litigation, Arbitration and Mediation practice groups of TozziniFreire, Lucas represents clients before Brazilian Courts and in national and international mediations and arbitrations. He holds a Master's degree in Procedural Law from the Law School of USP (Universidade de São Paulo) and has authored a book and several published papers on arbitration and procedural law.

TozziniFreire Advogados

Rua Borges Lagoa, 1328, São Paulo – SP, Brazil
Tel: +55 11 5086 5000 / URL: www.tozzinifreire.com.br

© Published and reproduced with kind permission by Global Legal Group Ltd, London

British Virgin Islands

Andrew Pullinger, Matthew Freeman & Charlotte Walker
Campbells

Introduction

The British Virgin Islands (the BVI) requires no introduction to those who have either visited its shores or been involved in offshore commerce. It sits on the eastern borders of the Caribbean Sea, and enjoys political sovereignty and economic stability. As a British Overseas Territory, its citizens are British citizens.

The BVI has long been the world's leading destination for company incorporation. The Registry now houses the titles of approaching one million companies. It offers investors highly developed corporate legislation which provides a greater degree of operational flexibility than would usually be found in their domiciliary states. The BVI Courts are naturally well-versed in corporate litigation.

The BVI's legal system descends from, and follows, the English common law.[1] Litigants in the BVI have the comfort and security of knowing that the ultimate appeal lies to the Judicial Committee of the Privy Council of the United Kingdom – the members of which are Justices of the United Kingdom's Supreme Court. It is quite usual for Judges from England to preside over cases in the BVI Commercial Court.

Arbitration is a relative newcomer to the arena of dispute resolution in the BVI. Although there has been an Arbitration Act on the statute books for over 40 years,[2] it was not readily suited to international work, not least because the BVI was not a party to the New York Convention ("the Convention").[3] However the *status quo* was altered after the BVI became subject to the Convention on 25 May 2014[4] and passed the Arbitration Act, 2013, which came into force on 1 October 2014 (the "Act"). The Act adopts many of the provisions of the UNCITRAL Model Law ("Model Law").[5,6]

It is not an understatement to say that there has been a sea-change in attitude towards arbitration. The British Virgin Islands International Arbitration Centre ("BVIIAC") is a statutory body created pursuant to the Act.[7] Its purposes include the facilitation and promotion of the BVI as an arbitral hub. The Government has invested heavily in arbitration, commissioning a purpose-built home with state-of-the art amenities in Road Town, Tortola. This opened in November 2016 and is the only such facility in the Caribbean.

The stated aim of the BVIIAC is to become the regional centre of choice for the resolution of disputes arising out of business activity, investments and projects worldwide. Nearly 2,000 of the world's leading arbitration practitioners are members of the BVIIAC panel of arbitrators. The BVIIAC has its own set of rules ("the Rules")[8] based on the 2010 UNCITRAL Arbitration Rules, and which apply to any arbitration administered by the BVIIAC.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Parallel to this, in the interest of promoting the BVI as an arbitral hub, the Government has eased immigration formalities for parties and their representatives who travel to the BVI for arbitrations. The hope is that the BVI will soon become the preferred regional venue for international arbitration.

The BVI Commercial Court is widely known to be arbitration friendly. As stated by Leon J in ***Hualon Corporation (M) SDN BHD (in receivership) v Marty Limited***:[9]

> *It is clear in the Act, in the extension of the New York Convention to this jurisdiction, in the arbitration jurisprudence of this jurisdiction (including before the Act), and in the public commitment of the Territory to arbitration as part of its strategic plan, that the Territory of the Virgin Islands as a matter of public policy strongly supports the use of arbitration to resolve international commercial and other disputes.*

The Act contains express stipulations that the Court should not interfere with an arbitration unless the Act permits it to do so[10] and, if it does, should give due regard to the wishes of the parties and the provisions of the arbitration agreement.[11] The pro-arbitration approach taken by the Court is borne out in the cases.

In *Sonera Holding B.V. v Cukurova Holding S.A.* (BVIHC (Com) No. 119 of 2011), the Court considered the extent to which the Act affects the jurisdiction of the Court to decide cases with an arbitral element. Sonera applied to the Court to enforce an arbitral award for damages obtained against Cukurova and was granted judgment. Cukurova subsequently applied to set aside the judgment on the principal ground that the First Tribunal had exceeded its jurisdiction in making the award. This argument was rejected by the Court, which was upheld by the Court of Appeal and subsequently the Privy Council, in response to which Sonera applied to the Court for an anti-arbitration injunction. In its judgment, the Court gives detailed consideration to the provisions of the Act. In particular, Bannister J noted that the general provisions under sections 7-9 and 11-16 are incapable of having extraterritorial effect. The Court held that the overriding nature of the prohibition contained in Section 3(2)(b) of the Act prevented the Court from interfering with the arbitration process and the application was dismissed.

In *Jinpeng Group Limited v Peak Hotels and Resorts Limited* BVIHCMAP 2014/0025 and 2015/0003, the Court of Appeal considered whether to stay a winding-up petition in favour of arbitration. The Court held that where a debt was not disputed on genuine and substantial grounds, but fell under the terms of an arbitration clause, the Court has a wide discretion to stay or dismiss the originating application to allow for arbitration to proceed. The Court of Appeal held that the applicant did not have to prove that exceptional circumstances existed in order for the Court to exercise its discretion to make a winding-up order.

In *Anzen Ltd. & Ors v Hermes Ones Ltd.* BVIHCMAP 2014/0013, Anzen (*et al*) appealed a decision not to grant a stay of proceedings filed in the Commercial Court in favour of arbitration. Anzen had not referred the disputes to arbitration and, in applying for the stay, relied instead on an arbitration clause in a shareholders' agreement. The Court of Appeal held that an arbitration clause which provides for an option to arbitrate does not create an immediately binding contract to arbitrate. However, as soon as one of the parties invokes the arbitration clause by referring the dispute to arbitration, there is a binding agreement to arbitrate, which is covered by section 2 of the Arbitration Act. If one of the parties by-passes the arbitration clause and files a claim at Court, the other party still has the option to invoke the arbitration clause, refer the matter to arbitration and apply for a stay of the court proceedings. If the party against which the court proceedings were brought does not refer

© Published and reproduced with kind permission by Global Legal Group Ltd, London

the matter to arbitration or submits to the court's jurisdiction, the dispute will proceed under the Court's jurisdiction.

In *Vendort v Evrostroy*[12] it was held that an applicant could rely on an arbitration award alone to issue a statutory demand (and to make an application for the appointment of a liquidator), without the need to first enforce the award or for any further order of the Court. This decision was upheld by the Court of Appeal (BVIHCVAP 2012/0041) and the Privy Council ([2016] UKPC 15).

It remains rare in practice to find an arbitration clause within any form of contract providing for the BVI to be the seat of arbitration. It is currently more common to encounter a foreign arbitral award pursuant to which a party has made an application that the award be enforced or recognised within the BVI, in accordance with the Act. However, with the opening of the Arbitration Centre, development of the applicable law in the BVI and the privacy afforded in arbitration proceedings, this is an area with potential for development.

As the Rules came into force only in November 2016, it is too soon to say whether they will be adopted in future agreements involving BVI entities. However, we are hopeful they will prove to be popular. Accordingly, this chapter will consider in tandem arbitrations carried out without and within the auspices of the BVIIAC. We are optimistic that the BVIIAC will become an attractive venue for arbitrations as it conveniently lies between North and South America, and should be regarded as an excellent neutral jurisdiction in which to resolve disputes.

The arbitration agreement

Formalities

The formalities required by the Act for any arbitration agreement follow those set out in Article 7 of the Model Law.[13] Thus arbitration agreements must be in writing, and may be contained in arbitration clauses in broader agreements or in separate agreements. Being "*in writing*" is widely defined, and includes electronic communications such as email.[14]

The Rules operate at the election of the parties, wherever the arbitration is conducted. The BVIIAC has drafted a model arbitration clause which may be used should the parties agree to come within the procedure of the BVIIAC.[15]

Arbitrability

There is nothing within the Act that limits the scope of any arbitration. The procedure is clearly tailored towards commercial disputes, and the remedies available to arbitral tribunals would not be suitable for other types of claim (such as non-financial family disputes). Where there is dispute, the BVI Court will follow English common law by limiting the scope of any arbitration to prohibit arbitrators considering matters that might trespass into the territory of public policy.[16]

Joinder

There is no express mechanism within the Act that permits joinder of another party to an arbitration. By contrast, Article 17(5) of the Rules permits the tribunal to allow any other party to the arbitration agreement to be joined into the arbitration. If a respondent to a claim wishes to join another party, it may do so when putting in its Response to the claim.[17] The Rules do not permit a third party that is not a party to the arbitration agreement to apply to be joined.

The Act does contain a procedure permitting competing arbitrations to be consolidated.[18] It allows a Court, on application, to consolidate two or more arbitral proceedings where there

© Published and reproduced with kind permission by Global Legal Group Ltd, London

are commonalities of law, fact, relief or for other good reason. The Court may also stay arbitrations pending conclusion of other arbitrations dealing with the same factual matrix. This part of the Act only automatically applies to agreements entered into before the Act came into force[19] (i.e. before 1 October 2014) or within six years after coming into force[20] (i.e. any agreements until 30 September 2020) which provide for domestic arbitrations.[21] The parties may agree that this section does not apply.[22]

Competence-competence and separability

Section 32(1) of the Act preserves the doctrine of *competence-competence* found at Article 16 of the Model Law, namely that the arbitral tribunal has the power to rule on all matters connected to the arbitration, including its own jurisdiction and the validity of any arbitration agreement. The same section enshrines the doctrine of separability, meaning that for the purposes of considering its jurisdiction, the tribunal treats the arbitration clause as standing independently of the balance of the agreement. A ruling that the arbitral tribunal does not have jurisdiction is not open to appeal.[23]

Arbitration procedure

The object of the Act is "*to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary delay or expense*".[24] Article 17 of the Rules carries a similar sentiment.

Commencement

Arbitral disputes commence on the date at which the Respondent receives a request that the dispute be referred to arbitration, unless otherwise agreed.[25] The form of the request is not prescribed. Where any limitation period refers to the bringing of an action, it is deemed to mean the commencement of arbitral proceedings.[26]

For an arbitration conducted through the BVIIAC, the party wishing to commence arbitration should communicate the same to the other parties, and send a notice of arbitration to the Secretariat of the BVIIAC.[27] Arbitral proceedings are deemed to commence on the date of receipt of that notice, subject to the payment of the correct fee. The Respondent then only has 30 days within which to communicate and send a response.[28]

Any challenges to the jurisdiction of the tribunal must be made no later than the submission of the statement of Defence.[29]

Place of arbitration

The Act contains no geographical restriction upon the place of arbitration, but in default of agreement it is left to the tribunal to decide.[30] For BVIIAC arbitrations, the parties are also free to agree the place of arbitration but, if no agreement is reached, then the venue will default to Road Town, Tortola, the capital of the BVI. The tribunal still has the power to decide that another venue is more appropriate.[31]

Procedural requirements

Parties may adopt their own agreed procedure,[32] failing which the tribunal can conduct the arbitration in any manner that it considers appropriate.[33] The initial step is usually the selection and appointment of the arbitral tribunal (which we deal with below). The tribunal can then consider any challenges to jurisdiction and scope and move on to look at specific procedural requirements relevant to the case being considered, such as the timings of Statements of Claim and Defences[34] and whether oral hearings are necessary.[35]

The Rules are slightly more restrictive in that they require the tribunal to set out a provisional timetable after receiving representations.[36]

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Evidential rules

An arbitral tribunal is not bound by the rules of evidence but may receive relevant evidence and give it appropriate weight.[37] The Rules mirror precisely Article 19(2) of the Model law which gives the tribunal the power to determine admissibility, relevance, materiality and weight. In this author's view, there is no significant difference. In practice, this evidential rule makes appeals against the substance of arbitration awards extremely difficult.

If the parties agree, the arbitral tribunal may make reference to the IBA Rules on the Taking of Evidence in International Arbitration 2010 ("the IBA Rules"), although there is no statutory compulsion to do so.

Expert evidence

It is, of course, for the parties to agree whether or not expert evidence is necessary. The tribunal also has the power to appoint an expert to consider specific issues and may order a party to produce documents, goods or property for inspection by the expert.[38]

It is sometimes the case that a party will be reluctant to co-operate with the court-appointed expert. Should that occur, the tribunal has the ability to request assistance from the competent Court in the BVI which can order the attendance of any person and the production of any evidence.[39] However, this power to order documents to be produced is limited by Section 54(9) of the Act, which provides that a person is not required to produce in arbitral proceedings any document or other evidence that he would not be required to produce in civil proceedings before a court.

The Rules allow the tribunal to appoint an expert after consulting with the parties.[40] There is no veto available to a disgruntled Claimant or Respondent, though they may object to the appointment on the grounds of qualification, impartiality or independence.[41]

The tribunal may also appoint assessors to assist in the assessment of costs.[42] The parties are unable to object to such an appointment.

Confidentiality

It is normal in most arbitrations that proceedings remain confidential arising, as they will, from commercial contracts which contain confidentiality clauses. The BVI Courts will follow the English common law in implying a term that the arbitral proceedings and documents are confidential.[43] The Act places this on a statutory footing by providing that no party is to publish, disclose or communicate any information relating to the arbitral proceedings or the award unless either agreed,[44] required to protect a legal right, or enforce or challenge the award,[45] as required by law[46] or to any professional or other adviser of any party.[47]

Article 17(6) of the Rules states that the arbitral proceedings are confidential to the parties and tribunal save where disclosure of an award is required pursuant to a legal duty or to protect or pursue a legal right.[48] This confidentiality extends to the existence of proceedings and any pleadings, evidence, documents and other materials save that are already in the public domain.[49]

Arbitrators

Appointment

The parties are free to choose the number of arbitrators[50] and the procedure for selection.[51] A procedure is set out in the Act for what should occur if the parties are not in agreement as to the choice of tribunal. These include making applications to the Court.[52]

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The Rules provide a parallel system. If the parties cannot agree the number of persons on the tribunal, then three will be appointed.[53] Each party may nominate an arbitrator in the respective notice of arbitration[54] and Response.[55] The appointment is made by the Appointing authority, who is the CEO of the BVIIAC.[56] The arbitrators are not required to be drawn from the list of panel of arbitrators, which is maintained by the BVIIAC.[57]

Any arbitrator appointed has a duty to declare matters that might give rise to doubts about his or her independence or impartiality.[58]

Challenge

A challenge to the appointment of an arbitrator can only be on the narrow ground of there being doubts about their independence, impartiality or qualifications.[59] The Rules only allow challenges for doubts about impartiality and independence,[60] presumably because the CEO of the BVIIAC will initially check the qualifications of the arbitrator to assess his or her suitability for the case.

The Act incorporates the timings for challenges to be made as set out at Article 13 of the Model Law, namely that a party has 15 days to send to the tribunal written reasons for the challenge.[61] The tribunal will then decide and, if so determined, may continue the arbitration (notwithstanding any further request to the Court which must be made within 30 days of the tribunal's decision).[62] If the Court ultimately upholds the challenge, it may set aside any award that has been made.[63]

The Rules contain slightly different timings.[64] They provide that in the event of a challenge, a committee formed of three arbitrators from the BVIIAC's panel will decide the matter.[65] The decision that is made is final and no further appeal lies to the Court.[66]

Immunity

Judicial immunity from suit is a well-established principle of English common law. However, it was not clear that arbitrators shared the same protection.[67] Any remaining doubt is removed by Section 101(1) of the Act which gives the tribunal, and any of its employees or agents, immunity for actions carried out in their capacity as a tribunal, unless they have acted in bad faith. There is a similar statutory immunity for the BVIIAC or its members.[68]

The Rules provide similar protection for arbitrators, any person appointed by the arbitrator, the BVIIAC and any of its employees.[69] The exception is if there has been "*intentional wrongdoing*".[70] This is probably narrower than the 'bad faith' exception within the Act.

Interim relief

The arbitral tribunal has broad powers to grant interim measures which (a) preserve the *status quo*; (b) prevent any action that may harm the arbitral process; (c) preserve assets; and/or (d) preserve evidence.[71,72] The preconditions for the grant of an interim measure require the party requesting the measure to satisfy the tribunal that: (i) if any harm caused is not remediable by damages, then the harm caused by not granting the measure substantially outweighs harm that would be caused by granting it; and (ii) that there is a reasonable possibility that the requesting party will succeed on the merits of the claim.[73]

Section 33(2) of the Act specifically excludes from the definition of the above interim measures those procedures set out at Section 54 of the Act. These are the following powers of the arbitral tribunal: to make orders giving security for costs; to direct the discovery of documents or delivery of interrogatories; and to direct that evidence be given by affidavit and in relation to the preservation of evidence or the testing of properties. The tribunal may exercise those powers without needing to balance the relative harm caused or to consider

© Published and reproduced with kind permission by Global Legal Group Ltd, London

the wider merits of the case. Should a party not comply with an order made under Section 54, the tribunal may dismiss or stay the claim.[74] There is no obvious reason why the Act does not expressly allow a Response to be dismissed should a Respondent be in default. This is likely to be a slip of the draftsmen's pen rather than a statutory choice to deliberately create an inequality of arms.

The tribunal may ask the requesting party to provide appropriate security[75] and to disclose any material change in circumstances.[76] If it transpires later that the interim measure should not have been granted, the requesting party may be liable for costs and damages.[77] The arbitral tribunal's decisions will be reinforced by orders of the Court.[78]

The Rules provide a tribunal with very similar powers in relation to a BVIIAC arbitration.[79]

In a recent civil appeal, *Kishigi Limited & Ors v Donna Union Foundation*,[80] the Court of Appeal held that, by virtue of section 43 of the Act, it is open to the Court to grant interim measures in aid of foreign arbitration proceedings. These interim measures include orders made in support of the enforcement of a potential arbitral award. The Court further held there was no basis upon which the Court could "*read into the express wording of the Act, the need for assets to be in the [BVI] in order for the Court to be able to grant interim measures in aid of foreign arbitration*". The Court of Appeal stated in clear terms that the Act comprehensively provides the Court with the jurisdiction to grant interim measures.

The arbitration award

Formalities

The formalities of the award required by Article 31 of the Model Law are brought into BVI law by Section 65 of the Act. Thus the award must be in writing, signed by all or the majority of arbitrators,[81] and should provide reasons for the decision unless otherwise agreed.[82] For BVIIAC arbitrations, as well as the formalities, the Award is also submitted to the Secretariat for any suggestions. Only after that can the Award be rendered.[83]

Within 30 days of the Award being received, a party may ask that it be corrected or specific points be interpreted.[84] The Act allows the tribunal 30 days to respond;[85] the Rules allow 30 days for corrections[86] but 45 days for interpretations.[87]

The parties may also ask for an additional award in respect of claims presented in the arbitration, but not decided in the Award. The tribunal is initially permitted 60 days within which to respond.[88]

Remedies available to the tribunal

The arbitral tribunal is able to grant any relief that a Court could have granted had the matter been litigated.[89] However, unless the parties agree, it does not have the power to order specific performance in relation to a contract relating to land or interests in land.[90]

Costs

The Act provides that costs are in the complete discretion of the arbitral tribunal.[91] When it comes to taxation, it is not bound to follow the scales and practices adopted by the Court.[92] Indeed, it contains a provision that actually renders void any agreement by the parties that each party should bear its own costs[93] unless the agreement to arbitrate was made after the dispute arose.[94] This is an unusual intervention given the freedom of parties to otherwise choose nearly every other aspect of how their disputes should be resolved.

The costs regime in the Rules uses as a starting point that the unsuccessful party ought to carry the costs of the arbitration. However, the tribunal can apportion costs taking into

© Published and reproduced with kind permission by Global Legal Group Ltd, London

account the circumstances of the case.[95] This follows traditional litigation.

As yet, the issue of the costs of third party litigation funding has not yet arisen in the BVI. The Courts would not allow this, but the English High Court in the landmark case of ***Essar Oilfields Services Limited v Norscot Rig Management PVT Limited***[96] has held that it is permissible to recover those costs in arbitral proceedings.

Challenge to the award

Seasoned practitioners will appreciate that it is not straightforward to challenge the decision of an arbitral tribunal.

Section 79(1) of the Act incorporates Article 34 of the Model Law and allows for challenges to the Court to be made as set out below. By contrast, the Rules do not include any explicit mechanism whereby the Award can be challenged. It is to be noted that Article 34(2) of the Rules provides that awards shall be "final and binding on the parties". It is open to argument whether these words alone are sufficient to displace any further recourse to the Court. Parties are certainly advised to consider the potential effects of this section before agreeing that the BVIIAC Rules are to apply to any arbitration that may arise in the future.

Under the Act, any potential applicant to the Court must first ensure it has exhausted all avenues in the arbitration itself.[97] Having done so, any application to set aside the Award must only be made on one or more of the following grounds:

(i) incapacity of a party;

(ii) invalidity of the arbitration agreement;

(iii) lack of proper notice of the appointment of the arbitrator or proceedings;

(iv) inability to present the case;

(v) the Award oversteps its jurisdiction in dealing with irrelevant matters;

(vi) the tribunal or procedure was not in accordance with the agreement of the parties (unless the agreement itself would not have been lawful);

(vii) the subject matter of the dispute is not capable of being arbitrated; or

(viii) the Award is contrary to public policy.

Challenges may also be made on the grounds that there has been a serious irregularity affecting the tribunal, the proceedings or the award.[98] The Act defines "serious irregularity" as one or more of the following which has or may cause substantial injustice:[99]

(i) A failure by the tribunal to comply with section 44 of the Act. That section imports Article 18 of the Model Law requiring the arbitrator to act with equality, fairly, impartially and with independence.

(ii) The tribunal exceeding its powers (otherwise than exceeding its jurisdiction).

(iii) A failure to conduct proceedings in accordance with the parties' agreement.

(iv) A failure to deal with the issues.

(v) A failure by the tribunal to correct and/or interpret the Award if so requested by the parties.

(vi) The Award being obtained by fraud or being in any way contrary to public policy.

(vii) A failure to comply with the form of Award.

(viii) Irregularity in the conduct of the proceedings.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Right to appeal

Finally, parties have a limited right to appeal to the Court on a point of law.[100] Unless the counter-party consents, leave of the Court will be required.[101] The parties thus will have to consider whether an agreement should contain an automatic appeal on a question of law. If leave is required, it will only be given if the question of law was one that was before the tribunal, is one that would substantially affect the rights of one or more of the parties, and the tribunal's decision was obviously wrong or, where the point is of general importance, is at least open to serious doubt.[102] Any further applications to appeal require leave of the Court.[103]

Enforcement of the award

The BVI is a contracting state to which the (New York) Convention applies. The Convention is widely regarded as one of the most successful international treaties. 150 countries fall within its umbrella.

The Convention is set out in Part X of the Act. Section 84 of the Act provides that Convention awards are enforceable in the territory in the same manner as they would be in any other Convention country. The preconditions are merely that originals, or certified copies, of the Arbitration Agreement and Award are provided (suitably translated if necessary).[104] The Courts will recognise the Award, and enforcement can only be challenged on grounds similar to those in which a domestic award could be challenged, namely:[105]

(i) the parties to the agreement were under some incapacity or the arbitration agreement was not valid under the law of the agreement or under the law of the country where the award was made; or

(ii) the losing party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case; or

(iii) the Award deals with matters falling outside the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission, provided that if the decisions on matters submitted to arbitration can be separated from those not submitted, then that part of the award may be recognised and/or enforced; or

(iv) 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

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

(vi) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(vii) the recognition or enforcement of the Award would be contrary to the public policy of that country.

If necessary, the Convention will be interpreted in accordance with principles of international law interpretation as set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

Non-convention awards are similarly enforceable in the BVI.[106] The grounds for not enforcing are identical save for an important additional provision that the Court may refuse to enforce an award for any other reason if it considers it just to do so.[107] There is no such discretion in relation to Convention awards.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Endnotes

1. Section 72 of the Common Law (Declaration of Application) Act (Cap 13) of 1705 provides that English common law is extended to the BVI. Sections 13 to 21 of the Eastern Caribbean Supreme Court (Virgin Islands) Act incorporate the rules of common law and equity form time to time in force in England. ***Veda Doyle v Agnes Deane*** HCVAP 2011/020 confirmed that where there is no local statute, the Court will have regard to the English common law.
2. BVI Arbitration Ordnance 1976.
3. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
4. On 24 February 2014, the United Kingdom submitted a notification to extend territorial application of the Convention to the British Virgin Islands.
5. United Nations Commission on International Trade Law Model law on International Commercial Arbitration (1985), with amendments as adopted in 2006.
6. Section 4 of the Act gives the UNCITRAL Model Law force of law save as amended.
7. Section 93(1) of the Act.
8. Pursuant to Section 107 of the Act.
9. BVIHC (Com) 2014/0090.
10. Section 3(2)(b) of the Act.
11. Sections 3(2)(c) of the Act.
12. BVIHCP 2012/0041.
13. Section 17 of the Act.
14. Section 17(3) of the Act.15. http://bviiac.org/Portals/0/Files/Arbitration%20Documents/2016BVIIACArbitrationClause.pdf.
16. ***Fulham FC Ltd v Richards & anr*** [2011] EWCA Civ 855.
17. Article 4(2)(a) of the Rules.
18. Schedule 2 Paragraph 1 of the Act.
19. Section 90(1)(a)(i) of the Act.
20. Section 90(1)(b) of the Act.
21. Meaning those which do not provide for any jurisdiction save for the BVI: Section 90(2) of the Act.
22. Section 91 of the Act.
23. Section 32(4) of the Act.
24. Section 3(1) of the Act.
25. Section 47 of the Act, incorporating Article 21 of the Model Law.
26. Section 12(2) of the Act.
27. Article 3(2) of the Rules.
28. Article 4(1) of the Rules.
29. Section 32 of the Act implementing Article 16(2) of the Model Law.
30. Section 46(1) of the Act.
31. Article 18 of the Rules.
32. Section 45(1) of the Act.
33. Section 45(2) substituting Article 19(2) of the Model Law.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

34. Section 49(1) of the Act applying Article 23 of the Model Law.
35. Section 50 of the Act applying Article 24 of the Model Law.
36. Article 17(2) of the Rules.
37. Section 45(3) of the Act.
38. Section 52(1) of the Act applying Article 26 of the Model Law.
39. Sections 53(1) and (2) of the Act.
40. Article 29(1) of the Rules.
41. Article 29(2) of the Rules.
42. Section 52(2) of the Act.
43. ***Glidepath BV and Ors v John Thompson and Ors*** [2005] EWHC 818 (Comm).
44. Section 16(1).
45. Section 16(2)(a) of the Act.
46. Section 16(2)(b) of the Act.
47. Section 16(2)(c). This is a curious addition because one would expect the other party to have disclosed any relevant information to its own advisers.
48. Article 34(8) of the Rules.
49. Article 17(7) of the Rules.
50. Section 21(3) of the Act.
51. Section 22(2) of the Act.
52. Section 22 of the Act generally.
53. Article 7(1) of the Rules.
54. Article 3(3)(g) and 3(4) of the Rules.
55. Article 4(2)(b) of the Rules.
56. Article 6(1) and 6(3) and Article 7(3) of the Rules.
57. Article 7(4) of the Rules.
58. Section 23 of the Act implementing Article 12(1) of the Model Law.
59. Section 23 of the Act implementing Article 12(2) of the Model Law.
60. Article 12(1) of the Rules.
61. Section 24(1) of the Act.
62. Section 24(1) of the Act.
63. Section 24(5) of the Act.
64. Article 13 of the Rules.
65. Article 13(5) of the Rules.
66. Article 13(5) of the Rules.
67. ***Sutcliffe v Thackrah*** [1974] AC 727 and ***Arenson v Arenson*** [1977] AC 405.
68. Section 102 of the Act.
69. Article 16(1 of the Rules: the parties agree to waive any claim.
70. Article 16(1) of the Rules.
71. Section 33 of the Act applying Article 17 of the Model Law.
72. For instance, the worldwide freezing injunction granted in ***PT Ventures SGPS SA v Vidatel Ltd*** BVIHC (Com) 2015/017.
73. Section 34 of the Act applying Article 17A of the Model Law.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

74. Section 54(3) of the Act.
75. Section 38 of the Act incorporating Article 17E of the Model Law.
76. Section 39(1) of the Act incorporating Article 17F(1) of the Model Law
77. Section 40 of the Act incorporating Article 17G of the Model Law.
78. Section 43 of the Act replacing Article 17J of the Model Law.
79. Article 26 of the Rules.
80. BVIHCMAP 2018/0043 and 0050.
81. If any arbitrator's signature is missing, reason should be provided: Section 65(1) of the Act.
82. Section 65 of the Act. The Award should also be dated and have the location set out: Section 65(3) of the Act.
83. Article 34(5) of the Rules.
84. Section 67 of the Act applying Article 33 of the Model Law; Articles 37(1) and 38(1) of the Rules.
85. Section 65(2) of the Act.
86. Article 38(2) of the Rules.
87. Article 37(2) of the Rules.
88. Section 67 of the Act incorporating Article 33(4) of Model Law; Article 39 of the Rules.
89. Section 68(1) of the Act.
90. Section 68(2) of the Act.
91. Section 72(1) and (2) of the Act.
92. Section 72(6) of the Act.
93. Section 72(8) of the Act.
94. Section 72(9) of the Act.
95. Article 43(2) of the Rules.
96. [2016] EWHC 2361.
97. Para 7(1) of Schedule 2 of the Act.
98. Paragraph 4 of Schedule 2 to the Act.
99. Paragraph 4(2) of Schedule 2 to the Act.
100. Paragraph 5(1) of Schedule 2 to the Act.
101. Paragraph 6(1) of Schedule 2 to the Act.
102. Paragraph 6(4) of Schedule 2 to the Act.
103. Paragraph 6(6) of Schedule 2 to the Act.
104. Section 85 of the Act applying Article IV of the Convention.
105. Article 5 of the Convention as set out at Sections 86(2) and (3) of the Act.
106. Section 82(1) of the Act.
107. Section 83(2)(c) of the Act.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Andrew Pullinger
Tel: +1 345 949 2648 / Email: apullinger@campbellslegal.com

Andrew is a Partner in our Litigation, Insolvency & Restructuring Group and specialises in commercial litigation, international arbitration and dispute resolution. He has extensive experience acting for clients in complex and high-value disputes, typically with a cross-border element. Andrew has experience litigating in jurisdictions throughout the world, as well as conducting institutional and *ad hoc* arbitrations under a variety of different rules (including ICC, LCIA, AAA and UNCITRAL). In London, Andrew specialised in international dispute resolution with a particular focus on international arbitration. He has extensive experience coordinating and leading teams in major, complex and high-value disputes. He has particular expertise advising clients in respect of investment fund and other financial services disputes (especially claims against administrators, custodians and auditors), professional negligence claims and a broad range of contractual disputes.

Matthew Freeman
Tel: +1 284 852 6155 / Email: mfreeman@campbellslegal.com

Matthew is a Senior Associate in the Litigation, Insolvency & Restructuring Group. Matthew advises and appears in the High Court and Commercial Court of the British Virgin Islands on behalf of provisional liquidators and liquidators, creditors, shareholders, directors, managers and other professional service providers in relation to a broad range of pre- and post-liquidation disputes. He has acted in litigation involving a variety of commercial contexts and structures, but his practice principally involves shareholder disputes (specifically relating to shareholders located in China and CIS countries) and claims relating to breaches of fiduciary duties.

Charlotte Walker
Tel: +1 284 852 6156 / Email: cwalker@campbellslegal.com

Charlotte is an Associate in our Litigation, Insolvency & Restructuring Group. Charlotte has broad commercial litigation experience, having advised clients on a wide range of disputes. She specialises in multi-jurisdictional commercial litigation and contentious corporate liquidations and receiverships and has advised debtors, existing stakeholders and creditors and insolvency practitioners in a number of multi-jurisdictional and complex contentious insolvencies.

Campbells (BVI)

Floor 4, Banco Popular Building, PO Box 4467, Road Town, Tortola VG-1110, British Virgin Islands
Tel: +1 284 494 2423 / Fax: +1 284 494 2475 / URL: www.campbellslegal.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Canada

Julie Rosenthal, Brad Halfin & Tamryn Jacobson
Goodmans LLP

Introduction

Canada is a federal state, made up of 10 provinces and three territories. Under the Canadian Constitution, the administration of justice falls within the jurisdiction of the provinces. Accordingly, each province has enacted its own legislation governing arbitrations. In addition, the federal government has enacted legislation which governs arbitrations involving a department of the federal government, a Crown corporation, or raising issues of maritime or admiralty law.[1]

With one exception, each province has enacted two arbitration statutes: one that governs international commercial arbitrations, and one that governs all other arbitrations.[2] Thus, for example, the province of Ontario has enacted the *Arbitration Act, 1991*, which governs domestic arbitrations,[3] and the *International Commercial Arbitration Act, 2017* governing international commercial arbitrations.[4]

Virtually all of the provinces (except Quebec) have incorporated the UNCITRAL 1985 Model Law (amended and updated in 2006) into their respective statutes. For example, in British Columbia, the *International Commercial Arbitration Act*[5] largely replicates the provisions of the Model Law. And, in Ontario, the *International Commercial Arbitration Act, 2017* provides that the Model Law "has force of law in Ontario", albeit subject to certain exceptions and modifications as set out in the Act.[6]

For ease of reference, this chapter will focus on the law governing international arbitrations in Ontario and British Columbia. To the extent that arbitration is being considered in other provinces or under the federal statute, the relevant legislation should be consulted.

There are a number of local arbitration bodies, including ADR Chambers International (in Ontario), the ADR Institute of Canada (in Ontario), the British Columbia International Commercial Arbitration Centre and the Canadian Commercial Arbitration Centre (in Quebec). Each of these institutions has its own set of procedural rules.

And, if parties so desire, they can also avail themselves of the services of international arbitral institutions, such as the International Court of Arbitration of the International Chamber of Commerce ("ICC"), the International Centre for Dispute Resolution ("ICDR"), or the London Court of International Arbitration ("LCIA"), for international arbitrations conducted in Canada.

Arbitration agreements

Formalities

Both the Ontario and the British Columbia statutes governing international arbitration allow parties to conclude arbitration agreements orally, by conduct or other means, but the contents

© Published and reproduced with kind permission by Global Legal Group Ltd, London

of the agreement must ultimately be recorded in writing (this can be done by letters or emails).[7] This departs from the statutes governing domestic arbitrations in most provinces, which do not require an arbitration agreement to be in writing.[8] Because the domestic statutes generally apply to all arbitrations not governed by the international statutes,[9] it may be possible to have an oral agreement to arbitrate an international dispute which would be governed by a domestic statute.

Parties may enter into an arbitration agreement before or after a dispute arises. Most commonly, the arbitration agreement is in the commercial document which establishes the relationship between the parties (for example, purchase and sale agreement, joint venture agreement and licence agreement).

Scope and arbitrability

The international arbitration statutes apply only to "commercial" arbitrations.[10] Within the scope of "commercial" activity, the arbitration agreement can be as narrow or broad as the parties wish. The broadest arbitration agreement can provide that all disputes between the parties be resolved by arbitration. More commonly, however, arbitration applies to disputes arising out of the particular agreement in which the arbitration agreement is contained. Alternatively, parties can agree to arbitrate only specific disputes – for example, purchase price adjustment disputes arising out of a purchase and sale agreement.

The availability of arbitration can be limited by legislation. For example, courts have held that certain provincial consumer protection and employment standards statutes oust the jurisdiction of an arbitrator, at least for that aspect of the parties' dispute that the statute addresses.[11]

There has been a recent tension in the courts between the policy in favour of enforcing arbitration (recognising the principles of freedom of contract) and the policy in favour of class actions to support access to justice. The Supreme Court of Canada has stated that courts should enforce arbitration agreements absent legislative intervention to the contrary, even in contracts of adhesion.[12] But the Ontario Court of Appeal recently used the doctrine of unconscionability to invalidate an arbitration clause in a standard form contract and thus allowed a proposed class action to continue in the courts.[13]

Separability and the tribunal's competence to determine its own jurisdiction

Both the British Columbia and the Ontario statutes provide that the arbitral tribunal is competent to determine its own jurisdiction, including determinations as to the existence or validity of the arbitration agreement.[14] A decision by the arbitral tribunal as to its jurisdiction may be appealed to the court within 30 days.[15]

Canadian courts have adopted the "competence-competence" principle, which holds that courts should refer matters of jurisdiction to arbitrators at first instance unless there is a pure question of law or uncontested facts.[16] The Ontario Court of Appeal recently held that the competence-competence principle was limited to instances in which the scope of the arbitration clause was in dispute, and did not apply when the validity of the clause was at issue.[17]

The statutes also provide that an arbitration clause that forms part of a larger contract shall be treated as independent and separable.[18] Canadian courts have interpreted and applied those statutory provisions in a consistent and predictable manner.[19]

Consolidation or joinder of parties or claims

The Model Law does not provide for consolidation of arbitration proceedings. However, both the Ontario and the British Columbia statutes provide that the court may order

© Published and reproduced with kind permission by Global Legal Group Ltd, London

consolidation of proceedings, if all parties consent.[20] (Such a consolidation order can be made upon application of all parties.) These provisions are useful when the parties have agreed to consolidation but cannot agree on the process, as it provides a mechanism for the court to grant directions. The statutes also provide that parties can agree to consolidate arbitration proceedings without a court order.[21]

Neither an arbitral tribunal nor a court can compel a third party who is not subject to the arbitration agreement to join in the arbitral proceedings. A court also cannot consolidate or join arbitral proceedings unless all parties consent or unless provided for in the arbitration agreement.[22] For this reason, parties are well-advised to ensure that the arbitration agreement requires all subcontracts or related agreements to contain a consolidated arbitration clause.

Arbitration procedure

Commencement of arbitration

Both the British Columbia and Ontario statutes provide that, unless otherwise agreed by the parties, arbitral proceedings are deemed to commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.[23]

The statutes impose no particular requirements for the form of the request or the manner of delivery, beyond stating that the request can be delivered personally or to the respondent's place of business, habitual residence or mailing address.[24]

That said, if the arbitration agreement provides that the initiating request for arbitration is to take a particular form or is to be delivered in a particular manner, or that certain procedural steps must be completed to start the arbitration, then those requirements must be satisfied. Thus, the Ontario Court of Appeal found that an arbitration had not been commenced within the required 12-month period specified in the contract because the notice of arbitration, despite having been served on the other party, had not been filed with the relevant institution as required by the arbitration agreement.[25]

Following the requirements set out in the arbitration agreement for starting the arbitration is particularly important in the context of contractual limitation periods (such as the 12-month period in the above-noted case), as well as statutory limitation periods. Canada generally has fairly short limitation periods for properly initiating claims as compared to other countries. (For example, the general limitation period in Ontario and BC is two years from discovery of the claim.)[26] A recent decision of the Ontario Court of Appeal suggests that where there are contractual preconditions to commencing an arbitration (for example, staged dispute resolution procedures which require negotiation or mediation before arbitration) the limitation period may be suspended until after those preconditions have been satisfied.[27]

Place of arbitration

The seat or place of the arbitration will generally determine the procedural law (*lex arbitri*) governing the arbitration (which may differ from the substantive law governing the dispute).[28] However, a recent decision of the Ontario Court of Appeal suggests that this may not always be the case when the arbitration agreement provides otherwise.[29]

Ordinarily, the hearing will be held in the seat of the arbitration, although the parties can agree otherwise. For example, if an arbitration agreement provides for the arbitration to take place in Toronto, Ontario, the parties could agree for the hearings to be held in Vancouver, British Columbia and be deemed to be taking place in Toronto. In that case, the Ontario statute would still govern the procedure of the arbitration and, if the parties needed court assistance (for example, in appointing an arbitrator), they would have to apply to the Ontario courts.[30]

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Procedural rules and evidence

With certain minor exceptions,[31] the choice of procedural rules is left up to the parties to decide. Thus, for example, an arbitration agreement can provide that the governing rules will be those of a particular arbitration institution, for example, the rules of the ICC, ICDR, LCIA, ADR Institute of Canada, Canadian Commercial Arbitration Centre, British Columbia International Commercial Arbitration Centre, or the LCIA, among others. Rather than use the rules of an institution, an arbitration agreement can also set out its own *ad hoc* procedural rules, in as much or as little detail as the parties desire.

If, however, the arbitration agreement is silent on procedure, the various statutes generally defer the choice of procedure to the arbitral tribunal.[32] This includes the power to determine the admissibility, relevance, materiality and weight of any evidence.[33] In that regard, arbitrators in Canada often refer to the *IBA Rules on the Taking of Evidence in International Arbitration* when deciding on the production and exchange of documents and the admissibility of evidence.

For those arbitrations that may involve the use of expert evidence, the typical practice in Canada is for the parties to exchange expert reports prior to the hearing. The statutes governing international arbitrations provide that the arbitral tribunal may appoint its own expert to report to it on specific issues, unless otherwise agreed by the parties,[34] although this is rare in Canada.

Privacy and confidentiality

Parties should address confidentiality obligations in the arbitration agreement (including any applicable exceptions, for example, public company disclosure obligations). Alternatively, the parties can incorporate the rules of an institution that satisfactorily address confidentiality obligations.

The British Columbia statute was amended in 2018 to include a provision that, unless otherwise agreed by the parties, the proceedings, evidence, documents, information and arbitral award are confidential. The Ontario statute remains silent on confidentiality, and the Canadian courts have not consistently determined whether an arbitration will be subject to an implied obligation of confidentiality absent an express confidentiality provision in the arbitration agreement. For that reason, if the parties desire confidentiality and it is not addressed in an Ontario-governed arbitration agreement, the parties should enter into a confidentiality agreement or have the arbitral tribunal issue a confidentiality order.

Arbitrators

The arbitration agreement can specify the number of arbitrators and the method of appointment or can refer to the rules of an institution which will determine the number of arbitrators. If the arbitration agreement is silent, the Ontario and British Columbia statutes provide for a default of three arbitrators, with one being appointed by each of the parties and the third being appointed by agreement of the two appointees.[35] (This is contrast with domestic acts, which default to a single arbitrator.) If there is a failure to comply with the appointment procedure (either the one agreed to by the parties or the one imposed by statute, as applicable), a party may apply to the court for assistance in appointing the tribunal.[36]

Under both the Ontario and the British Columbia statutes, 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 the arbitrator does not possess qualifications agreed to by the parties.[37] Any challenge to an arbitrator must be advanced within 15 days of the party becoming aware

© Published and reproduced with kind permission by Global Legal Group Ltd, London

of the issue,[38] and must be made first to the arbitral tribunal and, if unsuccessful, to the court.[39]

In determining whether there are justifiable doubts about the arbitrator's impartiality or independence, Ontario courts have recently begun referring to the 2014 IBA *Guidelines for Conflict of Interest* as an authoritative source.[40] The *Guidelines* ask whether a third person, knowing the relevant facts and circumstances, would conclude that the arbitrator may be influenced by factors other than the merits of the case. The British Columbia statute was amended in 2018 to provide that there are justifiable doubts as to the arbitrator's independence or impartiality only if there is a real danger of bias on the part of the arbitrator in conducting the arbitration. This is a higher threshold than the traditional common law test for bias which asks whether there is a reasonable apprehension of bias.[41]

Both the Ontario and the British Columbia statutes provide that an arbitrator's mandate terminates if they become *de jure* or *de facto* unable to perform their functions or for other reasons fail to act without undue delay, *and* they withdraw from office or the parties agree on the termination.[42] If a dispute remains about the arbitrator continuing to act (for example, if only one party alleges that the arbitrator has become unable to act or has unduly delayed), a party may ask the court to decide on the termination of the mandate.[43]

Arbitrators who are acting in a "judicial or quasi-judicial capacity" are generally immune from civil liability in Canada, absent fraud or bad faith.[44] The requirement for acting in a judicial or quasi-judicial capacity means that an arbitrator who is performing a valuation function may not enjoy the benefits of immunity.[45] The factors that must be present for immunity are:

1. there must be an existing dispute which the parties have submitted to the arbitrator;
2. the arbitrator must be acting in a judicial or quasi-judicial manner; that is, he or she receives evidence and hears argument in coming to his or her decision; and
3. the arbitrator must be fulfilling his or her function as an independent party, in compliance with the mandatory provisions of the applicable legislation.[46]

Most of the institutional rules also include a provision exempting the institution and arbitrators from liability absent wilful wrongful acts. In additional, many arbitrators require that parties sign an arbitration engagement agreement which contains various provisions, including immunity.

Interim relief

Depending on the terms of the arbitration agreement and the applicable procedural rules, parties to an international arbitration may have access to a broad range of interim relief in Canada. That interim relief may be sought either from the arbitral tribunal or from the courts.[47]

Ontario and British Columbia have very similar statutory regimes governing the granting of interim relief. In both provinces, the arbitral tribunal may, at the request of a party, and absent an agreement to the contrary, "grant interim measures" in order to:

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

(b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process;

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

(d) preserve evidence that may be relevant and material to the resolution of the dispute.[48]

The British Columbia statute also contemplates an order granting security for costs.[49]

© Published and reproduced with kind permission by Global Legal Group Ltd, London

In both provinces, interim relief may be granted only if the moving party proves that:

(a) irreparable harm is likely to result without the interim relief;

(b) the irreparable harm "substantially outweighs" the harm that is likely to be caused by the granting of the interim relief; and

(c) there is a "reasonable possibility" that the moving party will succeed on the merits of the claim.[50]

The party seeking interim relief shall be liable for any costs and/or damages if the arbitral tribunal later determines that the relief should not have been granted. Such costs or damages may be awarded at any point during the proceedings.[51]

An interim order (other than one granted *ex parte*, discussed below) can be enforced upon application to the Superior Court, unless the tribunal provides otherwise.[52] Enforcement may only be refused in limited circumstances (e.g., incapacity of the responding party, lack of notice, contrary to public policy).[53]

The tribunal may grant interim relief without notice to the other party (unless otherwise agreed to by the parties), but only if the tribunal determines that providing notice would risk frustrating the purpose of the relief sought.[54] A party seeking such an *ex parte* order must make full disclosure to the tribunal of "all circumstances that are likely to be relevant" to the request for relief, with that disclosure obligation continuing until the opposing party has had an opportunity to present its case.[55] If relief is granted on an *ex parte* basis, notice shall be given immediately afterwards to the other party,[56] and an opportunity shall be given "at the earliest practicable time" for that party to present its objection to the interim relief.[57] It should be noted, however, that such an order, made without notice, is not enforceable by the court and does not constitute an award.[58]

If the parties have agreed to arbitrate their dispute through an arbitration institution, that institution's procedures regarding interim relief will govern. For example, the ICC has special emergency procedures whereby the ICC can appoint an arbitrator on an urgent basis, where required.[59] Similarly, Article 6 of the ICDR's *International Dispute Resolution Procedures* provides for the appointment of an emergency arbitrator to grant interim relief.[60]

However, parties may sometimes be better off seeking interim measures from the courts rather than arbitral tribunals because, unlike arbitrators, courts can make certain orders binding on third parties (e.g., *Mareva* injunctions). Moreover, seeking relief from the courts may be more practical if the matter is urgent and an *ad hoc* arbitral tribunal is still being established without the benefit of a set of rules from an arbitral institution that specifically provide for a process and timetable to seek and be awarded urgent interim relief.[61]

The arbitral award

Both the Ontario and the British Columbia statutes require that the award be in writing and signed by the arbitrator(s).[62] The award must state the date and place of the arbitration, and set out the reasons for the decision (unless the parties have agreed that no reasons are to be given).[63] The award, once signed by the tribunal, must be delivered to each party.[64] No time limits are imposed for the delivery of the award.

If the matter settles prior to delivery of the arbitral award, the parties can ask the arbitral tribunal to prepare an award reflecting the settlement.[65] Such an award is binding and is of the same force and effect as an award reflecting the arbitral tribunal's decision on the merits.[66]

The Ontario statute is silent with respect to the arbitral tribunal's ability to award costs and interest. As a result, the tribunal's power to award costs and/or interest is determined by the

© Published and reproduced with kind permission by Global Legal Group Ltd, London

arbitration agreement or by the procedural rules adopted for the arbitration, which may contain specific provisions as to costs.[67] With respect to interest, British Columbia's legislation was recently amended to provide that, unless otherwise agreed to by the parties, the arbitral tribunal may award interest.[68] With respect to costs, British Columbia's legislation provides that, unless otherwise agreed to by the parties, costs of the arbitration are at the discretion of the arbitral tribunal. The British Columbia legislation provides that costs may include fees and expenses of arbitrators and expert witnesses, legal fees and expenses, administration fees of an institution and any other expenses incurred in connection with the arbitral proceedings, and may specify the party entitled to costs, the party who must pay costs, the amount of costs or method of determining that amount, and the manner in which costs must be paid.[69]

The mandate of the arbitral tribunal, along with the arbitral proceedings themselves, are terminated by the tribunal's final award.[70] Alternatively, the arbitral tribunal must issue an order terminating the proceedings before giving a final award, if:

1. the claimant withdraws his claim and the respondent does not object;
2. the parties agree on the termination of proceedings; or
3. the arbitral tribunal determines that the continuation of the proceedings is either unnecessary or impossible.[71]

Challenging the arbitral award

Neither the Ontario statute nor the British Columbia statute provide a right of appeal on the merits of an award.[72] It is not clear whether such a right can be granted by agreement of the parties.[73]

However, a party may apply to the courts to set aside the award.[74] Article 34(2) of the Model Law (adopted as part of the law of Ontario and adopted in similar form by British Columbia) provides the following grounds upon which an award may be set aside:

34(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

i. a party to the arbitration agreement referred to in article 7 was under some incapacity, or the said arbitration agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the Law of this State; or

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

iii. the award deals with a dispute not contemplated by, or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on the matter submitted to arbitration can be separated from those not so submitted, only that part of the award which contains a decision on matters not submitted to arbitration may be set aside (which decisions can be separated from matters within the submission to arbitration); or

iv. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

© Published and reproduced with kind permission by Global Legal Group Ltd, London

i. the subject matter of the dispute submitted to arbitration is not capable of settlement by arbitration under the law of this State; or

ii. the award is in conflict with the public policy of this State.

Applications to set aside an award must be made within three months of the receipt of the award to the courts of the province constituting the seat of the arbitration.[75] The Court may, when asked to set aside an award, where appropriate and if requested by a party, suspend the proceedings to set aside the award for a period of time to allow the arbitral tribunal an opportunity to resume the arbitral proceedings or take other actions, which, in the tribunal's opinion, will eliminate the grounds to set aside the award.[76]

A party may seek to have the arbitral tribunal correct any clerical, typographic or computation errors in an award, or may request the arbitral tribunal to interpret a specific point in the award. Such a request must be made within 30 days of receiving the award.[77] The arbitral tribunal may also correct any clerical, typographic or computation errors on its own initiative within 30 days of the date of the award.[78] The formalities of the award, as set out above, apply equally to any corrections or interpretations made.[79]

Enforcement of the arbitral award

All Canadian provinces and territories, with the exception of Quebec, have adopted and ratified the *New York Convention* allowing for the recognition and enforcement of arbitral awards from its signatory states. Among the adopting provinces, most have appended the *New York Convention* as schedules to their respective international commercial arbitration statutes, while the remainder have enacted legislation incorporating the *New York Convention*.[80] In Quebec, the *Civil Code of Procedure* provides that foreign arbitral awards will be recognised and enforced, if the matter in dispute is one that may be settled by arbitration in Quebec and if the award is not contrary to public policy. It also provides that the *New York Convention* should be "taken into account" when determining the scope of a party's right to have an award recognised and enforced.[81]

For those provinces that adopted or incorporated the *New York Convention*, it should be noted that in Canada, the *New York Convention* will apply only to differences arising out of legal relationships, whether contractual or not, which are considered "commercial" under the laws of Canada,[82] except in the case of the Province of Quebec where the law does not provide for such limitation.[83]

Common to all jurisdictions (other than Quebec) is the requirement that a party seeking to enforce an award must supply an authenticated original award (or a certified copy), and a copy of the arbitration agreement (or a certified copy).[84] In Ontario, if the language of the award is not an official language of the province, the party seeking to enforce the award must supply a certified translation of the award.[85] In British Columbia, if the language of the award is not an official language of Canada, the party seeking to enforce the award must supply a certified translation of the award.[86]

There are certain limited grounds upon which the court may refuse to enforce an arbitral award. These grounds, as set out in the Model Law,[87] are the same as the grounds noted above for setting aside an award, with the addition that an award may not be enforced if the party against whom the award is invoked furnishes proof that "[T]he award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which or under the law of which the award was made."[88] This issue was recently addressed by the Ontario Court of Appeal in *Popack v. Lipszyc*, which held that new issues arising between

© Published and reproduced with kind permission by Global Legal Group Ltd, London

the parties after the award had been made did not impact the binding (and enforceable) nature of the award under the Model Law.[89]

The most commonly cited basis for a refusal to enforce a foreign arbitral award is a failure by the arbitral tribunal to adhere to the norms of procedural fairness. Courts also have the power to refuse enforcement on the ground of public policy, although they have been much more reluctant to invoke that ground for refusing to enforce an award.[90] Thus, for example, in *Corporacion Transnacional de Inversiones S.A. de C.V. v. Stet International S.p.A*, it was held that the court will only refuse to enforce an award in circumstances where the award offends the most basic and explicit principles of justice and fairness, or if it "evidences intolerable ignorance or corruption on the part of the arbitral tribunal".[91] Among the (admittedly rare) situations where the court will refuse enforcement based on public policy are situations where enforcement of the award would result in the plaintiff enjoying double recovery.[92] British Columbia has recently amended its legislation to specifically provide that third party funding is not contrary to the public policy in British Columbia.[93]

The Ontario Court of Appeal in *Popack v. Lipszyc* recently held that reviewing courts have a residual discretion to refuse to set aside an award, or enforce an award, even if the court finds that one of the enumerated grounds in Articles 34 or 36 has been breached. The Court found that this residual discretion is "significantly affected" by the enumerated ground which has been breached.[94] Courts in other Canadian jurisdictions have similarly held that the courts retain a residual discretion to enforce or refuse to set aside an award, depending on the effect of the breach.[95]

It should be noted that for most provinces, when a party seeks to enforce a foreign arbitral award, provincial limitation periods apply. For those provinces that have adopted the *New York Convention*, the provincial limitation periods are applicable by virtue of Article III of the Convention, which provides that each contracting state must recognise arbitral awards in accordance with the rules of procedure of that territory. The Supreme Court of Canada recently held that "rules of procedure" was broad enough to encompass provincial limitation periods.[96] Accordingly, in most jurisdictions an arbitral award should be subject to the general limitation period applicable to most causes of action, which in most provinces is two years.

In Ontario and Quebec, however, the situation is slightly different. Ontario's legislation incorporates a 10-year limitation period to commence an application to recognise or enforce an arbitral award. This limitation period commences from the date the award was made or, if proceedings at the place of the arbitration were commenced, the date on which those proceedings concluded.[97] Quebec's statutory provision states that an arbitral award (once recognised by the court) is enforceable in the same manner as a judgment or order of the court.[98] In such circumstances, at least one author has suggested that an argument could be made that the enforcement of arbitral awards should be treated, for limitations purposes, the same as court orders. The limitation period in this respect is 10 years.[99]

Investment arbitration

Investment treaties

In recent years, Canada has emerged as a leading state in international investment arbitration. As of February 28, 2019, Canada has ratified 38 bilateral investment treaties, which are known in Canada as Foreign Investment Promotion and Protection Agreements ("FIPAs"). Notably, Canada has ratified FIPAs with 38 trading partners, including China and Russia.[100] In addition, Canada has concluded negotiations on (but has not ratified) a further seven FIPAs[101] and is in the process of negotiating 14 more.[102]

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Canada has also ratified 14 free trade agreements ("FTAs").[103] Historically, the most prominent among those was the North American Free Trade Agreement ("NAFTA"), between Canada, the United States and Mexico. However, the parties negotiated a new agreement – the Canada-United States-Mexico Agreement ("CUSMA", typically referred to outside Canada as USMCA) – which is intended to replace NAFTA. CUSMA was signed in November 2018 and ratification is in progress.[104] Of particular note is the fact that CUSMA, if ratified, will not permit any investor-state arbitrations against Canada (or to be brought by Canadians) under its provisions. The only such arbitrations that will be permitted will be "legacy" claims brought under NAFTA, which must be commenced within three years of the termination of NAFTA.[105]

In addition to the anticipated CUSMA transition, other recent developments of note are the ratifications of the Comprehensive Economic and Trade Agreement ("CETA") with the European Union (in late 2017) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP"), between Canada and ten Pacific-rim nations, including Mexico, Japan, Australia and Vietnam (in late 2018).[106]

With the notable exception of CUSMA, the FIPAs and FTAs to which Canada is a signatory (including CETA and CPTPP) generally provide that investors may submit a claim to arbitration under:

1. the International Centre for Settlement of Investment Dispute ("ICSID") rules – which are appropriate for matters arbitrated under the ICSID *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*;
2. the ICSID *Additional Facility Rules* – which are appropriate if one (but not both) of the parties to the dispute is a contracting member state or a national of a contracting member state under the ICSID Convention;
3. the UNCITRAL *Arbitration Rules;*
4. another body of rules approved by the parties to the agreement (e.g., the *LCIA Rules*); or
5. bespoke rules incorporated into the body of the trade agreement.[107]

In addition, Canada has ratified the ICSID *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*. Pursuant to the ICSID Convention, Canadians who invest in other ICSID member states[108] and who find themselves in a dispute relating to that investment may rely upon an arbitration under the ICSID *Convention* to resolve their disputes.[109] However, unless the investor has the consent of the other parties to the dispute, it is open to a contracting state to ask the investor first to exhaust local administrative or judicial remedies before having recourse to the ICSID process.[110] Foreign investors who are nationals of ICSID contracting states also have reciprocal rights under the ICSID *Convention* in Canada.[111]

According to the information made public by the Canadian Government, as at February 28, 2019, Canada is a party to seven active investment arbitration disputes. Six of those disputes were brought under Chapter 11 of NAFTA.[112] The remaining dispute, which was commenced in 2016, was brought by Global Telecom Holding S.A.E., an Egyptian-based telecommunications services company, under the Canada-Egypt FIPA and claims damages of "at least $1.32 billion CAD".[113]

Canada's Model FIPA

The Canadian government introduced its "Model FIPA" in 2004.[114] Although the FIPAs that Canada has entered into with major trading partners, such as China and Russia,

© Published and reproduced with kind permission by Global Legal Group Ltd, London

typically provide for their own customised procedures for arbitration claims, the FIPAs that Canada has entered into with many smaller countries adopt the procedures set out in the Model FIPA. Such agreements provide for, among other things, fair and equitable treatment in accordance with international law, public access to hearings and a procedure to be followed in accordance with the ICSID Rules, the UNCITRAL Arbitration Rules or another body of rules approved by the parties to the agreement (e.g., the LCIA Rules).

Canada's enforcement of investment arbitration awards

Canada is generally an enforcement-friendly jurisdiction. For example, in *United Mexican States v. Cargill Inc.*,[115] Mexico sought to set aside part of a US$77m arbitral award for losses that Cargill and its Mexican subsidiary sustained when Mexico imposed additional duties and permit requirements on the importation of high-fructose corn syrup into Mexico. The arbitral tribunal, which was seated in Toronto, determined that Mexico had breached Chapter 11 of NAFTA when it imposed restrictions on the importation of the corn syrup. The tribunal awarded damages for "downstream losses" that Cargill's Mexican subsidiary suffered, as well as for "upstream losses" that the U.S. parent company suffered when it could no longer sell the corn syrup to its Mexican subsidiary.

Mexico applied to the Ontario Superior Court to set aside the $41m portion of the arbitral award that related to upstream losses, on the basis that these damages were sustained by a U.S. producer and were therefore unrelated to an "investment" in Mexico as defined in Article 1139 of NAFTA. The application judge dismissed Mexico's application on the basis that Mexico's objection went to the merits of the decision, which was beyond the scope of review for the court.[116]

Mexico's subsequent appeal to the Ontario Court of Appeal was dismissed. The Court of Appeal determined that the proper standard of review was "correctness", but held that the arbitral tribunal was correct in holding that it had jurisdiction to decide the scope of damages suffered by *Cargill* and that NAFTA imposes no territorial limit on those damages.[117] The Supreme Court of Canada subsequently rejected Mexico's application for leave to appeal.[118]

More recently, in *Canada (Attorney General) v. Clayton*, the Federal Court dismissed a challenge brought by Canada to a liability award made in a Chapter 11 NAFTA arbitration.[119] While it acknowledged widespread criticism of the merits of the arbitral award, the Federal Court noted that the scope of its review was strictly confined to the question of whether the arbitral tribunal had exceeded its jurisdiction in the sense that its award dealt with a dispute not contemplated by, or not falling within, the terms of the submission to arbitration, or contained decisions on matters beyond the scope of the submission to arbitration.[120] The Court held that the tribunal had not exceeded its jurisdiction – even the tribunal's consideration of Canada's compliance with domestic law was held to be within its jurisdiction, as the parties' pleadings had squarely raised the issue.[121]

The decisions in Cargill and in Clayton are consistent with the long-standing approach of Canadian courts, which is to proceed on the basis "that an expert international arbitral tribunal acted within its authority", and that judicial interference should be limited to extraordinary cases.[122] As is the case with international arbitration awards generally, the Canadian courts are loathe to interfere with investment treaty arbitration awards, and deference is afforded to the arbitral decision provided that the arbitration has followed the correct procedures and conducted a fair hearing.[123]

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Endnotes

1. *Commercial Arbitration Act*, R.S.C. 1985, C. 17, as amended, s. 5(2).
2. The province of Quebec does not have an international arbitration statute. Instead, all arbitrations that take place in the province are subject to the provisions of the *Civil Code of Quebec*, CQLR c. C-1991, Chapter XVIII and other sections, including sections 2895, 3121, 3133 and 3148, as well as to the applicable provisions of the *Code of Civil Procedure*, c. C-25.01.
3. *Arbitration Act, 1991, S.O. 1991*, c. 17, s. 2(1), which states that the act applies to all arbitrations in the province unless its application is excluded by law, or unless the *International Commercial Arbitration Act* applies.
4. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, s. 5(3).
5. *International Commercial Arbitration Act,* R.S.B.C. 1996, chapter 233.
6. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, s. 5(1).
7. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter II, Art. 7, see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 2, s. 7.
8. *Arbitration Act, 1991*, S.O. 1991, c. 17, s 5(3), see also Arbitration Act, R.S.B.C. 1996, C. 55, part 1, s. 1 definition of "arbitration agreement" and s. 2.
9. *Arbitration Act, 1991*, S.O. 1991, c. 17, s 2(1), see also Arbitration Act, R.S.B.C. 1996, C. 55, part 1, s. 1 definition of "arbitration agreement".
10. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter I, Art. 1(1), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, part 1, s. 1(1). The British Columbia statute provides a non-exclusive list of when an arbitration will be considered "commercial", for example, disputes relating to a trade transaction for the supply or exchange of goods or services, a joint venture, construction, insurance, licensing, financing, banking, consulting, etc. (*International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 1, s. 1(6)). The various domestic arbitration statutes are not limited to "commercial" arbitrations.
11. *Seidel v. TELUS Communications*, 2011 SCC 15; see also *Wellman v. TELUS Communications Co.*, 2017 ONCA 433 (the SCC heard an appeal of this decision, but the decision remains under reserve) and *Heller v. Uber Technologies Inc.*, 2019 ONCA 1 (application for leave to appeal to SCC filed but not determined).
12. *Seidel v. TELUS Communications,* 2011 SCC 15, paras. 2 and 42.
13. *Heller v. Uber Technologies Inc.*, 2019 ONCA 1 (application for leave to appeal to SCC filed but not determined). In that case, the Ontario Court of Appeal found that the arbitration agreement required individuals to incur large up-front costs to commence an arbitration, that the individual had not received legal advice before entering into the agreement, and that there was a significant inequality of bargaining power between the parties (paras. 68-69).
14. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter IV, Art. 16(1), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, part 4, s. 16(1).
15. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter IV, Art. 16(3), see also *International Commercial Arbitration Act,* R.S.B.C. 1996, c. 233, part 4, s. 16(6).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

16. See, for example, the Supreme Court of Canada decision of *Dell Computer Corp v Union des Consommateurs*, [2007] 2 SCR 801 and the *Ontario Court of Appeal decision of Dancap Productions Inc. v. Key Brand Entertainment Inc.*, 2009 ONCA 135.
17. *Heller v. Uber Technologies Inc.*, 2019 ONCA 1 (application for leave to appeal to SCC filed but not determined).
18. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter IV, Art. 16(1), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, part 4, s. 16(1).
19. See, for example, *DG Jewelry Inc. v. Cyberdiam Canada Ltd* (2002), 21 CPC (5th) 174 (Ont. S.C.J.) para. 20 or *Krutov v. Vancouver Hockey Club Ltd.* 1991, 30 A.C.W.S. (3d) 164, para. 15.
20. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, s. 8(1), see also *International Commercial Arbitration Act,* R.S.B.C. 1996, c. 233, part 5, s. 27.01.
21. *International Commercial Arbitration Act, 2017*, S.O. 2017 c. 2, s. 8(2) and 8(3), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, part 5, s. 27.01.
22. *Liberty Reinsurance Canada v. QBE Insurance and Reinsurance (Europe) Ltd* (2002), 42 C.C.L.I. (3d) 249 (Ont. S.C.J.) para. 22-23; *South Coast British Columbia Transportation Authority v. BMT Fleet Technology Ltd.*, 2018 BCCA 468.
23. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter V, Art. 21, see also *International Commercial Arbitration Act,* R.S.B.C. 1996, c. 233, part 5, s. 21.
24. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter I, Art. 3, see also *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, part 1, s. 3.
25. *Bell Canada v. The Plan Group*, 2009 ONCA 548.
26. *Limitations Act, 2002*, SO 2002, c. 24 schedule B, s 4; *Limitation Act*, SBC 2012, c. 13, s. 6. Limitation periods vary by province.
27. *PQ Licensing S.A. v. LPQ Central Canada Inc.*, 2018 ONCA 331.
28. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 3rd ed. (New York: JurisNet, LLC, 2017) at 59; McEwan and Herbst, *Commercial Arbitration in Canada, A Guide to Domestic and International Arbitrations* (Toronto: Thomson Reuters Canada Limited 2017) at 7:10.
29. *Walt Disney Company v. American International Reinsurance Company, Ltd.*, 2018 ONCA 948. The arbitration agreement in that case stated that one party could select the venue and procedural laws of Bermuda or any one of London, Toronto or Vancouver under the English *Arbitration Act of 1996*. The party had chosen Toronto as the place of arbitration. Despite this, the Ontario Court of Appeal stated that even where Toronto was the seat chosen for the arbitration, the arbitration was to be conducted in accordance with the procedural laws set out in the English *Arbitration Act of 1996*.
30. See, e.g., *United Mexican States v. Karpa* (2005), 136 A.C.W.S. (3d) 200 (ONCA), para. 1.
31. For example, the parties cannot contract out of the requirement that the parties be treated with equality and that each party be given a full opportunity of presenting his or her case (*International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter V, Art. 18, see also *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, part 5, s. 18).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

32. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter V, Art. 19, see also *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, part 5, s. 19.
33. *International Commercial Arbitration Act*, R2017, S.O. 2017, c. 2, Model Law, Chapter V, Art. 19(2), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, part 5, s. 19(3).
34. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter V, Art. 26, see also *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, part 5, s. 26.
35. *International Commercial Arbitration Act,* 2017, S.O. 2017, c. 2, Model Law, Chapter II, Art. 10 and 11, see also *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, part 3, s. 10 and 11.
36. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter II, Art. 11, see also International Commercial Arbitration Act, R.S.B.C. 1996, c. 233, part 3, s. 11.
37. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter III, Art. 12(2), see also International Commercial Arbitration Act, R.S.B.C. 1996, c. 233, part 3, s. 12(3).
38. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter III, Art. 13(2), see also International Commercial Arbitration Act, R.S.B.C. 1996, c. 233, part 3, s. 13(2).
39. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter III, Art. 13, see also International Commercial Arbitration Act, R.S.B.C. 1996, C. 233, part 3, s. 13.
40. *Jacob Securities Inc. v. Typhoon Capital BV*, 2016 ONSC 604, para. 41.
41. *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, part 3, s. 12(3.1).
42. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter III, Art. 14(1), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, part 3, s. 14(1).
43. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter III, Art. 14(1), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, part 3, s. 14(2).
44. See, for example, *Flock v. Beattie*, 2010 ABQB 193. Although this case was an Alberta case regarding the Alberta domestic Act, it also canvasses the applicable Canadian and international law.
45. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 3rd ed. (New York: JurisNet, LLC, 2017) at 189.
46. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 3rd ed. (New York: JurisNet, LLC, 2017) at 188-189, citing *Sport Maska Inc. v. Zittrer*, [1988] 1 SCR 564 and certain English cases.
47. In both Ontario and British Columbia, the international arbitration statute expressly provides that interim relief can be granted by the courts. For Ontario, see *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 J. For British Columbia, see *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, s. 17.10.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

48. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17; *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, s. 17(2).
49. *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, s. 17(2)(e).
50. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 A(1); *International Commercial Arbitration Act,* R.S.B.C. 1996, c. 233, s. 17.01(1).
51. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 G; *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, s. 17.07.
52. *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 H(1); *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, s. 17.08(1).
53. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 I; *International Commercial Arbitration Act,* R.S.B.C. 1996, c. 233, s. 17.09(1).
54. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 B; *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, s. 17.02.
55. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 F(2); *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, s. 17.06.
56. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 C(1); *International Commercial Arbitration Act,* R.S.B.C. 1996, c. 233, s. 17.03(1).
57. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 C(2); *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, s. 17.03(2).
58. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter IV A, Art. 17 C(5); *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, s. 17.03(6).
59. ICC Rules, Art. 29.
60. ICDR Rules, Art. 6.
61. Kenneth J. McEwan, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (Toronto: Canada Law Book, 2004+) at 6-38.
62. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter VI A, Art. 31(1). see also *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, part 6, Article 31(1). In Ontario, in proceedings with more than one arbitrator, the signatures of the majority of the tribunal is sufficient, so long as the reason for any omitted signature is stated.
63. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter VI A, Art. Art. 31(2) and (3), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, part 6, Art. 31(3) and (4).
64. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter VI A, Art. 31(4), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, c.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

233, part 6, Art. 31(5).

65. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter VI A, Art. 30(1), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, part 6, Art. 30(2).

66. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter VI A, Art. 30(2), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 6, Art. 30(4).

67. Casey, *Arbitration Law of Canada: Practice and Procedure*, 3rd Ed., (New York: JurisNet, LLC, 2017), s.8.6.2, pg. 446; McEwan and Herbst, *Commercial Arbitration in Canada, A Guide to Domestic and International Arbitrations* (Toronto: Canada Law Book 2018) at 11:20.10.

68. *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 6, s. 31(7); Casey, *Arbitration Law of Canada: Practice and Procedure*, 3rd Ed., (New York: JurisNet, LLC, 2017), s. 8.6.2, p. 446.

69. *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 6, s. 31(8).

70. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter VI A, Art. 32(1), see also International Commercial Arbitration Act, R.S.B.C. 1996, C. 233, part 6, Art. 32(1).

71. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter VI A, Art. 32(2), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 6, Art. 32(2).

72. Casey, *Arbitration Law of Canada: Practice and Procedure*, 3rd Ed., (New York: JurisNet, LLC, 2017), s. 8.10, p. 456, s. 9.2.2 p. 477; McEwan and Herbst, *Commercial Arbitration in Canada, A Guide to Domestic and International Arbitrations* (Toronto: Canada Law Book 2018) at 10:50.10.

73. Casey, *Arbitration Law of Canada: Practice and Procedure*, 3rd Ed., (New York: JurisNet, LLC, 2017), s. 8.10, p. 456, s. 9.2.2 p. 477. In *Hall Street Associates L.L.C. v. Mattel Inc*. 128 S. Ct. 1396, the United States Supreme Court concluded that it was not open to the parties to expand the powers of review granted by statute.

74. *International Commercial Arbitration Act*, R.S.O. 1990 c I.9, Model Law, Chapter 2, Art. 6, wherein the Court is defined as the Superior Court of Justice; see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 7, Art. 34(2) wherein the Court is defined as the Supreme Court.

75. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter VII A, Art.34(3), see also International Commercial Arbitration Act, R.S.B.C. 1996, C. 233, part 7, Art. 34(3).

76. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter VII A, Art. 34(4), see also International Commercial Arbitration Act, R.S.B.C. 1996, C. 233, part 7, Art. 34(4).

77. *International Commercial Arbitration Act*, R.S.O. 1990 c I.9, Model Law, Chapter VI-A, Art. 33(1), see also International Commercial Arbitration Act, R.S.B.C. 1996, C. 233, part 6, Art. 33(1) and (2).

78. *International Commercial Arbitration Act*, R.S.O. 1990 c I.9, Model Law, Chapter VI-A, Art. 33(2), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 6, Art. 33(3).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

79. *International Commercial Arbitration Act,* R.S.O. 1990 c I.9, Model Law, Chapter VI-A, Art. 33(5), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 6, Art. 33(7).

80. Casey, *Arbitration Law of Canada: Practice and Procedure*, 3rd Ed., (New York: JurisNet, LLC, 2017), s. 10.3.1, p. 540. Ontario's *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, most recently incorporated the New York Convention as Schedule 1.

81. Code of Civil Procedure, R.S.Q. c. C-25.01, s. 948-949.

82. The term commercial applies broadly to contractual and non-contractual commercial relationships such as leasing, construction, investment, financing, etc., but does not include labour and employment disputes or consumer claims. McEwan and Herbst, *Commercial Arbitration in Canada, A Guide to Domestic and International Arbitrations*, (Toronto: Canada Law Book 2018) at 1:80; *Borowski v. Heinrich Fiedler Perforiertechnik GmbH* (1995), 29 C.P.C. (3d) 264 (Alta. Q.B.), see also *Patel v. Kanbay International Inc.* (2008), 93 O.R. (3d) 88 at paras. 12-13 (C.A.).

83. *United Nations Foreign Arbitral Awards Convention Act*, R.S.C. 1985 c. 16, s. 4(1). See also, New York Arbitration Convention online: http://www.newyorkconvention.org/countries. The term commercial applies broadly to contractual and non-contractual commercial relationships such as leasing, construction, investment, financing, etc., but does not include labour and employment disputes or consumer claims. McEwan and Herbst, *Commercial Arbitration in Canada, A Guide to Domestic and International Arbitrations*, (Toronto: Canada Law Book 2018) at 1:80; *Borowski v. Heinrich Fiedler Perforiertechnik GmbH* (1995), 29 C.P.C. (3d) 264 (Alta. Q.B.), see also *Patel v. Kanbay International Inc.* (2008), 93 O.R. (3d) 588 at paras. 12-13 (C.A.).

84. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter VIII A, Art. Art. 35(2), see also *International Commercial Arbitration Act,* R.S.B.C. 1996, C. 233, part 8, Art. 35(2).

85. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter VIII A, Art. 35(2), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 8, Art. 35(3).

86. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter VIII A, Art. 35(2), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 8, Art. 35(3).

87. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter VIII A, Art. 36(1), see also *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 8, Art. 36(1).

88. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Model Law, Chapter VIII A, Art. 36(1)(a)(v), see also *International Commercial Arbitration Act,* R.S.B.C. 1996, C. 233, part 8, Art. 36(1)(a)(vi).

89. *Popack v. Lipsyzc*, 2018 ONCA 635 at para. 85.

90. See, for example, *Schreter v. Gasmac Inc.*, [1992] O.J. No 257 at paras. 47-52 (Gen. Div.), see also *Beals v. Saldhana* [2001] O.J. No. 2586 at paras. 34-35, 84-86 (C.A.).

91. *Corporacion Transnacional de Inversiones S.A. de C.V. v. Stet International S.p.A* (1999) 45 O.R. (3d) 183 (S.C.) at para. 30 (S.C.J.) and see *Quintette Coal Limited v. Nippon Steel Corp. et al.,* [1990] B.C.J. No. 2241 at paras. 27 and 32 (C.A.).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

92. *Subway Franchise Systems of Canada Ltd. v. Laich*, 2011 SKQB 249 at para. 40; and see *Lambert Re:*, [2002] O.J. No. 3163 (C.A.), affirming *Lambert Re:*, [2001] O.J. No. 2776 at para. 76 (S.C.J.).

93. *International Commercial Arbitration Act*, R.S.B.C. 1996, C. 233, part 8, Art. 36(3). For the purpose of Art. 36(3) "third party funding", in relation to an arbitration, means funding for the arbitration that is provided (a) to a party to the arbitration agreement by a person who is not a party to that agreement, and (b) in consideration of the person who provides the funding receiving a financial benefit if the funded party is successful in the arbitration.

94. *Popack v. Lipsyzc*, 2016 ONCA 135, affirming *Popack v. Lipsyzc*, 2015 ONSC 3460 at para. 28-29.

95. *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664 at para. 127-129; *Rheaume v. Société d'investissements l'Excellence Inc.*, 2010 QCCA 2269 at para. 61.

96. *Yugraneft Corp. v. Rexx Management Corp*. 2010 SCC 19 at paras. 14-23, see also Casey, *Arbitration Law of Canada: Practice and Procedure*, 3rd Ed., (New York: JurisNet, LLC, 2017), at s. 10.4.2, p. 572-573.

97. *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, part III, Art. 10.

98. Code of Civil Procedure, R.S.Q. c. C-25.01, s. 951.2.

99. Casey, *Arbitration Law of Canada: Practice and Procedure*, 3rd Ed., (New York: JurisNet, LLC, 2017), at s. 10.4.2, p. 455. Given that the Quebec statutory provision appears to presume that the foreign arbitral award has already been recognised by the local courts, it is not clear whether one would succeed in an argument that there is no limitation period for an application to recognise a foreign arbitral award (as opposed to an application to enforce an award that has already been recognised). See also, *Civil Code of Quebec*, CQLR c. C-1991, Art. 2924.

100. Canada also has FIPAs in force with the following countries: Argentina; Armenia; Barbados; Benin; Burkina Faso, Cameroon; Costa Rica; Côte d'Ivoire; Croatia; Czech Republic; Ecuador; Egypt; Guinea, Hong Kong; Hungary; Jordan; Kosovo; Kuwait; Latvia; Lebanon; Mali, Mongolia, Panama; Peru; Philippines; Poland; Romania; Senegal; Serbia; Slovak Republic; Tanzania; Thailand; Trinidad and Tobago; Ukraine; Uruguay; and Venezuela. See: Government of Canada, "Trade and Investment Agreements", (28 February 2019) online: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng.

101. Canada has signed (but has not yet ratified) a FIPA with Moldova and Nigeria. Canada has concluded FIPA negotiations (but has not yet signed FIPAs) with Albania, Bahrain, Madagascar, United Arab Emirates and Zambia. See: Government of Canada, "Trade and Investment Agreements", (28 February 2019) online: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng.

102. Canada is in the process of negotiating FIPAs with Democratic Republic of the Congo, Gabon, Georgia, Ghana, India, Kazakhstan, Kenya, Macedonia, Mauritania, Mozambique, Pakistan, Qatar, Rwanda and Tunisia. See: Government of Canada, "Trade and Investment Agreements", (28 February 2019) online: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

103. In addition to NAFTA (with the United States and Mexico), CETA (with the European Union) and the CPTPP (with the Trans-Pacific Partnership), Canada also has FTAs with the following countries and organisations: Chile; Colombia; Costa Rica; European Free Trade Association (consisting of Norway, Switzerland, Iceland and Liechtenstein); Honduras; Israel; Jordan; Korea; Panama; Peru; and Ukraine. See: Government of Canada, "Trade and Investment Agreements", (28 February 2019) online: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng.

104. See Government of Canada "A new Canada-United States-Mexico Agreement", online: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux /agr-acc/cusma-aceum/index.aspx?lang=eng.

105. See Canada-United States-Mexico Agreement, Art. 14.2(4) and Annex 14-C.

106. See: Government of Canada, "Trade and Investment Agreements", (28 February 2019) online: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng.

107. See, for example, Government of Canada, "Agreement between Canada and [State] for the Promotion and Protection of Investments", (2004), online: http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf [Model FIPA] at pages 26-27; see also: Global Affairs Canada, "Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments", online: https://www.treaty-accord.gc.ca/text-texte.aspx?id=105176 at Art. 27; see also Government of Canada, "Comprehensive Economic and Trade Agreement", online: https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng at Chapter 29 and Annex 29-A.

108. There are currently 154 ICSID contracting states. A full list can be found at: International Centre for Settlement of Investment Disputes, "Database of ICSID Member States", online: https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx.

109. Art. 25 of the ICSID Convention.

110. Art. 26 of the ICSID Convention.

111. Art. 25 of the ICSID Convention.

112. Global Affairs Canada, "NAFTA - Chapter 11 – Investment – Cases Filed Against the Government of Canada", (29 January 2019) online: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng; Global Affairs Canada, "Trade dispute settlement", (18 July 2017) online: http://www.international.gc.ca/trade-commerce/trade_topics-domaines_commerce /trade_dispute_settlement-reglement _differends_commerciaux.aspx?lang=eng.

113. Global Affairs Canada, "Trade Topics: Dispute Settlement: Global Telecom Holdings S.A.E. v. Government of Canada", (28 June 2016) online: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gth_sae.aspx?lang=eng.

114. Government of Canada, "Agreement between Canada and [State] for the Promotion and Protection of Investments", (2004), online: http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf [Model FIPA] at pages 26-27.

115. *United Mexican States v. Cargill Inc*., 2011 ONCA 622, leave to appeal to SCC refused,

© Published and reproduced with kind permission by Global Legal Group Ltd, London

[2011] S.C.C.A. No. 528.

116. *United Mexican States v. Cargill Inc.*, 2010 ONSC 4656.

117. *United Mexican States v. Cargill Inc.*, 2011 ONCA 622 at para 74.

118. *United Mexican States v. Cargill Inc.*, [2011] S.C.C.A. No. 528.

119. *Canada (Attorney General) v. Clayton*, 2018 FC 436. It should be noted that the arbitral tribunal recently rendered its award on damages, awarding the investors only $7 million – far less than the several hundred million award that had been sought. For the award on damages, see: https://www.italaw.com/sites/default/files/case-documents/italaw10377_0.pdf.

120. *Canada (Attorney General) v. Clayton*, 2018 FC 436 at para. 98.

121. *Canada (Attorney General) v. Clayton*, 2018 FC 436 at para. 144.

122. *United Mexican States v. Cargill Inc.*, 2011 ONCA 622 at para. 33; *Canada (Attorney General) v. Clayton*, 2018 FC 436 at para. 155; see also *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, 2017 ONCA 939 at para. 24; and see *Canada (Attorney General) v. Mobil Investments Canada Inc.*, 2016 ONSC 790 at para. 34.

123. Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* 3rd ed. (London: Sweet & Maxwell 1999) at p. 433.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Julie Rosenthal
Tel: +1 416 597 4259 / Email: jrosenthal@goodmans.ca

Julie Rosenthal is a partner in the litigation group at Goodmans. She joined the firm in 1998 after clerking for Mr. Justice Frank Iacobucci at the Supreme Court of Canada. Julie has extensive experience in complex commercial disputes, white-collar crime, internal investigations, domestic and international arbitration, injunctions and competition law, as well as judicial review and patent-related disputes. She has appeared before the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court, and all levels of Court in Ontario. She has been counsel on a number of international arbitrations, including matters conducted under the ICC Rules, LCIA Rules, UNCITRAL Rules and on an *ad hoc* basis.

Brad Halfin
Tel: +1 416 597 4252 / Email: bhalfin@goodmans.ca

Brad Halfin is a partner in the litigation group at Goodmans. He focuses principally on the areas of complex commercial/construction litigation and arbitrations. His practice involves a broad range of commercial litigation matters including contract disputes, arbitrations involving real estate valuations and insurance defence. Brad has appeared at all levels of civil court in Ontario, including the Commercial Court and the Court of Appeal. He has also been involved in domestic and international arbitration proceedings. Brad is also a contributing editor to *LexisNexis Practice Advisor*'s Insolvency and Restructuring section on Construction Liens.

Tamryn Jacobson
Tel: +1 416 597 4293 / Email: tjacobson@goodmans.ca

Tamryn Jacobson is a partner in the litigation group at Goodmans, focusing on complex commercial arbitration and litigation. She has significant experience with both international (*ad hoc*, ICC and LCIA) and domestic arbitrations, dealing with disputes covering many industries (e.g., technology, banking, mining, construction, retail, hospitality, renewable energy). She has also appeared before all levels of court in Ontario. Tamryn also has an active *pro bono* practice. She is involved with Law Help Ontario, acting as duty counsel for low-income litigants at the Ontario Superior Court of Justice, and served as a director of the AIDS Committee of Toronto (ACT) for seven years, including as the Chair of ACT's Leadership and Governance Committees.

Goodmans LLP

Bay Adelaide Centre, 333 Bay Street, Suite 3400, Toronto, ON M5H 2S7, Canada
Tel: +1 416 979 2211 / Fax: +1 416 979 1234 / URL: www.goodmans.ca

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Cayman Islands

Andrew Pullinger & Shaun Tracey
Campbells

Introduction

The Cayman Islands (colloquially known as 'Cayman') enviably lie in the warm waters of the north western Caribbean. Drawn by its exceptional beaches and clement weather, the territory attracts tourists from the world over. Being only an hour's flight from Miami, it is also a natural offshore hub for many North American clients. It is a British Overseas Territory which enjoys political stability and has a well-founded reputation for a strong and impartial judiciary.

The legal system descends from the English common law, so its decisions draw wisdom from influential precedents created in the courts of many Commonwealth states. Any ultimate appeal lies to the Judicial Committee of the Privy Council of the United Kingdom – the members of which are Justices of the United Kingdom's Supreme Court. Judges from England will often preside over cases in the courts of the Cayman Islands.

Cayman is the world's fifth-largest financial centre and home to more than 80% of the world's hedge funds. Cayman's 11,000 funds have combined assets in excess of US$6 trillion. The Cayman courts are therefore experienced in considering disputes of the highest magnitude and regularly produce judgments which are relied upon in many jurisdictions. Its laws and legal system are well-developed and extremely well-versed in the financial and corporate arenas.

Arbitration in the Cayman Islands as a viable form of alternative dispute resolution was traditionally not suited to international cases. The old Arbitration Act of 2001 was based on England's Arbitration Act 1950. It contained what would now be considered to be weaknesses relating to the wider powers of the Court to control arbitration proceedings. A prime example was the court's power to continue court proceedings that had been commenced despite there being a valid arbitration clause. These anachronisms were remedied by the Arbitration Law, 2012 ("the Law"). This was modelled on England's Arbitration Act 1996 and the provisions of the UNCITRAL Model Law ("Model Law").[1,2] It was a complete and effective overhaul of the former arbitration position in the Cayman Islands, and a response to the growing importance of arbitration as a dispute resolution alternative.

In common with many jurisdictions, the Cayman Islands has seen arbitration growing in popularity.[3] Arbitration clauses are increasingly being included in commercial contracts and there is anecdotal evidence of greater recognition among practitioners and clients alike of the potential benefits of arbitration in the jurisdiction. As a result, there are now many reported cases from the Grand Court which relate to arbitrations in the Cayman Islands. No doubt the pro-arbitration legal framework and policies, relative ease of travel to the Cayman Islands, and business-friendly immigration rules, help to make arbitration a sensible alternative for many potential litigants. Arbitration is firmly on the menu of choices available to clients operating in the Cayman Islands.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The guiding principles

The provisions of the Law are expressly stated to be founded on the following principles:[4]

(i) the object of arbitration is to obtain the fair resolution of disputes by an impartial arbitral tribunal without undue delay or undue expense;

(ii) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; and

(iii) in matters governed by the Law, the court should not intervene except as provided in the Law.

These provide the bedrock for the construction and operation of arbitration clauses in the Cayman Islands.

The arbitration agreement

Formalities

The formalities required by the Law for any arbitration agreement follow those set out in Article 7 of the Model Law. Thus agreements must be in writing, and may be contained in arbitration clauses in wider agreements or in separate agreements. Being "*in writing*" includes electronic communications such as email or anything which provides a record of the agreement.[5] A suggested model clause is included in a Schedule to the Law for the parties to include if they are unable to agree the formulation of the arbitration clause.[6]

The Law includes an opt-out where one of the parties is a consumer in an arbitration agreement entered into in the Cayman Islands. In such a case, after a dispute has arisen, the consumer must certify in writing that he has read and understood the arbitration agreement and agrees to be bound by its terms before it may be enforced.[7] Although the term "consumer" is broadly defined in the Law, the Grand Court has confirmed that the provision applies only to individuals acting for purposes that are wholly or mainly outside their trade, business, craft or profession.[8]

Arbitrability

There is nothing within the Law that limits the scope of any arbitration save where it is contrary to public policy or the dispute is not capable of resolution by arbitration.[9] The issue is determined on a case-by-case basis, with the vast majority of commercial disagreements being considered to be receptive to arbitration. However, this is not always the case. In ***Cybernaut Growth Fund***,[10] it was held that a petition to wind up a company and appoint an arbitrator was not arbitrable. While this decision was doubted, it was not overruled in the appellate court in ***Re SPhinX Group***, where it was held that an argument over the distribution of a reserve in a court-supervised liquidation could be determined by arbitration.

In certain instances, statutory remedies and orders pursuant to regulatory laws are only available from the Grand Court.

Joinder

There is no express mechanism within the Law that allows joinder of another party to the arbitration. Parties may agree to consolidate proceedings or hearings, but the arbitral tribunal has no other power enabling it to do so.[11] Confirmation of this came in ***Unilever v ABC International***[12] where the respondent to an arbitration failed in its attempt to commence arbitral proceedings against several previous owners of the Claimant company.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Competence-competence and separability

Section 27 of the Law preserves the doctrine of *competence-competence* (found at Article 16 of the Model Law) that the arbitral tribunal has the power to rule on all matters connected to the arbitration, including its own jurisdiction and the validity of any arbitration agreement. The same section enshrines the doctrine of separability, meaning that for the purposes of considering its jurisdiction, the tribunal treats the arbitration clause as standing independently of the balance of the agreement. Any matter concerning the jurisdiction of the arbitral tribunal must be raised in the arbitration itself. The tribunal can then either deal with the matter as a preliminary question or in its award on the merits.[13] This enables the arbitration to continue notwithstanding any such application. A ruling that the arbitral tribunal does not have jurisdiction is open to application to the court as long as the application is made within 30 days.[14]

Proceedings commenced in breach of an arbitration agreement

Where a party to an arbitration agreement commences proceedings in the courts of the Cayman Islands in breach of an arbitration agreement, the court is bound to stay such proceedings on the application of a party to the arbitration agreement made at any time after the acknowledgement of service and before taking any step in the proceedings.[15]

The Grand Court's jurisdiction to grant an anti-suit injunction to restrain a party from continuing proceedings instituted in a foreign jurisdiction in breach of a Cayman arbitration agreement was first recognised in ***Origami Partners***.[16] More recently, an anti-suit injunction was granted by the Grand Court in ***BDO Cayman Ltd v Argyle Funds SPC Inc.***[17] to restrain the joint official liquidators of a Cayman company from continuing proceedings commenced in New York in breach of arbitration agreements.

Arbitration procedure

General duties

The general duties of the arbitral tribunal are to: (a) act fairly and impartially; (b) allow each party a reasonable opportunity to present its case; (c) conduct the arbitration without unnecessary delay; and (d) conduct the arbitration without incurring unnecessary expense.[18]

Commencement

Arbitral disputes commence on the date at which one party: (a) gives the other notice of an intention to submit a dispute; (b) serves on the other a notice requiring it to appoint or agree to the appointment of an arbitrator; or (c) serves on the other a notice requiring it to submit the matter to an arbitrator already named in the agreement.[19] The form of the notice is not prescribed.

Seat of arbitration

The Law contains no geographical restriction upon the seat of arbitration, but in default of agreement it is left to the tribunal to decide, having regard to the circumstances of the case and the convenience of the parties.[20] Hearings, and meetings among tribunal members, may be convened at any place the tribunal considers appropriate.[21]

Procedural requirements

The parties are free to agree the rules of the tribunal, failing which it will conduct the arbitration as it sees as appropriate.[22] It is not uncommon for agreements to refer to the rules of international organisations such as the AAA, LCIA and ICC. The tribunal can then deal with any challenges to jurisdiction and scope, and move on to consider specific procedural

© Published and reproduced with kind permission by Global Legal Group Ltd, London

requirements relevant to the case being considered such as the timings of Statements of Claim and Defences,[23] and whether oral hearings are necessary.

Evidential rules

An arbitral tribunal is not bound by the rules of evidence but may inform itself in relation to any matter as it thinks fit.[24] The Law also follows precisely Article 19(2) of the Model law, which gives the tribunal the power to determine admissibility, relevance, materiality and weight.[25] The Grand Court in ***Appalachian Reinsurance (Bermuda) Ltd v Mangino***[26] upheld a decision not to have an oral hearing in a summary judgment application relying in part on the parties' agreement that the tribunal was not obliged to follow "*judicial formalities or rules of evidence*". In practice, this evidential rule makes appeals to the substance of arbitration awards difficult, although decisions taken irrationally may still be challenged on the grounds that the award is contrary to natural justice.

Expert evidence

The parties may agree whether or not expert evidence is necessary and, if so, the number of experts. Where there is no agreement, the tribunal may appoint experts and require the parties to provide access to, or produce, documents, goods or property for inspection by the expert.[27]

Confidentiality

Arbitral proceedings are generally confidential arising, as they often will, from commercial contracts containing confidentiality clauses. The Caymanian courts will follow the English common law in implying a term for which the arbitral proceedings and documents are confidential.[28] The Law enshrines this by making arbitrations both private and confidential[29] and making theoretically actionable any disclosure of confidential information by a party or the tribunal.[30] There is no record of arbitrations.

Should the arbitration require intervention by the court for any reason, any party may request that applications to the court be heard in private, and that information only be published if the court is satisfied that the information is not of a type that a party would wish to remain confidential. Judgments in court proceedings arising out of arbitrations may be published (as normal) but any party has the right to apply for parts of the judgment to remain undisclosed[31] or undisclosed for a certain period of time.[32]

Arbitrators

Appointment

The parties are free to choose the number of arbitrators on the tribunal[33] (in practice, almost always either one of three) and the procedure for selection.[34] In default, the Law provides there shall be a single arbitrator.[35] The UK Supreme Court held in ***Jivraj v Hashwani***[36] that it was not contrary to equality legislation to include arbitration clauses that stipulated the religion (and, by extension, the race, nationality and gender) of an arbitrator. It is therefore unlikely that the Cayman courts would strike down similar arbitration clauses.

Any arbitrator appointed has a duty to declare matters that might give rise to doubts about his or her independence or impartiality.[37]

Challenge

A challenge to the appointment of an arbitrator may only be made on the narrow ground of there being justifiable doubts about his or her independence, impartiality or qualification for the role.[38]

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The parties may agree on the procedure for challenging an arbitrator.[39] If there is no such agreement, then the Law incorporates the timings of challenge contained at Article 13 of the Model Law, namely that a party has 15 days to send to the tribunal written reasons for the challenge.[40] The tribunal will then decide and any further challenges must be made to the court within 30 days of the tribunal's decision.[41] The arbitration may continue in the interim.[42] There is no further appeal from the decision of the court.[43]

A party may apply to the court for an arbitrator to be removed who is physically or mentally incapable of conducting proceedings (or where there exist justifiable doubts about the same).[44] Likewise an arbitrator may be removed by the court where he or she has refused or failed to conduct proceedings properly or with due expedition, and the same has or could lead to substantial injustice to a party.[45]

Immunity

It was not clear whether arbitrators shared the long-established principle of judicial immunity from suit to be found in the English common law.[46] Any doubt in the Cayman Islands is removed by Section 25 of the Law which gives the tribunal and any of its employees or agents immunity for negligent acts or omissions or mistakes of law or procedure. Liability still remains for actions carried out in bad faith.[47]

Interim relief

The Law has a system of 'Interim Measures' and 'Preliminary Orders'[48] mirroring that in the Model Law.

Unless the parties agree otherwise, the arbitral tribunal has broad powers to grant interim measures which: (a) preserve the *status quo*; (b) prevent any action that may harm the arbitral process; (c) preserve assets; and/or (d) preserve evidence.[49] A grant of an interim measure will only be made if the party requesting the measure can satisfy the tribunal that: (i) if any harm caused is not remediable by damages, then the harm caused by the measure substantially outweighs the harm that would be caused by not granting it; and (ii) there is a reasonable possibility that the requesting party will succeed on the merits of the claim.[50]

At the same time as requesting a without-notice interim measure, a party may also seek a preliminary order, the purpose of which is to direct the counter-party not to frustrate the purpose of the interim measure requested.[51] This will be granted if the tribunal believes that the counter-party would frustrate the interim measure had it received notice of the application.[52] This is a more serious measure, because it carries with it a negative connotation regarding the rectitude of the counter-party. Immediately after making a preliminary order, the tribunal will give notice to any other parties, and grant them an opportunity to present their case at the earliest practicable time.[53] A preliminary order will expire 20 days after its issue.[54]

The tribunal may ask the requesting party to provide appropriate security in connection with the interim measure.[55] By contrast, the party applying for a preliminary order must provide security unless the tribunal regards it as inappropriate or unnecessary to do so.[56] The tribunal may require any party requesting an interim measure to promptly disclose any material change in circumstances.[57] A party applying for a preliminary order must disclose all circumstances that are relevant to the granting or maintaining of the order.[58] If it later transpires that the interim measure or preliminary order should not have been granted, the requesting party may be liable for costs and damages.[59] These can be awarded at any time during the proceedings.[60]

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The arbitration award

Formalities

The formalities of the award required by Article 31 of the Model Law are brought into the Law by Section 63. The award must be in writing, signed by all or the majority of arbitrators,[61] and should provide reasons for the decision unless otherwise agreed, or the matter has settled on agreed terms.[62] The award must state on its face the date of the award and the seat of the arbitration.[63] There is no time limit within which an award must be made following the conclusion of the tribunal proceedings,[64] but (as stated above) the parties may apply for an arbitrator to be removed if he or she has not acted with due expedition. In practice, awards are typically produced promptly. If the time for making an award is stipulated in the arbitration agreement, the parties may, unless they agree otherwise, apply to the court for an extension of time.[65]

Within 30 days of an award being received a party may ask, on notice, that it be corrected for minor mistakes[66] or that specific points be interpreted.[67] The Law allows the tribunal 30 days to respond.[68] The parties may also within 30 days ask for an additional award in respect of claims presented in the arbitration, but not decided in the award.[69] The tribunal is initially permitted 60 days within which to respond.[70]

Remedies available to the tribunal

The parties are able to agree the powers of the tribunal when it comes to available remedies.[71] Unless the parties otherwise agree, the arbitral tribunal is able to award any relief that a court could have awarded had the matter been litigated in a civil court.[72] Unlike some other jurisdictions, there is nothing that prevents the tribunal making an award for specific performance in respect of land.

The Law gives the tribunal a discretionary power to award interest on some or all of any award for any period.[73] The rate of interest after the award is the same as that for a judgment debt.[74] In the Cayman Islands this rate is to be found in the Judgment Debts (Rates of Interest) Rules 2012. This will vary depending on the currency in which the award was made. For instance, damages in US dollars gather interest at 2.375%, but in South African rand the relevant rate is 7.125%.[75]

Costs

The Law provides that unless otherwise expressly stated, costs are at the complete discretion of the arbitral tribunal.[76] There are no provisions which direct the way in which the discretion ought to be exercised. It is likely to be guided the law of the arbitration agreement.

Third-party funding

There has been a trend in the Cayman Islands towards the recovery of third-party funding. The Grand Court has approved the same where it has been used to fund liquidation estates who could not otherwise have afforded their actions.[77] The English High Court in the landmark case of ***Essar Oilfields Services Limited v Norscot Rig Management PVT Limited***[78] has held that it is permissible to recover those costs in arbitral proceedings. This position was adopted in ***A Company v A Funder***[79] where such funding was obtained by a party seeking to recognise and enforce a New York arbitration award in the Cayman Islands.[80]

It was said by Segal J that:

> *"Cayman has an important, world-class court system and litigation culture and there is no reason why responsible, properly regulated commercial litigation funding undertaken in accordance with the principles I have set out should not*

© Published and reproduced with kind permission by Global Legal Group Ltd, London

*have a place in this jurisdiction. As has been accepted in other leading financial centre common law jurisdictions and as the Chief Justice noted in **Quayum**, the law of maintenance and champerty has evolved reflecting the evolution of public policy and that evolution should be reflected in Cayman law."*

Challenge to the award

Seasoned practitioners know the difficulties in challenging a final decision of an arbitral tribunal. Section 75(1) of the Law broadly follows Article 34 of the Model Law and permits the court to set aside an award on any of the following grounds:

(i) incapacity of a party;

(ii) invalidity of the arbitration agreement;

(iii) lack of proper notice of the appointment of the arbitrator or proceedings;

(iv) inability to present the case;

(v) the award oversteps its jurisdiction in dealing with irrelevant matters;

(vi) the panel or procedure was not in accordance with the agreement of the parties (unless the agreement itself would not have been lawful);

(vii) the making of the award was induced or affected by fraud, corruption or misconduct on the part of the rbitrator;

(viii) a breach of natural justice occurred in connection with the making of the award by which the rights of any party has been prejudiced;

(ix) the subject matter of the dispute is not arbitrable; or

(x) the award is contrary to public policy.

Any application to the court must be made within 30 days of the aggrieved party receiving the award.[81]

Whilst there is no express provision allowing the court to set aside an award on the grounds that a serious irregularity has taken place, this will generally be caught by the power to set aside an award on the ground that there has been a breach of natural justice.

Parties have a limited right to appeal to the court on a point of law.[82] Leave of the court will be required.[83] Leave will only be given if the question of law was one that was before the tribunal, is one that would substantially affect the rights of one or more of the parties, and the tribunal's decision was obviously wrong or, where the point is of general importance, is at least open to serious doubt.[84] Any further applications to appeal require leave of the court, and will only be given if the matter is of general importance or there is other special reason.[85]

Any applications to set aside awards or appeals must be made within 30 days of an award and only after all arbitral processes have been exhausted.[86]

Enforcement of the award

The Caymans Islands is a signatory to the (New York) Convention. The Convention is widely regarded as one of the most successful international treaties, with about 157 participant nations. The enforcement of awards made in such countries is governed in the Cayman Islands by the Foreign Arbitral Awards Enforcement Law (1997 Revision) (the "Enforcement Law").

The preconditions set out in the Convention are that originals, or certified copies, of the Arbitration Agreement and award are provided (suitably translated if necessary).[87] The courts

© Published and reproduced with kind permission by Global Legal Group Ltd, London

will recognise the award, and enforcement can only be challenged on grounds similar to those in which a domestic award could be challenged, namely:[88]

(i) the parties to the agreement were under some incapacity or the arbitration agreement was not valid under the law of the agreement or under the law of the country where the award was made; or

(ii) the losing party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case; or

(iii) the award deals with matters falling outside the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission (provided that if the decisions on matters submitted to arbitration can be separated from those not submitted, then that part of the award may be recognised and/or enforced); or

(iv) 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

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

(vi) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(vii) the recognition or enforcement of the award would be contrary to the public policy of that country.

If necessary, the Convention will be interpreted in accordance with principles of international law as set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

Section 72(5) of the Law provides that any arbitral award, irrespective of the country in which it was made, shall be enforceable.

It is relatively straightforward to enforce an arbitral award in the Cayman Islands, particularly by comparison to the enforcement of foreign judgments which generally fall to be enforced under the common law. An award will be enforced as if it was a domestic judgment, and all the ordinary enforcement mechanisms are therefore available.

A recent challenge to the enforcement in Cayman of a foreign award failed in *In the matter of China Healthcare Inc.*,[89] although such a challenge succeeded in *VRG Linhas Aereas S.A. v Matlin Patterson Global Opportunities Partners (Cayman) II L.P. & others*.[90] In VRG Linhas, the court exercised its limited discretion to refuse to enforce an award, on the grounds that it offended the principle that arbitration is a consensual process. In particular, the tribunal's purported exercise of jurisdiction was made pursuant to an arbitration agreement to which the defendants were not parties. Further, the tribunal had found the defendants liable on grounds that had not been pleaded or otherwise articulated, and therefore fell outside the boundaries of any submission. The award also offended the cardinal principle of natural justice that enshrines a party's right to be heard and was therefore held to be contrary to the public policy of the Cayman Islands.

* * *

Endnotes

1. United Nations Commission on International Trade Law Model law on International Commercial Arbitration (1985), with amendments as adopted in 2006.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

2. Section 4 of the Act gives the UNCITRAL Model Law force of law save as amended.
3. https://www.campbellslegal.com/client-advisory/rise-arbitration-cayman-islands-3319/.
4. Section 3(3). See also ***Appalachian Reinsurance (Bermuda) Ltd v Greenlight Reinsurance Ltd*** [2014] 1 CILR 152.
5. Section 4(3) of the Law.
6. Section 4(2) of the Law.
7. Section 8(1) of the Law.
8. ***BDO Cayman Ltd v Argyle Funds SPC Inc (in Official Liquidation)*** [2018 (1) CILR 114]. A note produced by Campbells is at: https://www.campbellslegal.com/client-advisory/anti-suit-injunction-granted-grand-court-restrain-cayman-liquidators-continuing-new-york-litigation-3676/.
9. Section 26(1) of the Law.
10. [2014] (2) CILR 4133.
11. Section 36 of the Law.
12. [2008] CILR 87.
13. Section 27(8) of the Law.
14. Section 27(9) of the Law.
15. Section 9 of the Law.
16. ***Origami Partners III LP v Pursuit Capital Partners (Cayman) Limited*** [2012] (2) CILR 191.
17. ***BDO Cayman Ltd v Argyle Funds SPC Inc (in Official Liquidation)*** [2018 (1) CILR 114]. This decision was the subject of a successful partial appeal, in ***Argyle Funds SPC Inc (in Official Liquidation) v BDO Cayman Ltd,*** CICA (Civil) 8 of 2018, unreported, 8 October 2018, however the appeal did not concern the anti-suit injunction granted to enforce the arbitration agreements.
18. Section 28 of the Law.
19. Section 12(1) of the Law.
20. Section 30(2) of the Law.
21. Section 30(3) of the Law.
22. Section 29 of the Law.
23. Section 32(1) of the Law.
24. Section 33(6) of the Law.
25. Section 29(3) of the Law.
26. ***Appalachian Reins. (Bermuda) Ltd. v. Mangino*** [2014] (1) CILR 152.
27. Section 37 of the Law.
28. ***Glidepath BV and Ors v John Thompson and Ors*** [2005] EWHC 818 (Comm).
29. Section 81(1) of the Law.
30. Section 81(2) of the Law.
31. Section 84(3) of the Law.
32. Section 84(3)(b) of the Law.
33. Section 15(1) of the Law.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

34. Section 16(1) of the Law.
35. Section 15(2) of the Law.
36. [2011] UKSC 40.
37. Section 18(1) of the Law.
38. Section 18(3) of the Law.
39. Section 19(1) of the Law.
40. Section 19(2) of the Law.
41. Section 19(4) of the Law.
42. Section 19(6) of the Law.
43. Section 19(5) of the Law.
44. Section 20(1)(a) of the Law.
45. Section 20(b) of the Law.
46. ***Sutcliffe v Thackrah*** [1974] AC 727 and ***Arenson v Arenson*** [1977] AC 405.
47. Section 25(4) of the Law.
48. Part VIII of the Law.
49. Section 44 of the Law.
50. Section 45(1) of the Law.
51. Section 46(1) of the Law.
52. Section 45(2) of the Law.
53. Section 47(2) of the Law.
54. Section 47(4) of the Law.
55. Section 49(1) of the Law.
56. Section 49(2) of the Law.
57. Section 50(1) of the Law.
58. Section 50(2) of the Law.
59. Section 51(1) of the Law.
60. Section 51(1) of the Law.
61. If any arbitrator's signature is missing a reason should be provided: Section 63(1)(b) of the Law.
62. Section 63(2) of the Law.
63. Section 63(3) of the Law.
64. Section 59(2) of the Law.
65. Section 60(1) of the Law.
66. Section 69(1)(a) of the Law.
67. Section 69(1)(b) of the law applying Article 33 of the Model Law.
68. Section 69(2) of the Law.
69. Section 69(4) of the Law.
70. Section 69(5) of the Law, which can be extended by 30 days: Section 69(6).
71. Section 57(1) of the Law.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

72. Section 57(2) of the Law.
73. Section 58(1) of the Law.
74. Section 58(3) of the Law.
75. http://www.gov.ky/portal/pls/portal/docs/1/11525535.PDF.
76. Section 64(1) of the Law.
77. ***Re ICP Strategic Credit Income Fund Ltd*** [2014] 1 CILR 314.
78. [2016] EWHC 2361.
79. Unreported, 23 November 2017, Segal J.
80. A note produced by Campbells is at: https://www.campbellslegal.com/client-advisory/cayman-court-approves-litigation-funding-agreement-3561/.
81. Section 75(2) of the Law.
82. Section 76(1) of the Law.
83. Section 76(1) of the Law.
84. Section 76(4) of the Law.
85. Section 76(11) of the Law.
86. Section 77(2) and (3) of the Law.
87. Article IV of the Convention.
88. Article 5 of the Convention.
89. Unreported judgment of Justice Kawaley dated 3 October 2018.
90. Unreported judgment of Justice Mangatal dated 19 February 2019.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Andrew Pullinger
Tel: +1 345 949 2648 / Email: apullinger@campbellslegal.com

Andrew is a Partner in our Litigation, Insolvency & Restructuring Group and specialises in commercial litigation, international arbitration and dispute resolution. He has extensive experience acting for clients in complex and high-value disputes, typically with a cross-border element. Andrew has experience litigating in jurisdictions throughout the world, as well as conducting institutional and *ad hoc* arbitrations under a variety of different rules (including ICC, LCIA, AAA and UNCITRAL). In London, Andrew specialised in international dispute resolution with a particular focus on international arbitration. He has extensive experience coordinating and leading teams in major, complex and high-value disputes. He has particular expertise advising clients in respect of investment fund and other financial services disputes (especially claims against administrators, custodians and auditors), professional negligence claims and a broad range of contractual disputes.

Shaun Tracey
Tel: +1 345 914 5862 / Email: stracey@campbellslegal.com

Shaun is a Senior Associate in our Litigation, Insolvency & Restructuring Group, and a member of CIArb. Shaun practises commercial and financial litigation and arbitration. He frequently represents investment funds, directors, professional firms and their insurers, in complex and high-value disputes. Shaun's recent work includes acting for a leading accountancy firm in a high-value professional liability arbitration, and acting for an international bank in the successful defence of a US$2 billion claim arising from the Bernard Madoff fraud. Shaun is also the author of *Don't Shoot the Advisor: A defence lawyer's guide to protecting your position and preventing lawsuits*.

Campbells (Cayman)

Floor 4, Willow House, Cricket Square, Grand Cayman KY1-9010, Cayman Islands
Tel: +1 345 949 2648 / Fax: +1 345 949 8613 / URL: www.campbellslegal.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

China

Ning Fei, Shengchang Wang & Jing Liu
Hui Zhong Law Firm

Introduction

Arbitration is on the rise in China. This is largely attributed to the compounded consequences of two critical phenomena: on the one hand, the dynamic growth of China's economy over the last decades has inevitably brought with it a high volume of disputes; and on the other, the implementation of the Arbitration Law of the People's Republic of China (1994) has shaped a pro-arbitration environment, which in turn attracts more and more parties to resolve disputes through arbitration in China.

According to statistics released by the Law Office of the State Council of the PRC, up to 2018, 235 arbitration commissions have been established in China's major cities. Altogether, these arbitration bodies accepted 239,360 new arbitration cases in 2017, an increase of 15% compared to 2017. Among the 235 arbitration commissions, China International Economic and Trade Arbitration Commission (CIETAC), Beijing Arbitration Commission (BAC), Shenzhen International Court of Arbitration (SCIA), Shanghai International Economic and Trade Arbitration Commission (SHIAC), and China Maritime Arbitration Commission (CMAC) have gained an international reputation and become leading arbitration institutions in the Asia-Pacific regions.

In January 2018, SCIA was merged with Shenzhen Arbitration Commission. This is the first example of a merger among arbitration institutions in mainland China. In July 2018, Hainan Arbitration Committee was renamed Hainan International Arbitration Court (HIAC), which is China's second arbitration institution to adopt a corporate governance mechanism to re-shape its organisational structure, following the pattern of SCIA. A number of foreign specialists have been invited to serve as council members of SCIA and HIAC.

Other well-known arbitration institutions in the world, such as Hong Kong International Arbitration Centre (HKIAC), Singapore International Arbitration Centre (SIAC), and the International Court of Arbitration of the International Chamber of Commerce (ICC Court), have set up their representative offices in Shanghai, China to expand arbitration services to business-people. It is envisaged that the presence of foreign arbitration institutions in mainland China will help improve China's arbitration system and environment as well.

China is not yet a territory of UNCITRAL Model Law, but the Model Law was taken as a guide when the Arbitration Law was drafted. The basic principles of modern arbitration have been introduced into China's arbitration. Nevertheless, there are still some distinctions between the Arbitration Law and Model Law, such as *ad hoc* arbitration, interim protection measures and judicial review of arbitration.

The Arbitration Law applies to both domestic and international arbitration. Within the Arbitration Law, there is a bifurcated treatment of the two types of arbitration. For domestic

© Published and reproduced with kind permission by Global Legal Group Ltd, London

arbitration, the people's court may examine certain substantive issues of arbitral awards in the process of setting-aside or enforcement, while in international arbitration, the people's court is normally required to abstain from touching on the merits of the arbitral awards. Calls for revision of the Arbitration Law have been soaring in recent years. According to a legislation plan released by China's top legislative body in September 2018, the legislative body will review and adopt the amended Arbitration Law within the next five years.

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 a 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 SAR and Macao SAR in 1997 and 2005 respectively.

China has made 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. Up to the end of 2018, China has concluded 145 bilateral investment treaties (BITs) and 22 other treaties with investment provisions (TIPs). Of the 145 BITs, 21 are signed but not in force, and 16 are terminated.

There are no special national courts for international arbitration. Despite this, the Supreme People's Court has endeavoured to centralise and harmonise the standards for recognition and enforcement of arbitration agreements and arbitral awards, as well as for the setting-aside of arbitral awards. The concrete method is to set up a unique, level-by-level report mechanism, which is discussed in detail below.

Arbitration agreement

The Arbitration Law provides that an arbitration agreement shall not be made orally and 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). As to the content of an arbitration agreement, Article 16 of the Arbitration Law provides that an arbitration agreement shall include three elements to be valid:

- the expression of the parties' intention to submit to arbitration;
- the subject matters to be arbitrated; and
- the arbitration institution selected by the parties.

In addition, Article 17 of the Arbitration Law provides that an arbitration agreement shall be invalid under any of the following circumstances:

- matters agreed upon for arbitration are not arbitrable;
- an arbitration agreement was concluded by persons without or with limited capacity for civil acts; or
- one party forces the other party to sign an arbitration agreement by means of duress.

It is obvious that the Arbitration Law encourages institutional arbitration, and in general, an agreement for *ad hoc* arbitration under the Arbitration Law is invalid. However, the Supreme

© Published and reproduced with kind permission by Global Legal Group Ltd, London

People's Court has made a breakthrough for *ad hoc* arbitration by issuing a judicial interpretation named the Opinions on Providing Judicial Safeguards for the Construction of Pilot Free Trade Zones (No. 34 [2016]), which recognises the validity of an arbitration agreement providing for *ad hoc* arbitration to be conducted in mainland China between or among the specific entities, i.e., the enterprises that are registered within China's Pilot Free Trade Zones.

Article 2 and Article 3 of the Arbitration Law deal with the issue of arbitrability from different angles. According to Article 2, 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 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. A Public-Private Partnership (PPP) contract may contain both arbitrable and non-arbitrable disputes, the distinction of which depends on whether they are solely related to the exercise of governmental or administrative power.

The Arbitration Law is silent on joinder/consolidation of third parties. This issue is left for various arbitration rules.

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).

Consolidation of two or more arbitrations with multiple parties is a complicated issue. The core of the issue is that all parties must be bound by an existing arbitration agreement, or there is a consensus reached by all parties. The arbitration commission plays a central role in making a decision on consolidation. According to Article 19 of the 2015 CIETAC Rules, 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 principal contract and its ancillary contract(s); or (iv) all the parties to the arbitrations have agreed to consolidation.

The Chinese law recognises the separability of an arbitration agreement. Both Article 19 of the Arbitration Law and Article 57 of the Contract Law stipulate that the validity of an arbitration agreement is independent from the underlying contract. Modification, rescission, termination of the contract or its being declared invalid does not affect the validity of an arbitration agreement.

The Arbitration Law fails to expressly regulate the competence-competence of an arbitral tribunal. While Article 20 of the Arbitration Law provides that if the parties object to the validity of the arbitration agreement, they may apply to the arbitration institution for a decision or to a people's court for a ruling, it does not preclude an arbitration institution from authorising an arbitral tribunal to make a decision on the jurisdictional issue if necessary. This is particularly true where the jurisdictional dispute is not merely a *prima facie* issue but also involves factual determination to be carried out by an arbitral tribunal. In fact, many Chinese arbitration rules have a special provision stating that the arbitral tribunal may decide on the jurisdictional issue with authorisation from the arbitration institutions.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Arbitration procedure

According to Article 22 and Article 23 of the Arbitration Law, a party may commence an arbitration by submitting an application for arbitration, which shall specify:

- the name, gender, age, occupation, work unit and address of the party;
- the name, domicile and the name and position of the legal representative or the person in charge of the legal entity;
- the reliefs sought and facts and grounds on which the claim is based; and
- evidence and the source thereof, the name and address of the witness.

Additional requirements for the commencement of an arbitration proceeding may be tailored by the parties or formulated by various arbitration rules. For example, the parties may set conciliation within a specific time period as a condition precedent to arbitration. Under Article 13 of the 2015 CIETAC Rules, failure to complete all formalities (including paying a deposit of arbitration fees) by the claimant may result in rejection of the application for arbitration and the arbitration proceeding being deemed not to have commenced.

The Chinese arbitration rules clearly distinguish the place (or seat) of arbitration from the place of hearing. While the place of arbitration must be fixed either by the parties or by the arbitral tribunal to be one specific place, the place of hearing can be more than one place, and can be anywhere that the tribunal deems convenient to all participants.

Chinese law has abundant rules of evidence applied to arbitration. Articles 43-46 of the Arbitration Law and Articles 63-81 of the Civil Procedural Law set out various rules of evidence covering most of the imperative issues, including: the types of evidence; the burden of proof; the examination and verification of evidence, witness, expert, appraiser; interim protection measure for evidence; and the power of collecting evidence by the judge/arbitrator on his/her own initiative. During the process of arbitration, an arbitral tribunal may invite the parties to reach further agreement on rules of evidence or decide appropriate rule of evidence at its own discretion.

Article 68 of the Civil Procedural Law deals with privilege and disclosure issue. It provides that evidence which involves any state secret, trade secret or individual privacy shall be kept confidential, and if it is necessary to present such evidence in hearing, such evidence shall not be presented in a hearing open to the public. Attorney-client privilege is generally respected and protected.

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. The Prague Rules on evidence have also caused attention and discussion in China. In many aspects, the CIETAC Guidelines on Evidence (2015) resemble the IBA Rules. The so-called "soft law", such as IBA guidelines and LCIA guidelines, are being taken into account by more and more practitioners and arbitrators as a useful reference in Chinese arbitration.

In Chinese arbitration, there are two types of expert: an expert appointed by the arbitral tribunal; and an expert appointed by the parties. Experts can furnish the arbitral tribunal with written statements on facts or law. To ensure the parties are provided with a reasonable opportunity to present their cases, experts may be called upon to be present at the oral hearing, and examined by the parties.

Arbitration in China is normally confidential, unless the parties have agreed otherwise

© Published and reproduced with kind permission by Global Legal Group Ltd, London

or the arbitral tribunal has decided otherwise. Article 40 of the Arbitration Law stipulates that an arbitration shall not be conducted in public. If the parties agree to a public hearing, the arbitration may proceed in public, except those concerning state secrets.

Arbitration rules adopted by the Chinese arbitration institutions often go further, to state that all participants to arbitration shall assume the responsibility of keeping all matters relating to arbitration confidential.

Arbitrators

Arbitration in mainland China is predominantly administered by arbitration commissions, each of which maintains its own panel of arbitrators. Generally, arbitration commissions only allow parties to choose arbitrators from their panel lists. In recent years, a few arbitration commissions like CIETAC, SCIA, HIAC and BAC have begun to take a more liberal approach, allowing parties who have reached agreement otherwise to nominate and appoint arbitrators from outside the existing panel lists, but subject to confirmation by the chairman of the arbitration commissions. All arbitrators must meet the qualification requirements laid down by Article 13 (for arbitrators of Chinese nationals) or Article 67 (for arbitrators of foreign nationals) of the Arbitration Law. The arbitration rules promulgated by each arbitration commission contain detailed methods of appointment, including appointment by default in case one party fails to do so.

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 a 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 no later than the closing of the final hearing. The chair of the arbitration commission is empowered to decide whether the challenge should be approved.

Almost every arbitration commission has published its own ethical rules of arbitrators, many of which borrow some experiences enriched by the IBA Guidelines on Conflicts of Interest in International Arbitration. In this case, an arbitrator must abide by the applicable ethical rules in addition to the statutory requirements. According to the principle of party autonomy, the parties may also agree that the IBA Guidelines on Conflicts of Interest in International Arbitration be applied to their specific arbitration. An arbitrator's mandate is usually terminated with dismissal of the case or by rendering of a final arbitral award, or on exceptional occasions, by rendering a substitute arbitral award after re-arbitration. Arbitrators are entitled to be reimbursed for their arbitrators' fees and expenses.

There is no immunity provision for arbitrators in the Arbitration Law, nor does it appear in the arbitration rules adopted by the Chinese arbitration commissions. The issue of immunity can be an area left for future regulation. Nevertheless, under Article 38 of the Arbitration Law, an arbitrator may be imposed with sanctions in two situations:

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- 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 gain 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". The scope of liability of an arbitrator is uncertain as yet and it is to be further observed.

A salient feature of Chinese institutional arbitration is that secretaries to arbitral tribunals are widely used and almost all secretaries are appointed by the arbitration commissions. The primary function performed by the secretaries is to assist the arbitral tribunals to administer arbitration proceedings. An arbitral tribunal may employ its own secretary selected from outside the secretariat, but only with consent from both parties.

Interim relief

According to Article 100 of the Civil Procedural Law (2013), there are three types of interim measures available for a party to seek from the people's court (i.e., preservation of property, preservation of evidence, and order to act or not to act). Article 101 of the Civil Procedure Law permits a party to apply for interim measures prior to initiating arbitration owing to urgent situations and upon providing a guarantee. Articles 28, 46 and 68 of the Arbitration Law provide that 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. It is generally understood that under the current Chinese law, the power to take interim measures in aid of arbitration is exclusively reserved for the people's court, as Article 28 and Article 46 of the Arbitration Law expressly require that an arbitration commission, upon receipt of one party's application for interim measures, must pass on the application to the competent people's court for the said court to examine and make a ruling.

Subject to the restrictive provisions of Chinese law, an arbitral tribunal has very limited power to order interim measures that do not call for compulsory enforcement. 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. The arbitral tribunal may draw an adverse conclusion if one party breaches the orders.

The Chinese law is silent on the issue of security for costs. Whether an arbitral tribunal may order a party to provide security for costs under the Chinese law is a controversial issue and in practice, no reported case shows that an arbitral tribunal seated in mainland China has ordered security for costs.

Many Chinese arbitration rules, such as those adopted by CIETAC, SHIAC, SCIA, HIAC and BAC, contain new rules of arbitration to set out special provisions regarding emergency arbitrators who may order interim measures. However, the operation of these rules will largely depend on whether the applicable national law permits exercise of power by an emergency arbitrator. Under the current Chinese law, the answer is negative. There are calls for the Arbitration Law to be revised to catch up with the mainstream in this respect.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

It is clear that under Article 100 of the Civil Procedural Law, the people's court has the power to order certain conduct from a party or prohibit the party from certain conduct. Accordingly, at least at a theoretical level, the Chinese court may order anti-suit injunctions in aid of international arbitration, or order anti-arbitration injunctions in aid of domestic litigation. In practice, the Chinese court normally takes an alternative approach to achieve the same goal. For instance, if the parties are bound by a valid arbitration agreement and one party chooses to file a lawsuit before the people's court, under Article 124 (2) of the Civil Procedural Law, the court shall notify the plaintiff to apply to an arbitral institution for arbitration if, in accordance with law, both parties are bound by a written arbitration agreement and they are prohibited from instituting an action in a people's court. The notice can be made either orally or in written form.

Arbitration award

Obviously an arbitral award shall be rendered in written form. An oral award will not be able to meet the requirements set out by Article 54 of the Arbitration Law. As to the content of an award, Article 54 of the Arbitration Law provides that an arbitral award must state the arbitration claims, the matters in dispute, the grounds upon which an award is given, the results of the award, the allocation of the arbitration fees and the date of the award. It further requires that the award must be signed by the arbitrators and sealed by the arbitration commission (for institutional arbitration). A dissenting arbitrator may choose not to sign the arbitral award, but the validity, finality and enforceability of an arbitral award will not be affected if an arbitrator dissents.

If an arbitral award is made in accordance with a settlement agreement reached by the parties through a successful conciliation, 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 be omitted 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 has the power to decline recording the settlement agreement as a consent award (Article 46 of the 2016 SCIA Rules).

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 an 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 are truly justified.

The Arbitration Law contains no specific guidance for arbitrators on how to allocate arbitration fees. This issue is left for the relevant arbitration rules. In general, the arbitration rules empower arbitrators with the broadest discretion to make decisions on cost allocation. 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. The test of reasonableness is determined by an arbitral tribunal on a case-by-case basis. When an arbitral tribunal finds it necessary, it may decide that the party who has delayed the arbitration proceedings or acted in bad faith bear all, or a larger proportion, of arbitration

© Published and reproduced with kind permission by Global Legal Group Ltd, London

costs. The recoverable costs awarded to a prevailing party may include an arbitration body's administrative fees, arbitrators' fees, attorneys' fees, in-house fees and costs, costs of witnesses, appraiser's fees, travel expenses and other reasonable costs. As third-party funding for arbitration becomes popular, it is envisaged that under Chinese law an arbitral tribunal is not precluded from awarding arbitration costs in relation to that transaction.

The issue of interest is usually dealt with by the applicable substantive law, and an arbitral tribunal may award it at the request of one or both parties. Very often, arbitral tribunals seated in mainland China award simple or compound interest on principal claims, calculated from the date due until the date of actual payment.

Challenge of the arbitration award

The Chinese law generally adopts the principle of finality of an arbitral award. Under Article 57 of the Arbitration Law, an arbitral award shall become legally effective on the date it is made. Article 9 of the Arbitration Law declares that the single ruling system shall be applied in arbitration. The arbitration commission shall not accept any application for arbitration, nor shall a people's court accept any action submitted by the party in respect of the same dispute after an arbitration award has already been given in relation to that matter. In other words, an arbitral award has the effect of *res judicata* regarding the same dispute that has already been adjudicated by an arbitral tribunal.

Adhering to the principle of finality, an arbitral award is not subject to appeal before the people's court. Nor does the court have the power to modify an arbitral award. In the process of setting-aside proceedings, however, the people's court has the power to rule to remit the arbitral award to the original arbitral tribunal to re-arbitrate the dispute if it is satisfied that the previous procedural irregularities in arbitration are remediable. Article 61 of the Arbitration Law provides that if the people's court holds that the case may be re-arbitrated by the arbitral tribunal after receipt of the application for setting-aside of an award, the court shall inform the arbitration tribunal of re-arbitration of the case within a certain period of time, and rule to suspend the setting-aside procedure. If the tribunal accepts to conduct re-arbitration, it may render a new award in substitution of the original award. If the arbitral tribunal refuses to re-arbitrate, the people's court shall rule to resume the setting-aside procedure.

The Arbitration Law provides that a court that has the primary and exclusive jurisdiction over setting aside an arbitral award is the intermediate people's court where the arbitration institution is domiciled (Article 58). Though the Arbitration Law is silent on *ad hoc* arbitration, theoretically the court that has primary and exclusive jurisdiction over the setting-aside of an *ad hoc* arbitral award shall be the intermediate people's court where the *ad hoc* arbitration takes place.

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 (i.e., public policy).

The grounds for setting aside an arbitral award vary depending upon the nature of the award. The Chinese law gives a bifurcated treatment towards pure domestic arbitration and foreign-related arbitration. The main distinction is whether the court may take a judicial review on the merits of the arbitral award that is brought into setting-aside proceedings.

A court may rule to set aside a domestic arbitral award if a party can furnish evidence to prove that there exist any of the following circumstances (Article 58 of the Arbitration Law and Article 237 of the Civil Procedural Law):

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- 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 exist any of the following circumstances (Article 70 of the Arbitration Law and Article 274 of the Civil Procedural Law):

- the parties concerned have not stipulated an arbitration clause in the contract or have not subsequently reached a written agreement for arbitration;
- 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. Should any of the aforesaid grounds be found, the arbitral award may be ruled to be set aside. The limitation of action for a party to apply for setting aside an award is six months starting from the date of receipt of the award, otherwise the application is time-barred.

No doubt the setting-aside of an arbitral award will have adverse effect on the finality of an arbitration. For the sake of avoidance of possible misconduct by the local courts or undue influence from local protectionism, the Supreme People's Court has set up a level-by-level report mechanism in respect of the setting-aside of arbitral awards ever since 1998 by virtue of issuing the Notice of Certain Matters Pertaining to Setting Aside of Foreign-related Arbitral Awards (No. 40 [1997]). In the said Notice, the Supreme People's Court decides that a level-by-level report mechanism applies to the setting-aside of Chinese foreign-related arbitral awards, arbitral awards made in foreign countries, and arbitral awards made in Hong Kong, Macao and Taiwan regions.

This mechanism is reiterated and reinforced in 2017 by the Provisions of the Supreme People's Court on Report for the Approval of Arbitration Cases that are Subject to Judicial Review (No. 21 [2017]). According to the mechanism, if both the intermediate and high people's courts find that such an arbitral award should be set aside, an intermediate people's court must report its finding and opinion to the competent high people's court, which must report its finding and opinion to the Supreme People's Court. The level-by-level reports are made through the internal channels of the court system and they are not open to the parties or the public. Only after the Supreme People's Court has agreed in a written reply may an intermediate people's court issue its ruling to set aside an arbitral award.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

In 2017, the level-by-level report mechanism was reiterated and reinforced by the Provisions of the Supreme People's Court on Report for the Approval of Arbitration Cases that are Subject to Judicial Review (No. 21 [2017]). In addition, the level-by-level report mechanism was extended to the regime of domestic arbitration. Article 3 of the said Provisions provides that the High People's Court, if it intends to agree with the intermediate people's court or the special people's court that the setting-aside of a domestic arbitral award is to be granted, it shall report to the Supreme People's Court for approval under the following circumstances, and only after case review by the Supreme People's Court can a ruling be rendered according to the opinion of the Supreme People's Court: (1) the domiciles of the parties to the arbitration case that is subject to judicial review are located in different provinces; or (2) the ground upon which the setting-aside of a domestic arbitral award is to be refused is violation of social and public interests.

Despite being criticised for lack of transparency, it is widely recognised that the role the Supreme People's Court plays in the level-by-level report mechanism is very helpful for harmonising the criterion of setting-aside, and effective in combating potential local protectionism. According to a statistic released by the Supreme People's Court, amongst the arbitral awards that had been filed to the people's courts for setting aside during the time period 2013–2015, 5.33% of foreign-related arbitral awards were ruled being set aside, and 15.77% of domestic arbitral awards were ruled being set aside. With implementation of the 2017 judicial interpretation on a level-by-level report mechanism, it is expected that the percentage of domestic arbitral awards set aside will decrease in the coming years.

Enforcement of the arbitration award

The PRC Arbitration Law sets out a general obligation on parties to comply with an arbitral award. If a party fails to comply with the award within the time period specified by the award, the successful party is entitled to apply to the competent people's court for compulsory enforcement of the award.

An arbitral award is recognisable and enforceable unless there is a ground for non-enforcement. For the purpose of enforcement, it is imperative to identify what type of an arbitral award it represents at the outset, since the grounds for refusal of enforcement of an arbitral award vary depending upon the type 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 which 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), under which the grounds for refusal basically mirror Article V of the 1958 New York Convention;
- the arbitral award made in Taiwan region: according to the Supreme People's Court Stipulation on Recognition and Enforcement of Arbitral Awards Made in Taiwan Region (2015), under which the grounds for refusal also highly resemble Article V of the 1958 New York Convention;

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- 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 was first set up by the Supreme People's Court in the regime of enforcement. In 1995, the Notice of the Supreme People's Court on the Disposal of the Relevant Issues concerning the Foreign-Related Arbitration and Foreign Arbitral Matters by People's Courts (No. 18 [1995]) was issued by the Supreme People's Court. This Notice applies to non-enforcement of Chinese foreign-related arbitral awards, arbitral awards made in foreign countries, and arbitral awards made in the Hong Kong, Macao and Taiwan regions. According to the mechanism, an intermediate People's Court must report its finding and opinion to the competent High People's Court, which must report its finding and opinion to the Supreme People's Court if both the intermediate and high level people's courts find that such an arbitral award should be denied enforcement. Only after the Supreme People's Court has agreed in a written reply may an intermediate people's court issue its ruling to refuse enforcement.

The level-by-level report mechanism was reiterated and reinforced in 2017 by the Provisions of the Supreme People's Court on Report for the Approval of Arbitration Cases that are Subject to Judicial Review (No. 21 [2017]) issued by the Supreme People's Court, and it was also extended to the regime of domestic arbitration. Similar to setting-aside of arbitral awards, an intermediate people's court may rule to deny enforcement only after an internal level-by-level report process has been completed. The Supreme People's Court has a final say on non-enforcement of two types of domestic arbitral awards: (1) the domiciles of the parties to the arbitration case that is subject to judicial review are located in different provinces; or (2) the ground upon which the enforcement of the domestic arbitral award is to be refused is violation of social and public interests.

An unusual mechanism that affords a third party the right to apply for non-enforcement of an arbitral award was introduced by the Supreme People's Court in 2018. On 5 January 2018, the Supreme People's Court adopted Provisions on Several Issues Regarding Handling Cases of Enforcement of Arbitral Awards, which permits a third party who is not a party to arbitration to apply to the enforcing court for non-enforcement of an arbitral award that infringes the third party's interest within 30 days from the date on which it knows or should have known that the court is taking enforcement action. The operational result of this new mechanism is yet to be observed.

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.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

According to a statistic released by the Supreme People's Court, amongst the arbitral awards that had been filed to the people's courts for enforcement during the time period 2013–2015, 0.14% of foreign-related arbitral awards were ruled to deny enforcement, and 4.67% of domestic arbitral awards were ruled non-enforcement.

It is believed that in general, the Chinese courts will not recognise or enforce an arbitral award that has been set aside by the court at the place of arbitration. Article 9 of the PRC Arbitration Law states that in case an arbitral award is set aside, the available remedy for the parties is either to reach a new arbitration agreement between them in respect of the same dispute in order to re-apply for arbitration, or to initiate a lawsuit before the competent court without concluding a new arbitration agreement. Whether the Chinese court will take a liberal approach to allow enforcement of an annulled arbitral award in the future is still open for further observation.

Investment arbitration

China is a contracting state to the ICSID Convention, which became 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. This notice may be deemed as a limitation of consent to ICSID arbitration by the Chinese Government. However, the limitation imposed by this notice would be deemed lifted if China agrees to liberalise the scope of disputes submitted to ICSID arbitration by a subsequent BIT or multinational treaty.

Up to 31 December 2018, China has concluded 145 bilateral investment treaties (BITs) and 22 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. The China-Hong Kong CEPA Investment Agreement became effective on 28 June 2017.

Development of investor-State arbitration in Mainland China: A notable development in Mainland China is that both SCIA and CIETAC announced in recent years that they would accept and administer investor-State arbitration cases concerning BITs claim and other investment treaty claims. SCIA introduces UNCITRAL Rules to administer investor-State arbitration and CIETAC publishes its own arbitration rules as well as panel of arbitrators for international investment disputes. While China's "Belt and Road" (OBOR) Initiative will inevitably bring with it numerous investor-State arbitrations, it is anticipated that the Chinese arbitration institutions may play a greater role in resolving OBOR disputes.

ICSID arbitrations where China is a respondent: Over the years there have been three ICSID arbitration cases to which China is a respondent. The Claimants were Malaysian investor Ekran Berhad (ICSID Case No. ARB/11/15), Korean investor Ansung Housing Co., Ltd (ICSID Case No. ARB/14/25), and German investor Hela Schwartz Gmbh (ICSID Case No. 17/19), respectively. The ICSID Case No. ARB/11/15 was settled and the proceedings were discontinued on 16 May 2013. The ICSID Case No. ARB/14/25 was concluded in the form of an arbitral award rendered by the arbitral tribunal on 9 March 2017, ruling that the investor's claim was time-barred by a three-year limitation of prescription embodied in the 2007 China-Korea BIT, and that the claims are manifestly without legal merits. The ICSID

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Case No. ARB/17/19 was registered on 21 June 2017 and it is still pending. There is no case of the kind where China has accepted the ICSID award and paid the investors yet. Nevertheless, it is widely admitted that China will be involved in more and more investor-State arbitration cases, and that the enforcement issue will emerge sooner or later in the coming years.

Enforcement of investor-State arbitral award in Mainland China: By acceding to the 1965 ICSID Convention, China undertakes the treaty obligation to recognise and enforce the ICSID award by virtue of Article 54 (1) of the said Convention which provides that "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." Article 54 (3) further addresses that enforcement of the ICSID award "shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought".

However, the Chinese law does not offer specified rules of implementation on how to enforce an ICSID Convention. In general, Article 283 of the PRC Civil Procedural Law (2012) allows a winning party to apply directly to the intermediate people's court at the place of domicile of the party against whom enforcement is sought or at the place where the property thereof is located, and the people's court shall process the application in accordance with an international treaty concluded or acceded to by China or under the principle of reciprocity. Assuming that China is a defendant and a losing party to an ICSID award, it would not be easy to identify which court is an appropriate forum for recognising and enforcing the ICSID award, since the plain understanding of the terms "domicile" and "property" under Article 283 of the PRC Civil Procedural Law may arguably be interpreted to the effect that they are directed to any intermediate people's court in Mainland China.

Further, the Supreme People's Court made it clear in 1987 that an investor-State award cannot be recognised and enforced under the 1958 New York Convention. In the Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China (No. 5 [1987]), it is stated that disputes between foreign investors and the host government are not considered to be a "commercial legal relationship", on which China had made a reservation when acceding to the 1958 New York Convention.

It is therefore desirable for the Chinese legislative body or the Supreme People's Court to introduce new rules, or at least clarify what exact procedural rules shall be followed in the future, in order to give clearer guidance on recognition and enforcement of an investor-State arbitral award.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Ning Fei
Tel: +86 10 5639 9688 / Email: feining@huizhonglaw.com

Mr. Ning Fei is an executive partner at Hui Zhong Law Firm and currently practises in the Beijing and Shanghai offices. He specialises in commercial arbitration and litigation. Mr. Fei has represented both Chinese and foreign clients in hundreds of commercial arbitration and litigation cases, and appeared before Chinese and international arbitral tribunals, as well as the courts of the PRC at various levels up to the Supreme People's Court. He has experience of CIETAC, HKIAC, SIAC, ICC, the SCC Institute and LCIA as an arbitrator, a counsel and a Chinese law expert.

Mr. Fei has been ranked a top-notch litigator and a first band arbitration lawyer by *Chambers Asia* since 2006. Mr. Fei is the first mainland China lawyer who has been invited to act as a Council member of the HKIAC. He has also been invited by SIAC to act as an advisory member. Mr. Fei was a partner at Jun He Law Office, heading the dispute resolution practice team from 2008 to 2013. Before joining the firm of Jun He, he was the managing partner of Haiwen & Partners' Shanghai office. Between1989 and 1993, he worked at the CIETAC secretariat. He also worked as a foreign associate at a Swiss law firm in Zurich, and a British law firm in London for three years.

Shengchang Wang
Tel: +86 10 5639 9688 / Email: wangshengchang@huizhonglaw.com

Mr Shengchang Wang is a senior consultant at Hui Zhong Law. He specialises in commercial arbitration and mediation. Mr Wang is the former vice-chairman and former secretary general of CIETAC and has handled more than 200 arbitration cases under the auspices of CIETAC, ICC, SCC Institute, HKIAC, SIAC and *ad hoc* arbitration.

Mr Wang is an advisory member of International Council for Commercial Arbitration (ICCA). His key works include *International Arbitration in the People's Republic of China* (Butterworths, Singapore 1995 and 2000, co-author), *Resolving Disputes in the PRC* (FT, Hong Kong, 1996), *Theory and Practice of Combining Arbitration with Conciliation* (Law Press, Beijing, 2001), and *Arbitration in China: A Practical Guide* (Sweet & Maxwell, 2004, co-general editor).

Jing Liu
Tel: +86 21 2226 1200 / Email: liujing@huizhonglaw.com

Mr. Jing Liu is a senior consultant of Hui Zhong Law Firm and is based in Hui Zhong's Shanghai office. He specialises in international commercial arbitration, BIT arbitration, international trade law, investment law, financial law, corporate business law and intellectual property law, etc.

Mr. Liu is the former Deputy Secretary General of the Hong Kong International Arbitration Centre (HKIAC). He started his professional career at the Secretariat of CIETAC and thereafter he practised for several years with the China and International Arbitration Group of Freshfields Bruckhaus Deringer (Hong Kong). He is admitted at the New York Bar. Mr. Liu is a graduate of Nanjing University and UC Berkeley.

Hui Zhong Law Firm

Suite 2304 One Indigo, No. 20 Jiuxianqiao Road, Chaoyang District, Beijing 10016, China
Tel: +86 10 5639 9688 / URL: www.huizhonglaw.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

England & Wales

Joe Tirado
Garrigues UK LLP

Introduction

Notwithstanding the uncertainty and concerns surrounding Brexit, London continues to be a major hub for the resolution of commercial disputes, particularly by way of arbitration. As a result, the English courts are frequently faced with issues that are both central and ancillary to international arbitral proceedings. In such matters, the English courts have a long tradition of seeking to support arbitration and enforcing arbitral agreements and awards.

Underpinning the courts' approach is the Arbitration Act 1996 (the "**1996 Act**"), which still provides a sound framework for arbitration users and the courts. In addition, the United Kingdom has a suite of legislation in place to assist with the enforcement of arbitral awards.

England (in particular, London) remains one of the leading international arbitration centres of the world and is frequently selected as a seat of arbitration.[1]

The 1996 Act and relevant conventions

While not structurally based upon the UNCITRAL Model Law on International Commercial Arbitration (1985) (the "**1985 Model Law**"), the 1996 Act shares many of the main features of the 1985 Model Law. The 1996 Act is split into three parts:

- Part I (sections 1–84) sets out the structure to support anticipated or on-going arbitral proceedings, including provisions as to appointment of a tribunal and the powers of the English court to support on-going arbitral proceedings;
- Part II (sections 85–98) primarily concerns domestic arbitration, including consumer arbitration agreements and statutory arbitrations; and
- Part III (sections 99–104) concerns the recognition and enforcement of foreign arbitral awards.

The United Kingdom (which includes the jurisdiction of England & Wales) signed and ratified the New York Convention in 1975. The United Kingdom has also signed and ratified the Geneva Convention on the Execution of Foreign Arbitral Awards 1927.

With regard to other reciprocal arrangements, the Foreign Judgments (Reciprocal Enforcement) Act 1933 provides for the enforcement of arbitral awards from certain former Commonwealth countries. The Arbitration (International Investment Disputes) Act 1966 makes provision for the recognition and enforcement of ICSID awards. Under section 99 of the 1996 Act, the Arbitration Act 1950 (the predecessor to the 1996 Act) remains in effect with regard to the enforcement of certain awards that do not fall under the New York Convention.

London-based international dispute resolution institutions

London has emerged as a key seat for arbitration, and a number of leading institutions are

© Published and reproduced with kind permission by Global Legal Group Ltd, London

based in London. The London Court of International Arbitration ("**LCIA**") is a renowned international arbitration institution with an impressive 125-year history and, as of 1 October 2014, a newly revised set of arbitration rules. The Chartered Institute of Arbitrators ("CIArb") administers arbitrations under its own rules and acts as an appointing authority. The Centre for Effective Dispute Resolution ("**CEDR**") is a London-based mediation and alternative dispute resolution body which administers arbitration under UNCITRAL Rules.

There are also a number of institutions catering for disputes arising in a particular trade area or industry. The London Maritime Arbitrators Association ("**LMAA**") has been the longstanding leading arbitral institution with respect to maritime disputes, with its own set of procedural rules. Commodity disputes are regularly conducted under the rules applicable to that commodity, for example the London Metal Exchange ("**LME**").

Arbitration agreement

The formalities surrounding an arbitration agreement are similar under English law as to other jurisdictions. Section 5 of the 1996 Act requires an arbitration agreement to be in writing or evidenced in writing. This requirement reflects section 7 of the 1985 Model Act (and the 2006 version of the UNCITRAL model act, the "**2006 Model Act**"). Section 5 of the 1996 Act allows for unsigned agreements, an exchange of communications, or an agreement "*evidenced in writing*". The English courts have interpreted "writing" to mean a record kept by any means, including electronic records or communications including email.[2]

Arbitrability

The arbitration agreement is defined in section 6 of the 1996 Act as "*an agreement to submit to arbitration present or future disputes (whether they are contractual or not)*".

The parties may decide to include all disputes arising between them to be decided by arbitration, or they may limit the recourse to arbitration strictly to one type of dispute or to disputes concerning the breach of one contract.

However, some types of dispute cannot be referred to arbitration by reason of mandatory law and/or public policy. The English Court of Appeal observed in the case of *Fulham Football Club Ltd v Richards & Anr*[3] that arbitrability will be determined by considering whether:

"…the matters in dispute… engage third party rights or represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process".[4]

Joinder of third parties and consolidation of proceedings

Section 35 of the 1996 Act provides that arbitral tribunals shall not have the power to consolidate proceedings unless the parties agree to confer such power on the tribunal. Selection of the arbitration rules of an arbitral institution, where such arbitration rules allow for consolidation, can be seen to be an indirect conferral of such powers by the parties on the arbitral tribunal. Powers of consolidation can be found in many arbitration rules maintained by leading arbitral institutions. For example, the updated arbitration rules of the LCIA (which entered into force from 1 October 2014) provide at Article 22 for joinder and consolidation in particular circumstances.

Jurisdiction and competence-competence

The question of whether a tribunal had (or has) jurisdiction is often dependent on an examination of the meaning and scope of the relevant arbitration agreement (valid or

© Published and reproduced with kind permission by Global Legal Group Ltd, London

otherwise). English courts tend to adopt a commercial pragmatism when it comes to interpreting arbitration agreements, particularly in the context of multi-party and multi-contract disputes. For example, the Court of Appeal in *Yegiazaryan v Smagin [2016] EWCA Civ 1290* found that unclear wording in a standalone agreement between the claimant and respondent amounted to an arbitration agreement and entitled the claimant to file a LCIA arbitration against the respondent under two other agreements in which the respondent was not himself named as a party.[5]

Section 30 of the 1996 Act clearly sets out that, unless otherwise agreed by the parties, the arbitral tribunal has the power to rule on its own substantive jurisdiction, including deciding: (a) whether there is a valid arbitration agreement; (b) whether the tribunal is properly constituted; and/or (c) what matters have been submitted to arbitration in accordance with the arbitration agreement. Alternatively, if the arbitral tribunal gives its permission (or if the parties agree), the English court can determine a preliminary issue of jurisdiction. This latter power of the English courts is set out in section 32 of the 1996 Act.

Separability

Separability of the arbitration agreement is preserved by section 7 of the 1996 Act, together with the approach of the English courts in associated case law. Section 7 of the 1996 Act states:

"Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

The English courts have upheld the approach reflected in this wording in cases such as the case of *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Limited & Ors*,[6] where it was held that the arbitration agreement was valid even where the underlying guarantee agreement was illegal as a matter of Chinese law (China being the place of performance of the underlying agreement).

Arbitration procedure

Commencing an arbitration

Section 14 of the 1996 Act provides that arbitral proceedings are commenced by a written notice to the other party/parties or the appointing authority. This is the default procedure unless the parties agree otherwise. Institutional rules can add further requirements as to the content of such notice and payment of any initial institutional fees.

Seat of arbitration

For international arbitrations seated in England & Wales, the typical seat of arbitration selected by the parties or the court is London. There is no requirement under English law that procedural and evidential hearings physically take place at the seat of arbitration.

Applicable law

The arbitral tribunal will apply the substantive law chosen by the parties to the merits of the dispute.[7] Further, if the parties agree, the tribunal may determine the dispute in accordance with other considerations such as rules UNIDROIT, etc. Where the parties have not chosen or agreed to the substantive law, section 46 requires that the tribunal apply the substantive law identified by the conflict of laws which are applicable.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Following the decisions of *Sulamérica Cia Nacional De Seguros S.A. and others v Enesa Engenharia S.A*[8] and *Arsanovia Ltd v Cruz City 1 Mauritius Holdings*,[9] the English commercial court in *Habas Sinai Ve Tibbi Gazlar Istihsal Andustrisi AS and VSC Steel Company Ltd*[10] held the proper law of the arbitration agreements to be determined by undertaking a three-stage enquiry into: (i) express choice; (ii) implied choice; and (iii) the law with which the arbitration agreement has the closest and most real connection.

Rules on evidence

Section 34 of the 1996 Act sets out the evidential matters over which the tribunal has authority, including: the form of written statements of case and submissions; the location and timing (and form) of hearings; the extent of document production; all issues as to admissibility and weight of evidence; the manner in which evidence shall be tendered or exchanged; and the extent to which the arbitrators should take the initiative in ascertaining the facts and the law.[11]

Arbitration rules chosen by the parties along with procedural guidelines such as the IBA Rules on the Taking of Evidence in International Arbitration (2010) (the "**IBA Rules**") will guide the arbitral tribunal on the rules of procedure and evidence. The arbitral tribunal will set down the procedural timetable along with additional rules on evidence (if any) that would be adopted.

Privilege

English law recognises the existence of legal privilege, a right which enables a person to resist compulsory disclosure of certain categories of information. However, the 1996 Act is silent on the existence and treatment of issues of privilege. Most often, the question as to which rules of privilege to apply to a given set of communications will be determined by the tribunal.[12] If the parties so agree, the tribunal might also be guided by the IBA Rules.

Disclosure

The English Civil Procedural Rules (CPR Rule 31.16) provide that the court may order disclosure by a party prior to the commencement of proceedings, with the aim of encouraging early resolution of the dispute, assisting procedural fairness and saving costs. However, these rules do not apply to arbitration proceedings.[13] As stated above, it is ultimately for the tribunal to decide on the scope of document production.

Generally an arbitral tribunal would take into account that the scope of document production will differ according to the legal and cultural backgrounds of the parties and the seat of arbitration. The approach of tribunals in England is generally conservative and 'fishing expeditions' are not welcome and, indeed, are positively discouraged.[14]

Expert evidence

Section 37 of the 1996 Act gives the power to the tribunal to appoint its own expert(s), but each party shall be given a reasonable opportunity to comment on any information, opinion or advice offered by the expert. Section 37 is not a mandatory section.

As with many other matters of procedure, it is at the tribunal's discretion which rules to follow regarding expert evidence. Arbitral institutional rules such as those of the LCIA or the ICC may guide the tribunal, or similarly other rules agreed by the parties such as the IBA Rules.

There is an increasing trend among arbitrations seated in England & Wales (as with international arbitrations seated elsewhere) towards attempting to get opposing expert witnesses to find common ground. This can lead to methods proposed or imposed by the arbitral tribunal such as "hot tubbing" and expert witness conferencing, under which experts are questioned simultaneously with a view towards identifying any common ground together

© Published and reproduced with kind permission by Global Legal Group Ltd, London

with, generally, getting results from the two experts which are directly comparable and based on the same set of parameters and assumptions.

Confidentiality

The 1996 Act has no provision relating to confidentiality. Under English common law there is an implied term of the arbitration agreement that the arbitration is private and the evidence, along with the pleadings, are considered to be confidential.[15] There are certain exceptions to the implied term. The details of arbitral proceedings may become public due to a court order for disclosure or if it is necessary for the protection of the legitimate interests of one of the parties, or where there is public interest in disclosure.[16]

In a LCIA arbitration, arbitration proceedings are considered to be private unless the parties consent or the arbitral tribunal directs.[17] Further, Article 30 of the LCIA rules provides that parties as a general rule must undertake to keep all awards, along with materials in the proceeding created for the arbitration, as confidential.

Guidelines for counsel

All English solicitors are bound by ethical rules under English law. However, in international arbitration in any jurisdiction there are difficulties as lawyers from different jurisdictions operate under different ethical codes and boundaries.

The guidelines under the 2014 LCIA Rules (General Guidelines for the Parties' Legal Representatives, Annex to the LCIA Rules) seek to level this playing field. Those guidelines state that counsel should not: (1) engage in activities intended unfairly to obstruct the arbitration or jeopardise the finality of the award (for example, by repeated challenges which the legal representative knows are unfounded); (2) make false statements; (3) rely upon false evidence; (4) conceal any document ordered to be produced by the tribunal; or (5) make unilateral undisclosed contact with any member of the arbitral tribunal.[18]

The LCIA guidelines are mandatory and apply to any counsel acting in any LCIA arbitration proceedings commenced under the new rules.

In case of misconduct, the LCIA Rules provide at Article 18.6 for the following sanctions: (1) a written reprimand; (2) a written caution as to future conduct; (3) a reference to the legal representative's regulatory and/or professional body.

The IBA Guidelines on Party Representation 2013 is another set of guidelines which seek to apply a uniform standard to counsel in international arbitrations. However, such guidelines are only applicable if the parties specifically agree to them for a given dispute.

Arbitrators

Appointments in general

Parties to an arbitration in England & Wales are free to agree on the number of arbitrators, the appointment of arbitrators and whether a chairman or umpire is to be appointed to the tribunal.[19] Parties may also impose restrictive qualifications on the appointment of arbitrators. The UK Supreme Court case of *Jivraj v Hashwani*, exemplifies the notion that parties are free to impose (by virtue of agreement) a criteria or necessary qualification on the appointment of arbitrators.[20]

Procedure

Article 16 of the 1996 Act states that the default position is that an arbitral tribunal will generally consist of a sole arbitrator unless the parties to the arbitration request otherwise, or else if it is determined that a three-member tribunal is appropriate for the matter at hand.[21]

© Published and reproduced with kind permission by Global Legal Group Ltd, London

In case of sole arbitrator, the parties must jointly appoint the arbitrator within 28 days of service and in case of three arbitrators, each party shall appoint one arbitrator within 14 days. The two appointed arbitrators shall appoint a third arbitrator as the chairman of the tribunal.[22]

Challenging an arbitrator

Parties to a proceeding may challenge the appointment of an arbitrator if that arbitrator has not acted fairly and impartially in his treatment of the parties. The arbitration act imposes a duty upon arbitrators to treat the parties fairly and equally.[23]

Under the LCIA Rules, prior to appointment, the prospective arbitrator candidate has to sign a declaration that no circumstances known to him or her are likely to give rise to any justified doubts as to his or her impartiality or independence, other than those disclosed by him/her.[24] This duty is a continuing duty as arbitrators appointed to proceedings must also disclose any circumstances that arise after the date of declaration and prior to the arbitration conclusion, which may affect their impartiality.

Section 24 of the 1996 Act allows the party to an arbitral proceedings to apply to the court to remove an arbitrator on the grounds that the arbitrator is not impartial or independent; does not possess the qualifications; has failed to conduct the proceedings in a proper manner; and mental or physical incapacity. The court will not exercise this power if the arbitral tribunal or the institution has the power to remove arbitrators, unless it is satisfied that the parties have exhausted any recourse to that institution or person.

Common law on impartiality and IBA Guidelines on conflicts of interest

The English common law provides for a general test for impartiality. In *R v Gough* it was that there should exist a real danger of bias.[25] The later judgment of *Locabail v Bayfield*[26] serves to provide practical guidance on the timing and level of disclosure.

The IBA Guidelines on Conflicts of Interest in International Arbitration provide a number of provisions which directly address the issue of how and when impartiality may exist and what are the requirements imposed on the arbitrators. The IBA guidelines are considered a reflection of actual practice incorporated into the arbitration by the parties. Usually, arbitral tribunals in England & Wales, especially the LCIA, will on occasion refer to the IBA guidelines to provide clarity, but it is not bound by the guidelines.

LCIA challenges

The Arbitration International Journal in its special 'Challenges' issue,[27] has published digests of reasoned arbitral challenge decisions of the LCIA court. A challenge of an arbitrator is most often resolved by the president or vice president of the LCIA court or by means of a division of the court consisting of three or five members, appointed by the president or the vice president. In practice, challenges are most commonly resolved by a division of the court. The usual practice for submission and resolution of a challenge is for written submissions and supporting documents to be submitted by the challenging party, the challenged arbitrator and the other party or parties. Challenges are usually resolved on paper as oral submissions are a rare alternative taken by the court.[28]

Immunity of arbitrators

Section 29 of the 1996 Act grants immunity to the arbitrator unless bad faith is proven. The LCIA and the ICC Rules similarly exclude liabilities where fraud, misconduct or bad faith have not been proven. This is most often seen as a consequence of the consensual nature of arbitral proceedings and the trust placed in tribunals to resolve disputes. Immunity as such helps to provide a degree of finality to the proceedings by preventing parties from holding the arbitrators liable where they disagree with the result of proceedings.[29]

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Secretaries to the arbitral tribunal

There are no rules governing the conduct of the secretaries to the arbitral tribunal. In practice, there are instances of arbitrators appointing arbitral secretaries under the LCIA Rules. The LCIA in the FAQ section of the website lays down the function of administrative secretaries by confining: "their activities to such matters as organising papers for the Tribunal, highlighting relevant legal authorities, maintaining factual chronologies, keeping the Tribunal's time sheets and so forth".[30]

A recent survey conducted by White & Case and Queen Mary University,[31] held that the use of tribunal secretaries is most common in arbitrations of Latin American respondents (62%), while least common in arbitrations of respondents from North America (23%) and Asia (26%).[32]

Interim relief

Interim relief is available from both the English courts and London-seated arbitral tribunals.

The English courts have broad powers under section 44 of the 1996 Act as to interim relief in support of arbitral proceedings. These powers are typically invoked on an urgent basis before an arbitral tribunal has been composed and, once an arbitral tribunal is constituted, the court will only act where the tribunal has no power or is unable to act effectively (section 44(5)). The court's powers under section 44 can be exercised in support of foreign-seated arbitrations if the court considers that it is appropriate to do so (section 2(3)),[33] but do not extend to a non-party to an arbitration agreement outside of the jurisdiction.[34]

Similarly, section 38 of the 1996 Act specifies that arbitral tribunals have broad powers as to interim relief (including the power to order security for costs), although such powers can face limitations due to practical considerations, such as the ability to enforce an interim order such as an asset-freezing injunction against third parties which are not party to the arbitral proceedings. An arbitral tribunal might also choose to issue an interim award against one party for the payment of sums, pursuant to section 39 of the 1996 Act.

Broad powers to grant interim relief

The English courts have interpreted their powers under section 44 broadly. For example, section 44(3) states that the court may make orders in cases of urgency for the purposes of preserving "evidence or assets". The courts have interpreted "assets" to include contractual rights.

English courts also allow an injunction against court proceedings ("anti-suit injunctions") by which the contractual rights of the parties that include the right to have disputes referred to and resolved by arbitration are protected.

Following the ECJ decision in *Allianz SpA and Others v West Tankers Inc.*,[35] the English courts may not grant an anti-suit injunction to restrain proceedings commenced in the court of another EU member state. However, anti-suit injunctions remain available in respect of proceedings brought outside the EU.[36] If no arbitration proceedings have commenced and none are intended (thereby precluding an application under section 44 of the 1996 Act), but a party nonetheless seeks to protect its rights under an arbitration agreement, the courts have jurisdiction to award a final anti-suit injunction under section 37 of the Senior Courts Act 1981.[37]

English courts can order anti-arbitration injunctions in aid of domestic litigation, but rarely do so. *Excalibur v Texas Keystone Inc.*,[38] is one of the rare examples of the Commercial Court intervening in an arbitration that was subject to oversight by the New York, not English, courts.[39]

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The powers of the court do not extend to ICSID arbitrations, where any relief should be sought from the tribunal.[40]

Although the 1996 Act applies mainly to arbitrations seated in England and Wales, there are some provisions which apply even if the seat is elsewhere or has not been determined. These powers mainly relate to applications to stay court proceedings brought in breach of an arbitration agreement (section 9) or in order to exercise the English court's powers to secure the attendance of witnesses (section 43) or to grant injunctive relief in support of the arbitration (section 44).

The rules of a number of arbitral institutions, such as the LCIA and the ICC, now also provide for the appointment of an emergency arbitrator to grant interim relief in situations where the arbitral tribunal has yet to be appointed.

Security for costs

Under section 38(3) of the 1996 Act, the arbitral tribunal can pass an order for security of costs of the arbitration. There are no grounds given under section 38(3), but they usually relate to the claimant's inability to pay, and classic examples include the claimant's insolvency or likely refusal to pay, and the consequent difficulties of enforcement.

Section 68(3) only allows the tribunal to order the claimant to provide the security for costs. The LCIA Rules under Article 25, however, allow the tribunal to ask for security for costs of the arbitration and legal fees, as well as security for all or part of the dispute.

Arbitration award

Formal requirements

The parties are free to agree on the form of the award.[41] In the absence of any agreement, the award must be in writing and signed by all the arbitrators (or all those assenting to it). Further, unless it is an agreed award or the parties have agreed to the contrary, the award must contain reasons and state the seat of the arbitration and the date on which it is made.[42]

The award will take effect from the date on which all the above conditions are met.

The tribunal is not subject to a time limit in rendering its award. If the arbitration agreement imposes such a time limit, upon application by the tribunal or by any party to the proceedings, the court may extend such time limit if it is satisfied that a "*substantial injustice*" would otherwise result.[43]

Costs for the parties

Unless otherwise agreed by the parties, the tribunal may make an award allocating the costs of the arbitration between the parties.[44] Under the 1996 Act, costs of the arbitration include the arbitrators' fees and expenses, those of any arbitral institution used during the proceedings, and the legal or other costs of the parties; for example, translators, venue hire, travel expenses.[45]

Unless the parties otherwise agree, the tribunal will award costs of the arbitration on the basis of the general principle that costs should 'follow the event', i.e. that the unsuccessful party should pay the successful party's recoverable costs.[46]

Interest

The parties are free to agree on the tribunal's power to award interest under section 49 of the 1996 Act. The default position is that the tribunal may award simple or compound interest at such rates and with such rests as it considers appropriate, up to the date of the award and from the date of the award to the date of payment, on: the whole or part of any

© Published and reproduced with kind permission by Global Legal Group Ltd, London

amount awarded in respect of the principal claim; and any award as to costs.[47] No mandatory or customary rate of interest is applicable.

Challenge of the arbitration award

The English courts have generally followed a policy of non-interference in the arbitral process with respect to challenges to arbitral awards. Such challenges are rarely successful.

There are three grounds on which a party may appeal (or challenge) an award made under the 1996 Act:

- The tribunal lacked substantive jurisdiction under section 67.
- A party may challenge an award on the grounds of serious irregularity under section 68.
- An appeal to the court under section 69 on a question of law arising out of an award made in the proceedings.

Section 67: Substantive Jurisdiction

Under section 67 an award can be challenged on the basis that it was made without jurisdiction. The award could be the substantive award on the merits of the claims, or may be a separate preliminary award containing the tribunal's ruling on its own jurisdiction.

Section 67 is mandatory and parties cannot contract out of the right to challenge an award on the basis of substantive jurisdiction.[48] The phrase "*substantive jurisdiction*" is defined in section 30(1) and section 82 of the 1996 Act. Thus challenge can be made on:

- Existence or validity of the arbitration agreement.
- Constitution of the tribunal.
- Scope of the arbitration agreement.

The validity of the arbitration agreement can be called into question under section 67. It may be argued that the arbitration agreement is invalid due to some flaw with the contract in which it is contained. The principle of separability, however, would generally mean that the invalidity of the contract does not affect the arbitration agreement, unless the basis of invalidity may be such as to render both the contract and the arbitration agreement invalid – for example, lack of capacity.[49]

In *B v A*,[50] the court held that an error by a tribunal in the application of the chosen law does not lead to a lack of substantive jurisdiction. The House of Lords in *Fiona Trust & Holding Corp v Privalov*[51] held that the parties to an arbitration agreement, as rational businessmen, should be assumed to have intended that any dispute arising out of the relationship into which they had entered, or purported to have entered, should be decided by the same tribunal. This assumption can only be departed from in case the arbitration agreement makes it clear that the parties intended to exclude certain questions from the arbitral jurisdiction.

The hearing under section 67 is a full one. Each party has the right to put to the court all arguments and evidence (and evidence not presented to the tribunal). The process is not a judicial review but a complete retrial.[52]

Section 68: Serious irregularity

Section 68 is also a mandatory section and the parties cannot contract out of it. The serious irregularity could be related to the award or proceedings or to the tribunal. The irregularity should cause or would cause "*substantial injustice*". It requires a high threshold for the courts to set aside the award under section 68.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Section 68(2) lists a few of the following kinds of irregularities, which is exhaustive in nature:

- Failure by the tribunal to comply with section 33 of the 1996 Act (which sets out the tribunal's general duties, such as the duty to give each party a reasonable opportunity to put its case).
- The tribunal exceeding its powers (other than in relation to its substantive jurisdiction).
- Failure by the tribunal to deal with all the issues that were put to it.
- The award being obtained by fraud or in a manner contrary to public policy.

In *Fidelity Management SA v Myriad International Holdings BV*,[53] Morrison J held that section 68 was a "*long stop*" to deal with "*extreme cases where ... something ... went seriously wrong with the arbitral process*".[54]

In a recent case of *Lorand Shipping v Davof Trading (Africa) B.V. (MV "Ocean Glory",)*[55] there was a rare example of a successful application under section 68.

Section 69: Appeal on a point of law

Section 69 of the 1996 Act allows the parties to arbitral proceedings to appeal to the court on a question of law. This is one of the most controversial sections with respect to international arbitration. This section is not mandatory and can be excluded by agreement between the parties. Arbitral rules like the LCIA and the ICC Rules exclude any appeal on a question of law.[56]

The reported decisions under section 69 tend to be in the field of shipping/maritime, commodities, construction and rent review cases.[57] The appeal can be only against English law and not a foreign law. Thus appeal under section 69 is not available if it has been determined according to the law of another jurisdiction or another system.[58] There will also be no appeal on questions of fact.

An appeal under section 69 can be brought with the agreement of all the other parties to the arbitration or with the leave of the court. Pursuant to section 69(3), permission to appeal will only be granted if all of the following requirements are satisfied:

- That the determination of the question will substantially affect the rights of one or more of the parties.
- That the question of law is one which the tribunal was asked to determine.
- The decision of the tribunal is obviously wrong; or the question is one of general public importance and the tribunal's decision is open to serious doubt.
- That, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper for the court to determine the question.

Procedure for challenging awards

Any application to challenge an award or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.[59]

Further, no application or appeal under sections 67, 68 or 69 may be brought unless the applicant or appellant has first exhausted any available arbitration process of appeal or review and any available recourse for correction of the award under section 57.[60]

The court may order, on any application under section 67, 68 or 69, security for costs of the application or appeal. The application may even be dismissed if such an order is made and not complied with.[61]

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Section 70(6) provides that on any application under sections 67, 68 or 69, the court may order the applicant or appellant to provide security for the costs of the application or appeal. The application or appeal may be dismissed if such an order is made and then not complied with.

Enforcement of the arbitration award

Most international arbitration awards in the United Kingdom will be enforced under the 1975 New York Convention. The United Kingdom has made what is known as the 'reciprocity reservation'. By virtue of this, the United Kingdom's New York Convention obligations will apply only to the recognition and enforcement of awards made in the territory of another contracting state. The United Kingdom has also extended the convention's territorial application, including to certain of its overseas territories and crown dependencies.

Further, as noted above, the UK is also party to the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. However, very few states are signatories to the Geneva Convention and not to the New York Convention.

Other reciprocal arrangements under which international arbitration awards might be enforced exist, such as the 1933 Foreign Judgments (Reciprocal Enforcement) Act, which provides for the enforcement of arbitral awards from certain former Commonwealth countries.

The enforcement of awards delivered by ICSID Tribunals will be take place pursuant to the 1996 Act.

The 1996 Act incorporates into English law the provisions for the recognition and enforcement of awards which are found in the New York Convention.[62] In particular, pursuant to section 102, a party seeking the recognition or enforcement of a New York Convention award must produce: (i) the duly authenticated original award or a duly certified copy of it; and (ii) the original arbitration agreement or a duly certified copy of it.

Further, if the award or agreement is in a foreign language, the party must also produce a certified translation of it.

As a practical note, assuming the enforcement proceedings are not contested, enforcement should be a matter of weeks and the costs should be relatively minimal. The courts retain the discretion to enforce an award that has been set aside or suspended by the courts in the seat of arbitration,[63] but in practice this is quite rare.

In England & Wales the courts generally adopt a pro-arbitration approach and are in favour of the enforcement of international arbitration awards. The courts very rarely refuse to enforce awards on public policy grounds.[64]

One particular case in which the enforcement of an ICC award was refused is the case *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*.[65] In this case the award was refused enforcement on the grounds, *inter alia*, that the Government of Pakistan had not been a party to the operative arbitration agreement. The Supreme Court applied French law as the governing law, concluding that there was no evidence of a common intention on the part of Dallah and the Government of Pakistan to make the Government a party to the arbitration agreement.

The decision in the Supreme Court case of *IPCO v NNPC [2017] UKSC 16* provides, among other matters, clarification regarding the role of security in the enforcement of New York Convention awards in England & Wales, and is likely to be of significant value internationally in respect of interpretation of Article V of the New York Convention. Lord Mance (with whom the other justices agreed) concluded that the court had no power to make an award debtor's properly arguable right to resist enforcement (on the grounds provided by section

© Published and reproduced with kind permission by Global Legal Group Ltd, London

103(2) or 103(3) of the 1996 Act conditional on the provision of security. The Supreme Court held that the express power to order security under the 1996 Act, section 103(5) was not applicable in those circumstances – that subsection applied only while the English court was adjourning its decision pending the outcome of a challenge to the award in the curial court.

On the subject of the role of curial court, in *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat* [2017] EWHC 1911 (Comm), the English High Court dismissed an attempt to enforce a Russian award that had already been annulled by the seat courts in Moscow, holding, among other matters, that it was not enough to show that the Russian courts' decisions were manifestly wrong or even perverse to succeed under section 103(2)(f) of the 1996 Act. Further, *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat* demonstrates that award creditors have a very high hurdle to surmount when attempting to enforce awards that have been annulled by the court of the seat of the arbitral proceedings.

Investment arbitration

The United Kingdom drafted its first Model Agreement for the Promotion and Protection of Investments (IPPA) in 1971, which led to negotiating IPPAs with various developing countries.[66] The first IPPA was with Egypt in 1976.[67] At the moment, UK has signed 110 IPPAs or Bilateral Investment Treaties ("**BITs**"), of which 11 are not in force and five have been terminated.[68]

The UK government is generally favourable to investment treaty arbitration. It has ratified the ICSID convention on 23 December 1981 and implemented the Washington Convention by the Arbitration (International Investment Disputes) Act 1966.

The only multilateral investment protection treaty to which the United Kingdom is a party is the Energy Charter Treaty ("**ECT**"), which entered into force in 1998.

Features of the Bilateral Investment Treaties

- *Investor*

As regards companies, most of the UK's BITs define "*Investor*" as a company incorporated or constituted under the laws of a Contracting Party. This even includes companies incorporated or constituted in territories to which the BIT is extended; for example, Jersey, Guernsey, the Isle of Man expressly.

- *Definition of investment*

The Model UK IPPA defines the term '*investments*' broadly:

"*Every kind of asset and in particular, though not exclusively … (i) movable and immovable property and any other property rights such as mortgages, liens, or pledges; (ii) shares in and stock and debentures of a company and any other form of participation in a company; (iii) claims to money and to any performance under contract having a financial value; (iv) intellectual property rights, goodwill, technical processes and know-how; and (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.*"[69]

All UK BITs refer to a non-exhaustive list of eligible assets under the definition, but make no reference to indirectly controlled assets. The ECT, on the other hand, refers to indirectly controlled assets: "every kind of asset, owned or controlled directly or indirectly".[70]

- *Fair and equitable treatment*

The majority of the UK's BITs, (and the ECT) provide that each Contracting Party shall accord fair and equitable treatment to investment. Article 2(2) of the UK Model BIT states:

© Published and reproduced with kind permission by Global Legal Group Ltd, London

"*Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment ...*"

The fair and equitable treatment standard in the UK BIT is not linked with international law or customary law.

- *Umbrella clause*

Most UK BITs consists of an umbrella clause. Article 2(2) of the UK Model BIT states:

"*Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.*"

- *Expropriation*

Article 5(1) of the UK Model BIT covers expropriation:

"*Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.*"

That expropriation should be for a public purpose related to the internal needs of the Contracting Party is common to UK BITs. Some of the BITs lay down more specific conditions in which expropriations may be carried out; for example, the UK-India BIT permits expropriations "*related to the internal requirements for regulating economic activity*". In the UK-China BIT, the term "*market value*" has not been included to define compensation for expropriation.[71]

Another feature of the expropriation clauses under some UK BITs is that they also protect the minority shareholders.[72]

National treatment and most-favoured nation

All UK BITs include national treatment and most-favoured nation (MFN) clauses.

Article 3(1) of the Model UK BIT is the national treatment clause:

"*Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.*"

Article 3(2) of the Model UK BIT provides:

"*Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State*."

These provisions do not extend to the benefits of membership of a customs union, a monetary

© Published and reproduced with kind permission by Global Legal Group Ltd, London

union or a free trade area, nor to taxation agreements.[73] Further, Article 3(2) clarifies that these provisions will not extend on account of the UK's membership to the European Union.

Procedural rights under the BIT

Article 8 of the Model UK BIT contains two versions. The first provides resolution of disputes under the ICSID Convention where both states have signed the ICSID Convention. The investor shall bring the claim to the ICSID if the claim is not resolved in three months' time.

The second version provides that after three months, the investor can submit to investment arbitration. The parties may agree to any of the three institutions: ICSID, the ICC International Court of Arbitration, or an *ad hoc* tribunal constituted under the UNCITRAL Rules. If parties fail to agree within three months, the investor can refer the dispute to arbitration under the UNCITRAL Rules.

Decisions against UK

There has been no publicly available award against UK. There has been only one case, *Ashok Sancheti v United Kingdom*,[74] where an English court addressed issues relating to a UK BIT where the claimant sought to stay proceedings as he had filed a request for arbitration under the UK-India BIT. The English Court refused to grant the stay on the grounds that the Corporation of London (which was the defendant in the court proceedings) was not a party to the arbitration agreement under section 9 of the BIT.

There have been other instances where an English court has ruled on issues related to investment arbitration but a UK bilateral treaty was not involved.[75]

* * *

Endnotes

1. In the *2018 International Arbitration Survey: The Evolution of International Arbitration* prepared by the School of International Arbitration, Queen Mary, University of London, in partnership with White & Case, London was listed as the most preferred (64%, up from 47% in the 2015 survey) seat of arbitration. More than half of the respondents think that Brexit will have no impact on the use of London as a seat.
2. *Bernuth Lines Ltd v High Seas Shipping Ltd [2006] 1 Lloyd's Rep 537.*
3. *[2011] EWCA Civ 855.*
4. *Fulham Football Club, per Patten J.* at paragraph 40.
5. The decision in *Yegiazaryan v Smagin* also shows that a dispute arising in relation to a series of agreements is capable of being heard in a single arbitration, even if the parties named in each of the agreements are not identical. Where there is uncertainty, as in that case, regarding the meaning of an arbitration clause, the apparent commercial purpose should prevail over formalistic or technical interpretation. See also, *Autoridad del Canal de Panamá v Sacyr [2017] EWHC 2228 (Comm)* which demonstrates the court's realistic and commercial approach to the interpretation of Section 9 of the 1996 Act when it comes to ensuring respect for the parties' decision to arbitrate rather than litigate.
6. [2013] EWHC 1063 (Comm).
7. Section 46 of the 1996 Act.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

8. [2012] EWCA Civ 638.
9. [2013] 2 All ER 1.
10. [2013] EWHC 4071 (Comm).
11. Joseph Tirado, Sherina Petit, *et al.*, Chapter 23: Factual Evidence in Julian D. M. Lew, Harris Bor, *et al*. (eds), *Arbitration in England*, with chapters on Scotland and Ireland, Kluwer Law International 2013 pp. 483 – 550.
12. *Ibid* at fn 15.
13. See *EDO Corporation v. Ultra Electronics Limited [2009] EWHC 682 (Ch)* and subsequently in *Travelers Insurance Company Ltd v. Countrywide Surveyors Ltd [2010] EWHC 2455 (TCC)* (6 September 2010), the courts held that a claim for pre-action disclosure cannot be entertained where the underlying dispute is going to be referred to arbitration. In sum, the power to order pre-action disclosure in accordance with the Senior Courts Act 1981, s. 33(2) can only be invoked by an applicant who appears likely to be a party to subsequent court proceedings.
14. Tirado, Petit, *supra* at fn 15.
15. See *Michael Wilson & Partners Ltd v Emmott [2008] EWCA Civ 184* and *Ali Shipping Corporation v 'Shipyard Trogir' [1999] 1 WLR 136*.
16. Julian D.M. Lew, Chapter 21: Confidentiality in Arbitrations in England in Julian D. M. Lew, Harris Bor, *et al*. (eds), *Arbitration in England*, with chapters on Scotland and Ireland, Volume (© Kluwer Law International; Kluwer Law International 2013) pp. 441–454.
17. Article 19 of the LCIA Rules.
18. See Sapna Jhangiani, "How Far Do The New LCIA Guidelines For Parties' Legal Representatives and the IBA Guidelines On Party Representation go?", Kluwer Arb Blog http://kluwerarbitrationblog.com/blog/2014/05/21/how-far-do-the-new-lcia-guidelines-for-parties-legal-representatives-and-the-iba-guidelines-on-party-representation-go/.
19. Article 15 of the 1996 Act.
20. *Jivraj v Hashwani*: Parties to arbitral proceedings had entered into a joint venture agreement which provided for an ad-hoc arbitration in London. The agreement stipulated that the arbitral tribunal must belong to a particular religious set (i.e. Ismaili Muslims). The claimant argued that the stipulation was contrary to the Employment Equality (Religion and Beliefs) Regulations Act 2003. The Supreme Court held that arbitrators are not employees and are not therefore covered by the aforesaid Act. Therefore, qualifications concerning religion, beliefs, or otherwise, can be justly imposed upon the arbitral tribunal by agreement of the parties to the proceedings.
21. The default position under the LCIA Rules 2014 is also that unless parties have agreed otherwise, a sole arbitrator will be appointed.
22. Section 16(5) of the 1996 Act.
23. Section 33 of the 1996 Act.
24. Article 5.4 of the LCIA Rules.
25. *R v Gough [1993] AC 658*, House of Lords case − on appeal from the Court of Appeal. The appellant claimed that a member of the jury present at the first instance was biased towards him due to the fact that he and the jury member were neighbours, and that due

© Published and reproduced with kind permission by Global Legal Group Ltd, London

to a lack of impartiality the judgment should be overturned. The appeal was dismissed under the notion that a "real danger of bias" must exist and that bias should be established on the basis of the possibility (rather than the probability) of bias.

26. [1999] EWCA Civ 3004. The court held that the notion of judge in regards to impartiality is extended to include all judicial decision-makers, including arbiters, jurors, etc. Impartiality will automatically result in disqualification if any pecuniary or proprietary interest is held by the decision maker in the claimant.
27. Volume 27 Number 3, 2011.
28. Oral submissions are very rare − only two so far: LCIA REF NO UN 7949 (3 December 2007) and LCIA ref no 3488 (11 July 2007).
29. Redfern & Hunter, Oxford University Press 2009, para 5.55.
30. See http://www.lcia.org/Frequently_Asked_Questions.aspx#Secretaries.
31. 2012 Current and Preferred Practices in the Arbitral Process: International Arbitration Survey.
32. See also Berwin Leighton Paisner's 2016 International Arbitration Survey which focusses on the role of tribunal secretaries in international commercial arbitration.
33. The judgment in *Company 1 v Company 2 [2017] EWHC 2319 (QB)* illustrates that a party seeking urgent interim relief from the English court in support of arbitration proceedings seated outside England faces a significant challenge trying to persuade the court to grant such relief, even where, as here, the parties have agreed that English law will govern the procedure of the arbitration.
34. See, *DTEK Trading v Morozov [2017] EWHC 94 (Comm).*
35. C-185/07 [2009] AC 1138.
36. See, for example, *Midgulf International Ltd v Groupe Chimique Tunisien [2010] EWCA Civ 66*; *Shashoua and ors v Sharma [2009] EWHC 957 (Comm).*
37. *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC [2011] EWCA Civ 647*.
38. [2011] EWHC 1624 (Comm).
39. *78 Arbitration*, Issue 1 t 2012, Chartered Institute of Arbitrators (2012).
40. *ETI Euro Telecom International NV v Republic of Bolivia & Anor [2008] EWCA Civ 880*.
41. Section 52(1) of the 1996 Act.
42. Sections 52(3)-(5) of the 1996 Act.
43. Section 50 of the 1996 Act.
44. Section 61(1) of the 1996 Act.
45. Section 59 of the 1996 Act.
46. Section 61(2) of the 1996 Act.
47. Sections 49(3) and 49(4) of the 1996 Act.
48. Robert Merkin and Louis Flannery, *Arbitration Act 1996*, 5th Edition, Informa Law, p.292.
49. David Wolfson and Susanna Charlwood, Chapter 25: Challenges to Arbitration Awards in Julian D. M. Lew , Harris Bor, et al. (eds), *Arbitration in England*, with chapters on Scotland and Ireland, (© Kluwer Law International; Kluwer Law International 2013) pp. 527–562.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

50. [2010] EWHC 1626 (Comm).
51. 2007] UKHL 40.
52. Robert Merkin and Louis Flannery, *Arbitration Act 1996*, 5th Edition, Informa Law, p. 296.
53. [2005] EWHC 1193 (Comm).
54. David Wolfson and Susanna Charlwood, Chapter 25: Challenges to Arbitration Awards in Julian D. M. Lew , Harris Bor, *et al.* (eds), *Arbitration in England*, with chapters on Scotland and Ireland, (© Kluwer Law International; Kluwer Law International 2013) pp. 527–562.
55. [2014] EWHC 3521 (Comm).
56. See Art. 34(6) of the ICC Rules and Art 26.8 of LCIA Rules.
57. Robert Merkin and Louis Flannery, *Arbitration Act 1996*, 5th Edition, Informa Law, p. 322.
58. David Wolfson and Susanna Charlwood, Chapter 25: Challenges to Arbitration Awards in Julian D. M. Lew , Harris Bor, *et al*. (eds), *Arbitration in England*, with chapters on Scotland and Ireland, (© Kluwer Law International; Kluwer Law International 2013) pp. 527–562. See also *Schwebel v. Schwebel [2010] EWHC 3280 (TCC)*.
59. Section 70(3) of the 1996 Act.
60. Section 70(2) of the 1996 Act.
61. Section 70(6) of the 1996 Act.
62. Sections 101-103 of the 1996 Act.
63. Section 103(2)(f) of the 1996 Act.
64. See, *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd [1999] 3 WLR 811*, where enforcement was ordered despite public policy considerations relating to alleged illegality and *Sinocore v RBRG [2017] EWHC 251 (Comm)*, where attempts to set aside an order granting permission to enforce a CIETAC award and for judgment to be entered in the terms of the award on public policy grounds even though the award creditor had participated in fraudulent behaviour. In *Stati v Kazakhstan [2017] EWHC 1348 (Comm)*, the High Court decided that an application to set aside an order granting permission to enforce a SCC award should proceed to trial to determine whether the award had been procured by fraud, even though attempts to set aside the award at the court of the seat had failed. See also *Taurus Petroleum v SOMO [2017] UKSC 64*, for a demonstration of the court's pro-enforcement approach. In this case, the Supreme Court re-emphasised the clear policy of the English courts to ensure the efficient recognition and enforcement of arbitral awards, and agreed that it would be inconsistent to allow an international arbitration award to be turned into an English judgment for the purpose of enforcing the award and then to limit the means available for enforcement on the grounds of an allegedly insufficient connection with the jurisdiction.
65. [2010] UKSC 46.
66. Alejandro Escobar and Kate Hill, Chapter 14: Multilateral and Bilateral Investment Treaties and the United Kingdom in Julian D. M. Lew, Harris Bor, *et al.* (eds), *Arbitration in England*, with chapters on Scotland and Ireland, Kluwer Law International 2013, pp. 267–292.
67. *Ibid*.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

68. See http://investmentpolicyhub.unctad.org/IIA/CountryBits/221#iiaInnerMenu.
69. Article 1(a) of Model BIT.
70. Article 1(6) of the ECT.
71. Alejandro Escobar and Kate Hill, Chapter 14: Multilateral and Bilateral Investment Treaties and the United Kingdom in Julian D. M. Lew, Harris Bor, *et al.* (eds), *Arbitration in England*, with chapters on Scotland and Ireland, Kluwer Law International 2013, pp. 267–292.
72. A Contracting Party which expropriates a company incorporated or constituted in accordance with its own laws, and in which nationals of the other Contracting Party own shares, shall ensure that the expropriation provision of the BIT is applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of such shares.
73. Further See Article 7 of Model UK BIT: "The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the nationals or companies of either Contracting Party or of any third State shall not be construed so as to preclude the adoption or enforcement by a Contracting Party of measures which are necessary to protect national security, public security or public order, nor shall these provisions be construed to oblige one Contracting Party to extend to the nationals or companies of the other the benefit of any treatment, preference or privilege resulting from:
    (a) any existing or future customs, economic or monetary union, a common market or a free trade area or similar international agreement to which either of the Contracting Parties is or may become a party, and includes the benefit of any treatment, preference or privilege resulting from obligations arising out of an international agreement or reciprocity arrangement of that customs, economic or monetary union, common market or free trade area; or
    (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation; or
    (c) any requirements resulting from the United Kingdom's membership of the European Union including measures prohibiting, restricting or limiting the movement of capital to or from any third country."
74. [2008] EWCA 1283.
75. See *Occidental Exploration & Production Co. v Ecuador [2005] EWCA Civ. 1116*; *Czech Republic v European Media Ventures SA [2007] EWCA 2851*; *ETI Euro Telecom International NV v (1) Bolivia (2) Empresa Nacional de Telecommunicaciones Entel SA [2008] EWCA Civ 880*.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Joe Tirado
Tel: +44 207 796 1940 / Email: joe.tirado@garrigues.com

Joe Tirado is the Co-Head of International Arbitration and ADR at leading Spanish and Latin American firm, Garrigues UK LLP, and is based in London. He has over 25 years of dispute resolution experience and has handled hundreds of cases as counsel, arbitrator, mediator, and expert determiner in both English and Spanish.

Joe is recognised as a ranked individual for international arbitration and ADR in leading legal directories, where he is described as "first class" and "best known for his work on energy-related disputes, but is also recognised for his financial services and public international law expertise" and work in Latin America, the CIS and India.

Joe is a solicitor-advocate with full rights of audience before all civil courts, an accredited mediator, an ICSID conciliator and panel member of a number of leading arbitration and mediation panels. He has extensive experience of both commercial and investment arbitration.

Joe has been involved in a wide variety of contested matters in the UK and over 50 other countries. He has handled high-value cases in a number of sectors, including banking and finance; commodities; construction and engineering; energy (oil & gas, renewable and power generation); food and beverage; information, communication and technology (ICT); mining; petrochemical; pharmaceutical; professional services; sport; transport (automobile and aviation); and travel.

He has also conducted and advised on international commercial and investment arbitrations under all the major international arbitration rules before the leading international arbitration institutions, including the ICC, LCIA, SCC, ICDR/AAA, SIAC, CCIG, DIAC, and VIAC as well as "pure" *ad hoc* and UNCITRAL arbitrations.

Joe regularly sits as an arbitrator, mediator and expert determiner in both English and Spanish.

Garrigues UK LLP

100 Cheapside, London EC2V 6DT, United Kingdom
Tel: +44 20 7796 1940 / Fax: +44 20 7398 5839 / URL: www.garrigues.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Finland

Markus Kokko & Vilma Markkola
Borenius Attorneys Ltd.

Introduction

Arbitration in Finland is governed by the Arbitration Act of 1992 (967/1992 as amended). The Act was 'inspired' by the UNCITRAL Model Law in place at the time, but did not correspond to it word for word. Nevertheless, it did not conflict with the Model Law, nor has its interpretation been considered to conflict with how arbitration practice has evolved since then, either domestically or internationally.

The Arbitration Act contains a few sections applicable to foreign arbitral proceedings and awards. Only minor amendments have been made since its enactment. The legal community in Finland has been calling for a revision of the Act in order for it to correspond to international standards. As a result, in January 2019, the Finnish Ministry of Justice launched a project to revise the Finnish arbitration legislation.

The judiciary's attitude towards arbitration is quite positive, and attorneys also tend to recommend arbitration in business-to-business disputes due to the advantages afforded by arbitration. The fact that state courts often have limited knowledge of industry realities, despite otherwise being competent, also plays a role in attorneys' positive attitude towards arbitration. Finland is party to, and has ratified, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The main centre for domestic or international arbitration is the Arbitration Institute of the Finland Chamber of Commerce. The present Arbitration Rules of the Finland Chamber of Commerce (the "Arbitration Rules") entered into force as of 1st June 2013. The key objective of the Arbitration Rules was to address issues such as expediency and cost-efficiency, multi-party administration, arbitrator-ordered interim relief and increased confidentiality.

The Arbitration Rules now stipulate a sole arbitrator to be the default number of arbitrators, unless the parties agree otherwise. If the board of the Institute considers it appropriate, the number of arbitrators may nevertheless be three. The challenge and replacement regimes concerning the arbitrators have also been conformed to the UNCITRAL Rules.

The reduction of the time and cost of proceedings has been addressed by stipulating that a preparatory conference shall be held (Art. 29), a procedural timetable shall be set up (Art. 30), a cut-off date prior to the hearing shall be set (Art. 33), the proceedings shall be officially closed, barring additional statements or claims (Art. 39), and the main rule is that the award shall be given within nine months from the time at which the tribunal received the case file from the Institute (Art. 42).

The Arbitration Rules also contain provisions on arbitrator-ordered interim relief. The

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Arbitral Tribunal may grant "any interim measures" it deems appropriate. What standards should be applied to the evaluation of whether an interim relief measure is appropriate have deliberately been left out in order to allow for flexibility in this respect. According to the Arbitration Rules, a party may seek a court-ordered interim measure only in appropriate circumstances.

In addition to the above, the Arbitration Institute has also revised the rules for expedited arbitration, although the expedition procedure is quite seldom used.

Arbitration agreement

As a general rule, if a civil law case may be settled outside of court, the case is arbitrable. The exception is that consumers are not bound by arbitration agreements concluded before the dispute has arisen. Arbitration is not applicable to non-discretionary (indispositive) matters.

For an arbitration agreement to be valid, it must be in writing. Arbitration agreements concluded by way of correspondence are also acceptable. Arbitration clauses in wills, deeds of gift, bills of lading or similar documents, in the bylaws of an association, of a foundation, of a limited liability company or of another type of company or corporate entity, and by which the parties or the person against whom a claim is made are bound, shall have the same effect as separately concluded arbitration agreements.

The wording of the arbitration agreement is obviously subject to the normal rules of contract law, and can be interpreted or dismissed entirely if it is found lacking in clarity or enforceability. It is therefore recommended that due care be taken when drafting an arbitration clause. Consumers are not bound by arbitration agreements made before the dispute has arisen, but are equally bound to arbitration agreements concluded once the dispute has actualised.

The separability doctrine is applied in Finland. As a result, arbitrators may rule on the validity of a contract which includes an arbitration clause. The invalidity of the contract will therefore not automatically lead to the invalidity of the arbitration agreement. Arbitrators may also rule on their own competency (*kompetenz-kompetenz*).

Although it has not been stated *expressis verbis* in the Arbitration Act, arbitrators are generally considered to have the power to estimate damages when a party is unable to bear its burden of proof to the full extent (even if these powers haven't been granted to the arbitrator in the arbitration agreement). Guidance on the powers of the arbitrators may to this extent be found in the Code of Judicial Procedure.

The Arbitration Rules include detailed provisions on the constitution of an arbitral tribunal in multi-party cases, joinder of additional parties to pending arbitration proceedings, claims between multiple parties, claims under multiple contracts (including multiple arbitration agreements) and on the consolidation of two or more arbitrations into a single arbitration proceeding.

Arbitration procedure

The Arbitration Act does not contain very many provisions on the procedure of the proceedings. According to the Act, the parties may agree on the procedure to be applied and, in the absence of such an agreement, the arbitrators are empowered to decide on the procedure, taking into account the requirements of impartiality and expediency. The arbitrators may not impose fines or undertake other coercive measures to enforce their

© Published and reproduced with kind permission by Global Legal Group Ltd, London

procedural orders. The proceedings may physically take place outside the seat of arbitration.

The proceedings are not confidential as such. The arbitrators have a duty of confidentiality, but a corresponding duty concerning the parties must be based on an agreement or applicable arbitration rules.

A party to an arbitration may, if the arbitral tribunal considers it appropriate, petition a court to order the production of documents for the purpose of the arbitration, in which case the court will apply the Code of Judicial Procedure on the matter.

Finland does not have extensive discovery or disclosure proceedings concerning evidence in civil law disputes. The court may nevertheless order a party to present a document or another piece of evidence which may be relevant as evidence in the dispute when petitioned by a party. Refusal may be sanctioned with a fine, and the court may order an executive officer (bailiff) to execute the order.

As the main rule is that a party must be able to present its own evidence in support of its claims, the Code of Judicial Procedure is based on the notion that the requested evidence must be specified and relevant as evidence in the case. Usually the requirement of specificity is quite strictly interpreted. A petition concerning a narrow category of documents may nevertheless be successful, as courts have been somewhat more flexible during the last decade. However, as a rule of thumb it may be stated that the petition, and the subsequent order to produce, should be specific enough for an executive officer to be able to enforce the order by executing it himself. The court may order a third party to produce the evidence as well.

The rules on privilege in the production of documents are for the most part similar to the exemptions of giving testimony in the main hearing. Some information and documentation (such as business and trade secrets) is protected by law and can therefore not be subject to a production order.

A public official, a healthcare professional, an attorney or counsel, a court-appointed mediator or auxiliary mediator may not present a document if it can be assumed that the document contains something on which he or she may not be heard as a witness. In addition, a witness may refuse to give a statement which would reveal a business or professional secret, unless very important reasons require that the witness be heard on the subject matter. Similarly, a party may refuse to provide a document containing this kind of information. The court will examine the grounds for refusal prior to deciding on the issue. Partial production of a document may also be ordered.

There is an exception to the confidentiality obligation and right of an attorney. An attorney might be ordered to testify and produce documents if he has not acted for the client in court proceedings (i.e. only acted in an advisory role) and the testimony relates to investigating an aggravated offence. In-house counsels are considered normal employees of a company and as such, do not enjoy any special confidentiality rights or obligations.

The IBA Rules on the Taking of Evidence in International Arbitration are frequently invoked, especially in disputes involving foreign parties (international arbitration). Even though Finland traditionally has had a rather dismissive stance concerning, for instance, disclosure, the stance on document production has nevertheless loosened up in domestic arbitration as well, and the apprehensive attitude found in the Code of Judicial Procedure no longer corresponds to the attitudes of seasoned arbitrators. An arbitral tribunal is not bound by the Code of Judicial Procedure and is consequently not obligated to apply the principles found in it, even when both parties are domestic.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Adverse inferences may be drawn by the arbitral tribunal if a party refuses to produce the requested evidence (drawing adverse inferences is naturally beset by its own set of problems concerning the conclusions one might be able to draw based on a refusal). Parties are nevertheless quite prone to adhere to orders issued by tribunals, and refusal rarely becomes an issue in the proceedings.

The Arbitration Act does not contain provisions on expert witnesses. The Arbitration Rules, on the other hand, allows the arbitral tribunal to appoint one or more experts to report on specific issues after consulting the parties.

Electronic production of documents has not surfaced as a real problem, due to a restrictive view on document production in general. At the moment, no steps are being taken to prepare for possible problems concerning electronic production that might surface in the future.

A party may petition a state court to appoint one or more arbitrators to the tribunal. Correspondingly, a court may relieve an arbitrator when requested to do so by the parties. A court may also enforce the production of evidence (including witness testimony) if it is considered necessary by the arbitral tribunal.

Notwithstanding the *lis pendens* rule applicable to the relationship between the arbitration proceedings and court proceedings, a state court may grant interim relief when petitioned to do so by a party. The Code of Judicial Procedure is applicable to the application for interim relief.

Arbitrators

Unless the parties have agreed otherwise (or applicable institutional arbitration rules provide for rules on the arbitrators), three arbitrators shall be appointed. However, the starting point in the Arbitration Rules, in the absence of agreement between the parties, is that only one arbitrator is appointed unless the board of the institute considers three arbitrators appropriate considering the circumstances. Foreign nationals are *expressis verbis* allowed. An arbitrator shall be impartial and independent of the parties. Arbitrators have not been afforded immunity and are, as a starting point, liable for their actions.

The arbitration tribunal may rule on an arbitrator challenge. A challenge shall be presented within 15 days from the time at which a party became aware of the grounds for the challenge. Based on the Arbitration Rules, the Board of the Arbitration Institute may release an arbitrator, if it accepts a challenge made by a party due to e.g. partiality. Where an arbitrator has been replaced, the reconstituted arbitral tribunal shall, after consulting with the parties, decide if and to what extent prior proceedings will be repeated before the reconstituted arbitral tribunal.

National courts will examine the matter only after an award has been rendered.

The IBA Guidelines on conflict of interest are not binding on tribunals or courts. The guidelines are nevertheless invoked quite frequently in challenge cases, and it can be said that the guidelines are taken into account when deciding on a challenge.

Based on the Arbitration Rules, the arbitral tribunal may, after consulting with the parties, appoint a secretary when deemed appropriate. A secretary shall meet the same requirements of impartiality and independence as any arbitrator. Secretaries for arbitral tribunals are utilised to a certain degree and are more common in complex, high-value disputes involving an abundance of factual issues.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Interim relief

Under the Arbitration Rules of the Arbitration Board of the Finnish Chambers of Commerce, Article 36.5, a party in need of urgent interim measures that cannot await the constitution of an arbitral tribunal may apply for the appointment of an emergency arbitrator in accordance with Appendix III of the Arbitration Rules ("Appendix III"), unless the parties have exercised their right to opt out of the application of the provisions contained in Appendix III, i.e. specifically excluded the possibility of emergency arbitration in the relevant underlying agreement.

If the emergency arbitrator proceedings have not been ruled out, parties normally have the freedom to choose between applying for interim measures from the court from the emergency arbitrator, or even from the arbitral tribunal or arbitrator.

The purpose of emergency arbitrator proceedings is to get access to interim measures where the client's need for interim relief is so urgent that it cannot wait for the constitution of the arbitral tribunal. Where the urgency requirement is not fulfilled, the emergency arbitrator shall dismiss the Applicant's request for interim measures of protection.

The emergency arbitrator shall have the same power to grant any interim measures of protection as the arbitral tribunal. The scope of interim measures available under the Arbitration Rules is wide, since the arbitral tribunal may, at the request of a party, grant any interim measures it deems appropriate.

The practicability of arbitrator-ordered interim measures is limited by the fact that under the Arbitration Rules, the arbitral tribunal, and also the emergency arbitrator, shall give the party against which the request is directed an opportunity to submit comments before deciding whether to grant any interim measure. The right to comment on interim measures before they have been ordered may defeat the element of surprise sometimes needed to make full use of such protective measures.

Even if the provisions of the Appendix concerning emergency arbitrator proceedings are applied, the parties are not prevented from seeking urgent interim measures of protection from a competent judicial authority such as the local courts, at any time prior to making an application for the appointment of an emergency arbitrator, and in appropriate circumstances even thereafter.

Interim measures are regulated under Finnish law in the Code of Judicial Procedure, when measures are applied from general courts. Under the Code of Judicial Procedure, the court may order "precautionary measures" in situations set out in Chapter 7 of the Procedural Code. Usually, the party petitioning for interim relief must post security for the potential damage an injunction may cause the other party.

The court may order the seizure of property if the petitioner establishes its receivable to be likely, and there is a danger that the other party hides or otherwise acts in a manner that endangers the receivable.

If the petitioner establishes the likelihood of him having some other enforceable right, and there is a danger that the other party, by doing or neglecting to do something, endangers or otherwise diminishes the right from being realised, the court may: (i) under the threat of a fine, order the other party to refrain from doing something; (ii) under the threat of a fine, order the other party to do something; (iii) entitle the petitioner to do something or have something done; (iv) order the property of the other party to be set into the custody of an agent (trustee); or (v) order any other measure which is necessary to safeguard the right which needs to be protected.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The order must be proportional to the right which is to be safeguarded, and may not cause unreasonable harm to the other party. The system for interim relief is quite flexible in that it recognises different kinds of rights and the need to protect them, and has, for instance, successfully been used to prevent a strike by a labour union and to prevent a party from terminating an agreement.

Arbitration award

The arbitration award must be made in writing and must be signed by the arbitrators. If an arbitrator refuses to sign the award, an explanation as to the refusal shall be provided. Unless the parties explicitly agree that the arbitrators shall base their award on equity (*ex aequo et bono*), the arbitrators must base their award on the law.

The arbitral tribunal's final decision on the merits of the case constitutes the final award rendered by the tribunal. In addition to final awards, the tribunal may issue separate awards during the course of the proceedings. The tribunal may also render consent awards and additional awards if requested by the parties. The tribunal may furthermore order the parties to bear the costs of the arbitration and also allocate the costs *inter partes*. An award on both the main issues in dispute as well as costs may include interest if the applicable substantial law allows for it.

The arbitral tribunal may, by way of a separate award, decide an independent claim presented to the tribunal. A separate award may also be given concerning a part of a claim which has been admitted by the respondent. In addition, a separate award may be rendered, with the consent of the parties, concerning an issue which determines how the rest of the dispute shall be resolved. The tribunal may, for instance, rule on a time-bar issue or divide a damages case by first ruling on the grounds of liability, and only after that rule on the amount of damages.

Additional awards are also possible if the arbitral tribunal neglects to rule on a claim in its actual award. In addition, the arbitral tribunal may correct clerical errors in the award at the behest of a party. The tribunal may also, on its own initiative, correct the clerical error after having heard the parties on the issue.

Based on the Arbitration Rules, the award shall be rendered within nine months of the tribunal having received the case file from the Arbitration Institute.

Challenge of the arbitration award

An arbitral award can be set aside by the court on the basis of either invalidity or nullity. The award is considered invalid if: (i) the case was inarbitrable; (ii) the award contradicts the foundations of the judicial system (*ordre public*); (iii) the award is so unclear and incoherent it cannot serve as a basis for enforcement; or (iv) the award has not been signed by the arbitrators (majority suffices, but an explanation must be provided for why the minority has not signed the award). The award is considered null if: (i) the arbitrators have exceeded their powers; (ii) the arbitrators have been appointed in the wrong manner; (iii) an arbitrator has been incompetent due to bias; or (iv) the arbitral tribunal has not afforded a party sufficient opportunity to present its case.

There have recently been a few attempts at challenging arbitration awards in high-value cases. Challenges have nevertheless often been appeals on the merits concealed in claims on the issues described above. The courts have not been convinced and the *in favorem pro validitate* principle has been upheld.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Enforcement of the arbitration award

The enforcement of arbitral awards is decided on by the state courts. As a rule, the state court will apply the *in favorem pro validitate* rule on its deliberation, and the threshold for setting the award aside is quite high. Very many arbitral proceedings take place in Helsinki, and other district courts may not be as familiar with arbitral law. Thus, it is recommended to seat the arbitration in Helsinki.

Finland has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and foreign arbitral awards are therefore enforceable in Finland. Arbitral awards are challenged every now and then, but challenges are quite seldom accepted by the courts. In principle, an award can be enforced even though it has been successfully challenged in the place of arbitration.

Enforcement of a foreign arbitral award can be denied by the court if: (i) the arbitration agreement has been invalid (due to certain grounds); (ii) a party has not been informed of the proceedings or has otherwise been inhibited or unable to present its case; (iii) the arbitral tribunal has exceeded its powers; (iv) the composition of the arbitral tribunal or the arbitration itself has significantly deviated from the arbitration agreement; or (v) the arbitral award has not yet become binding in the country in which it was given, or if it has been set aside in that country. The arbitral award may not be enforced to the extent that the arbitral award contradicts the foundations of the Finnish legal system (*ordre public*).

The party enforcing the award or the judgment always bears the risk for the other party's insolvency. If the execution is unsuccessful due to lack of assets, the party enforcing the award will have to pay its own legal costs, in addition to not being able to retrieve the claimed amount.

Investment arbitration

Finland has signed the Convention on the Settlement of Investment Disputes between States and National of other States (also known as the ICSID Convention or the Washington Convention) on 14 July 1967 and deposited its instrument of ratification on 9 January 1969. Finland attained status as a Contracting State to the ICSID Convention on 8 February 1969. There is only one case on ICSID record involving parties of Finnish nationality (claimants). The case was largely successful for the claimants.

Finland has signed Bilateral Investment Treaties (BITs) with over 70 countries. Most of these BITs have entered into force and allow recourse to arbitration as a means of dispute resolution.

Finland has also signed the Energy Charter Treaty and ratified it on 16th December 1997.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Markus Kokko
Tel: +358 20 713 3482 / Email: markus.kokko@borenius.com

Markus regularly advises major domestic and international clients on dispute resolution and corporate crime cases.

Markus has in-depth experience of domestic and international corporate and commercial disputes and he has acted as lead counsel in numerous extensive cases. His field of experience encompasses cases related to a wide variety of business sectors, such as the chemicals industry, financial markets, international trade, retail, wholesale and mining. Markus also has an exceptional track record in handling a broad range of litigation and arbitration cases.

Markus frequently advises in complex corporate crime cases and criminal investigations regarding, *inter alia*, insider trading, environmental violations and tax.

Markus' efficient and client oriented approach has earned him an excellent reputation which has been recognised by rankings in *Chambers Global, Chambers Europe, Legal 500* and *Best Lawyers*.

Markus heads the Litigation & Arbitration and Corporate Crime teams at Borenius.

Vilma Markkola
Tel: +358 20 713 3302 / Email: vilma.markkola@borenius.com

Vilma is specialised in dispute resolution related matters. In addition to litigation, arbitration and corporate crime related cases, Vilma also advises clients on employment and insolvency law.

Borenius Attorneys Ltd.

Eteläesplanadi 2, 00130 Helsinki, Finland
Tel: +358 20 713 33 / Fax: +358 20 713 3499 / URL: www.borenius.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

France

Christophe Dugué
Avocat au Barreau de Paris

The purpose of this paper is to briefly set forth the main features of French arbitration law, a modern legislation which, together with a pro-arbitration case law and the presence of the International Chamber of Commerce, explains why Paris remains at the forefront of international arbitration places.

In the introduction we shall examine why Paris is and remains an attractive place as seat of the arbitration, and the main features of French arbitration law that aim at increasing the efficiency of arbitration. The following sections shall address the salient points regarding the arbitration agreement, the arbitration procedure, the arbitrators, interim relief, the arbitral award, the challenge and enforcement of the arbitral award and, finally, investment arbitration.

Unless otherwise provided, references made below to "Articles" are references to articles of the French Code of Civil Procedure as modified by the Decree of 13th January 2011. Quotations of articles of this decree are based on the English version that can be accessed at http://parisarbitration.net/wp-content/uploads/2017/02/EN-French-Law-on-Arbitration.pdf.

Introduction

The selection of Paris as the seat of the arbitration

International arbitration is the preferred mechanism for the resolution of commercial or investment international disputes. The selection of the seat of the arbitration is as important as the choice of the arbitrator(s), and is preferably to be made by the parties at the outset in their arbitration agreement. In order to ensure efficient arbitration proceedings and enforcement of the award, private parties and State entities very often elect for Paris as the seat of their arbitration. Many reasons explain the choice of Paris among all international arbitration places.

1. The drafting of the arbitration clause: the importance of selecting the seat of arbitration

When they opt for arbitration for the resolution of disputes that might occur in connection with their contract, parties are concerned that their case does not end up before a State court that they did not intend to choose in the first place.

This is why they must take particular care when drafting the arbitration clause of their contract. When they opt for institutional arbitration, it is wise to reproduce the standard clause generally proposed by the chosen institution. This will ensure that arbitration will be administered by the proper institution chosen by the parties.

It is also useful to consider supplementing the clause in order to specify the place of arbitration.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

When the parties do not address this point *ab initio*, they bear the risk that difficulties arise at the stage of introduction of the arbitration proceedings, at a time when the parties are not likely to agree on anything. Increased costs and additional delays might result from the selection process of the seat by the institution or by the arbitral tribunal, not to mention a possible intervention of State courts, with the risk that the seat ends up being different from the one that the parties would have otherwise chosen. Careful drafting of the arbitration clause thus avoids unnecessary debates and uncertainties that disrupt the arbitral proceedings.

2. What is the seat of arbitration? What are the consequences attached to the seat of arbitration?

The seat of arbitration is the place where the award is deemed to have been made, and not the place where hearings are actually held (whatever the seat of the arbitration, the arbitrators and the parties are at liberty to select any place(s) they deem convenient to hold their meetings).

The legal consequences are that the *lex loci arbitri* applies before and after the award is made:

- Before the award is rendered, the law of the seat carries the determination of the competence of the State courts in the event of difficulties in the constitution of the arbitral tribunal, or to order provisional or conservatory measures before the arbitral tribunal is in place; the courts of the seat of arbitration may also be requested to resolve any other difficulties in the conduct of the proceedings (as far as these issues cannot be resolved by the arbitral tribunal or the institution administering the proceedings).
- Once the award is rendered, the arbitral tribunal is *functus officio*; proceedings for annulment of the award are heard before the State courts of the seat and for the grounds determined pursuant to the law of the seat. Depending on the location selected, and the resulting applicable law, these reasons may be very limited or instead allow a full review of the merits of the case. It is thus crucial to opt for a seat that authorises the annulment of the award for a limited number of reasons only.

The selection of the seat is thus important for at least two reasons:

- When opting for arbitration the parties want a flexible, neutral, fast and efficient procedure. It follows that the intervention of State courts should be as limited as possible and with the aim to promote the smooth conduct of the arbitration proceedings, not to hinder them.
- The parties' intent is to have a binding arbitration award that is enforceable in all countries. Accordingly, a seat that authorises the annulment of the award for a limited and predetermined number of grounds must be given preference.

3. What are the criteria to be considered for the selection of the seat of arbitration? How to choose a seat of arbitration?

In sum, an arbitration seat that meets the needs of the parties must be located in a State:

- that is a signatory to the New York Convention of 10th June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards;
- whose laws are favourable to arbitration; and
- the courts of which intervene in support of arbitral proceedings and do not interfere to derail the arbitration proceedings.

Finally, the choice of Paris allows the parties to benefit from a recent development designed to enhance the attractiveness of Paris for foreign parties. Since 1st March 2018, an

© Published and reproduced with kind permission by Global Legal Group Ltd, London

international chamber of the Paris Court of Appeal has been set up, which is responsible for litigation involving international trade interests, as well as all actions for annulment filed since 1 January 2019 against arbitral awards pronounced in international commercial matters (which were so far submitted to Chamber 1-1 of the Court). It must be noted that Paris is thus as competitive as other places that have also put in place international commercial chambers (Amsterdam, Frankfurt, Singapore and by next year Brussels).

Some features of the common law and international arbitration procedures have been incorporated, in accordance with the rules of civil procedure: 1) the parties have the opportunity to have a "tailor-made procedure", by setting a timetable of proceedings (hearing dates, order and length of testimony) at the first hearing ("first case management hearing"); 2) orality is preferred in matters of evidence: witnesses, parties and experts may be heard and questioned, in addition to depositions and written reports that are submitted in writing; 3) exhibits may be filed in the English language without translation; 4) although the procedural acts must be in French and oral arguments are held in French, the parties, the witnesses and the experts are allowed to speak in English. A translation of the documents and/or simultaneous translation at the hearing may, however, be made at the expense of the party requesting it.

While not the only one, Paris meets all these criteria with the benefit of a pro-arbitration law, specialised judges, institutions and arbitration professionals that provide a secure legal environment allowing for the smooth conduct of arbitral proceedings, also meeting the objectives of speed and efficiency. In addition, Paris provides all the logistic elements that are necessary for the conduct of arbitration proceedings.

To choose Paris as the seat of arbitration, it suffices to add to your arbitration clause: "*The seat of the arbitration shall be Paris, France*."

French arbitration law aims at increasing the efficiency of arbitration

1. The recent modernisation of French arbitration law

French international arbitration legislation (that is not based on the UNCITRAL Model Law) was introduced in the French Code of Civil Procedure by a Decree N°81-500 enacted on 12th May 1981. This was already a very liberal and pro-arbitration regime that was interpreted in order to favour recourse to international arbitration, both by the Paris Court of Appeals (which is the competent judicial court for all applications for recognition and enforcement of international arbitration awards in France) and by the Cour de Cassation.

This regime was recently reformed by Decree N°2011-48 of 13th January 2011 (which entered into force on 1st May 2011) in order to further modernise the legal framework and incorporate the case law developed by French courts.

Pursuant to this last reform, there is no drastic change in the regime applicable to international arbitration but rather a consolidation of recognised principles of case law, such as the recognition of arbitration agreements "by reference" to another document that contains the arbitration clause (Article 1443), and the autonomy of the arbitration clause (Article 1447). It also incorporates both positive (Article 1465) and negative (Article 1448) effects of the well-known (and of French origin) principle of "*compétence-compétence*": it is for the arbitrators to rule on their own jurisdiction and national courts must decline jurisdiction when there is an arbitration agreement (with the exception of cases where the arbitration is manifestly void or inapplicable). It is worth noting in this respect that French courts strictly comply with the negative effect of the principle of "*compétence-compétence*".

© Published and reproduced with kind permission by Global Legal Group Ltd, London

A number of innovations aiming at increasing efficiency of arbitration proceedings also result from the recent Decree.

2. Some innovations to increase efficiency

The major innovation regarding domestic arbitration is that the appeal of the award is no longer available as of right: it cannot be appealed unless expressly provided otherwise by the parties (Article 1489). This change is in line with the rules of many legal systems and also with Article 34 of the UNCITRAL Model Law that serves as a basis for arbitration law in many countries.

In international arbitration, the Decree confirms the position of the case law that the "*arbitration agreement shall not be subject to any requirement as to its form*" (Article 1507) and aligns the position of French law to the one of the most modern laws (and competitor in terms of place of arbitration) such as Swiss law: an application to set aside an award or an appeal against an enforcement order no longer suspends the enforcement of the award (Article 1526), which appears to be an efficient (and sometimes criticised) measure to achieve greater efficiency of the arbitration process. In the same vein, the Decree provides for the possibility for the parties to an international arbitration to agree at any time to waive their right to set aside an award (Article 1522).

All these provisions contribute to greater efficiency and illustrate the confidence placed by French arbitration law in the arbitral institution.

There is a very clear line of French case law establishing that French courts can recognise and enforce awards which have been set aside elsewhere, including by courts at the seat of the arbitration (see, Norsolor, Cour de Cassation 9th October 1984; Hilmarton, Cour de Cassation 23rd March 1994 and 10th June 1997; Chromalloy, Paris Court of Appeals 14th January 1997; and Putrabali, Cour de Cassation, two decisions of 29th June 2007).

The analysis of French courts is that the law of the seat of the arbitration is not the source of validity of an arbitral award, and that the law of the country where enforcement is sought is applicable to determine if an award must be recognised and enforced.

French law thus determines the conditions for recognition of the arbitral award as part of the French legal order, without regard to the grounds for which the award was set aside by other courts in any other jurisdiction. The rule established by French case law is that an international award is not part of any national legal order, but rather a decision of an autonomous arbitral legal order and must be recognised in France even if set aside at the seat of the arbitration.

3. When is arbitration international?

Although the regime applicable to domestic and to international arbitration tends to be fairly similar, the distinction between domestic and international arbitration remains: the French Code of Civil Procedure is divided in two sections dealing respectively with domestic arbitration (Articles 1442 to 1503) and international arbitration (Articles 1504 to 1527). It is specifically provided (Article 1506) that a number of provisions set forth under the section governing domestic arbitration also apply to international arbitration; these provisions are mainly general fundamental procedural principles governing any arbitration with a seat in France.

The criterion to characterise international arbitration is of an economic nature: "*an arbitration is international when international trade interests are at stake*" (Article 1504). This is another illustration of the existence of an autonomous legal arbitral order, since it is not for the parties to determine the international character of their arbitration but rather the

© Published and reproduced with kind permission by Global Legal Group Ltd, London

existence of objective economic criteria resulting from the existence of a flux of services, goods or funds across national frontiers, and this irrespective of the nationality of the parties, the law applicable to the merits or to the procedure, or the seat of the arbitration.

In sum, French law appears to offer a more favourable regime than the one provided for by the UNCITRAL Model Law as well as the one resulting from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, which France signed on 25th November 1958 and ratified on 26th June 1959.

Arbitration agreement

What are the formalities needed for the arbitration agreement and the drafting of the arbitration clause?

A written arbitration agreement is mandatory for domestic arbitration (Article 1443) but not for international arbitration (Article 1507). The same rules apply to the arbitration agreement (i.e. the arbitration clause agreed upon by the parties at the time they enter into a contract and that applies to all future disputes that might arise in connection with the contract) and the submission agreement (i.e. in the event that no arbitration clause was concluded, the agreement of the parties to submit a specific dispute to arbitration) (Article 1442).

In any event, the consent to arbitration must be established and, as a result, it is desirable to provide for arbitration in writing (in the contract, on invoices, or by reference to another document that includes the arbitration agreement) since this is the best evidence available both before courts or arbitrators if one party challenges the jurisdiction of the arbitral tribunal or at the time of recognition and enforcement of the award (since the proof of the existence of an arbitration agreement shall be required along with the award).

To determine the existence of the parties' consent to arbitrate their dispute and to assess the existence, validity and scope of the conventional power to engage a party to the arbitration French courts do not resort to any national law: "*by virtue of a substantive rule of law in international arbitration, the existence and validity of an arbitration clause shall be assessed without reference to national law, but only under the control of the parties to resort to arbitration in terms of the circumstances of the case*" (see, Shackleton, Cour de Cassation, 16th March 2016, confirming the decision of the Paris Court of Appeals of 24th June 2014).

As outlined in the Introduction, a specific and detailed agreement agreed upon at the outset allows the parties to avoid uncertainties, waste of time and money at the time a dispute arises. Such an agreement need not be very long but must clearly record the parties' intent to resort to arbitration and, as a minimum, indicate if the arbitration is institutional (with the exact name of the institution) or *ad hoc*, and in both cases the substantive law, the procedural rules that are applicable, the number of arbitrators, the language of the arbitration and the seat of the arbitration. Finally, one might consider adding whether or not the arbitration shall be confidential, since confidentiality is not to be taken for granted (indeed, some institutions such as the ICC do not provide for confidentiality in their rules).

What disputes are arbitrable?

Pursuant to Article 2059 of the French Civil Code, parties can opt for arbitration for all disputes relating to private patrimonial rights (excluded are, for example, family law, criminal law, succession law, for which the rights cannot be freely disposed of by a party; see Article 2060 of the French Civil Code). Arbitration is not available to public entities in connection with domestic disputes (Article 2060 of the French Civil Code); however, such restriction does not apply to international arbitration.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

In its earlier version, Article 2061 of the French Civil Code expressly provided for the validity of an arbitration clause inserted in a contract concluded in connection with professional activities. Pursuant to Article 11 of the Law of "Modernization of Justice in the 21st Century" dated 18th November 2016, this Article 2061 was modified, extending the scope of the arbitration clause (see Charles Jarosson and Jean-Baptiste Racine, *Les dispositions relatives à l'arbitrage dans la loi de modernisation de la justice du XXIe siècle*, Rev. Arb. 2016, pp.1007 *et seq*.). As now drafted, this article provides that: "*The arbitration clause must have been accepted by the party against whom it is opposed, unless the latter has succeeded to the rights and obligations of the party which originally accepted it. When one of the parties has not contracted in the course of his professional activity, the clause cannot be opposed to him*." The innovation is that this article does not refer to the validity of the arbitration clause but rather its effects (the "opposability"), that consumer disputes can be referred to arbitration, and that arbitration proceedings can be commenced so long as the party that "has not contracted in the course of its professional activity" does not object (in which case, the dispute shall be referred to competent judicial courts). This recent change should not affect international arbitration and its exact consequences remain to be determined by case law.

What rules exist for the joinder/consolidation of third parties?

As a matter of principle, the arbitration agreement is binding on parties to the contract that contains the arbitration clause.

This does not mean that non-signatories cannot be parties to arbitration proceedings. French courts take into account the behaviour of the parties from which acceptance to be bound by the arbitration clause can be inferred; for example, the non-signatory's involvement in the negotiation, execution or performance of the contract (See, for example, *État libyen,* Paris Court of Appeals, 28th October 2014).

Do the principles of "*compétence-compétence*" and separability apply?

1. The principle of "compétence-compétence"

As indicated in the Introduction, the principle of "*compétence-compétence*" is enshrined in the French Code of Civil Procedure in two articles that relate to the positive and negative branches of this principle, and that apply to both domestic and international arbitration.

Article 1465 relates to the positive aspect, pursuant to which it is for the arbitral tribunal to rule on its own jurisdiction ("*the arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction*"). Article 1448 relates to the negative aspect of the principle, according to which judicial courts shall decline jurisdiction in the presence of an arbitration agreement ("*when a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction*").

There is very little room left for French courts to retain jurisdiction when parties have provided for arbitration, since the only exception allowing a court to do so (and only if requested by a party: "*A court may not decline jurisdiction of its own motion.*"), is subject to two cumulative conditions: there is no arbitral tribunal seized as yet and the "*arbitration agreement is manifestly void or manifestly not applicable*" (Article 1448).

As a matter of example, the presence of multiple arbitration clauses under various agreements shall not *per se* render the arbitration clause inapplicable.

In a recent decision of 30th March 2016, Inthemix, the Paris Court of Appeals held that the Paris Commercial Court had validly declined its jurisdiction since "*under the terms of Article 1448 of the Code of Civil Procedure, when a dispute subject to an arbitration agreement is*

© Published and reproduced with kind permission by Global Legal Group Ltd, London

brought before a court of the State, it declares itself incompetent unless the arbitral tribunal is not yet seized and if the arbitration agreement is manifestly void or manifestly inapplicable".

The Court of Appeals held that "*manifest inapplicability of the arbitration clause*" which must be established by the applicant, does not result from "the interdependence of the three contracts at stake that form a unified economic undertaking according to the will of the parties", nor from the fact that they are "*signed by different persons, have different objects, relate to different obligations and are subject to distinct disputes*". The Court of Appeals notes that the arbitration clauses at stake "*are not inconsistent with each other to make inapplicable the arbitration clause in the franchise agreement*".

Obviously, the principle of "*compétence-compétence*" is not designed to deprive the parties from the possibility to obtain interim or conservatory measures from judicial courts, although preference is given to the arbitral tribunal, once constituted.

As long as the arbitral tribunal is not in place, Article 1449 expressly provides for the jurisdiction of State courts: "*The existence of an arbitration agreement, insofar as the arbitral tribunal has not yet been constituted, shall not preclude a party from applying to a court for measures relating to the taking of evidence or provisional or conservatory measures. Subject to the provisions governing conservatory attachments and judicial security, application shall be made to the President of the Tribunal de Grande Instance or of the Tribunal de Commerce who shall rule on the measures relating to the taking of evidence in accordance with the provisions of Article 1452 and, where the matter is urgent, on the provisional or conservatory measures requested by the parties to the arbitration agreement*."

2. The separability of the arbitration agreement: the principle of autonomy

French courts have long established that the validity of the arbitration agreement is not affected by the invalidity of the contract in which it is inserted; the arbitration clause is independent from the contract.

The so-called autonomy of the arbitration agreement is now expressly set forth in Article 1447 (applicable to both domestic and international arbitration): "*The arbitration clause is independent from the contract to which it refers. The validity of the former is not affected by the nullity of the latter.*"

French case law applies the principle of autonomy in a very pro-arbitration fashion, since the arbitration agreement is also considered to be independent from the law governing the contract, and its validity must be assessed "*subject to the prior application of the mandatory rules of French law and public international order, according to the shared will of the parties, without the need to refer to State Law*" (Dalico, Cour de Cassation, 20th December 1993). Recent case law accepts the "survival" of the arbitration agreement even if the contract is inexistent or never existed (So Good International Ltd, Cour de Cassation, 28th November 2006).

Arbitration procedure

How are the arbitration proceedings commenced?

There is no specific requirement to start an arbitration procedure, which usually results from the filing of a request for arbitration with the respondent or the institution referred to in the arbitration clause.

Can hearings take place outside the seat of the arbitration?

As mentioned in the Introduction, the seat of the arbitration bears no relevance to the determination of the place where the arbitrators and the parties meet, which can be the same

© Published and reproduced with kind permission by Global Legal Group Ltd, London

place as the place of the seat, but can also be any place deemed more convenient.

Procedural rules

The rule governing court proceedings do not apply and the parties, the arbitrators and the parties' counsels have to deal with many procedural matters which, if not properly addressed in due course, can lead to numerous procedural incidents that will entail increased costs and delays.

Among these questions are:

- What are the rules on evidence?
- What rules are applicable regarding privilege and disclosure?
- Are other "soft rules" to be taken into account? (such as the IBA Rules on the taking of evidence or the recent so-called "Prague Rules", see http://arbitrationblog.kluwerarbitration.com/2019/03/02/a-comparison-of-the-iba-and-prague-rules-comparing-two-of-the-same/).
- Are there any rules regarding expert evidence?
- Are there any guidelines for Counsel to take into account (such as the ones of the LCIA or IBA)?
- Are arbitration proceedings confidential?
- Can the evidence and pleadings be kept confidential?

1. The procedural rules shall be fixed by the parties and/or the arbitral tribunal

The answer to these questions and any other issue of procedural or organisational nature is that it is for the parties, failing which the arbitral tribunal, to decide what they deem appropriate in the context of their case.

Article 1464, paragraphs 1 and 2, applicable to domestic arbitration provide that: "*Unless otherwise agreed by the parties, the arbitral tribunal shall define the procedure to be followed in the arbitration. It is under no obligation to abide by the rules governing court proceedings. However, the fundamental principles governing court proceedings set forth in Articles 4, 10, Article 11, paragraph 1, Article 12, paragraphs 2 and 3, Articles 13 through 21, 23 and 23-1 shall apply.*"

The same principle is in fact applied in international arbitration where, unless the parties have agreed upon specific rules, the arbitral tribunal determines (in consultation with the parties) the procedural rules applicable.

In any event, a few procedural questions are specifically dealt with in the French Code of Civil Procedure: due process, evidence, confidentiality and the obligation to act diligently and in good faith.

2. Due process

An arbitral tribunal with a seat in France must act fairly and ensure that due process is observed; this requirement states the obvious for every one familiar with international arbitration. It stems from the provisions of Article 1510, which states that: "*Irrespective of the procedure adopted, the arbitral tribunal shall ensure that the parties are treated equally and shall uphold the principle of due process.*"

Should this not be the case, the award might be set aside on two grounds (due process, international public policy) that can be found at Article 1520 pursuant to which, "*An award may only be set aside where: (...) (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy.*"

© Published and reproduced with kind permission by Global Legal Group Ltd, London

3. Evidence

The parties and the arbitral tribunal can freely devise the rules that they consider fit for the arbitration proceedings. Rules such as the IBA Rules on the Taking of Evidence in International Arbitration (which rules, as a practical matter, are often used by arbitral tribunals with a seat in France) can be selected, or used as a mere reference by the arbitral tribunal.

One of the features introduced by the Decree of May 2011, pursuant to which French courts can act in support of the arbitration proceedings, is the possibility for a party to request the arbitral tribunal, once it is constituted, to summon a third party to appear before the President of the *Tribunal de Grande Instance* for the purpose of obtaining the evidentiary document that the party to the arbitration intends to rely upon.

Article 1469 paragraph 1 (applicable to both domestic and international arbitration) provides as follows: "*If one of the parties to arbitral proceedings intends to rely on an official [acte authentique] or private [acte sous seing privé] deed to which it was not a party, or on evidence held by a third party, it may, upon leave of the arbitral tribunal, have that third party summoned before the President of the Tribunal de Grande Instance for the purpose of obtaining a copy thereof [expédition] or the production of the deed or item of evidence).*"

This is another illustration of the primacy given to arbitral tribunals and of the support that French courts must provide to facilitate the conduct of arbitration.

4. Confidentiality

With respect to domestic arbitration, Article 1464, fourth paragraph provides that: "*Subject to legal requirements, and unless otherwise agreed by the parties, arbitral proceedings shall be confidential.*" This applies to both the parties and the arbitral tribunal. This provision is not detailed (Is the existence of the arbitration confidential? Is the award confidential? Are the documents exchanged during the arbitration confidential, etc.), and it does not apply to international arbitration. In both types of arbitrations, however, the deliberations of the arbitral tribunal are confidential (Article 1479).

As a result, international arbitration is not confidential as of right under French law.

This does not mean that international arbitration cannot be confidential, but this is an issue that needs to be addressed either before the arbitration is commenced (in the arbitration agreement), or at any point in the course of the proceedings (in the procedural rules discussed at the outset by the parties and the arbitral tribunal, or by means of a specific request made before the arbitral tribunal for an order on confidentiality).

The first place where confidentiality provisions may be found are the rules of arbitration of the institution selected by the parties. However, the rules selected by the parties to govern the arbitration proceedings may not contain confidentiality provisions (for example, the ICC Rules do not contain confidentiality provisions − other than the confidential character of the work of the International Court of Arbitration, Article 6 of Appendix I; by contrast, the Swiss Rules contain a detailed provision, article 44). Even when they exist, the confidentiality provisions of the institutional rules might not be as detailed or specific as might be required by the parties.

Parties should therefore consider drafting specific confidentiality provisions:

- in their arbitration clause (both for domestic and international arbitration) in order to cover, when appropriate, the existence of the arbitration and the documents and materials used in the proceedings (written submissions, exhibits, witness statements, expert reports, procedural orders and other communications with the arbitral tribunal,

© Published and reproduced with kind permission by Global Legal Group Ltd, London

transcripts of hearings …) as well as oral exchanges made during the arbitration proceedings; or

- in the terms of reference (which might also prove useful to supplement the procedural rules that result from the set of rules applicable to the dispute).

In any event, Parties can also request the arbitral tribunal to rule by way of procedural orders on certain matters to preserve the confidentiality of the proceedings, or of some pieces of sensitive information such as trade secrets or know-how, that might need to be disclosed in the course of the arbitration proceedings, and that are not the subject of a patent or a confidentiality agreement (although a partial award appears preferable, since it is enforceable and an order is not). The ICC rules, Article 22(3), contemplate such a possibility: "*Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.*"

5. The obligation of diligence and good faith

One major innovation, applicable to both domestic and international arbitration, results from the third paragraph of Article 1464 pursuant to which: "*Both parties and arbitrators shall act diligently and in good faith in the conduct of the proceedings.*"

This innovation is in line with recent development in international arbitration in order to tackle the criticism that arbitration proceedings are exceedingly costly and take too much time.

Arbitral Institutions such as the ICC or the LCIA have introduced the same obligation of diligence (See, ICC Rules 2012 [now 2017], Article 22(1): "*Article 22 Conduct of the Arbitration 1 − The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute*"; LCIA Rules 2014, Article 14.4 (ii): "*Under the Arbitration Agreement, the Arbitral Tribunal's general duties at all times during the arbitration shall include: (…) (ii) a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute.*"). The next revision of the Rules of Arbitration of the Association For Arbitration that should be released in 2019 also contains a provision similar to Article 1464.

In sum, it is for the parties and the arbitral tribunal to design the procedural rules, which is usually done at the time when the terms of reference are signed, or in the first procedural order issued simultaneously by the arbitral tribunal (or any subsequent procedural order issued by the arbitral tribunal to rule upon any such issue).

Arbitrators

Appointment of arbitrators

The constitution of the arbitral tribunal is dealt with in great detail by French law (Articles 1450 to 1461).

- An arbitrator must be a natural person and a legal person can only administer the arbitration. This provision of Article 1450 is not applicable to international arbitration. As noted by a commentator (see Thomas Clay, *Code de l'arbitrage commenté*, Lexis Nexis, 2015, p. 57), this entails that French courts will grant exequatur to an international award with a seat outside of France that is "signed" by an institution, and

© Published and reproduced with kind permission by Global Legal Group Ltd, London

that an arbitration agreement that would designate a legal person as the arbitrator would be deemed valid (in such a case such legal person would be considered as administering the procedure).

- An arbitral tribunal shall comprise a sole arbitrator or an uneven number of arbitrators (Article 1451).
- Each party is granted the right to nominate an arbitrator (Article 1452).

The agreement of the parties regarding the appointment of the arbitrator(s) must be followed.

Judicial courts play a specific role in the event of difficulties in connection with the constitution of the arbitral tribunal: Articles 1451, 1452, 1453, 1454, 1455, 1456, 1459 and 1460 refer to the "judge acting in support of the arbitration" (the "*juge d'appui*") which is the President of the Tribunal de Grande Instance (Article 1459) who has exclusive jurisdiction to finalise the constitution of the arbitral tribunal.

Duty of disclosure: Are the IBA guidelines on conflict of interest taken into account?

Pursuant to the second paragraph of Article 1456, before accepting a mandate, arbitrators must disclose "*any circumstance that may affect his or her independence or impartiality*", and this obligation to be independent and impartial is of a permanent nature, since the arbitrator "*shall disclose any such circumstance that may arise after accepting the mandate*".

Notorious facts or participation in arbitration academic or social events need not be disclosed and the IBA Guidelines on Conflicts of Interests in International Arbitration are frequently referred to.

The scope of such disclosure encompasses objective circumstances (such as a flow of business with a party or a counsel involved in the arbitration) as well as subjective circumstances (for example, friendly relationship) that, in the mind of the parties, can cast a reasonable doubt as to the arbitrator's independence or impartiality. There appears to be a significant flow of judicial decisions on this topic, which reflects the tendency of parties to challenge awards rather than the lack of impartiality or independence of arbitrators.

Removal and challenge of arbitrators

An arbitrator may only be removed by unanimous consent of the parties (Article 1458) or, in the event the parties cannot agree, by the person responsible for administering the arbitration (i.e. institutional arbitration or *ad hoc* arbitration with an appointing authority vested with the power to administer the proceedings) or, if there is no such person, by the judge acting in support of the arbitration (Article 1456, last paragraph).

Regarding the challenge of arbitrators, the provisions of Article 1466 might serve as a guardrail. Article 1466 imposes on parties a duty to raise "*in a timely manner*" before the arbitral tribunal any irregularity in the conduct of the proceedings that such party is aware of, failing which "*without a legitimate reason*" such party "*shall be deemed to have waived its right to avail itself of such irregularity*". The knowledge of any irregularity, which encompasses any element regarding the constitution of the arbitral tribunal, that is not raised in due course by a party, will prevent such party from challenging the arbitrator, and ultimately from challenging the award on such ground.

Immunity of arbitrators?

French law does not provide for the immunity of the arbitrators which can be held liable (including on criminal grounds) as a result of the performance of their mission in the event of wilful misconduct, gross negligence or denial of justice (see, Thomas Clay, *op. cit.* p.58; Cour de Cassation, 15th January 2014).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Secretary to the arbitral tribunal

It is fairly common that arbitral tribunals with a seat in France are assisted by an administrative secretary. This function is not the subject of specific provisions of the French Decree on arbitration; however, such a person acts under the directives and responsibility of the arbitral tribunal and it is certain that its lack of partiality or independence would taint that of the arbitral tribunal and could give rise to the same consequences as for an arbitrator that did not meet the requirements of Article 1456.

As a practical matter, the presence of a secretary is subject to the agreement of the parties and this person is also required to provide a statement of independence and impartiality (see, for example, the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the 2017 ICC Rules of Arbitration that contains an entire section devoted to the appointment, duties and remuneration of administrative secretaries, and provides in particular that "*Administrative Secretaries must satisfy the same independence and impartiality requirements as those which apply to arbitrators under the Rules. ICC staff members are not permitted to serve as Administrative Secretaries.*")

Interim relief

What types of interim relief are available to the parties? Can the parties apply to both courts and arbitral tribunals for such interim relief?

As mentioned in the Introduction ('Arbitration agreement, 1. The principle of competence-competence'), Article 1449 expressly provides for the possibility to obtain interim relief from the arbitral tribunal, once constituted, of from judicial courts prior to the constitution of the arbitral tribunal: "*The existence of an arbitration agreement, insofar as the arbitral tribunal has not yet been constituted, shall not preclude a party from applying to a court for measures relating to the taking of evidence or provisional or conservatory measures. Subject to the provisions governing conservatory attachments and judicial security, application shall be made to the President of the Tribunal de Grande Instance or of the Tribunal de Commerce who shall rule on the measures relating to the taking of evidence in accordance with the provisions of Article 1452 and, where the matter is urgent, on the provisional or conservatory measures requested by the parties to the arbitration agreement.*"

This provision is consistently applied by French courts (see, for example, Paris Court of Appeals, 29th March 2016: "*However, according to Article 1449 of the Code of Civil Procedure, applicable to international arbitration under Article 1506 1 of the code, the existence of an arbitration agreement does not preclude, in case of emergency, the referral to the national judge so long as the arbitral tribunal is not constituted to obtain an interim measure, such request to be brought before the presiding judge of the Tribunal de Grande Instance or the commercial court.*").

Any kind of interim relief can be obtained from an arbitral tribunal, save for attachments and judicial security for which judicial courts retain exclusive jurisdiction.

These powers are vested in arbitral tribunals by virtue of Article 1468: "*The arbitral tribunal may order upon the parties any conservatory or provisional measures that it deems appropriate, set conditions for such measures and, if necessary, attach penalties to such order. However, only courts may order conservatory attachments and judicial security. The arbitral tribunal has the power to amend or add to any provisional or conservatory measure that it has granted*."

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Anti-suit injunctions

1. *What are anti-suit injunctions?*

Anti-suit injunctions are orders obtained from a judicial court by a party in order to restrain another party from bringing or continuing an arbitration case. The judicial court is requested to protect its own jurisdiction or the jurisdiction of the appropriate forum other than the arbitration that it is requested to order a party to refrain from bringing, or to withdraw or suspend an arbitration.

Anti-suit injunctions raise the issue of which national courts and arbitral tribunals have jurisdiction to decide on the validity, scope and effectiveness of an arbitration agreement and in which order (see on this topic, *Anti-Suit Injunctions in International Arbitration*, 2003, IAI Series on International Arbitration N°2, Emmanuel Gaillard Ed., Juris Publishing, Inc.).

2. *Can French courts order anti-arbitration injunctions in aid of domestic litigation?*

Such injunctions are, in essence, anti-arbitration measures designed to derail arbitration proceedings or resist enforcement of an award.

As such, they are unlikely to be obtained from French courts, unless −when reviewing an award for recognition or enforcement purposes− French courts disagree on the decision of the arbitrators regarding their own jurisdiction and set aside the award. In such an event it is however doubtful that French courts would issue an anti-arbitration injunction. French courts might retain their jurisdiction, in the event that an action is brought before them and they determine that there is no arbitration clause, or that such clause is invalid and that they are the court of competent jurisdiction as a result of applicable rules of conflict.

3. Can French courts order anti-suit injunctions in aid of international arbitration?

In the event that a French judicial court is seized of a dispute that is either pending before an arbitral tribunal or that is the subject of an arbitration clause, it will have to decline its jurisdiction by virtue of the negative effect of the principle of "*compétence-compétence*" (Article 1448).

French arbitration law contains many provisions regarding the role of the "*juge d'appui*", whose function is to act in support of the arbitration process in connection with difficulties in the constitution of the arbitral tribunal but is not defined in the law so as to encompass the equivalent of anti-suit injunctions. A French court would thus not issue pro-arbitration injunctions.

This does not mean that French courts would not give effect to anti-suit injunctions issued by foreign courts.

4. Would French courts give effect to a foreign anti-suit injunction?

There is at least one decision of the French Cour de Cassation giving effect to a foreign anti-suit injunction issued in the context of litigation proceedings (and not arbitration) that can serve as an indication of the rule that would apply should enforcement of an anti-arbitration injunction be sought in France.

In the In Zone Brands International INC decision of 14th October 2009, the Cour de Cassation decided that in its decision of 17th April 2009, the Court of Appeals of Versailles held exactly first, that "*having regard to the jurisdiction clause freely accepted by the parties, no fraud could result from the seizure by the American Company of the courts designated by the jurisdiction clause*"; second that "*there cannot be denial of justice, since the purpose of the decision of the Georgian judge is precisely to rule on its own jurisdiction and to give effect to the agreement on jurisdiction entered into by the parties*"; and finally that "*is not*

© Published and reproduced with kind permission by Global Legal Group Ltd, London

contrary to international public policy the 'anti-suit injunction' the sole purpose of which (...) is, as in the present case, to sanction the violation of a pre-existing contractual obligation".

In sum, the issuance of an anti-suit injunction against a French company does not contravene French international public policy and should therefore be given effect by French courts.

Arbitral award

Making of the award

The award is the decision reached by the majority of the arbitrators, unless the arbitration agreement provides otherwise, and it must be signed by all the arbitrators (Article 1513, applicable to international arbitration).

In order to ensure efficiency and avoid deadlock situations, French law expressly provides that if there is no majority the chairman of the arbitral shall rule alone and that should an arbitrator refuse to sign, the chairman shall make a mention thereof in the award that it shall sign alone (Article 1513, third paragraph). Finally, the same Article 1513 confirms that an award made in such circumstances shall have the same effect as if signed by all arbitrators or made by majority decision.

As to the content of the award, Article 1481 (applicable to both domestic and international arbitration) lists the elements that an award must contain (name and details of the parties and their counsels, names of the arbitrators, date when and place where the award was made). In addition, an award must state "*succinctly*" the respective claims and arguments of the parties and the reasons upon which it is based (Article 1482).

Pursuant to Article 1483 which is not applicable to international arbitration, an award that does not comply with these requirements is void. As a result, French courts have ruled that an international award cannot be set aside on the ground of a lack of motivation, which is not in itself contrary to French international public policy.

Effects of the award

As soon as made, the arbitral award is *res judicata* with respect to the claims adjudicated in that award (Article 1484), and the powers vested in the arbitrators cease with respect to such claims (Article 1485). In the event of an interim award the powers vested with the arbitrators remain on all claims, and in the case of a partial award their powers remain to adjudicate the remainder of the dispute not decided by such award.

An interesting feature introduced by the Decree of 13th January 2001 is that "*the award may be declared provisionally enforceable*" (Article 1484, second paragraph, applicable to both domestic and international arbitration), a provision to be read in conjunction with Article 1496 (domestic arbitration) pursuant to which, unless declared provisionally enforceable, enforcement of the award shall be stayed until the expiry of the time limit for the appeal or action to set aside or, if such action is filed, until it is decided. In sum, it is highly advisable in connection with domestic arbitration to require that the award be declared provisionally enforceable in order to expedite enforcement of the award.

Regarding international arbitration, Article 1526 goes further since it expressly provides that "*neither an action to set aside an award nor an appeal against an enforcement order shall suspend enforcement of an award*". This is perhaps the most important innovation (inspired from Swiss law) introduced by the Decree of 13th January 2011 and is a complete upturn of the previous rule.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

In the matter of international arbitration, provisional enforcement need not to be requested, it exists as of right.

The only limitation of provisional enforcement might occur when it could "*severely prejudice the rights of one party*" (Article 1526, international arbitration), in which case a stay might be requested from the first president of the Court of Appeals of Paris ruling in expedited proceedings ("*référé*"). The same recourse (although in slightly different terms) is provided for domestic arbitration, when enforcement of the award could "*lead to manifestly excessive consequences*" (Article 1497).

Challenge of the arbitral award

The set of rules to challenge an arbitral award vary for domestic and international arbitration, which is a further demonstration that the determination of the domestic or international character of the arbitration is essential (this was in particular a crucial point in the so-called "Tapie arbitration case"). All recourses are centralised before the Court of Appeals of the place where the award was made (domestic arbitration: Article 1494, and international arbitration: Article 1519).

Appeal

An international award cannot be appealed (Article 1518). In domestic arbitration, the principle is now that the award cannot be appealed unless the parties have provided otherwise (Article 1489).

It must be noted that an application for revision of the award can be filed in the event of fraud (Article 1502).

Action to set aside

The only recourse against an international award is an action to set aside (Article 1518). The possibility for the parties to waive their right to any recourse against the award in international arbitration was introduced by the Decree of 13th January 2011 (see, Article 1522).

Both the law and French case law are pro-arbitration and as a result, it is very rare that an award is successfully challenged in France.

The five grounds to set aside an award are listed, exhaustively, at Article 1520: "*An award may only be set aside where: (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or (2) the arbitral tribunal was not properly constituted; or (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy.*"

With respect to domestic arbitration, there is a sixth ground set forth at Article 1491 that relates to the lack of reasons upon which the award is based, or when one of the elements detailed above (see 'Arbitral award – Making of the award') is missing.

These conditions apply both to the recognition and enforcement of arbitral awards made abroad or in international arbitration. There is thus no review on the merits and it must be noted regarding the notion of international public policy that although construed very narrowly by French courts it is scrutinised very thoroughly by French Courts.

International public policy

When applying Article 1520 (5), case law has firmly established that French courts must ensure that that public order is respected (Paris Court of Appeal, 16th May 2017, Democratic

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Republic of Congo case) and that arbitral tribunals must draw all civil consequences when corruption is brought to their knowledge (Cour de Cassation, 13th September 2017, rejecting the appeal against the decision of the Paris Court on Appeal of 27th September 2016 in the Indagro case).

The subject matter of the courts' scrutiny in defence of international public order is to assess if the recognition or enforcement of the award would have the effect of "*manifestly, effectively and concretely*" violating international public order. The level of scrutiny is "*reinforced*". In the presence of allegation of money laundering, the court conducts a "*thorough search*" of the evidence and is not limited to the evidence produced before the arbitrators, nor bound by the findings, assessments and qualifications made by them; it finds in its own investigations the elements which lead it to consider that the international public order is violated (Paris Court of Appeal, 21st February 2017; Belokon case). In the same vein, an award is annulled when it would have the effect to give force to a contract obtained by corruption; having applied this method of a thorough check, the court finds that a title allowing the exploitation of a natural resource was obtained by fraud. No limitation is placed on the powers of the court to search, in law and in fact, all the elements concerning the violation (Paris Court of Appeals, 16th January 2018, MK Group case). Its assessment is made *in concreto*, on the basis of elements drawn from the file, and not only of the award.

Enforcement of the arbitral award

In the case of awards rendered outside of France, applications for enforcement are centralised and can only be filed before the *Tribunal de Grande Instance of Paris* which enforces the award by rendering an enforcement ("*exequatur*") order. This is an e*x parte* procedure that requires the filing by the requesting party of an original copy of the award together with evidence of the arbitration agreement, which serves as a basis for the jurisdiction of the arbitral tribunal that made the award (Article 1516) together with a translation in French when such documents are in a foreign language (Article 1515).

The order shall be served to the other party, after which an appeal against the order can be filed before the Paris Court of Appeals (Article 1525) on the same grounds as the ones set forth to set aside an award by Article 1520.

As detailed in the Introduction ('*Some innovations to increase efficiency*'), French courts do enforce arbitral awards that are annulled by courts of the seat of the arbitration. This is consistent with the pro-arbitration stance that prevails in France.

In sum, the arbitration regime provided by French law is more favourable than the one resulting from Article V (1) of the New York Convention of 10th June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, which is a possibility contemplated at Article VIII of this convention. Since courts in certain jurisdictions would deny recognition of awards that would have been annulled at the seat of the arbitration, parties willing to secure the enforcement and circulation of their award should not hesitate and opt for Paris as the seat of their (next) arbitration. In so doing they would ensure that their award can hardly be annulled at the seat in France, which will in turn facilitate its recognition elsewhere.

Regarding the New York Convention and its implementation, UNCITRAL provides very useful and freely accessible tools intended to "*assist judges, arbitrators, practitioners, academics and Government officials to use resources relating to the New York Convention more efficiently*". It has very recently published its Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York) in order to

© Published and reproduced with kind permission by Global Legal Group Ltd, London

"*promote the uniform and effective interpretation and application of the New York Convention with a view to limit the risk that State practice might diverge from its spirit*". This Guide is supplemented by an online platform, making available case law implementing the New York Convention from multiple common law and civil law jurisdictions (cases are reported in the form of summaries highlighting the interpretation and application of specific provisions of the New York Convention by States, and the full text of the original language decisions is also available), as well as other useful resources relating to the New York Convention. (See: http://newyorkconvention1958.org/.)

Investment arbitration

Investments made by nationals of certain countries on the territory of another foreign host country are the subject of various multinational or bilateral investment treaties (known as "BITs") concluded to protect investments and enhance international commercial relationship.

France is a party to many such BITs as well as international treaties such as the Energy Charter Treaty (which it signed on 17th December 1994, see https://energycharter.org/who-we-are/members-observers/). France is also one of the Contracting States of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (submitted to States for signature on 18th March 1965 and which entered into force on 14th October 1966), also known as the ICSID Convention. The ICSID Convention established the International Centre for Settlement of Investment Disputes ("ICSID") which is designed to offer institutional and procedural support to tribunals or parties in arbitrations among investors and states.

There is only one ICSID arbitration case against France that was pending until recently (*Erbil Serter v. French Republic*, ICSID Case No. ARB/13/22) and which is the first case ever registered against France before ICSID.

According to (limited) information made publicly available on the ICSID website (see Case Details, available at https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/13/22), the Claimant, Mr. Erbil Serter of Turkish nationality, filed its claim related to ship hull design against the French Republic, Respondent, on the basis of the Turkey–France BIT of 2006. The case was registered on 10th September 2013, the arbitrator appointed by the Claimant accepted his appointment on 3rd February 2014, and the arbitrator appointed by the Respondent accepted his appointment on 14th February 2014. ICSID Convention Arbitration Rules applied and French was the language of the arbitration. This case is now concluded following a procedural order issued by the Secretary General on 2nd March 2018 taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 45 (i.e. when the parties fail to take any steps for a period exceeding six consecutive months or such other period as the parties may agree with the approval of the Tribunal). The effect of such an order is not to dispose of any of the claims raised by the parties. The claims can therefore be raised again in subsequent proceedings.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Christophe Dugué, ACIArb, Avocat au Barreau de Paris
Tel: +33 6 1525 1425 / Email: cdugue.law@outlook.fr

Admitted to the Paris Bar (1992) Christophe Dugué serves as arbitrator and acts as counsel in international arbitration cases.

With over two decades of experience in international arbitration in institutional (especially ICC, AFA, CAIP and Swiss Rules) and *ad hoc* (including UNCITRAL) arbitration cases, Christophe Dugué regularly serves as chairman, sole arbitrator or co-arbitrator in ICC, AFA and *ad hoc* international arbitration proceedings (appointments by the parties, by the ICC and by the AFA).

He also acts as counsel and has been involved as lead counsel in cases with parties from Asia, Africa (North Africa, West and South Africa), Europe, the Middle East and North America and has represented clients ranging from individuals and mid-sized companies to Government-owned entities and major international corporations.

He practises both in English and French, under a variety of applicable laws from both civil law and common law jurisdictions.

Cases involved industries such as banking, chemicals, construction (including FIDIC), defence, energy, IT, infrastructures, joint-ventures, M&A, mining, oil & gas, private equity and transport infrastructure industries, amongst others.

Christophe Dugué's former experience includes notably 10 years as a Partner at Shearman & Sterling LLP's international arbitration practice group in Paris and also the creation of an international arbitration boutique firm in Paris.

Christophe Dugué is an associate member of the Chartered Institute of Arbitrators (CIArb), and a member of the International Arbitration Institute (IAI), the Comité Français de l'Arbitrage (CFA), the Swiss Arbitration Association (ASA), the Association Française d'Arbitrage/Association For Arbitration (AFA). He is on the panel of arbitrators of the Asian International Arbitration Centre (AIAC) since 2014 and also on the list of neutrals of the Mediation & Conciliation Network (MCN), India.

Christophe Dugué, Avocat au Barreau de Paris

Tel: +33 6 1525 1425 / Email: cdugue.law@outlook.fr
https://fr.linkedin.com/in/christophe-dugué-24b5233a

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Germany

Catrice Gayer & Thomas Weimann
Herbert Smith Freehills Germany LLP

Introduction

Germany – Arbitration-friendly civil law jurisdiction

The use of arbitration as a dispute-resolution mechanism in Germany has a long-standing tradition. In most areas of business and commerce, institutional and *ad hoc* arbitration is commonly and successfully used. German arbitration law is part of the German code of civil procedure (*Zivilprozessordnung* ("ZPO")) and is contained in Sections 1025 to 1066[1] thereof.

The ZPO is based on the UNCITRAL Model Law on International Commercial Arbitration of 1985 ("ML"). Therefore, users will find it particularly easy and predictable to apply.

Under the principle of territoriality, the ZPO is applicable to all arbitrations with a place of arbitration in Germany (Section 1025(1)). Further, the ZPO applies to all arbitrations whether *ad hoc* or institutional. German lawmakers opted for a unified system: the ZPO provides a single set of rules for national and international arbitration.

Currently, a working group of the Federal Ministry of Justice is analysing if the ZPO needs to be revised.

Germany is a signatory state of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention or "NYC").

Germany has not declared a commercial or reciprocity reservation (Article I(3) NYC). Pursuant to Section 1061(1), recognition and enforcement of foreign arbitral awards is governed by the NYC. Germany has also ratified, *inter alia*, the European Convention on International Commercial Arbitration of 1961 ("European Convention").

German lawmakers decided to grant functional competence for arbitration-related matters to the regional higher courts (*Oberlandesgericht* ("OLG") (Section 1062)) (e.g. appointment and challenge of arbitrators; setting aside and enforcement of (foreign) awards and orders for interim measures; declaring arbitration proceedings admissible). This usually ensures consistent, quick and arbitration-friendly decisions. An appeal against orders of the OLG is limited to complaints on a point of law (*Rechtsbeschwerde*) with the German Federal Court of Justice (*Bundesgerichtshof* ("BGH")) (Sections 1065(1), 1062(1) Nos. 2 and 4).

The most well-known arbitration institution in Germany is the German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit* ("DIS")). The DIS administers national and international arbitration proceedings under the DIS arbitration rules, which have been revised. The new DIS Rules entered into force on 1 March 2018 ("DIS Rules 2018").

A number of industry-focused arbitration institutions exist in Germany (e.g. German Maritime Arbitration Association ("GMAA"), *Waren-Verein der Hamburger Börse*, as well

© Published and reproduced with kind permission by Global Legal Group Ltd, London

as arbitration institutions with stock and commodity exchanges). The Chinese European Arbitration Centre (CEAC) administers international Asia-related arbitration proceedings.

The Rules of Efficient Conduct of Proceedings in International Arbitration ("Prague Rules") were signed in December 2018. The working group consisted of mainly civil law arbitration practitioners (including Germans).

Arbitration agreement

Does the principle of competence-competence apply?

According to the *Kompetenz-Kompetenz* principle, an arbitral tribunal can decide on its own jurisdiction (Section 1040(1) sentence 1). An arbitral tribunal's decision assuming jurisdiction is not binding or final for a court. Any agreement by parties to confer the final and binding decision to an arbitral tribunal is not valid, but in principle, will not invalidate the arbitration agreement as a whole.

Jurisdiction and preliminary rulings of arbitral tribunals

If a party raises objections regarding the jurisdiction of the arbitral tribunal (Section 1040(2)), the arbitral tribunal can assume jurisdiction by way of a preliminary ruling (Section 1040(3)). A preliminary ruling is not an award for the purposes of setting-aside proceedings (Section 1059). The ZPO provides a special procedure to have the ruling overturned (Section 1040(3)). The opposing party must file an application with the court within one month after its receipt. Otherwise, the opposing party is precluded from invoking the invalidity of an arbitration agreement in any post-award proceedings. An arbitral tribunal can render an award, although the proceedings under Section 1040(3) are still pending. Reversing its own case law, the BGH recently held that the issuance of an award does not render the application (Section 1040(3)) inadmissible. Further, the three-month deadline for the award debtor to file a setting-aside application against the award will only start to run after the service of the court's decision (Section 1040(3)) denying the jurisdiction of the arbitral tribunal (by way of analogy of Section 1059(3) sentence 2) (BGH, 9.8.2016, NJW 2017, 488).

Does the principle of separability apply?

The arbitration agreement is an agreement independent of the existence, validity or termination of the main contract (Section 1040(1) sentence 2).

What are the substantive mandatory requirements of an arbitration agreement?

According to Section 1029(1), an arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

The first requirement of a "defined legal relationship" only precludes the validity of arbitration agreements providing that all future disputes between the parties, without any reference to a specific relationship (e.g. a specific contract or framework agreement) will be resolved by arbitration.

The fulfilment of the second requirement often raises problems: the parties' agreement to submit all or certain disputes to arbitration. It is essential that it can be clearly and unambiguously derived from the arbitration agreement that the parties' intention was to exclude the state courts as a dispute-resolution forum, and to have any disputes resolved by arbitration. If this requirement is fulfilled, courts enforce arbitration agreements even if the arbitration institution is not unambiguously designated (e.g. KG Berlin, 3.9.2012, SchiedsVZ 2012, 337).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Likewise, the parties should clearly use the term arbitration and avoid terms such as conciliation, mediation, expert determination, or any other form of alternative dispute resolution. The parties can still agree on multi-tier arbitration agreements.

Non-mandatory requirements

It is highly recommended for parties to agree on non-mandatory issues in the arbitration agreement:

- set of arbitration (institutional or *ad hoc*) rules (e.g. of the DIS, ICC, VIAC, SIAC);
- place of arbitration (e.g. Düsseldorf, Germany);
- number of arbitrators and/or procedure for the constitution of the arbitral tribunal; and
- language of the arbitration.

If the parties wish to apply institutional arbitration rules, it is highly advisable to use the model arbitration clauses of the various arbitration institutions. The latter publish their model clauses on their official websites in various languages.

Emergency arbitrator and expedited proceedings rules – opt in or opt out?

Parties need to carefully check whether emergency arbitrator or expedited proceedings rules apply automatically by agreeing on a set of institutional rules ("opt-out system" (e.g. Article 29(6)b) ICC Rules) or whether they have to explicitly agree to the application of these rules in the arbitration agreement ("opt-in system", e.g. Article 45(1) VIAC Rules). Under the DIS Rules 2018, the arbitral tribunal shall discuss the application of the rules of the expedited proceedings with the parties in the case management conference (Section 27.4 (ii) and Annex 4 DIS Rules 2018). The parties should also agree on the rules of law governing the dispute in their choice-of-law clause (Section 1051).

(International) mandatory rules and arbitration agreements

Counsel and in-house lawyers need to be particularly considerate of (internationally) mandatory rules when drafting an arbitration agreement and a choice-of-law clause in an agency agreement. The rights of an agent to claim indemnity or compensation – after the principal's termination of an agency agreement – is enshrined in the national laws of the member states of the EU based on Articles 17–19 of Council Directive 86/653/EEC.

Articles 17–19 are qualified as internationally mandatory rules, if an agent operates its principal activity and has its seat in the EU (ECJ, Ingmar, C-381/98, EuZW 2001, 50). An arbitration agreement providing for a place of arbitration outside of the EU in tandem with a choice-of-law clause for the governing law of a non-EU country was refused enforcement by a court in Germany (OLG München, 17.5.2006, WM 2006, 1556). The court held that this tandem would pose a "reasonable threat" that an arbitral tribunal (e.g. seated in California) would not apply an agent's mandatory claim for compensation.

In 2016, the BGH overturned the highly disputed decision of the OLG München *in causa* Pechstein (OLG München, 15.1.2015, SchiedsVZ 2015, 40). The BGH held that the arbitration agreement between the ice speed skater Claudia Pechstein and the ISU was valid (BGH, 7.6.2016, SchiedsVZ 2016, 268). It ruled, in particular, that the arbitration agreement would not violate: (i) the German antitrust law prohibition on abuse of a market-dominant position (Section 19(1) of the German code against restraints of competition (*Gesetz gegen Wettbewerbsbeschränkungen* ("GWB")); (ii) the fundamental right to free exercise of profession (Article 12(1) GG (German constitution)); or (iii) the right to fair proceedings under Article 6 of the European Convention of Human Rights ("Convention").

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Claudia Pechstein initiated proceedings with the ECHR, claiming the violation of her right under Article 6 of the Convention. The ECHR held that Pechstein had not accepted the arbitration agreement freely: had she not accepted it, she could not have practised professional sports at this level. Therefore, the ECHR held that – contrary to voluntary arbitration proceedings – Pechstein had not waived her rights under Article 6. The ECHR ruled that the CAS was an independent and impartial body and in this respect Article 6 was guaranteed. But Pechstein's right to fair proceedings was violated as her hearings were not held in public (ECHR, 2.10.2018, 67474/10).

Form requirements of an arbitration agreement

Section 1031 requires an arbitration agreement to fulfil the "writing" requirement. Only arbitration agreements between businessmen (Section 14 of the German civil code (*Bürgerliches Gesetzbuch* ("BGB"))) not involving consumers, will be addressed herein.

An orally concluded arbitration agreement does not suffice. The writing requirement is fulfilled if the agreement is signed by the parties or if it is contained in an exchange of letters, telefaxes or other means of telecommunication (e.g. emails (OLG Celle, 2.8.2018, BeckRS 2018, 17805)), which provide a record of the agreement. The list of means of communication in Section 1031(1) is not exhaustive.

Unlike the ML, Section 1031(2) also provides a more lenient writing requirement. An arbitration agreement is deemed to be in writing if it is contained in a document transmitted from one party to the other party. Unless the receiving party raises objections without undue delay, the contents of the document, and thus the arbitration agreement, become part of the contract in accordance with common usage. Thus, an exchange of means of telecommunications containing the arbitration agreement is not required. Section 1031(2) is of high practical importance in business transactions. Often, contracts are concluded orally and one party confirms the content of the agreement by a commercial letter of confirmation (*kaufmännisches Bestätigungsschreiben*). If such a letter reflects the result of the negotiations without significant deviations, the recipient will be deemed to be bound by the contract, unless the recipient objects without undue delay.

A contract, complying with the form requirements of subsections 1 or 2 of Section 1031 (signature, exchange of means of communications, failure to raise objections), can also contain a reference to a separate document containing an arbitration agreement. Often, arbitration agreements are included in separate standard terms and conditions ("STC"). As long as the reference is such as to make the arbitration agreement part of the contract, the form requirements are fulfilled (Section 1031(3)).

The assessment of the validity of an arbitration agreement in STC is two-fold:

- *First*: An arbitration agreement will be validly incorporated into the contract, if the reference is unambiguous and the recipient had the opportunity to review the arbitration agreement (actual review is not required). In recent decisions, courts confirmed that the threshold for a valid incorporation is low. It is sufficient to send the STC containing the arbitration agreement to the other party. It is not necessary to send the institutional rules (referred to in the arbitration agreement) to the other party as long as they are publicly available (e.g. on the website of the arbitration institution) (KG Berlin, 13.6.2016, 20 SchH 1/16).
- *Second*: If German law governs this question, the validity of the STC, and thus of the arbitration agreement itself, is subject to the specific validity requirements set out in Sections 305(1), 307(1), (2) BGB (also applicable between businessmen (Section

© Published and reproduced with kind permission by Global Legal Group Ltd, London

310(1) BGB)). An arbitration agreement which fulfils the requirements of a just constitution of an arbitral tribunal and a fair treatment of the parties will be usually considered valid.

Full review of the arbitration agreement and special procedure for admissibility of arbitration proceedings

In case a party initiates court proceedings in violation of an arbitration agreement, the opposing party must invoke the existence of the arbitration agreement prior to the beginning of the oral hearing (Section 1032(1)) (*Schiedseinrede*). Otherwise, it will be deemed that the opposing party has waived its right to arbitrate. The party initiating the court proceedings bears the burden of proof for the invalidity of the arbitration agreement.

Further, the ZPO stipulates a special procedure not mirrored in the ML: a party can file an application with the OLG to determine, in particular, whether the arbitration agreement is valid (Sections 1032(2), 1062(1) No. 2). This application is admissible even if a party has already initiated arbitration proceedings, as long as the arbitral tribunal has not been constituted yet (BGH, 8.11.2018, BeckRS, 37260).

Both procedures (Sections 1032(1) and (2)) apply also if the place of arbitration is outside of Germany (Section 1025(2)). In principle, the courts will make a full review of the validity of the arbitration agreement at this pre-arbitration stage. In many other jurisdictions, the courts assess the validity of the arbitration agreement only on a *prima facie* basis at such a stage, and make a full review only in post-award proceedings. The German approach ensures that parties do not spend time and costs on arbitration proceedings, resulting in an arbitral award which will be set aside or refused enforcement due to an invalid arbitration agreement.

What disputes are arbitrable?

Any claim involving an economic interest is arbitrable. Thus, any monetary claims, also involving questions of antitrust law, the use of intellectual property rights ("IPR"), etc., are arbitrable. The term "economic interest" is broadly interpreted. Further, even claims not involving an economic interest are arbitrable, if the parties are entitled to conclude a settlement on the issue in dispute (Section 1030(1)).

Disputes on the existence of a lease of residential accommodation within Germany are not arbitrable (Section 1030(2)). Due to the rising importance of disputes arising out of (patent) licence agreements, it has been recently heavily discussed in the German arbitration community whether the validity of patents is arbitrable (at least with *inter partes* effect between the parties of the arbitration).

Scope of an arbitration agreement

In a recent decision, a regional court in Germany decided that follow-on damage claims – based under German law on e.g. Section 33 GWB and to be qualified as tortious claims – fall within the scope of a model arbitration clause ("arising out of" or "in connection with") contained in a supply agreement between a claimant and a respondent/cartelist supplier (LG Dortmund, 13.9.2017, NZKart 2017, 604). The court stressed that the ECJ's interpretation principles as to whether forum selection clauses comprise follow-on damage claims (CDC/Akzo Nobel *et al* (ECJ, C-352/13)) are not applicable to arbitration clauses.

What rules exist for joinder/consolidation of third parties?

The ZPO does not provide any rules for joinder and consolidation of third parties. The parties can agree on institutional rules providing for these cases (e.g. Article 7 ICC Rules or Section 19 DIS Rules 2018). If German law applies to this question, a third party might

© Published and reproduced with kind permission by Global Legal Group Ltd, London

be bound to an arbitration agreement, if rights and obligations arising out of a main contract containing it, have been validly assigned.

The question whether a natural person – acting as legal representative on behalf of a corporate entity, but being not party to the main contract – is bound by an arbitration agreement between the corporate entity and a third party, is disputed. In a recent decision, it was held that it does not suffice that the natural person was involved in the execution of the arbitration agreement. Such an extension of the arbitration agreement to the natural person requires that it is clear from its wording (or at least its interpretation) that the natural person shall be within the scope of the arbitration agreement (OLG München, 16.1.2019, BeckRS 2019, 342).

Arbitration procedure

Commencing arbitration proceedings

Pursuant to Section 1044, arbitration proceedings commence on the date on which a request for a dispute is received by the respondent. Many institutional rules, if agreed upon by the parties, deem proceedings to be commenced on the date on which the institution receives the request for arbitration (e.g. Article 4(2) ICC Rules or Section 6.1 DIS Rules 2018).

The request under Section 1044 has only to state the names, the subject matter of the Dispute, and contain a reference to the arbitration agreement. If the parties agree on a set of institution rules, the requirements of a request for arbitration (Article 4(3) ICC Rules or Section 5.2 DIS Rules 2018) are much more elaborate than under Section 1044. A claimant has, e.g., to also state the relief sought, nominate an arbitrator and set out the facts giving rise to the claims.

If German substantive law applies to this question, the statute of limitations period is suspended on the date the arbitration proceedings begin (Section 204(1) No. 11 BGB).

Can hearings take place outside of the place of arbitration?

Yes, according to Section 1043(2), unless the parties agree otherwise.

What are the rules on evidence?

Except for mandatory provisions of the ZPO (in particular, the right to be heard, equal treatment of the parties and representation by counsel (Sections 1042(1) and (2)), the parties are free to determine the procedure themselves or by reference to institutional rules (Section 1043(3)). Failing an agreement of the parties, the arbitral tribunal has wide discretion to conduct the arbitration as it considers appropriate (Section 1043(4)).

The applicable rules on evidence will depend, *inter alia*, on the legal background of the arbitrators and parties, the nature of the dispute and the parties' expectations. Arbitral tribunals and parties can therefore tailor-make the procedure.

It is good practice, mostly at the beginning of the proceedings, that an arbitral tribunal will issue special procedural rules and a procedural order no.1 after having heard the parties. The DIS Rules 2018 enhance the German tradition of pro-active arbitrators in order to make proceedings more efficient, quicker and cost-effective, stipulating a mandatory agenda for the case-management conference. Irrespective of whether the arbitration is international or national, the arbitrators need to address during the conference whether the parties confer upon the arbitral tribunal the explicit power to give a preliminary assessment of the merits of the case (Section 27.4 (i) and Annex 3).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Arbitral tribunals lack coercive powers. They cannot compel witnesses or experts to appear. They cannot administer oaths. Further, they cannot order a third party to produce documents. A party, with the approval of the arbitral tribunal, or the arbitral tribunal itself, can request a court to assist in the taking of evidence or to perform other judicial acts (Section 1050).

Taking of evidence in national arbitrations

The continental civil law tradition of Germany, and a limited inquisitorial approach, will prevail. Written witness statements are the exception. During an evidentiary hearing, an arbitral tribunal will examine witnesses first. Counsel to parties will typically ask additional, in particular, follow-up questions to the witness to test the witness' credibility and the probative value of the statement. An arbitral tribunal may give directions, such as which facts it considers (ir)relevant, and give a preliminary assessment on the merits of the case, unless the parties agree otherwise. Document production between the parties is the exception. Some of these traditions are also reflected in the Prague Rules (e.g. Articles 2.4 and 4.2).

Parties can appoint their own experts. Further, the ZPO provides a framework for arbitral tribunal-appointed experts (Section 1049), subject to the parties' agreement. The arbitral tribunal may appoint one or several experts, and order a party to give the expert any relevant information or to produce, or grant access, to any relevant documents (Section 1049(1)). Experts have a continuing obligation to be impartial and independent (Sections 1049(3), 1036). Otherwise, a party can challenge the expert. This challenge procedure is a special feature of the ZPO, not provided for in the ML. The deadline is two weeks after becoming aware of the expert's appointment or after becoming aware of the circumstances giving rise to the challenge (Sections 1049(3), 1037(2)).

The arbitral tribunal will decide on the expert's challenge. Recourse to the state courts against an arbitral tribunal's dismissal of such a challenge is excluded (e.arg. Section 1049(3)), but an award debtor can later invoke the expert's lack of impartiality and independence in post-award proceedings (Section 1059(2) No. 1(d), Article V(1)(d) NYC). Sometimes the information raising doubts as to the impartiality and independence of an expert only becomes known after the award is issued, because the expert violated its ongoing disclosure obligation. Under the former jurisprudence of the BGH, an award debtor may challenge the award with this new information only in particularly serious and manifest cases of an expert's lack of impartiality and independence. The BGH reversed this case law and applies now a more lenient threshold: the new information must – from an *ex ante* perspective – raise doubts as to the impartiality and independence sufficient to challenge the expert (BGH, 2.5.2017, SchiedsVZ 2017, 317).

Taking of evidence in international arbitrations

Written witness statements are commonly used. In particular, if a common-law party is involved, the examination of witnesses will follow the common law tradition (direct, cross and re-examination). Sometimes also a hybrid system between common and civil traditions will be adopted.

As regards document production, arbitral tribunals use the IBA Rules on the Taking of Evidence (of May 2010) (Article 3) ("IBA Rules") as guidelines. Usually they will clarify in the special procedural rules that they are not bound by them and use Redfern schedules. Subject to the circumstances of the case, German arbitration practitioners apply the requirements of document production under Article 3 IBA Rules rather strictly (the law applicable to the merits, the burden of proof, and the involvement of a party from a common law jurisdiction often plays a role). This strict approach minimises costs and increases the

© Published and reproduced with kind permission by Global Legal Group Ltd, London

efficiency and speed of arbitration proceedings. It is common practice that the parties appoint experts. The IBA Rules (Articles 5 and 6) are often used as guidelines. German arbitration practitioners in international arbitrations also use witness conferencing with experts and witnesses.

What rules are applicable regarding privilege and disclosure?

In civil court proceedings, in principle, discovery or disclosure of documents by an opposing party does not exist. The threshold under the exceptions (e.g. Sections 422, 423, 142) is very high. Accordingly, rules regarding privilege do not exist either in the ZPO. In international arbitrations in Germany, various approaches to determine the applicable law to the question of privilege, and different concepts of privilege in numerous jurisdictions, often arise under the IBA Rules (Article 9(2)(b)). Therefore, German arbitration practitioners are experienced in finding appropriate solutions, ensuring a level playing field between parties from different jurisdictions.

Are arbitration proceedings confidential? Can the evidence and pleadings be kept confidential?

The ZPO is silent on whether arbitration proceedings are confidential.

The BGH held that an arbitrator has a confidentiality obligation under his/her arbitrator's contract with the parties (BGH, 5.5.1986, NJW 1986, 3077, 3078), unless the contrary is clearly indicated.

As regards the confidentiality obligations of parties, the legal situation is not clear: if the parties have not explicitly agreed in their contract or in their arbitration agreement on the confidentiality of the arbitration proceedings, it is subject to scholarly debate whether an implied obligation can be derived from either of the contracts.

Therefore, in practice, the parties and the arbitral tribunal often conclude a confidentiality agreement at the outset of the arbitration proceedings (e.g. in the terms of reference of ICC proceedings). The wording of such a confidentiality agreement should be broad, so it also encompasses e.g. the parties' pleadings, expert reports and witness statements. Unlike the ICC Rules, Section 44.1 DIS Rules 2018 obliges, *inter alia*, parties, counsel and arbitrators to keep the arbitration confidential.

Experts, witnesses, court reporters, etc. are not bound by such a confidentiality agreement. Therefore, separate agreements should be concluded with them.

Arbitrators

Appointment of arbitrators

Unless the parties agree otherwise, the number of arbitrators shall be three (Section 1034(1)).

Party autonomy also prevails as regards the procedure of the appointment of the arbitral tribunal (Section 1035(1)). Failing an agreement by the parties, the default rules of the ZPO provide a standard procedure: in case of a three-member tribunal, each party appoints its own arbitrator and the two party-appointed arbitrators shall appoint the chairman. Should a party fail to appoint its own arbitrator and subsequently fail to do so within one month of a request by the other party, the other party may request the court to make the appointment. In case the party-appointed arbitrators fail to agree on the chairman within one month of their appointment, or in case the parties fail to agree on a sole arbitrator, the court will make the appointment upon request of a party (Section 1035(3)).

The ZPO stipulates a special procedure, not mirrored in the ML, which safeguards, also between businessmen,[2] an equal treatment of the parties in the constitution of the arbitral

© Published and reproduced with kind permission by Global Legal Group Ltd, London

tribunal (Section 1034(2)). This procedure allows a court, upon application of one party, to appoint a substitute arbitrator if the arbitration agreement grants preponderant rights to one party (e.g. only one party has the right to nominate the sole arbitrator or the chairman). The disadvantaged party must make the application within two weeks after becoming aware of the constitution of the arbitral tribunal.

Deviating from the ML (Article 11(1)), the ZPO does not prohibit persons from acting as an arbitrator due to their nationality, unless the parties agree otherwise (e.g. Article 13(5) ICC Rules). Depending on the matter in dispute, engineers, accountants, etc. are nominated as arbitrators, particularly in national arbitrations. In contrast to its previous version, the DIS Rules 2018 no longer require a sole arbitrator or the president to be a lawyer.

How can arbitrators be challenged?

Arbitrators must be impartial and independent (Section 1036). Their duty to disclose circumstances that give rise to justifiable doubts as to their impartiality or independence is ongoing from the time of their appointment (Section 1036(1) sentence 2). Otherwise, they can be challenged (Section 1036(2)).

As regards challenges, a two-tier system applies: first, a party has to file a challenge (a "written statement of the reasons of the challenge") with the arbitral tribunal. The deadline is two weeks after the constitution of the arbitral tribunal or after the challenging party becomes aware of the circumstances enumerated in Section 1036(2) (1037(2) sentence 1).

In practice, the challenged arbitrator – even if not obligated to do so by law – often refrains from participating in the tribunal's decision on the challenge.

Second, if the challenge is dismissed, the challenging party may apply to the OLG (within one month) to decide on the challenge (Sections 1037(3) sentence 1, 1062(1) No. 1).

Otherwise the challenging party is precluded from invoking in post-award proceedings that the arbitral tribunal was not properly constituted (Section 1059(2) No. 1(d) or Article V(1)(d) NYC) (unless public policy applies). The OLG is not bound by the decision of the arbitral tribunal or a third party (e.g. ICC Court (Article 14 ICC Rules) or DIS Arbitration Council (Section 15.4 DIS Rules 2018)). The parties cannot validly waive recourse to the courts under Section 1037(3). A complaint on a point of law against a decision of the courts with the BGH is not admissible (Section 1065(1)).

The IBA Guidelines on Conflicts of Interest in International Arbitration of 2014 ("IBA Guidelines") are widely known and used by arbitrators in Germany. Some courts tend to apply the standard applicable to state judges in order to assess whether facts give raise to justifiable doubts as to an arbitrator's independence and impartiality (Section 42 (2) ZPO (OLG Frankfurt, 24.1.2019, BeckRS 2019, 848, para. 71)). In this respect, courts tend also to consider the principles (red, orange and green lists) laid down in the IBA Guidelines. The courts do not explicitly refer to or stress not to be bound by the IBA Guidelines (e.g. OLG Frankfurt, 24.1.2019, BeckRS 2019, 848, paras 89 *et seqq*.)

The regional higher court of Berlin decided that an arbitrator giving a preliminary assessment of the merits of a case does not give raise to justifiable doubts as to his independence and impartiality (KG Berlin, 13 SchH 2/17, 12.2.2018, NJ 2018, 206).[3]

How is an arbitrator's mandate terminated?

It is terminated, in particular:

- if an award is issued (the arbitral tribunal becomes *functus officio*);
- if an arbitrator withdraws from his/her office;

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- by a court's decision in a challenge procedure to remove the arbitrator (Section 1037);
- by a court's decision to remove the arbitrator, if an arbitrator becomes *de jure* (e.g. legal incapacity) or *de facto* unable to perform his functions (Section 1038(1) sentence 2); or
- if the parties agree to terminate the arbitrator's mandate.

Immunity of arbitrators

Arbitrators are generally immune from liability for damages in their capacity as a decision-maker. They cannot be held liable if they render a decision that is legally incorrect, except for cases of intentional breach of duty (e.g. Section 45.1 DIS Rules 2018) or criminal offences. They enjoy more or less the same privilege as German state judges (by way of analogy of Section 839(2) BGB).

However, arbitrators are generally liable for breaches of their contract with the parties, in particular, in cases, where they:

- resign without good cause;
- fail to disclose circumstances which may lead to a challenge for lack of impartiality
- or independence; or
- unduly delay or even refuse to continue with the arbitration proceedings.

In their contract with the arbitrators or by reference to institutional rules, the parties can agree to restrict (e.g. Section 45.2 DIS Rules 2018) or exclude the arbitrator's liability (e.g. Article 40 ICC Rules). The validity of the restriction or exclusion is subject to the applicable law.

Interim relief

Can the parties apply with both courts and tribunals for interim relief?

Under the ZPO, the parties to an arbitration agreement are free to choose whether to seek interim relief with a court or an arbitral tribunal (Sections 1033, 1041). The parties can opt out of seeking interim relief with arbitral tribunals (Section 1041(1)). Whether the parties can also validly waive recourse to the courts (at the place of arbitration) is disputed among scholars and courts. In a recent decision, a court held that the parties' agreement in an arbitration clause (with place of arbitration in Germany) to exclusively grant a state court in the US the jurisdiction for interim measures was not valid (LG Bonn, 29.5.2018, BeckRS 2018, 11467).

Before or during arbitration proceedings, a party can request a court to order interim relief (Section 1033), even if the place of arbitration is outside of Germany (Section 1025(2)) and if the court assumes international jurisdiction. In practice, German courts can order interim relief, subject to the circumstances and the fulfilment of certain requirements, *ex parte* and within 24 hours.

What types of interim relief are available to parties?

Courts may, for example, grant: (i) a pre-award attachment (Arrest) to secure a monetary claim; (ii) a preliminary injunction (*einstweilige Verfügung*) to secure any other claim; or (iii) a procedure to preserve evidence (*selbstständiges Beweisverfahren*).

Arbitral tribunals have a wider discretion than courts as regards the types of interim relief they can order. Contrary to courts, arbitral tribunals can only order interim measures against the parties to the arbitration agreement. Lacking coercive powers, arbitral tribunals cannot enforce interim measures if a party does not voluntarily comply with them. Upon request of a party, a court can enforce them (Section 1041(2)). When ordering the enforcement, the

© Published and reproduced with kind permission by Global Legal Group Ltd, London

court will not review the merits (prohibition of the *révision au fond*) (OLG Brandenburg, 25.7.2018, BeckRS 2018, 33168).

If the opposing party can prove that the interim measure – ordered by the court or an arbitral tribunal – was unjustified from the outset, the applicant is liable for damages (Sections 945, 1041(4)) resulting from the enforcement of such a measure.

Arbitration award

Formal requirements for an arbitration award

An award must:

- be in writing;
- be signed by the sole arbitrator or, in case of a three-member tribunal, by its majority;
- state the reasons upon which the arbitral tribunal has based its decision (unless the parties agree otherwise); and
- state the date of the award and the place of the arbitration (Section 1054).

A copy of the award signed by the arbitrators must be delivered to each party. A specific form of delivery is not required (Section 1054(4)).

Is a time frame stipulated for the arbitration award?

Unless agreed otherwise by the parties, the ZPO does not specify a time frame for rendering the award.

Can an arbitral tribunal order costs for the parties? If yes, under what criteria?

An arbitral tribunal has the power to allocate the costs of the arbitration at its discretion, unless the parties agree otherwise (Section 1057). By exercising such discretion, the arbitral tribunal must take into account all circumstances of the case, particularly its outcome. In practice, German arbitration practitioners usually follow the "costs follow the event" rule. Depending on the circumstances of the case, arbitral tribunals may also take into account e.g. "guerrilla tactics", or the outcome of jurisdictional objections, or voluminous requests to produce.

Can interest be included in the award and/or costs?

An arbitral tribunal can grant interest in the award if a party has filed a respective claim. Otherwise, granting interest would qualify as an *ultra petita* ruling and constitute a ground for setting aside or refusing the enforcement of an award (Section 1059(2) No. 1(c) and Article V(1)(c) NYC).

Challenge of the arbitration award

On what grounds can an award be challenged?

According to Section 1059(2) (mirroring Article 34(2) ML), an award may be set aside only if:

1. the applicant shows sufficient cause that:
   (a) a party to the arbitration agreement was under some incapacity or the arbitration agreement is not valid; or
   (b) the opposing 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; or
   (c) the arbitral tribunal has exceeded its authority; or
   (d) the composition of the arbitral tribunal or the arbitration proceedings was not in

© Published and reproduced with kind permission by Global Legal Group Ltd, London

accordance with the ZPO or with an admissible agreement of the parties and this presumably affected the award; or

2. the court finds that:
   (a) the subject-matter lacks objective arbitrability under German law; or
   (b) recognition and enforcement of the award would violate public policy.

Section 1059(2) provides an exhaustive list of grounds on the basis of which an award can be set aside. The grounds in No. 1 have to be pleaded by the applicant ("[…] shows sufficient cause […]"). The grounds in No. 2 are considered by the court *ex officio* ("[…]the court finds […]"). A review of the merits by a court is not admissible (prohibition of the *révision au fond*).

The wording of Section 1059(2), "may be set aside", has to be read as "shall be set aside". A court does not have any discretionary powers: it has to set aside an award if a ground exists. An oral hearing is mandatory (Section 1063(1), first alternative).

Deviating from the ML (Article 34(4)), Section 1059(4) provides that a court will set aside the award and remit the case, in appropriate cases, to the arbitral tribunal. Further, Section 1059(5) stipulates that the arbitration agreement becomes operative again once the award has been set aside (except if the arbitration agreement is invalid).

Before arbitration proceedings are initiated, parties cannot validly waive setting-aside proceedings. After the award is issued or once a party becomes aware of a circumstance giving rise to invoke a ground listed in Section 1059(2) No. 1, a waiver to invoke this ground is valid. The grounds of No. 2 of Section 1059(2) (lack of objective arbitrability and violation of public policy) cannot be validly waived.

Is it possible to modify the arbitration award?

An application for the correction, interpretation or an additional award with the arbitral tribunal is admissible within one month after receipt of the award, unless agreed otherwise by the parties (Section 1058(1), (2)).

Recent examples of successful and unsuccessful challenges of arbitral awards

A recent order of the OLG München illustrates the general approach of courts to apply the grounds under Section 1059 in setting aside proceedings restrictively (OLG München, 9.11.2015, SchiedsVZ 2015, 303). The applicant argued that the arbitral tribunal had incorrectly applied the applicable law. The OLG confirmed the prohibition of the *révision au fond* in post-award proceedings. It held that an award would only violate *ordre public* (Section 1059(2) No. 2(b)) if the violated provision is not only mandatory, but forms the basis of a functioning public or economic life.

Further, the OLG held that the threshold of the violation of a party's right to be heard is high (Section 1059(2) No. 1(b), (d), No. 2(b)): if an arbitral tribunal has given a legal assessment of the merits of the claim, it can deviate from this assessment in the award. The right to be heard is only violated if the arbitral tribunal failed: (i) to inform the parties of the change of legal assessment; and (ii) to grant them the right to comment upon the amended legal assessment. The OLG also confirmed that arbitral tribunals do not have to address in a complete and exhaustive manner in the award every legal and factual argument submitted by the parties (see also OLG Frankfurt, 3.1.2018, BeckRS 2018, 3303, para. 31). Only if the reasons of the award are, in particular, self-contradictory, can an award be set aside for violation of Section 1054(2) (Section 1059(2) No. 1(d)).

Courts in Germany can remit the case to the tribunal after having set aside the award (Section 1059(4)), but only upon application of a party. In a recent decision, the BGH held that

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Section 1059(4) also applies *mutatis mutandis* if a court refuses to declare a domestic award enforceable according to Section 1060 (2) sentence 1 (and thereby sets aside same award) (BGH, 7.6.2018, SchiedsVZ 2018, 318).

Enforcement of the arbitration award

The application in enforcement proceedings is admissible if:

- it is in writing or put on record at the court registry (Section 1063(4)); and
- if the award or a certified copy is annexed to the application (Section 1064(1)).

The stricter admissibility requirements under Article IV NYC (e.g. original or duly certified copy of the arbitration agreement; translation of the award into official language of enforcement state) do not apply (Article VII(1) NYC). In practice, the applicant submits a translation of the award, or at least of its operative part.

A foreign award can be refused enforcement based on the reasons of Article V NYC.

Can an arbitration award be enforced if it has been set aside at the seat of arbitration?

An OLG has to refuse enforcement of an award which has been validly set aside (Article V(1) (e) NYC). If the European Convention applies, the application of Article V(1)(e) NYC is limited. Pursuant to Article IX(2) European Convention, a court can refuse enforcement only if the award has been set aside for reasons stated in Article IX(1)(a)-(d) European Convention (being identical to the reasons set out in Article V(1)(a)-(d) NYC). If an award has been set aside, e.g. for violation of public policy or lack of arbitrability at the place of arbitration, Article V(1)(e) NYC cannot be applied by the courts in Germany under the European Convention.

Trends in enforcement

The vast majority of foreign awards are enforced in Germany. In a recent decision, the BGH confirmed the distinction between the German *ordre public national* and *international* (BGH, 2.3.2017, NJOZ 2017, 802). The enforcement of foreign awards under the NYC is only subject to the German *ordre public international*, the standard of which is more lenient than the German *ordre public national.* Enforcement of a foreign award will only be refused if the arbitration proceedings have a serious defect affecting the basis of public and economic life.

Counsel and award debtors have to be aware of the "preclusion" case law in Germany: is an award debtor precluded from invoking grounds under Article V NYC in enforcement proceedings in Germany if he fails to invoke the same grounds in setting-aside proceedings within the statutory time limits of the *lex loci arbitri*? The BGH had to decide on this question of preclusion only for the invalidity of arbitration agreements (Article V(1) (a) NYC). It held that an award debtor is not precluded from invoking the invalidity of an arbitration agreement in enforcement proceedings, even if he had not initiated setting-aside proceedings invoking the same ground (BGH, 16.12.2010, NJW 2011, 1290). As regards any grounds other than the invalidity of the arbitration agreement (e.g. violation of right to be heard, *ultra petita* decision, flawed constitution of arbitral tribunal (Article V(1) (b), (c), (d) NYC)), this question of preclusion has not yet been decided by the BGH. Although criticised by scholars and courts, the majority view of the OLGs[4] seems to be in favour of preclusion.

Investment arbitration

Germany is currently a party to more than 130 effective BITs, the ICSID Convention and the ECT.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The BGH made a referral for a preliminary ruling to the ECJ to decide, in particular, on the compatibility of ISDS mechanisms, such as arbitration clauses in Intra-EU BITs, with Articles 344, 267 and 18 TFEU (BGH, 3.3.2016, SchiedsVZ 2016, 328 (Achmea B.V./Slovak Republic)). In September 2017, the Advocate General delivered its opinion in favour of compatibility. In March 2018, the ECJ declared that: (i) arbitral tribunals constituted under BITs do not qualify as courts for the purposes of Article 267 TFEU; and (ii) arbitration clauses in intra-EU BITs are incompatible with EU law, as they have an adverse effect on the autonomy of EU law (ECJ, 6.3.2108, C-284/16) ("*Achmea Decision*").

Public debate in Germany has further been fuelled by the ICSID arbitration pending between, *inter alia*, Vattenfall AB, a Swedish power company and Germany since 2012 (ICSID case No. ARB/12/12). Vattenfall AB made investments in a number of nuclear power plants in Germany. The ECT dispute arose from the 2011 amendment to Germany's Atomic Energy Law ("Amendment"). The Amendment stipulated that Germany's nuclear power plants are to be phased out by 2022. Vattenfall AB is claiming damages of more than €4 billion. The arbitral tribunal held a hearing on jurisdiction, merits and quantum[5] in October 2016. Following the ECJ's Achmea Decision, Germany raised jurisdictional objections, arguing that the TFEU would also preclude arbitration clauses in multilateral agreements to which the EU member states are party, such as the ECT. The tribunal dismissed the objection and upheld jurisdiction in August 2018. Germany's application to disqualify all three members of the tribunal was dismissed in March 2019. The award is still outstanding.

* * *

Endnotes

1. Unless explicitly stated otherwise, any reference to sections are those of the ZPO.
2. As defined in Section 14 BGB.
3. It has to be noted that the place of arbitration in the arbitration was in Germany.
4. OLGs: Regional higher courts.
5. Except for this hearing – which was made public via streaming on the ICSID website – the proceedings have been largely non-transparent.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Catrice Gayer
Tel: +49 211 975 59136 / Email: catrice.gayer@hsf.com

Catrice Gayer regularly acts as counsel and arbitrator in international and national arbitration cases. Her particular fields of industry are energy, construction/infrastructure, IP and antitrust (including FRAND), commercial (agency, trade, distribution, licence), and corporate (including M&A) disputes. She also acts as (co-)counsel in enforcement proceedings of awards and foreign judgments before German courts and abroad. Her track record also includes the representation of national and foreign clients in civil and commercial disputes before the regional courts.

Catrice Gayer is recognised for her dispute resolution work in leading directories. She has been recommended as a Rising Star (Commercial Arbitration) in *Expert Guides* and is ranked in *Who's Who Legal's Future Leaders in Arbitration* in 2018 and 2019.

She is an appointed member of the ICC Commission on Commercial Law and Practice. Catrice was a regional chair of the DIS40 (2016-2018), is a co-chair of the Young CEAC and a member of the Executive Committee of the AIJA. Catrice Gayer regularly publishes on international litigation, arbitration and corporate matters. She is fluent in English, French and German and has reading knowledge of Spanish.

Thomas Weimann
Tel: +49 211 975 59136 / Email: thomas.weimann@hsf.com

Thomas Weimann is co-head of Herbert Smith Freehills' Disputes practice in Germany. Before joining HSF, he was a partner at Clifford Chance for many years and head of that firm's Düsseldorf arbitration and litigation practice. Thomas enjoys a practice that spans a wide range of arbitration work, with a special focus on high-value construction-related disputes including plant construction, industrial engineering and civil construction projects and disputes (*inter alia* turn-key civil construction projects, power plants with a focus on turbines, sludge water plants, pulp mills, offshore windfarms with a special focus on cable laying and converter platforms, chemical industry, subway projects, shopping malls and museums). He also sits as an arbitrator in proceedings under the auspices of the ICC, DIS, CIETAC and PCA and other renowned arbitral institutions. He has been counsel in more than 60 major construction arbitrations with a regional focus on Germany, the Arab region, the US and Russia. As President of the Chinese European Legal Association (CELA) and one of the founders of the Chinese-European Arbitration Centre (CEAC) seated in Hamburg, he has well developed links with China. Thomas speaks frequently at seminars and conferences, in particular in Greater China. Furthermore, he speaks at international conferences, *inter alia* the annual meeting of the International Bar Association and the St. Petersburg International Legal Forum.

Herbert Smith Freehills Germany LLP

Breite Str. 29-31, 40213 Duesseldorf, Germany
Tel: +49 211 975 59000 / URL: www.herbertsmithfreehills.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Hong Kong

Barbara Chiu & Crystal Luk
King & Wood Mallesons

Introduction

As an alternative to litigation, arbitration is known for its procedural flexibility, which allows parties to engage in an efficient and fair process leading to a final, binding and enforceable award. Except where disclosure of arbitral awards may be mandatory in court proceedings or regulatory matters, arbitration proceedings and awards in Hong Kong are generally confidential.

Arbitration is governed by the Arbitration Ordinance (Cap. 609) (the "**Arbitration Ordinance**") which came into force on 1 June 2011 and replaced the old Arbitration Ordinance (Cap. 341). Arbitrations commenced before 1 June 2011 remain governed by the old Arbitration Ordinance.

This chapter aims to provide a general overview of the arbitration law and practice in Hong Kong and the latest developments in the jurisdiction's arbitration sphere.

Arbitration agreement

A fundamental principle of arbitration is that any reference of a dispute to arbitration must be based on an arbitration agreement between the parties. "Arbitration agreement" is therefore an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Under the Arbitration Ordinance, an arbitration agreement must be in writing. An arbitration agreement is considered to be in writing if its content is "recorded" in any form (including electronic communication), regardless of whether the agreement has been concluded orally, by conduct or by other means.

Very often, an arbitration agreement is in the form of an arbitration clause incorporated as part of the contract. Under Hong Kong law, an arbitration clause is treated as an agreement independent of the other terms of the contract.

There are no express requirements on the content of an arbitration agreement under the Arbitration Ordinance. In practice, it is recommended to include the following terms in an arbitration agreement:

(1) Common Intention to Submit Disputes to Arbitration

As the primary source for ascertaining jurisdiction and the scope of arbitration which may be commenced under it, an arbitration agreement is usually expressed with a clear common intention that the parties submit their disputes to arbitration.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

(2) Seat of Arbitration

The seat of arbitration not only ascertains which jurisdiction's arbitration laws will govern the conduct of the arbitration proceedings but also determines the places where the arbitral award will be made (which is crucial in the context of enforcement), and the powers of the court and the extent to which it may intervene. Any ambiguity to the seat of arbitration may give rise to doubts as to the validity of the arbitration agreement, or provide an opportunity for the party resisting the claim to challenge jurisdiction.

(3) Number of Arbitrators

Typically, an arbitration agreement provides for a sole arbitrator or three arbitrators. In the case of three arbitrators, usually each party nominates its own arbitrator with the third one to be chosen by the parties' nominated arbitrators.

(4) Applicable Set of Arbitration Rules

Most arbitration agreements provide the set of rules and procedural guidelines for the conduct of the arbitration. In situations where no rules are agreed, the arbitral tribunal appointed may administer the arbitration in the way it thinks fit under the framework of the Arbitration Ordinance.

Arbitration procedures

Unlike court proceedings, there are no single or fixed procedures for conducting arbitration proceedings. Parties may agree on their own rules or choose a set of arbitration rules and procedures.

In general, arbitration proceedings in Hong Kong follow a similar pattern of: (1) commencement; (2) appointment of arbitrators; (3) preliminary meeting; (4) exchange of written submissions; (5) discovery; (6) hearings; (7) post-hearing submissions; and (8) award.

Unless otherwise agreed by the parties, arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Once the appointment of the arbitrator has been formalised, a preliminary meeting may be held between the arbitrator, the parties and their representatives. The main purpose of a preliminary meeting is to explain the nature of the dispute and address procedural issues only. Although not necessary, parties are commonly advised to briefly present the issues in dispute at that meeting, in order to help the arbitral tribunal in laying down procedures or time frame for complying with the same.

After the preliminary meeting, the claimant and the respondent are required to exchange written submissions. Usually, the claimant will first submit a statement of claim and then the respondent will submit a defence. The written submissions serve to identify the issues and the relief sought. Supporting documents will be annexed to the pleadings, which saves considerable time and dispenses with the need for formal discovery.

After the exchange of written submissions, the parties will proceed to the discovery stage. The parties are generally free to decide the terms and mode of discovery and inspection. In the absence of an agreement, the tribunal is left with wide discretion to admit any evidence (excluding evidence protected by privilege) that it considers relevant to the proceedings.

Parties may seek further discovery and inspection of documents by making interlocutory applications of "specific discovery". Subject to contrary agreement by the parties, the tribunal is granted general powers to make orders with respect to evidence; for example,

© Published and reproduced with kind permission by Global Legal Group Ltd, London

directing discovery of documents, delivery of interrogatories, attendance of witnesses to give evidence, and production of evidence. Under certain circumstances, the arbitral tribunal or a party, with the approval of the arbitral tribunal, may request the assistance of the court.

The parties may then exchange the statements of witnesses who may appear in an arbitration as witnesses of fact or as experts. In most cases, written witness statements are prepared and signed by each witness to be called by a party and these are then exchanged before the hearing.

After all the above is completed, the case will proceed to a hearing. The parties may agree to hold oral hearings for the presentation of evidence and oral argument. Alternatively, they may agree to a "documents-only arbitration".

At the oral hearing, the approach taken in most cases is for the tribunal to first invite the claimant to open its case, followed by the claimant's witnesses. Then, it is the respondent's turn to open its case and call its witnesses. At the end of the hearing, the parties may present a formal oral closing statement and, in most cases, the closing submissions may be reduced to writing.

An arbitration award will then be delivered by the tribunal after the oral hearing.

Interim relief

Under the Arbitration Ordinance, the arbitral tribunal has the power to order interim measures similar to those of Court (such as injunctions) to preserve the *status quo*, prevent the other side from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process, and preserve assets and evidence.

In general, the requesting party shall satisfy the arbitral tribunal that:

(1) if the interim measure is not granted, the harm resulted will not be adequately reparable by an award of damages, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the interim measure is granted; and

(2) there exists a reasonable possibility that the requesting party will succeed on the merits of its claim.

Where prior disclosure of the application would may tip off the other party and frustrate the purpose of the interim measure, a tribunal may grant a preliminary order on an *ex parte* basis (i.e. without notifying the other party).

Challenge of the arbitration award

At the end of the arbitration proceedings, the arbitrator(s) will make an award, which must be provided with reasons unless otherwise agreed by the parties.

An arbitral tribunal is empowered to award any remedy or relief that could have been ordered by the Hong Kong courts; for example, damages and specific performance of a contract (except for a contract relating to land). The only qualification on a tribunal's power to award remedies is that it has no power to make orders binding on third parties to the arbitration.

Unless agreed by the parties, an award made by an arbitral tribunal under an arbitral agreement is final and binding both on the parties and on any person claiming through or under any of the parties.

The Arbitration Ordinance only provides limited grounds to challenge an award, which are set out below:

© Published and reproduced with kind permission by Global Legal Group Ltd, London

(a) **Setting aside on procedural grounds**

Parties are entitled to set aside an arbitral award based on exhaustive procedural grounds, including:

(1) incapacity of a party;

(2) invalidity of the arbitration agreement;

(3) a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his or her case;

(4) the award deals with a dispute not contemplated by the terms of the submission to arbitration;

(5) the composition of the tribunal or the procedure was not in accordance with the parties' agreement or Hong Kong law;

(6) the subject matter of the dispute is not capable of settlement by arbitration under Hong Kong law; or

(7) the award is in conflict with Hong Kong's public policy.

An award may also be set aside following a successful challenge to an arbitrator who participated in the proceedings resulting in the award.

(b) **Challenge on ground of serious irregularity**

Parties do not have a mandatory right to challenge an award on the grounds of serious irregularity, unless they have opted in the relevant provision in Schedule 2 of the Arbitration Ordinance.

Grounds of serious irregularity focus mainly on the arbitral tribunal exceeding its powers and substantive irregularity in the conduct of the arbitral proceedings or in the award. In addition, an applicant must show that there is substantial injustice.

(c) **Application for leave to appeal on question of law**

An appeal of an award on a question of law can only be brought with either: (i) the agreement of all the parties to the arbitral proceedings; or (ii) the permission of the Court.

In applying for permission to appeal on question of law, the applicant has to satisfy that:

(1) the decision on the question of law will substantially affect the rights of part(ies);

(2) the arbitral tribunal was asked to decide on the question; and

(3) the decision of the arbitral tribunal on the question is obviously wrong, or the question is one of general importance and the decision of the arbitral tribunal is at least open to serious doubt.

Enforcement of the arbitral award

Hong Kong mirrors the principles and spirit of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention") and has adopted a pro-enforcement attitude in enforcing arbitral awards.

An arbitral award, whether made in or outside Hong Kong, is enforceable in the same manner as a judgment of the court that has the same effect, but only with the permission of the Court. Although permission is not granted by Court as a matter of right, it will only be refused in very limited circumstances. If the Court does not grant the permission, a party may still be able to enforce the arbitral award at common law by commencing an action on the award.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

(a) **Procedures**

Under the Arbitration Ordinance, there are slightly different regimes governing the procedure for enforcement of arbitral awards made by contracting states to the New York Convention (i.e. Convention awards), non-contracting states to the New York Convention (i.e. Non-Convention awards), recognised Mainland arbitral authorities (i.e. Mainland awards) and awards made in Macao (i.e. Macao awards).

Generally, the party seeking to enforce an award must produce the award, arbitration agreement and translation of the award or agreement (if applicable).

An application for leave may be made *ex parte* (i.e. without notifying the other party) but the Court may direct a summons to be issued, bringing the action to the notice of the other parties. As with all *ex parte* applications, the applicant must make full and frank disclosure of all relevant information which are against him, as well as those in his/her favour.

(b) **Grounds of refusing enforcement**

Enforcement of an arbitral award may be refused on the following grounds:

(1) incapacity of a party;

(2) invalidity of the arbitration agreement;

(3) the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his or her case;

(4) the award deals with a dispute not contemplated by the terms of the submission to arbitration;

(5) the composition of the tribunal or the procedure was not in accordance with the parties' agreement or Hong Kong law;

(6) the subject matter of the dispute is not capable of settlement by arbitration under Hong Kong law;

(7) the award is in conflict with Hong Kong's public policy; or

(8) any other reason the Court considers just.

Note that the Arbitration Ordinance expressly allows the Court to refuse to enforce an award for any other reason the Court considers just. This ground is not included in the equivalent provisions in respect of the enforcement of Convention Awards, Mainland awards, and Macao awards.

Latest developments: Third party funding in Hong Kong

Background

Third party funding of arbitration is the provision of funding under a funding agreement to a party to an arbitration by a party who does not have an interest recognised by law in the arbitration ("**third party funder**") in return for the third party funder receiving a financial benefit dependent on the successful outcome of the arbitration.

Historically, third parties were prohibited from funding an unconnected party's litigation or arbitration under the doctrines of maintenance and champerty at common law.

On 14 June 2017, the Hong Kong Legislative Council passed two bills that legalise third party funding to arbitration in Hong Kong, namely: the Arbitration (Amendment) Bill 2016 (on arbitrability of intellectual property disputes); and the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 (now the Arbitration and

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017) ("**Amendment Ordinance**").

On 7 December 2018, the Secretary of Justice issued the Code of Practice for Third Party Funding of Arbitration (the "**Code of Practice**") providing a code of practice and regulatory framework for arbitration funders. Under the Code of Practice, certain requirements should be observed if one is looking for a third party funder or intending to become a third party funder.

On 1 February 2019, the Amendment Ordinance finally came into full force and effect (by way of amendment to the Arbitration Ordinance). Under section 98K of the Arbitration Ordinance, third party funding of arbitration is not prohibited by the common law doctrines of maintenance and champerty.

Eligibility to become a third party funder

Capital adequacy requirements are imposed on a third party funder, who must ensure that it has the capacity to pay all debts when they become due and payable and cover all of its aggregate funding liabilities under all of its funding agreements for a minimum period of 36 months. A third party funder should also maintain access to a minimum of HK$20 million of capital as well. An audit opinion on the third party funder's most recent annual financial statements must be provided to the advisory body, showing that it satisfies the capital adequacy requirements.

Duties of a third party funder

The Code of Practice imposes a number of obligations on a third party funder. For instance, a third party funder must:

1. take reasonable steps to ensure that the funded party is aware of the right to seek independent legal advice on the funding agreement before entering into it;
2. provide a Hong Kong address for service in the funding agreement;
3. set out all the key features and terms of proposed funding; and
4. set out the name and contact details of the advisory body responsible for monitoring and reviewing the operation of third party funding.

Funding agreement

Under the Code of Practice, there are content requirements for a funding agreement. The funding agreement shall set out clearly that:

(a) the third party funder will not seek to influence the funded party or the funded party's legal representative to give control or conduct of the arbitration to the third party funder except to the extent permitted by law;

(b) the third party funder will not take any steps that cause or are likely to cause the funded party's legal representative to act in breach of professional duties; and

(c) the third party funder will not seek to influence the arbitration body and any arbitral institution involved.

In relation to liability for costs, the funding agreement must state whether, and to what extent, the third party funder is liable to the funded party's costs including adverse costs, costs insurance premiums, security for costs and any other financial liabilities.

Disclosure of third party funding arrangement

For funding agreements reached on or before the commencement, the funder party must give a written notice on the commencement of arbitration to each other party to the arbitration

© Published and reproduced with kind permission by Global Legal Group Ltd, London

and the arbitration body; whereas for funding agreements reached after the commencement, such notice shall be given or within 15 days after the funding agreement is made.

Likewise, a written notice should be given if a third party funding arrangement comes to an end during the arbitration.

Conclusion

With the legislative and governmental support, third party funding is expected to be increasingly common in Hong Kong. For a party who may have the option of going to court or arbitration but without the financial means, arbitration may now become a feasible option. It is anticipated that there will be further development on the regulations for third party funders and professional conduct guidelines for lawyers as third party funding continues to grow in the future.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Barbara Chiu
Tel: +852 3443 8307 / Email: barbara.chiu@hk.kwm.com

Mrs. Barbara Chiu specialises in commercial litigation, international arbitration, regulatory investigation/litigation, white-collar crimes, insolvency and restructuring, intellectual property related disputes, judicial review and employment laws with over 20 years' experience in Hong Kong.

One of her SFC cases was awarded "Deal of the Year" by Chinese Business Law Award 2017 and she is the finalist in the "Dispute Resolution Lawyer of the Year" by The Macallan ALB Hong Kong Law Awards 2017. In 2018, she was awarded "Matter of the Year: Novel criminal case in Hong Kong" by *Asialaw and Benchmark Litigation 2018*.

Crystal Luk
Tel: +852 3443 8347 / Email: crystal.luk@hk.kwm.com

Crystal specialises in commercial litigation, international arbitration, regulatory investigations/litigation, white-collar crimes, employment law and intellectual property related disputes.

Crystal has extensive experience in a wide range of commercial disputes, typically involving multi-jurisdictional or cross-border element, including contractual disputes, shareholder and joint venture disputes, minority shareholders' protection and fraud.

King & Wood Mallesons

13/F, Gloucester Tower, The Landmark, 15 Queen's Road Central, Central, Hong Kong
Tel: +852 3443 1000 / Fax: +852 3443 1299 / URL: www.kwm.com/en/hk

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Hungary

Zoltán Faludi, Artúr Tamási & Enikő Lukács
Wolf Theiss Faludi Erős Attorneys-at-Law

Introduction

Hungary has had a separate arbitration act in place since 1994 which was based, to a large extent, on the UNCITRAL Model Law. The new and retailored Act No. LX of 2017 on arbitration ("**Arbitration Act**") has been enacted with effect from 1 January 2018. The new Arbitration Act is based on the fundamental principle of party autonomy. The parties are free to choose to have their dispute arising out of commercial relationship settled by arbitral tribunals instead of by the state courts.

The Arbitration Act is largely based on the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006. Accordingly, Hungary remains a model law country. Moreover, the provisions of the Arbitration Act should be interpreted in line with the explanations of the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006.

Hungary is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) and is also a party to the European Convention on International Commercial Arbitration of 1961 (European Arbitration Convention).

The Arbitration Act governs both domestic and international arbitrations with their seat in Hungary. Under the regime of the Arbitration Act, *ad hoc* or permanent arbitral institutions conduct arbitration procedures.

The Arbitration Act introduces the institutional framework for Hungarian commercial arbitration, on the basis of which the following permanent arbitration courts have been established:

(a) Permanent Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry (Commercial Arbitration Court) with general jurisdiction in Hungary as the main institution dealing with arbitration;

(b) Sports Arbitration Court under the provisions of Act on Sports which is competent in matters defined in that Act; and

(c) Arbitration Court for agricultural disputes which is attached to the Hungarian Chamber of Agriculture.

Commercial disputes are most commonly referred to the Permanent Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry (i.e. the Commercial Arbitration Court) which offers institutional arbitration both for domestic and international disputes. The Commercial Arbitration Court has adopted a new set of Rules of Procedure which are applicable as of 1 February 2018 ("**Rules of Procedure**").

© Published and reproduced with kind permission by Global Legal Group Ltd, London

As a result of the revision of the Arbitration Act, the Money and Capital Markets Arbitration Court and the Energy Arbitration Court ceased to exist on 31 December 2017.

Arbitration agreement

Arbitration agreements must be in writing and must contain the parties' submission of their dispute(s), arising from their contractual or non-contractual relationship, to arbitration, either to a permanent institution or *ad hoc* arbitration. The arbitration agreement may be entered into on a stand-alone basis or as part of another agreement (arbitration clause). An arbitration agreement will only be valid if duly signed by all parties.

Arbitration agreements concluded via electronic communication must be deemed to be in written form even if they are not signed electronically, but the electronic communication is available to the other party and is suitable for later reference.

Arbitration agreements are also deemed to have been concluded in writing if the party alleges the existence of the arbitration agreement in his declaration on the referral to arbitration or in his statement of claim, and it is not disputed by the other party.

The parties may also enter into valid arbitration agreements by referring to a separate document (e.g. general terms and conditions) containing an arbitration agreement, provided that the parties' contract expressly refers to that separate document and that the separate document becomes part of the parties' contract.

There are a number of disputes that cannot be submitted to arbitration; those arising from consumer contracts, marriage, personal or family status and capacity, public administration and labour relations, press statements and enforcement procedures. The arbitral tribunals must scrutinise claims and applications brought before them to ensure that matters that are not arbitrable are not admitted.

The principle of competence-competence is recognised in the Arbitration Act, including also the separability principle. The arbitral tribunal itself may decide on its own jurisdiction, including any objection regarding the existence and validity of the arbitration agreement. In this respect, the arbitration clause which is part of the contract shall be considered as an agreement independent of the other provisions of the contract. The decision of the arbitral tribunal, which states that the contract does not exist or is invalid, shall not necessarily entail invalidity of the arbitration agreement.

An objection against the jurisdiction of the arbitral tribunal shall be filed at the time of submitting the defence at the latest. The arbitral tribunal may decide on this objection either as a preliminary issue or in its award. If the arbitral tribunal established its jurisdiction as a preliminary issue, either party may, within 30 days, challenge this decision before the competent State court. In this case, until the decision of the State court, the arbitral tribunal may continue the procedure and may adopt a decision.

Under the Arbitration Act, at the request of either party, the arbitral tribunal informs person(s) having legal interest as to the outcome of the arbitration procedure that they may join the procedure to promote the party who has the same interest in order to succeed in the arbitration procedure.

Unless otherwise agreed by the parties, any person not being a party to the arbitration agreement may take part in the arbitration procedure as a party if the claim submitted by or against him can only be resolved in unity with the dispute which is the subject of the arbitration agreement, and this person submits to the competence of the arbitration court in a written statement.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Arbitration procedure

In the course of the arbitration procedure the parties shall be provided with equal treatment and each party shall be given the possibility to plead his case.

Within the framework of the Arbitration Act, the parties may freely agree on the rules of procedure to be followed by the arbitral tribunal. In the lack of such an agreement, the arbitral tribunal shall determine the rules of procedure at its discretion within the framework of the Arbitration Act.

The Rules of Procedure of the Commercial Arbitration Court provide detailed provisions regarding the conduct of the arbitration procedure, including provisions on the taking of evidence. In addition, the Rules of Procedure provide for the possibility to hold a case management conference with the participation of the parties, in person or by telecommunication means, in order to draw up a procedural timetable.

The parties may freely agree on the place of the arbitration. Failing such agreement, it will be determined by the arbitral tribunal taking into consideration the circumstances of the case including, in particular, that it is to be suitable for the parties. The arbitral tribunal – unless otherwise agreed by the parties – may also meet at another place for the purposes of consultations between the arbitrators, hearing the parties, the witnesses or experts and inspecting objects or documents.

Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to provide an expert opinion on issues requiring special expertise.

Unless otherwise agreed by the parties, the arbitration procedure shall start on the day on which the defendant received the statement for referring the dispute to arbitration.

Unless otherwise agreed by the parties, the arbitral tribunal decides whether it holds a hearing for the purposes of presenting the positions and evidence or conducts the procedure *in camera* without holding a hearing. At the request of any of the parties, in the proper phase of the procedure the arbitral tribunal holds a hearing even if the parties have agreed that the dispute shall be adjudged without holding a hearing.

The Arbitration Act provides for the possibility of renewal of the procedure within one year following receipt of the arbitration award, based on facts or evidence that were not taken into account during the original arbitration procedure for any reason not attributable to the party relying on them, provided that it could have resulted in a more favourable decision to this party. The renewal procedure is only applicable unless otherwise agreed by the parties. Therefore, the application of renewal of procedure can be excluded by the parties in their arbitration agreement.

The arbitral tribunals may choose to follow the IBA Rules on Taking of Evidence in International Arbitration.

Arbitrators

The number of arbitrators is agreed by the parties, but it must be an odd number. The parties may agree on the rules of the procedure regarding the appointment and the challenge of the arbitrator or arbitrators within the limits laid down by the Arbitration Act.

In general practice, each party appoints one arbitrator, and the party-appointed arbitrators elect the chairman of the tribunal. If the number of the arbitrators is three, and if a party fails to appoint its arbitrator within 30 days of receipt of the other party's request, or if the party-appointed arbitrators fail to elect the chairman within 30 days of their

© Published and reproduced with kind permission by Global Legal Group Ltd, London

appointment, the competent state court will appoint the arbitrator. If the dispute falls within the jurisdiction of the Commercial Arbitration Court, such appointing responsibilities will be exercised by its Presidium.

Either party may, by written notice to the tribunal, challenge an arbitrator within 15 days of receiving notice of the arbitrator's appointment or within 15 days of becoming aware of circumstances giving rise to doubts as to the arbitrator's independence or impartiality. If the arbitrator fails to resign or the other party disputes the challenge, the tribunal will decide on the matter. If the tribunal dismisses the challenge, the challenging party may, within 30 days of receipt of the decision, request the state court or the Presidium of the Commercial Arbitration Court – in case the dispute falls within the jurisdiction of the Commercial Arbitration Court – to decide on the challenge. The tribunal, including the challenged arbitrator, may continue the arbitration procedure and issue an award until the receipt of the decision on the challenge.

Arbitrators must be independent from the parties, impartial and unbiased, they must not be instructed to rule one way or another, and they are under full confidentiality obligations. They must issue a declaration of impartiality upon their appointment, or a statement of disclosure on any matters that they believe in good faith to have a material impact on their independent, impartial and unbiased conduct.

Arbitrators must have the knowledge and expertise relevant to the matter in the arbitration. No person may be appointed as an arbitrator if he or she: (i) is under the age of 24; (ii) is enjoined from public matters; (iii) is condemned by court to imprisonment; (iv) is under guardianship ordered by the court; (v) is enjoined from the exercise of jobs that require a law degree; or (vi) is under probation.

Arbitration institutions are free to adopt a code of ethics; however, the most significant Hungarian arbitration institution, the Commercial Arbitration Court, does not have codes of ethics. Nevertheless, various international guidelines and recommendations may be taken into account in practice. For instance, the State court took into account ICCA guidelines in one set-aside judgment.

The Arbitration Act does not contain specific provisions regarding the activities of the secretariat to the arbitral tribunal. Generally, it is regulated by each arbitral institution which freely defines the necessary administrative tasks of the secretariat.

Interim relief

Under Hungarian arbitration law, four types of interim relief are available to the parties. First, the parties may request interim measures from the arbitral tribunal. Second, the parties may request preliminary measures from the arbitral tribunal. Finally, the parties may request interim injunctions and security measures from the ordinary courts.

Interim measures by the arbitral tribunal

The parties may request interim measures from the arbitral tribunal, and the tribunal may render interim measures for the following purposes:

- to maintain or restore the *status quo* pending determination of the dispute;
- to take action that would prevent, or to refrain from taking action that is likely to cause damage or imminent threat of damage, or prejudice to the arbitral proceedings;
- to take measures to keep available the assets serving as a basis for the satisfaction of the arbitral award, or to provide cover corresponding to their value; or

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- to preserve evidence that may be relevant to the resolution of the dispute.

The party requesting an interim measure from the tribunal must satisfy the arbitral tribunal that:

- a harm not reparable by an award of damages is likely to result if the measure is not ordered, and such harm outweighs the harm the other party is likely to suffer by granting the measure (balance of convenience); and
- the requesting party will succeed on the merits of the claim (the acceptance of which shall not limit the discretion of the arbitral tribunal in any subsequent determinations).

The arbitral tribunal may prescribe that the party requesting the interim measure shall provide a security in relation to the requested interim measure.

The arbitral tribunal may oblige the parties to immediately notify the arbitral tribunal of any changes to the circumstances on grounds of which the interim measure has been adopted.

The arbitral tribunal may, upon request or under certain circumstances, *ex officio* amend, suspend or set aside the interim measure ordered at any time.

An interim measure is enforceable in accordance with the general rules concerning enforcement of arbitral decisions. A party who benefits from an interim measure shall immediately notify the ordinary court of the enforcement in case of setting aside, suspension or amendment or change in the interim measure.

Preliminary measures ordered by the arbitral tribunal

A party may request preliminary measures from the arbitral tribunal in case it has requested an interim measure and the preliminary measure is necessary in order to avoid frustration of the purpose of the interim measure requested.

The opponent is not notified of the request for a preliminary measure until the arbitral tribunal takes a decision on the request. The party requesting a preliminary measure is obliged to reveal to the tribunal all circumstances that might be relevant in respect of adopting or maintaining the preliminary measure. This obligation applies until the opposing party is allowed to respond to the request for a preliminary measure.

The arbitral tribunal has to notify all parties of its decision on the preliminary measure and shall also inform the parties of any oral communications between the arbitral tribunal and any of the parties in relation to the preliminary measure. The opposing party shall have the possibility to submit its observations on the request for a preliminary measure and the decision on a preliminary measure. If the opposing party contests the adoption of the preliminary measure, the arbitral tribunal has to make its decision immediately.

A preliminary measure shall be valid for a maximum of 20 days. The arbitral tribunal may render an interim measure upon hearing the parties regarding the preliminary measure.

If the arbitral tribunal orders a preliminary measure, it has to order the provision of security by the party requesting the preliminary measure, unless the arbitral tribunal considers that unnecessary.

A preliminary measure is not capable of enforcement, but is binding on the parties.

The party requesting an interim or a preliminary measure shall be responsible for all costs and damages caused by such measure in case the arbitral tribunal later finds that the interim or preliminary measure should have not been taken. The arbitral tribunal may render a decision about those costs and damages at any point of time.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Interim injunctions ordered by the ordinary court

An interim injunction may also be requested by a party from the ordinary court. This may be particularly practical before the arbitral tribunal is established.

An interim injunction may be requested from the court for the following purposes:

- to maintain the *status quo* if that could be incapable of restoration at a later point of time;
- to prevent frustration of the exercise of the applicant's right at a later point of time;
- for the avoidance of a directly threatening disadvantage; or
- for other equitable reason.

However, an interim injunction may only be requested for an obligation that the applicant would be entitled to claim on the basis of the right enforced in the subject dispute.

The applicant shall satisfy the court concerning the facts serving as the basis of the application, as well as that the criteria for granting an interim injunction discussed above are met.

The court will request comments of the other party before making a decision on the interim injunction.

The court may render the interim injunction conditional upon the provision of a security. This can take place either in case the applicant offers a security, or if the opponent requests a security and satisfies the court that it would be entitled to claim damage or punitive damages in case the interim injunction is granted, but later it (i.e. the party against whom the interim injunction is granted) prevails in the dispute. The opponent must also satisfy the court regarding the amount of the requested security. If the court orders the provision of a security, then the interim injunction will not be enforceable until the security is provided. Upon the termination of the dispute, the opponent against whom the interim injunction is granted may keep the amount of the security without further proof or proceedings in case it prevails in the dispute, while if the applicant prevails in the dispute, the amount of the security shall be paid back to them.

A party may also request an interim injunction before bringing the arbitration procedure, if it satisfies the court that requesting an interim injunction at the time of bringing the arbitration procedure would frustrate the purpose of the interim injunction due to the time factor. In this case, the court shall set a deadline not longer than 45 days for bringing the arbitration procedure. If the procedure is not brought within that deadline, the interim injunction becomes ineffective.

Security measures ordered by the ordinary court

Security measures may also be requested from the ordinary court in case the applicant has brought arbitration proceedings and the existence, amount and due date of the claim enforced in arbitration are proven by a private document of full probative force or by a public document (e.g. by an acknowledgement of the debt). The applicant also has to prove that later fulfilment of the claim is endangered. Ordering a security measure is considered to be an enforcement procedure and a separate court fee is payable on the application, generally in the amount of 1% of the claim.

Security of cost

Based on the criteria of interim measures ordered by an arbitral tribunal as well as interim injunctions and security measures ordered by the court, an application for the security of cost is not possible.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Anti-suit and anti-arbitration injunctions

Based on criteria of interim injunctions by the ordinary court, anti-suit or anti-arbitration injunctions do not seem possible and in practice, are not rendered by the Hungarian ordinary courts.

Arbitration award

The Arbitration Act requires that an arbitration award must be in writing and be signed by all arbitrators. The award must describe the reasons and grounds of the decision, and must provide a proper justification of the decision. The award shall only contain provisions on the amount and allocation of procedural costs and expenses, including the arbitrators' fees if either party so requests. The date of the award and the seat of arbitration must be clearly indicated. A copy of the award must be delivered to each party. Interim or partial awards are enforceable if they meet the validity criteria for final awards set out in the Arbitration Act.

Unless the parties agree otherwise, the arbitral tribunal adopts its award with a majority of votes. Dissenting opinions are allowed, however they will not be added to the award, but kept on record.

During the arbitration the parties may at any time agree to terminate the disputed matter. In that case, the arbitral tribunal will terminate the proceedings by adopting a ruling (not an award). If the parties request, their settlement will be set out in an arbitral award, provided that the arbitral tribunal is convinced that the settlement is in full compliance with the applicable substantive law.

Either party may request the arbitral tribunal to correct any misspelt or erroneous names, figures, calculations or other typographical errors in the award. Such errors can be corrected by the arbitral tribunal *ex officio*, too. Either party may request that the arbitral tribunal interprets certain parts of the award. Such interpretation will become part of the reasoning of the award. Either party may request that the arbitral tribunal supplements the award if requests, claims or applications presented in the process remained unresolved. The arbitral tribunal may, if it finds it necessary, hold another hearing, and will issue a supplementary award.

It is worth highlighting that anonymised extracts of arbitration awards shall be available on the website of the Commercial Arbitration Court.

Challenge of the arbitration award

The only remedy available under Hungarian law against an arbitration award is the set-aside procedure before the ordinary courts.

An ordinary court may only set aside an arbitration award under limited circumstances such as:

- a party to the arbitration agreement had no legal capacity or capacity to act;
- the arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of such law, under Hungarian law;
- the party was not given proper notice of the appointment of an arbitrator or of the proceedings of the arbitral tribunal, or was otherwise unable to present his case;
- the arbitral award deals with matters not falling within the scope of the arbitration agreement; however, if the matters falling within the scope of the arbitration agreement

© Published and reproduced with kind permission by Global Legal Group Ltd, London

and those not falling within the scope of the arbitration agreement can be separated, setting aside may only be requested in respect of decisions on matters not falling within the scope of the arbitration agreement;

- the composition of the arbitral tribunal or the arbitration procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a mandatory provision of the law or, in the absence of an agreement, was not in accordance with the law;
- the subject matter of the dispute is not arbitrable under Hungarian law; or
- the arbitral award is contrary to the Hungarian public policy.

The court's powers are limited to setting aside the award, but the court may not modify the award or review the award as to its merits or as to points of law or facts.

On request of either parties, the ordinary court may stay the set-aside proceeding for a maximum of 90 days in order to provide the arbitral tribunal with the possibility to reopen the proceedings in order to rectify the grounds for set-aside. However, the arbitral tribunal's possibilities are limited to correcting any typing or calculation errors in the awards, providing an interpretation as to the award and supplementing it in any matter in which the award shall, but does not include a decision.

By far the most often-claimed set-aside ground is violation of Hungarian public policy, and arbitral awards have been set aside on that ground in the vast majority of cases. So far, the courts have set aside arbitration awards on an exceptional basis only, and the vast majority of arbitration awards have been upheld by the courts. We expect that this practice will continue under the new Arbitration Act.

In case the award is set aside, the arbitration procedure shall be repeated from the point of an appointment of the arbitrators by the parties.

Enforcement of the arbitration award

Enforcement of Hungarian arbitration awards

As a general rule, an arbitral award has the effect of a final and binding court judgment and shall be enforced in the same manner as a final and binding court judgment is enforced. For the enforcement of an arbitration award, the original of the arbitration award or a certified copy shall be attached.

The court shall reject the enforcement of an arbitration award if the subject of the award in non-arbitrable under Hungarian law, or the arbitration award violates Hungarian public policy.

The above is applicable to arbitration awards rendered in arbitrations that took place in the territory of Hungary, as well as to arbitration awards rendered by arbitrational institutions seated in Hungary even if their proceeding took place outside of Hungary.

Enforcement of foreign arbitration awards

Foreign arbitration awards may be enforced in Hungary on the basis of an international treaty, reciprocity or a provision of a Hungarian act.

A further condition of the enforcement of a foreign arbitration award is that it must be capable of enforcement, i.e. it must contain an obligation that is enforceable. On request of the court, a Hungarian translation of the arbitration award shall be submitted along with an original or a certified copy of the arbitrational award. Such Hungarian translation is generally requested by the Hungarian courts. The procedure starts with an application for an enforcement order. Once an enforcement order is received, the award is enforceable

© Published and reproduced with kind permission by Global Legal Group Ltd, London

according to the same rules as a Hungarian award, which in turn is enforced as a Hungarian court judgment.

Arbitration treaties concluded by Hungary

In practice, the most significant ground for enforcement of foreign arbitral awards is an international treaty allowing for the enforcement of the award.

Hungary is a party to the New York Convention of 1958 on the recognition and enforcement of foreign arbitration awards. However, based on the reservations made by Hungary to the New York Convention, Hungary applies the New York Convention only to recognition and enforcement of awards made in the territory of another contracting State, and only to disputes arising out of legal relationships that are considered commercial under Hungarian national law.

Hungary is also a party to the Geneva European Convention on International Commercial Arbitration of 1961.

Enforcement of awards set aside at the courts of seats of the arbitration

Article V.1.e. of the New York Convention allows for the rejection of the enforcement of a foreign arbitration award in case the arbitral award has been set aside, or the enforcement thereof has been stayed in the jurisdiction under the law of which the arbitration award was rendered. Hungarian courts would enforce this rule and would not enforce arbitration awards that have been set aside in the jurisdictions under the law of which they were rendered.

However, the European Convention on Commercial Arbitration limits this provision to awards that have been set aside for specific reasons (i.e. the most common set-aside grounds). In respect of countries that are parties to the New York Convention and the European Convention on International Commercial Arbitration, Article V.1.e. of the New York Convention discussed above shall be applied too, within this limited scope only.

Investment arbitration

Hungary is a party to over 60 bilateral investment treaties. Furthermore, Hungary is a member of the European Union and as such all investment protection treaties concluded by the European Union are also applicable in Hungary. Hungary is also a party to some multilateral investment treaties, such as the European Energy Charter Treaty or the ICSID Convention.

Hungary has been a respondent in more than 15 international investment arbitrations. The first case against Hungary was brought in 2001 in relation to a power plant investment and has been settled by the parties. There followed in 2003 a case related to Budapest Airport (in which the author of this section had the privilege to act as a member of the legal team on the legal claimant's side), which resulted in the highest-value investment arbitration award against Hungary to date. The number of cases significantly increased after 2011. Currently five cases are pending against Hungary before ICSID itself. These relate to: a hotel operation project; a farming enterprise; social voucher services; food voucher services; and food products.

Investors have been successful in many arbitrations brought against Hungary; Hungary rarely settles the cases.

Once all remedies are exhausted, Hungary accepts the arbitration awards rendered in investment arbitration cases and typically pays out to the investors. Accordingly, the role of national courts in enforcement of awards made in investment arbitrations has been quite limited so far.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Zoltán Faludi
Tel: +36 1 4848 800 / Email: zoltan.faludi@wolftheiss.com

Zoltán Faludi is the managing partner of the Budapest office of Wolf Theiss. He has over 20 years of experience as an attorney with a focus on energy, project finance as well as on arbitration and dispute resolution. Zoltán has experience in conducting out-of-court settlement discussions, facilitating and moderating negotiations between parties upon joint appointment of and mandate by the disputing parties. Cases where he is acting as an arbitrator include energy project development, financing, commercial and energy commodity trading-related disputes. His strong industry knowledge is perceived as adding expert value to the professional handling of arbitration cases. He is the ex-chairman of the former Energy Arbitration Court in Hungary. Zoltán is regularly invited to speak at various local and international events, focusing on market-related questions.

Artúr Tamási
Tel: +36 1 4848 800 / Email: artur.tamasi@wolftheiss.com

Artúr Tamási is a member of the Litigation & Dispute Resolution team in Budapest. He represents clients in Hungarian commercial and administrative disputes, enforcement proceedings as well as in litigious matters involving public and criminal law. He also has long standing experience in Hungarian and international commercial arbitrations, including construction-, contractual- and investment arbitration before the ICSID, Hungarian, Swiss, Russian and other arbitration fora. His practice also includes general commercial law and agricultural law. He is experienced in internal investigations, both at Hungarian and foreign corporations. Artúr primarily represents clients in the property investment, financial services and energy sector. Prior to joining Wolf Theiss, Artúr gained valuable experience while working at the Budapest and Warsaw offices of a US-based full-service global law firm. He speaks English, Polish and Hungarian.

Enikő Lukács
Tel: +36 1 4848 800 / Email: eniko.lukacs@wolftheiss.com

Enikő Lukács is an Associate in the Litigation & Dispute Resolution Practice Group. She graduated from the Pázmány Péter Catholic University. During her studies she participated in the National Competition of Hungarian Universities (OTDK) with her thesis on international tax matters. Enikő joined Wolf Theiss as a legal intern in 2012 and became an Associate over the years. She advises national and international clients on a wide range of civil procedures in various industries. Enikő has valuable experience in the preparation, negotiation and full handling of litigation, arbitration, insolvency and enforcement proceedings. Enikő regularly deals with restructuring, security enforcement, as well as representation of creditors. Her areas of interest are cross-border insolvency-related and restructuring issues. She usually attends arbitration events including conferences organised by the Young Arbitrators Forum of the ICC.

Wolf Theiss Faludi Erős Attorneys-at-Law

Kálvin tér 12-13, H-1085 Budapest, Hungary
Tel: +36 1 4848 800 / URL: www.wolftheiss.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

India

Ganesh Chandru & Prashant Kumar
Lakshmikumaran & Sridharan

Introduction

The use of alternative dispute resolution ("**ADR**") mechanisms in India has its roots in ancient times when disputes were settled through several mechanisms such as the *Kulani* (village council), *Sreni* (corporation) and *Puga* (assembly), and commercial disputes by Mahajans and Chambers.[1] The judiciary in India is overburdened because of the increase in the number of litigation cases that are filed, and also because of the long pendency of such cases. Therefore, ADR methods such as arbitration, mediation, conciliation and *Lok Adalats* (people's court) are all the more important in India for the speedy resolution of disputes.

The first legislative recognition of arbitration in modern India was the enactment of the [Indian] Arbitration Act, 1899 which was based on the English Arbitration Act of 1899. This was followed by the inclusion of arbitration-related provisions in the Code of Civil Procedure, 1908 and Arbitration (Protocol and Convention) Act, 1937 which gave effect to the Geneva Protocol on Arbitration Clauses 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 ("**Geneva Convention**").[2]

In 1940, the British-era government enacted a comprehensive and self-contained code, the [Indian] Arbitration Act. After India's independence in 1947, commercial activity increased considerably and arbitration started receiving more attention. On 10 June 1958, India became a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("**New York Convention**") and ratified it on 13 July 1960. To give effect to this Convention, India enacted the Foreign Awards (Recognition and Enforcement) Act, 1961. Only those foreign awards are enforceable that arise out of legal relationships, whether contractual or not, considered as commercial under the law in force in India. Further, India follows the reciprocity principle and limits the enforcement of arbitral awards to those made in other New York Convention and Geneva Convention countries.

The law on arbitration in India was substantially contained in three enactments, namely, the Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and the Foreign Awards (Recognition and Enforcement) Act, 1961. The need to consolidate and reform the country's arbitration law further gained traction after the Model Law on International Commercial Arbitration was propounded by the United Nations Commission on International Trade Law (UNCITRAL) in 1985 ("**the Model Law**") and the introduction of economic reforms in India in 1991. In order to facilitate business, India adopted the Model Law in its entirety except for a few variations and enacted the Arbitration and Conciliation Act, 1996 ("**the Act**"), with the objective "*to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation...*"[3] It is a comprehensive piece of legislation

© Published and reproduced with kind permission by Global Legal Group Ltd, London

that lays down the law on arbitration in India, and is divided into four parts: Part I on Arbitration seated in India; Part II on Enforcement of Foreign Awards; Part III on Conciliation; and Part IV contains Supplementary Provisions. There is only one legislation for arbitration in India, for both international and domestic arbitration.

Varied interpretation of the provisions of the Act led to a growing sense of dissatisfaction among the users of arbitration. Attempts to remedy most of these issues have been made by way of the Arbitration and Conciliation (Amendment) Act, 2015 ("**the Amendment Act**"). The Amendment Act has followed most of the recommendations of the Law Commission of India's 246th Report ("**Law Commission Report**") and also introduced certain new provisions which are unique to the Indian jurisdiction. As per the amended law, High Courts and the Supreme Court exercise exclusive jurisdiction in relation to international commercial arbitration.[4] Further, pursuant to the Commercial Courts Act, 2015 ("**Commercial Courts Act**"), special commercial divisions have been set up in High Courts and commercial courts have been set up in the District Courts to hear and dispose arbitration matters involving commercial disputes[5] of a specified value.[6] The Commercial Courts Act was amended in 2018 (with effect from 3 May 2018). In order to bring more cases within the ambit of commercial courts, the Commercial Courts Amendment Act has decreased specified value of a commercial dispute from the earlier value of INR One Crore, i.e. INR 10 Million (about USD 141,000) to INR 300,000 (about USD 4,200).

There are many arbitral institutions in India. Some of the popular ones are the Indian Council of Arbitration ("**ICA**"), International Centre for Alternative Dispute Resolution ("**ICADR**"), the Delhi International Arbitration Centre ("**DAC**"), Nani Palkhivala Arbitration Centre ("**NPAC**"), and the Mumbai Centre for International Arbitration ("**MCIA**"). All these institutions have their own arbitral rules, panel of arbitrators, and offer venues for conducting arbitral hearings. Foreign arbitral institutions like Singapore International Arbitration Centre ("**SIAC**") work through their representative (marketing) offices in India. SIAC established its first overseas representative office in Mumbai, Maharashtra in the year 2013 and a second one in GIFT City, Gujarat, in 2017. However, all SIAC arbitrations are administered out of the Singapore office. The International Chamber of Commerce ("**ICC**") has a national committee in India (ICC India). The ICC Court of Arbitration has an Indian Arbitration Coordinator based in New Delhi. The ICC arbitrations are administered out of the Secretariat in Paris, New York, Sao Paulo, Hong Kong and Singapore. Cases involving Indian parties are mostly administered at the recently launched Secretariat in Singapore. The London Court of International Arbitration ("**LCIA**") established a subsidiary in India called LCIA-India in 2009. However, it closed down its operations in 2016. Now, all LCIA arbitrations relating to Indian parties are administered out of London.

The concept of institutional arbitration is still at a nascent stage in India. At present, majority of the arbitrations in India are conducted on an *ad hoc* basis. To keep up with the momentum to reform India's image as an international arbitration hub, a High-Level Committee headed by Retired Justice B.N. Srikrishna ("**Srikrishna Committee**") was constituted to propose recommendations for strengthening institutional arbitration in India. It also made recommendations for tweaks to be made to the amendments to the Act that came into force in October 2015.

Based largely but not completely on the recommendations of the Srikrishna Committee, the Arbitration and Conciliation (Amendment) Bill, 2018 ("**Amendment Bill 2018**") was drafted. The Amendment Bill 2018 was passed in the lower house of Indian parliament on 10 August 2018 and has been pending before the upper house of the Indian parliament.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

However, the last session of the parliament concluded on 13 February 2019, with the Amendment Bill 2018 still pending. The term of the lower house ends on 3 June 2019 and the Amendment Bill 2018 will lapse with the dissolution of the lower house, which is likely to happen earlier than that date when the new members of parliament of the lower house are sworn in after the general elections, unless the President of India promulgates the Amendment Bill 2018 as an ordinance in the interim. The Bill provided for the creation of an independent body called the 'Arbitration Council of India', which would have graded arbitral institutions and accredited arbitrators. We will have to wait and watch whether the new government that is formed after the general elections will take up the Amendment Bill 2018 in its present form, or with modifications, or will drop it altogether.

The New Delhi International Arbitration Centre Bill, 2018 ("**the NDIAC Bill**") was also introduced and passed by the lower house of parliament, and is pending before the upper house. As the current lower house of the parliament will dissolve before 3 June 2019 and there is no further session of the parliament before the general elections, the NDIAC Bill was to lapse. However, the President promulgated the NDIAC Ordinance on 2 March 2019, which is almost a replica of the NDIAC Bill. This ordinance will be in effect for a maximum period of six months and six weeks, within which time it needs to be enacted by parliament after the new government is formed. Under the ordinance, the NDIAC has been declared as an institution of national importance. Further, the ordinance envisages NDIAC taking over the infrastructure and other facilities of ICADR.

The NDIAC Ordinance has been challenged by ICADR before the Delhi High Court and a stay of the ordinance was granted by the Delhi High Court on 7 March 2019. The status of the ordinance will be known after a final decision is made by the Court upon hearing the detailed stance of the parties.

Arbitration agreement

The Act does not prescribe a particular format to draft an arbitration agreement. However, as per section 7 of the Act, a valid arbitration agreement must be in writing. The writing may be a document signed by the parties or an exchange of letters or other means of telecommunication that can be produced as a record of the agreement. Further, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The words used should disclose the intention and obligation of the parties to go to arbitration and not merely contemplate the possibility of going to arbitration.[7] Therefore, while drafting an arbitration clause, care must be taken to clearly express the parties' intention to arbitrate.

Section 7(5) of the Act provides that reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement. In ***Inox Wind Ltd. v. Thermocables Ltd.***,[8] the Supreme Court of India clarified that "*though general reference to an earlier contract is not sufficient for incorporation of an arbitration clause in the later contract, a general reference to a standard form would be enough for incorporation of the arbitration clause.*"

Further, in ***Elite Engineering and Construction (Hyderabad) Private Ltd v. Techtrans Construction India Private Limited***[9] and ***Duro Felguera, S.A. v. Gangavaram Port Limited***,[10] the Supreme Court followed its ruling in ***M.R. Engineers and Contractors (P) Ltd. v. Som Datt Builders Ltd.***,[11] which reiterated that a general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred contract into the contract under consideration. There should be a special reference indicating a mutual intention to incorporate the arbitration clause from another document into the contract. The exception to the requirement of special reference is where the referred document is not

© Published and reproduced with kind permission by Global Legal Group Ltd, London

another contract, but a standard form of terms and conditions of trade associations or regulatory institutions which publish or circulate such standard terms and conditions for the benefit of the members or others who want to adopt the same.

Arbitrability

Section 2 (1)(f) of the Act defines international commercial arbitration, as follows:

"Section 2(1)(f). "*international commercial arbitration' means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India*...." (Emphasis added)

The Supreme Court of India in ***A. Ayyasamy v. A. Paramasivam and Ors.***[12] ("***Ayyasamy***") noted that certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, cannot be referred to arbitration. The Court also pointed out some of the categories of disputes that are generally treated as non-arbitrable:

(i) patent, trade marks and copyright;

(ii) anti-trust/competition laws;

(iii) insolvency/winding up;

(iv) bribery/corruption;

(v) fraud; and

(vi) criminal matters.

In addition to the above, in ***Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Ors.***,[13] matrimonial disputes, guardianship matters and testamentary matters were held to be non-arbitrable and in ***Himangni Enterprises v. Kamaljeet Singh Ahluwalia***,[14] eviction or tenancy matters governed by special statutes were held to be non-arbitrable.

In terms of IP rights, the matter will not be arbitrable if the dispute arises *à propos* the grant of the right itself. However, disputes arising out of commercial contracts involving such rights – for instance, disputes arising out of copyright licensing agreements – are arbitrable. In other words, *inter partes* disputes are arbitrable. In the case of ***Emaar MGF Land Limited v. Aftab Singh,***[15] the Court in effect held that disputes that came under the purview of the Consumer Protection Act, 1986 are not arbitrable. The proceedings under the Consumer Protection Act are special proceedings and are required to be continued pursuant to the said Act despite an arbitration agreement.

Arbitrability of disputes where allegations of criminal offence and/or corruption are raised

It is a well-settled principle that **only** if a matter is commercial, is it arbitrable. In India as in other countries, one of the objections which a reluctant Respondent tries to raise to thwart the arbitral process is to allege that there are elements of fraud and/or corruption which are connected to the subject matter of the arbitration, and therefore the matter is not arbitrable.

There are two relatively recent judgments of the Supreme Court of India which are very instructive on issues involving allegations of fraud and/or corruption.

In case of foreign-seated arbitration, the Supreme Court in ***World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.***[16] held that allegations of fraud do not affect the validity of the arbitration agreement and under section 45 of the Act, the Court can refer the dispute to arbitration.

In case of domestic arbitration, the Supreme Court in ***Ayyasamy***[17] has held that matters that involve allegations of "serious fraud" would not be arbitrable, but matters that had "mere allegations" of fraud were arbitrable. Serious allegation of fraud would entail "extensive

© Published and reproduced with kind permission by Global Legal Group Ltd, London

evidence", and the matter would generally be "complex in nature".

Joinder / Consolidation

The Act does not contain any provision for Joinder of third parties and Consolidation of arbitrations. However, court decisions in this regard are instructive.

The Supreme Court of India has analysed the issue of joinder of third parties in ***Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. & Ors***.[18] and held that the expression, 'person claiming through or under', as provided under section 45 of the Act, would mean and include within its ambit multiple and multi-party agreements. This enables even the non-signatory parties to some of the agreements to be made parties to the arbitration. The court further held that "*...In the cases of group companies or where various agreements constitute a composite transaction like mother agreement and all other agreements being ancillary to and for effective and complete implementation of the mother agreement, the court may have to make reference to arbitration even of the disputes existing between signatory or even non-signatory parties. However, the discretion of the court has to be exercised in exceptional, limiting, befitting and cases of necessity and very cautiously*".[19]

As regards Consolidation, the decision of the Supreme Court of India in ***Olympus Superstructures Pvt. Ltd v. Meena Vijay Khetan and Ors.***,[20] is very useful. It was held that, where there are disputes and differences in connection with the main agreement and also disputes in regard to "other matters" "*connected*" with the subject-matter of the main agreement, arbitration shall be governed by the general arbitration clause of the main agreement. The disputes under the main agreement and disputes connected therewith can be referred to the same arbitral tribunal.[21]

Therefore, in appropriate cases, Joinder of parties and Consolidation of arbitrations are possible in India.

Competence-competence / Doctrine of separability

The principles of competence-competence and separability are statutorily recognised under section 16 of the Act. The arbitral tribunal is empowered to decide matters relating to the scope of its own authority and validity of the arbitration agreement. The Act recognises that arbitration clauses are separable from the main contract and an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

As per section 16(5) of the Act, if the tribunal rejects a challenge to its jurisdiction, it shall continue with the arbitral proceedings and make an award. The parties can challenge such an award under section 34 of the Act only after the final award has been rendered.[22] However, if the tribunal accepts a challenge to its jurisdiction, the order is directly appealable to court under section 37(2)(a) of the Act.

Arbitration procedure

Commencement of arbitration

Section 21 of the Act provides that a party may invoke arbitration by sending a request for the dispute to be referred to arbitration. The arbitral proceedings commence on the date on which such a request is received by the opposite party.

Seat of arbitration

Pursuant to section 20 of the Act, parties are free to agree on the place of arbitration, failing which the place of arbitration shall be determined by the arbitral tribunal. As per section 20(3) of the Act, the tribunal may meet at any place as it considers appropriate for

© Published and reproduced with kind permission by Global Legal Group Ltd, London

consultation, hearing etc., unless otherwise agreed by the parties. Recently, the Supreme Court of India in ***Union of India v. Hardy Exploration and Production (India) INC***[23] held that the term 'venue' used in the arbitration agreement would not equate to 'place' or 'seat' and, as the arbitral tribunal did not determine the 'seat' or 'place', Kuala Lumpur (which was the venue) could not be considered the seat. Therefore, it was held that the Indian courts would have jurisdiction to deal with an application to set aside the award.

In ***Indus Mobile Distribution Private Ltd. v. Datawind Innovations Private & Ors***,[24] the Supreme Court held that as the juridical seat of arbitration was Mumbai, the courts in Mumbai alone would have jurisdiction to the exclusion of all other courts as regards applications made to court in relation to arbitral proceedings (even if no cause of action arose in Mumbai). This reiterates the principle of 'curial support' for arbitration matters.

In the absence of any clear provision in the Act, the uncertainty as to whether two Indian parties may choose a foreign seat of arbitration was answered in ***GMR Energy Limited v. Doosan Power Systems India Private Limited & Ors.***[25] ("***GMR Energy***"). The Delhi High Court endorsed the view that two Indian parties can opt for a foreign seat of arbitration. An arbitration seated outside India would be covered under Part-II of the Act (Enforcement of Foreign Awards) and not under Part-I of the Act (Arbitrations seated in India). The Court relied on the decision of the Madhya Pradesh High Court in ***Sasan Power Ltd. v. North American Coal Corp. (India) (P) Ltd.***,[26] which also held that two Indian parties were free to arbitrate in a place outside India, and an award rendered pursuant thereto would be a foreign award. An appeal against the decision of the single judge in GMR Energy was filed before a division bench of the Delhi High Court but was withdrawn. Therefore, the judgment of the single judge stands.

Rules on evidence

Section 19(1) of the Act provides that the Civil Procedure Code, 1908 or the Indian Evidence Act, 1872 are not binding on the arbitral tribunal and section 19(2) provides that parties are free to agree on the procedure to be followed. Failing such an agreement, the arbitral tribunal is empowered to conduct proceedings as it considers appropriate.[27] Section 19(4) of the Act empowers the arbitral tribunal to determine the admissibility, relevance, materiality and weight of any evidence. The Supreme Court of India in the case of ***Srei Infrastructure Finance Limited v. Tuff Drilling Private Limited***,[28] held that the arbitral tribunal may draw guidance from the fundamental principles underlying the Code of Civil Procedure or the Indian Evidence Act.

The tribunal is empowered to appoint expert(s) to report to it on specific issues.[29] Section 26(2) of the Act provides that, if a party requests or if the arbitral tribunal considers it necessary, the experts shall participate in the oral hearing where the parties can cross-examine the expert on his report.

As regards the IBA Rules on taking of Evidence in International Arbitration, there appear to be not that many instances in India where the parties have adopted the said Rules.

Confidentiality, privilege and disclosure

There is no provision in the Act at present that specifically provides for arbitration proceedings or evidence to be kept confidential. However, the Act provides for confidentiality for conciliation proceedings under section 75 of the Act. Parties are free to incorporate confidentiality clauses in their arbitration agreements or choose institutional rules that provide for confidentiality. The MCIA Rules 2017 under Rule 35 provides for confidentiality of all matters relating to the proceedings and the award. The deliberations of the tribunal shall also

© Published and reproduced with kind permission by Global Legal Group Ltd, London

be confidential. Under Rule 35.4 of the MCIA Rules 2017, the arbitral tribunal is empowered to take appropriate measures, including issuing an order or award for sanctions or costs, if a party breaches confidentiality of the proceedings. The Amendment Bill 2018 had proposed inclusion of new section 42A in the Act which would provide that the arbitrator and arbitral institutions shall maintain confidentiality of all arbitral proceedings except the award. However, as mentioned earlier, the Amendment Bill 2018 will lapse upon the dissolution of the lower house of parliament and the amendments will have to be introduced by way of a new amendment bill and would need to be passed by both the houses of parliament.

The principle of 'attorney-client privilege' is provided for under sections 126 and 129 of the Indian Evidence Act. While the Indian Evidence Act does not per se apply to arbitration proceedings in India, the fundamental principles underlying the Evidence Act may be used as a guide for arbitration proceedings.[30]

Pursuant to section 27 of the Act, the arbitral tribunal may seek the court's assistance in taking evidence, which includes production of documents. The arbitrator has the general power to order discovery, inspection and production of documents.

Fast-track procedure

The Amended Act also provides for resolution of disputes by a fast-track procedure under section 29B of the Act if the parties so agree. By opting for this procedure, parties may decide not to have oral hearings. The award is to be made within six months from the date of constitution of tribunal, unless extended by six months by agreement of parties or extended by court upon an application made by a party.

Arbitrators

The parties to an arbitration are free to agree on a procedure for appointing the arbitrator(s). If the parties fail to appoint an arbitrator or the selection mechanism has failed:

(a) in case of domestic arbitration, an application for appointment can be made to the High Court; and

(b) in case of international commercial arbitration, the parties may directly approach the Supreme Court for the appointment of arbitrator(s).[31]

The amended section 12 of the Act provides that an arbitrator can only be challenged if: (a) circumstances exist which give rise to justifiable doubts as to his independence or impartiality; or (b) he does not possess the qualifications as agreed between the parties.

When a person is approached regarding his possible appointment as an arbitrator, he has to make a disclosure in writing in a form specified in the *Sixth Schedule* of the Act, which essentially mandates an arbitrator to make disclosures regarding potential Conflict of Interest as well as provide the circumstances which are likely to affect his ability to devote sufficient time to the arbitration, and to complete the arbitration within 12 months.

The Amendment Act has incorporated the *Fifth* and *Seventh Schedules* in the Act, which have been drawn from the Orange and Red lists of the IBA Guidelines on Conflicts of Interest in International Arbitration.[32] The grounds stated in the Fifth Schedule act as a guide in determining whether any circumstances exist that give rise to justifiable doubts as to the arbitrator's independence or impartiality. Section 12(5) of the Act, in effect, provides that if any of the grounds mentioned in the Seventh Schedule are attracted, then a person shall be ineligible to be appointed as an arbitrator unless the parties expressly agree in writing to waive the applicability of the provision. In ***HRD Corporation (Marcus Oil and Chemical Division) v. GAIL (India) Limited (Formerly Gas Authority of India Ltd.)***,[33] the Supreme

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Court held that for grounds listed under the *Fifth Schedule*, the arbitral tribunal is empowered to adjudicate on the challenge and its decision can only be challenged in a setting-aside petition after the award is made. However, in case of a challenge on the grounds mentioned under any of the categories listed in the *Seventh Schedule*, the arbitrator is ineligible to continue his duties and an application to terminate his mandate can be filed directly before the court, pursuant to section 14(2) of the Act.

The Act does not have an express provision at present regarding immunity of arbitrators. The Amendment Bill 2018 had proposed inclusion of new section 42B that would protect an arbitrator from being sued for any act or omission done in good faith during the course of the arbitration proceedings. As regards administrative assistance to the arbitral tribunal, the Act empowers the arbitrators to arrange for administrative assistance by a suitable institution or person with the consent of the parties.[34]

Interim relief

Under the Indian law, parties have the right to approach the courts under section 9 of the Act (or arbitral tribunal, under section 17 of the Act) for interim measures. Some of the interim measures available to the parties include:

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) order for detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in the arbitration;

(d) interim injunction or the appointment of receiver; and

(e) such other interim measure of protection as may appear to be just and convenient to the court or arbitral tribunal.

Further, the arbitral tribunal has the same power for making orders as the court has for the purpose of, and in relation to, any proceedings before it.

There have been significant amendments to sections 9 and 17 of the Act to make interim measures more effective. Section 9(2) of the Act provides that where parties have obtained a court order for a pre-arbitration interim measure, the arbitral proceedings must commence within 90 days of such order. Once the tribunal is constituted, the court shall not entertain any application for interim measure unless the court finds that the remedy provided under section 17 may be inefficacious.[35] Section 17(2) of the Act provides that the orders of the arbitral tribunal shall be enforceable in the same manner as an order of the court.[36]

Interim measures of protection from Indian courts for arbitrations seated outside India

In ***Bhatia International v. Bulk Trading S.A. and Anr***[37] ("***Bhatia International***"), the courts interpreted section 2(2) of the Arbitration Act to mean that Part I of the Act applied to arbitrations held in India, and also to arbitrations conducted outside India, unless it was expressly or impliedly excluded. This led to parties using this judgment to make application for setting aside foreign awards under Part I of the Act (which contains section 34 – the set-aside provision).[38] This led to a lot of criticism of Indian arbitration in international legal circles. The Supreme Court of India in ***Bharat Aluminium v. Kaiser Aluminium Technical Services***[39] ("***BALCO***"), overruled ***Bhatia International*** and held that Part I of the Act will not be applicable to arbitrations seated outside India. However, this led to a situation where parties could not get interim relief from Indian courts against possible dissipation of assets where the seat of arbitration was outside India. To overcome this lacuna, section 2(2) of the

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Act was amended in 2015 to clarify that provisions for interim measures provided under section 9, which falls under Part I of the Act, shall apply to international commercial arbitrations even if the seat of arbitration is outside India.

Anti-suit injunction

Section 8 of the Act provides that where an action in a matter which is the subject of an arbitration agreement is brought before a judicial authority, the courts must refer the parties to arbitration unless it finds that *prima facie* no valid agreement exists. Similarly, under section 45 of the Act, the court can refer the parties to arbitration where arbitration is seated outside India. The Supreme Court of India in ***Sasan Power Limited v. North American Coal Corporation India Private Limited***,[40] clarified that where a matter is brought before a court under section 45 of the Act, the court can only look into the question as to whether the arbitration agreement is "*null and void, inoperative or incapable of being performed but not the legality and validity of the substantive contract*".

Anti-arbitration injunction

There have been instances where anti-arbitration injunctions granted by High Courts in aid of domestic litigation were overturned by the Supreme Court of India.

In ***World Sport Group (Mauritius) Ltd v. MSM Satellite (Singapore) Pte Ltd.***,[41] the Supreme Court set aside the anti-arbitration injunction granted by a Division Bench of the Bombay High Court and opined that the only bar to refer parties to foreign-seated arbitration is where the arbitration agreement was null and void, inoperative or incapable of being performed.

Security for costs

While there is a provision under sections 9 and 17 of the Act for securing the amount in dispute, there is no express provision under the Act for security for costs. However, it can fall within the ambit of sections 9 and 17 of the Act, which allows the court or the arbitral tribunal, as appropriate, to make any interim measure in an arbitration as a court could make for the purpose of, and in relation to, any proceedings before it. Thus, the court or tribunal may grant security for costs in an arbitration. MCIA Rule 29(e) provides that the arbitral tribunal can order any party to provide security for legal or other costs in any manner it thinks fit. In India, applications for security for costs are quite rare.

Arbitration award

Section 31 of the Act, which provides for the form and content of an arbitral award, states that the award must be in writing and signed by all or majority of the arbitrators. The arbitral award shall state the reasons upon which it is based, unless the parties have agreed otherwise or if it is a consent award. The award shall state the date and place of arbitration.

As the majority of arbitrations in India are conducted on an *ad hoc* basis without any institutional oversight, there was a tendency for arbitration proceedings to be protracted for years, resulting in delay in the rendering of awards. This is one of the main reasons India was seen as a less preferred seat of arbitration. To rectify this problem, the Amendment Act has added section 29A to the Act, which provides that the award shall be made within a period of 12 months from the date the arbitral tribunal enters upon the reference. The parties may agree to an extension of not more than six months.[42] If the award is not made within a period of 12 months or the extended period, the mandate of the arbitrator(s) shall terminate unless the court has, on an application in writing made before it, extended the period for making the award, either prior to or after the expiry of the period of 12 or 18 months, as the case may be.

This strict timeline has made it practically difficult for parties involved in complex and

© Published and reproduced with kind permission by Global Legal Group Ltd, London

document-intensive arbitration matters to complete the arbitration within 12/18 months.

To this end, the Amendment Bill 2018 had proposed an amendment to exclude international arbitrations from the purview of section 29A. Further, there is a proposal that the period of 12 months to make an award (which would apply only to domestic arbitrations) should commence from the date of completion of pleadings by the parties. However, the Amendment Bill 2018 will lapse shortly unless promulgated as a Presidential ordinance.

Costs

The Act also allows the arbitral tribunal to order costs. The Amendment Act introduced a new section 31A to the Act which is based on the Law Commission's recommendation that "*The loser-pays rule logically follows, as a matter of law, from the very basis of deciding the underlying dispute in a particular manner; and as a matter of economic policy, provides economically efficient deterrence against frivolous conduct and furthers compliance with contractual obligations.*"[43] The tribunal has the discretion to decide the amount of such costs and when such costs are to be payable. However, when ordering costs the tribunal may have regard to the conduct of parties; whether a party has succeeded partly in that case; frivolous counter-claims leading to delay; and reasonable offer to settle by one party.

Interest

Section 31(7)(a) of the Act provides that unless otherwise agreed by the parties, the arbitral tribunal may include in the award interest, at such rate as it deems reasonable on the whole or any part of the sum awarded, for the whole or any part of the period from the date when the cause of action arose until the date of the award.

As regards post-award interest, section 31(7)(b) of the Act provides that, unless the award otherwise directs, any sum directed to be paid in an arbitral award shall carry interest at a rate of 2% higher than the current rate of interest prevalent on the date of award, from the date of the award to the date of payment. 'Current rate of Interest' means the highest of the maximum rates at which interest may be paid on different classes of deposits (other than those maintained in savings accounts or those maintained by charitable or religious institutions) by different classes of scheduled banks, in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India ("**RBI**") under the Banking Regulation Act 1949.[44] For example, if the maximum rate of interest to be paid by any Scheduled Bank as directed by the RBI at any given period is say 7%, then the post-award interest would be 9% (i.e. 7% + 2%). Until the Amendment Act of 2015, the statute provided for a default rate of post-award interest of 18% *per annum*.

Challenge of the arbitration award

In India, there is no provision in the Act for appeal against an award. The only recourse for a party is to file an application to set aside the award on very limited grounds under section 34 of the Act.[45]

Section 34 of the Act provides that an arbitral award may be set aside by the court only if the party making the application furnishes proof that:

(i) the party was under some incapacity;

(ii) the arbitration agreement was not valid;

(iii) proper notice of the appointment of an arbitrator was not given or the party was unable to present its case;

(iv) the award fell outside the scope of the arbitration agreement;

© Published and reproduced with kind permission by Global Legal Group Ltd, London

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

(vi) the subject matter of the dispute is not capable of settlement by arbitration; or

(vii) the award is in conflict with the public policy of India.

In the past, the ground of "public policy" was often used to set aside awards in India. An analysis of some of the cases where 'public policy' has been discussed by the Supreme Court of India is as follows:

In the case of ***Renusagar Power Co Ltd v. General Electric Co***[46] ("***Renusagar***"), the Supreme Court held that the term "public policy" should be construed narrowly. It held that enforcement of a foreign award would be refused on the ground that it is contrary to public policy if it is contrary to fundamental policy of Indian law; the interests of India and justice or morality. In the case of ***Oil and Natural Gas Corporation v. Saw Pipes Ltd.***,[47] ("***Saw Pipes***") the issue was whether an award made in India could be set aside on the ground of "public policy", as the arbitral tribunal had incorrectly applied the law of liquidated damages. The Supreme Court added the ground of "patent illegality" under section 34 to challenge an arbitral award.

In the case of ***Bhatia International***,[48] the Supreme Court held that Part I of the Act would apply to arbitrations seated outside India, unless it was expressly or impliedly excluded. In ***Venture Global Engineering v. Satyam Computer Services Ltd.***,[49] the ratio in ***Bhatia International*** was followed and the Supreme Court applied the expanded view of public policy and ruled that a foreign award can be set aside under the public policy exception in section 34(2)(b)(ii), which fell under Part I of the Act.

In ***BALCO***,[50] the Supreme Court held that Part I would not be applicable to arbitral proceedings seated outside India, and overruled Bhatia International. This judgment only applied prospectively, i.e. to agreements executed on or after 6 September 2012 (the date of the judgment). However, the Supreme Court in BALCO did not distinguish the term "public policy" under section 34 and section 48 of the Act (which deals with foreign awards).

In ***ONGC Ltd v Western Geco International Ltd***[51] ("***Western Geco***"), the Supreme Court interpreted the term "public policy" in section 34 of the Act widely. The Court held that the term "fundamental policy of India", which is an ingredient in the interpretation of the term "public policy", included judicial approach, principles of natural justice and Wednesbury's principle of reasonableness.

In ***Associate Builders v. DDA***,[52] ("***Associate Builders***") when applying the public policy test under section 34 of the Act, the Supreme Court held that the court "*does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score*".

With respect to fundamental policy of Indian law, the court held that challenge would include factors such as: violations of foreign exchange legislation; disregarding orders and binding judgments of superior courts; and three principles followed in the ***Western Geco***[53] judgment. The court held that factors for an award to be construed as being against justice and morality would include: an award shocking the conscience of the court; and the tribunal awarding sums more than the parties' claim. The court also held that award would be patently illegal if the award was induced by fraud or corruption; the award contravenes the substantial law

© Published and reproduced with kind permission by Global Legal Group Ltd, London

of India where the illegality goes to the root of the matter; the award contravenes the Act; and the tribunal failed to decide the dispute in accordance with the terms of the contract.

Recently, in the case of ***Delhi Metro Rail Corporation Ltd v. Delhi Airport Metro Express Private Ltd.***,[54] the Division Bench of the Delhi High Court set aside an award for an amount of INR 2782.33 crores plus interest which was payable by Delhi Metro Rail Corp. Ltd. to Delhi Airport Metro Express Pvt. Ltd. under Article 29.5.2 of the Concessionaire Agreement. It was held "*that the impugned award suffers from perversity, irrationality and patent illegality in the face of the Award in the form of confusion and ambivalence as to the termination notice and the date of termination*". The court observed that most importantly, the arbitral tribunal had ignored and did not consider vital evidence while deciding the matter. Applying the test and principles laid down in ***Associate Builders***, the court found that the reasoning of the award was completely flawed and perverse as it suffered from patent illegality, defied logic and was irrational which no reasonable person would formulate. Therefore, the court partially allowed setting aside the award, with liberty to the parties to invoke the arbitration clause for fresh adjudication of their claims and counter-claims.

The amendment to section 34 has significantly restricted the scope for setting aside the award on the grounds of public policy. Explanation 1 to section 34(2)(b) clarifies that an award is in conflict with the public policy of India only if the award:

- was induced or affected by fraud or corruption or in violation of section 75 (confidentiality as regards conciliation) or section 81 (matters discussed in conciliation proceedings used as evidence in arbitral or judicial proceedings); or
- is in contravention with the fundamental policy of Indian law; or
- is in conflict with the most basic notions of morality and justice;[55] or
- in case of domestic arbitrations, the award may be set aside if it is vitiated by patent illegality on the face of the award. However, an award cannot be set aside merely on the ground of an erroneous application of the law.[56]

From the above analysis, it is clear that the Indian courts are taking a pro-arbitration approach. The courts are hesitant to set aside domestic awards and allow applications for resisting enforcement of foreign awards on mere allegations of violation of public policy. Moreover, the scope of public policy has been clarified and narrowed by the amendments.

Prior to the Amendment Act, a petition to set aside an award led to an automatic stay of the enforcement proceedings until the petition under section 34 was finally disposed of, virtually depriving the award creditor of the benefits of an award made in his favour. Section 36 has been amended in an attempt to rectify this anomaly. It provides that an application filed under section 34 to set aside the award shall not by itself render the award unenforceable.[57] The amendment requires the party to file a separate application for stay of the enforcement proceedings. While considering the application for grant of stay, the court can even order the award debtor to furnish security.[58]

Can an award be modified?

An award once made is final and binding. It cannot be modified save for correction, interpretation and additional award (on aspects missed out). Section 33 of the Act empowers the arbitral tribunal to correct any error in computation, any clerical or typographical error or any errors of a similar nature, either upon a request by a party, or on its initiative within 30 days of receipt of the award by the parties. The arbitral tribunal can also give an interpretation of a specific point or part of the award[59] or make an additional award[60] as to any claim presented in the arbitral proceedings, but omitted from the award.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Enforcement of the arbitration award

India is a signatory to both the New York Convention and Geneva Convention. Part II of the Act provides for enforcement of foreign awards under both conventions. Only those foreign awards that arise out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, are enforceable. Further, India follows the reciprocity principle and limits the enforcement of arbitral awards to those made in other New York Convention and Geneva Convention countries. The awards that are recognised are those that have been made at a seat in a country notified by the Central Government of India under section 44 and section 53 of the Act, respectively.

Formal requirements

The party applying for the enforcement of a foreign award shall, at the time of the filing of an application for enforcement, produce before the court the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made. The party also needs to produce the original agreement for arbitration or a duly certified copy thereof, and such evidence as may be necessary to prove that the award is a foreign award.[61] In case the award or agreement to be produced is in a foreign language, the party seeking to enforce the award shall produce a translation in English certified as correct by diplomatic or consular agent of the country to which the party belongs, or certified as correct in such other manner as may be sufficient according to the law in force in India.[62]

Conditions for enforcement of a foreign award

Enforcement of a foreign award may be refused under section 48 of the Act on broadly similar grounds as provided in section 34 of the Act, except that an application to resist enforcement of a foreign award under section 48 cannot be made on the ground that the award was patently illegal and therefore against the public policy of India. Some important case laws in this regard are discussed below:

In the case of ***Shri Lal Mahal Limited v. Progetto Grano Spa***[63] ("***Shri Lal Mahal***"), the Supreme Court held that the wider meaning given to the expression "public policy" in the *Saw Pipes* case would not be applicable in the case of enforcement under section 48 of the Act. The court applied the decision of ***Renusagar***, and held that the expression "public policy of India" must be given a narrow meaning. Therefore, an award cannot be refused enforcement under section 48 of the Act if it is "patently illegal".

In ***Cruz City 1 Mauritius Holdings v. Unitech Limited***,[64] the Delhi High Court held that the defence of public policy to resist enforcement of a foreign award, is extremely narrow and the same could not be equated to offending any particular provision or a statute. The expression "fundamental policy of law" must be interpreted in that perspective and must mean only the fundamental and substratal legislative policy and not a provision of any enactment.

In the case of ***NTT Docomo Inc v. Tata Sons Limited***,[65] the arbitral tribunal had ruled in favour of Docomo in a dispute arising out of a shareholder agreement. Docomo filed an application before the Delhi High Court for enforcement of the award. Tata Sons had initially resisted the enforcement, but subsequently withdrew all its objections in relation to the enforcement of the award. The RBI filed an intervention application on the ground that Shareholders' Agreement between Docomo and Tata Sons was violative of the Foreign Exchange Management Act ("**FEMA**") Regulations. It contended that inasmuch as it concluded that FEMA Regulations need not be looked into, the award was illegal and contrary to the public policy of India. The court held that the sum awarded by the arbitral tribunal was in the nature of damages and not price of the shares. It further held that there

© Published and reproduced with kind permission by Global Legal Group Ltd, London

was nothing in the shareholders' agreement as interpreted by the award which was opposed to the public policy or fundamental policy of India. The court rejected the RBI's argument, held that the award was enforceable, and also that there was nothing in the Consent Terms between the parties which could be said to be contrary to any provision of Indian law, much less opposed to public policy, or void or voidable under the Indian Contract Act.

In ***Glencore International AG v. Dalmia Cement (Bharat) Limited***,[66] an application was filed by Glencore for enforcement of an arbitration award made by a tribunal constituted under the LCIA Rules. Dalmia Cement filed objections under section 48 of the Act, contending that the award was opposed to the public policy of India, as the arbitral tribunal had awarded damages in favour of Glencore, without Glencore establishing or furnishing any documentary proof of the loss suffered by it. The Delhi High Court noted that Dalmia Cement had full opportunity to contest the veracity and the evidentiary value of the documents produced by Glencore, and rejected Dalmia's objections under section 48 of the Act. An application for leave to appeal against this judgment was dismissed by the Supreme Court of India.

The issue of interpretation of 'public policy' with respect to enforcement of foreign awards was dealt with by the Delhi High Court in ***Daiichi Sankyo Company Ltd. v. Malvinder Mohan Singh and Ors***,[67] where the court ruled in favour of enforcement of the award. Taking a pro-arbitration approach, the court followed the ratio laid down by the Supreme Court in ***Shri Lal Mahal*** and held that the scope of 'public policy' under section 48(2)(b) of the Act is narrow in comparison to section 34(2)(b)(ii) of the Act. "Fundamental Policy of Indian Law" does not mean provisions of the statute, but substratal principles on which Indian Law is founded. A special leave petition filed before the Supreme Court of India seeking permission to appeal against the above decision of the Delhi High Court, was dismissed *in limine* by the Supreme Court. Therefore, the judgment of the Delhi High Court in favour of enforcement of the foreign award stands good. On 21 December 2018, the Singapore High Court dismissed an application to set aside the award.

Can an arbitration award be enforced if it has been set aside at the courts of the seat of arbitration?

Pursuant to section 48(1)(e) of the Act, at the request of the party against whom enforcement of a foreign award is invoked, the courts may refuse enforcement if the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.[68] In other words, it is at the discretion of the court to refuse enforcement if the award was set aside by a court at the seat of arbitration.

Trends of enforcement in India – pro-arbitration or anti-arbitration

As regards recent trends of enforcement in India, we can say that it is pro-arbitration. The amendments to the Act, including the provisions dealing with recourse against awards and enforcement, were made in the year 2015. A Presidential ordinance was promulgated on 23 October 2015 to amend the Act. Within two months the Amendment Act was passed by the parliament, based on the ordinance and was made effective from 23 October 2015. A year thereafter, i.e. in January 2017, a high-level committee was constituted to look at the institutionalisation of the arbitration mechanism in India, *viz*., the Srikrishna Committee.

Within seven months of its constitution, the committee came up with its report, proposing among other things, tweaks to the amendments made to the Act, so as to remove practical problems faced by the users of arbitration in India. Based largely but not completely on the recommendations of the Srikrishna Committee, the Amendment Bill 2018 was drafted. It was passed in the lower house of Indian parliament on 10 August 2018 and has been pending before the upper house of Indian parliament. However, as the Amendment Bill 2018 would

© Published and reproduced with kind permission by Global Legal Group Ltd, London

lapse soon, we need to wait and watch whether the new government will re-introduce the Amendment Bill 2018 in the current form, or with modifications, or will drop it altogether. It is also pertinent to note from the judgments discussed under the headings, 'Challenge of the arbitration award' and 'Enforcement of the arbitration award' above that the judiciary in India has been increasingly supportive of arbitration.

In relation to the question as to whether the amendments made to the Act in 2015 would apply prospectively or retrospectively to arbitration-related court applications, there were conflicting decisions of different High Courts on the issue as to whether the amended provisions would apply to court proceedings commenced after 23 October 2015, i.e. the commencement of the Amendment Act (in relation to arbitration proceedings that commenced before the Amendment Act). In this regard, the Supreme Court in ***Board of Control for Cricket in India v. Kochi Cricket Private Limited and Others***[69] ("***BCCI***") clarified that the amendments to the Act would apply to court proceedings which have commenced, "in relation to arbitration proceedings", on or after the commencement of the Amendment Act. Therefore, even if the arbitration was commenced prior to the amendments, any court application after the amendments came into force in relation to such arbitrations would be dealt with by applying the amended Act. However, the Amendment Bill 2018 clarified that the amendments made in 2015 will only apply to court proceedings filed in relation to arbitrations that were commenced after 23 October 2015. Since the Amendment Bill 2018 will lapse soon, the ratio in BCCI case prevails for now.

Investment arbitration

Bilateral Investment Treaties (BITs)

As of this date, India has signed 83 Bilateral Investment Treaties ("**BITs**"). However, in the year 2017, India gave notice to 58 countries terminating the BITs, and has suggested that they renegotiate the treaty based on the Model BIT that India came up with in 2015/2016. While discussions are ongoing with some countries to renegotiate the BITS, the Model BIT has been criticised, as it is perceived to be in favour of the host state.

Multi-lateral Investment Treaties (MITs)

India is not a party to any of the major multi-lateral investment treaties. Specifically, India is not a party to the ICSID Convention or even the Energy Charter Treaty. However, India has signed the India-ASEAN Comprehensive Economic Cooperation Agreement (India-ASEAN CECA). ASEAN (Association of South East Asian Nations) consists of Thailand, Indonesia, Vietnam, Philippines, Malaysia, Singapore, Myanmar, Cambodia, Laos and Brunei.

Recent investment arbitration cases against India

In recent years, 24 investment arbitrations have been commenced against India. Nine (9) out of these investment arbitrations have been settled[70] and three (3) investment arbitration awards were rendered against India, in: (i) *White Industries v. Republic of India*; (ii) *Devas v. India*; and (iii) *Deutsche Telekom v. India*.

In ***White Industries v. Republic of India***,[71] an award was made against India. In this case, an ICC award in a commercial arbitration between White Industries and Coal India was sought to be enforced in India. As it was delayed for many years, White Industries initiated a BIT arbitration under the India-Australia BIT and an award was eventually rendered in its favour. The Union of India did not take any recourse against this award. We understand that the matter was settled and the payment was made pursuant to the award.

As regards the interim award on merits made in ***Deutsche Telekom v. India***, the challenge

© Published and reproduced with kind permission by Global Legal Group Ltd, London

filed by India before the Swiss courts for annulment of the award was rejected by the First Civil Court of the Swiss Federal Tribunal (the supervising court for arbitrations) by a 3:2 majority in a judgment dated 11 December 2018.

An award was rendered in favour of India in ***Louis Dreyfus Armateurs SAS v India***[72] in September 2018. In this case, *Louis Dreyfus Armateurs SAS* ("**LDA**"), a French investor, filed claims against India for alleged breach of the France-India BIT by India in not providing full protection and security to the investor. LDA had invested in a joint venture, Haldia Bulk Terminals Pvt Ltd, which was to carry out modernisation works at Haldia Docks. In 2012, the joint venture was terminated citing mounting losses, non-allocation of cargo, and law and order issues. The arbitral tribunal constituted under the UNCITRAL Arbitration Rules dismissed the claim on the ground of lack of jurisdiction since the investor did not have a minimum 51% ownership in the project.

Treatment of investment arbitration awards by national courts

The manner in which the national courts in India treat investment arbitral awards has not been tested to date. However, there have been some recent decisions by Indian courts on applications seeking interim measures in relation to BIT arbitrations. These are discussed below.

In ***Union of India vs. Vodafone Group PLC United Kingdom & Anr.***,[73] ("**Vodafone**") the Delhi High Court delivered a landmark judgment holding that the investment arbitration disputes are fundamentally different from commercial disputes and as such, the Arbitration and Conciliation Act, 1996 will not apply to claims brought under investment treaties. A suit was filed by Union of India against Vodafone Group Plc and Vodafone Consolidated Holdings Ltd. seeking relief of declaration and a permanent injunction restraining the defendants from proceeding with the arbitration under the India UK Bilateral Investment Protection Agreement. It was held that the Court's inherent powers are not circumscribed by anything contained in the Arbitration Act and the ratio in cases to which the Arbitration Act applies would not apply to investment arbitration cases.

The Court said that even though national courts are not divested of their jurisdiction the moment there is an arbitration between a private investor and a state, the national courts will exercise great restraint and grant anti-arbitration injunction only if there are very compelling circumstances, the Court has been approached in good faith, and there is no alternative efficacious remedy available. The Court refused to grant Union of India's plea for an injunction restraining the continuation of arbitration proceedings under the India-UK BIT even as separate arbitration proceedings were pending under the India-Netherlands BIT.

The judgment in the ***Vodafone Case*** was relied on by the High Court of Delhi in ***Union of India vs. Khaitan Holdings (Mauritius) Limited & Ors.***,[74] where the Court refused to grant an anti-arbitration injunction against the arbitral proceedings initiated by Khaitan Holdings under the India–Mauritius BIT. It was held that while the Court had inherent jurisdiction to entertain the suit, public policy required that the Government honour its commitments including bilateral ones. The adherence to treaties is therefore not just a contractual stipulation but a solemn commitment by a sovereign nation. Thus, the continuation of arbitral proceedings is the rule and not the exception. It was held that the question as to whether Khaitan Holdings is a genuine 'investor', which can invoke the jurisdiction of the arbitral tribunal, is a question to be determined by the arbitral tribunal constituted under the BIT.

The above decisions show the pro-arbitration approach taken by Indian Courts in recent times.

* * *

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Endnotes

1. See *Bharat Aluminium v. Kaiser Aluminium (2012) 9 SCC 552* at para 30.
2. Ibid at para 36.
3. Preamble to the Act.
4. Section 2(1)(e) of the Act and section 11 of the Act.
5. Section 2(1)(c) of the Commercial Courts Act defines a '*commercial dispute*' and covers the subject matters that would fall within its ambit.
6. Sections 2(1)(i) and 10 of the Commercial Courts Act.
7. See *Jagdish Chander v. Ramesh Chander, (2007) 5 SCC 719* at para 8.
8. (2018) 2 SCC 519 at para 18.
9. (2018) 4 SCC 281 at paras 15 and 16.
10. (2017) 9 SCC 729 at para 36.
11. (2009) 7 SCC 696 at para 22.
12. (2016) 10 SCC 386 at para 14.
13. (2011) 5 SCC 532 at para 36.
14. (2017) 10 SCC 706 at paras 21, 22, 24.
15. 2018 SCC Online SC 2771 at paras 25, 26 and 27.
16. (2014) 11 SCC 639 at para 36.
17. (2016) 10 SCC 386 at paras 23 and 18.
18. (2013) 1 SCC 641 at para 165.1.
19. Ibid at para 165.2.
20. (1999) 5 SCC 651.
21. Ibid at para 30.
22. Section 16(6) of the Act.
23. 2018 SCC OnLine SC 1640 at paras 37 to 41.
24. (2017) 7 SCC 678 at paras 19 and 20.
25. (2017) SCC OnLine Del 11625 at paras 29, 44 and 45.
26. (2015) SCC OnLine MP 7417 at paras 57 and 72.
27. Section 19(3) of the Act.
28. (2018) 11 SCC 470 at para 17.
29. Section 26(1) of the Act.
30. See *Srei Infrastructure Finance Limited v. Tuff Drilling Private Limited, (2018) 11 SCC 470* at para 17.
31. Section 11(6) of the Act.
32. Law Commission Report, Page 30 at para 59.
33. (2018) 12 SCC 471 at para 12.
34. Section 6 of the Act.
35. Section 9(3) of the Act.
36. Section 17(2) of the Act.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

37. (2002) 4 SCC 105 at para 32.
38. See *Venture Global Engineering v Satyam Computer Services Ltd.*, (2008) 4 SCC 190.
39. (2012) 9 SCC 552 at paras 89, 195 and 196.
40. (2016) 10 SCC 813 at para 49.
41. (2014) 11 SCC 639 at paras 39 and 40.
42. Section 29A (3) of the Act.
43. Law Commission Report, page 34 at para 71.
44. Section 2 (b) of the Interest Act, 1978.
45. Section 34 (1) of the Act.
46. 1994 Supp (1) SCC 644 at para 66.
47. (2003) 5 SCC 705 at para 22.
48. (2002) 4 SCC 105 at para 32.
49. (2008) 4 SCC 190 at paras 37 and 47.
50. (2012) 9 SCC 552 at paras 89, 195 and 196.
51. (2014) 9 SCC 263 at paras 35, 38 and 39.
52. (2015) 3 SCC 49 at para 33.
53. 2014 (9) SCC 263 at paras 35, 38 and 39.
54. 2019 SCC OnLine Del 6562 at paras 49, 104, 116 and 139.
55. Explanation 1 to section 34(2) of the Act.
56. Section 34(2A) of the Act.
57. Section 36 (2) of the Act.
58. Section 36 (3) of the Act.
59. Section 33 (1) (b) of the Act.
60. Sections 33 (4) and (5) of the Act.
61. Section 47 (1) of the Act.
62. Section 47 (2) of the Act.
63. (2014) 2 SCC 433 at para 29.
64. 2017 SCC OnLine Del 7810 at para 97.
65. 2017 SCC OnLine Del 8078 at paras 51, 60, 61 and 64.
66. 2017 SCC OnLine Del 8932 at para 38.
67. 2018 SCC OnLine Del 6869 at paras 61, 96 and 97.
68. Section 48 (1) (e) of the Act.
69. (2018) 6 SCC 287 at paras 78 and 82.
70. UNCTAD ISDS website – updated on 31 July 2018.
71. Award dated 30 November 2011.
72. Award of 11 September 2018.
73. 2018 SCC OnLine Del 8842 at paras 2, 117, 144, 145 and 147.
74. 2019 SCC OnLine Del 6755 at paras 47 and 52.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Ganesh Chandru
Tel: +91 97171 18642 / Email: ganesh.chandru@lakshmisri.com

Ganesh Chandru is an Executive Partner at Lakshmikumaran & Sridharan ("L&S") and he heads the firm's International Arbitration Practice Group. He is admitted to practice in India, England & Wales and Singapore and is a Fellow of the Chartered Institute of Arbitrators, UK and the Singapore Institute of Arbitrators.

His practice encompasses advising and representing parties in international arbitration matters (under Rules of SIAC, ICC, LCIA, SCMA, UNCITRAL as well as *ad hoc*) and in arbitration matters seated in India that are conducted pursuant to the Arbitration and Conciliation Act, 1996. He also advises and represents parties in litigation matters before the courts. He sits as an arbitrator in international arbitrations and is a member of the Panel of Arbitrators of SIAC, the Singapore Institute of Arbitrators, the Indian Council of Arbitration and the Asian International Arbitration Centre (formerly Kuala Lumpur Regional Centre for Arbitration).

Prior to joining L&S in New Delhi in 2015, he spent more than 16 years in Singapore specialising in International Arbitration and Dispute Resolution. He worked with some top International law firms and Singapore law firms. Between 2002 and 2007, Ganesh was the Counsel & Assistant Registrar of the Singapore International Arbitration Centre. He supervised the administration of about 500 arbitrations during his five-year stint at SIAC, and also pioneered SIAC's initiatives in India. He has been recognised in the Global Arbitration Review 100 (2009) as a "Significant" name and has been listed as one of the "Future Leaders" by *Who's Who Legal* and the *Global Arbitration Review* (GAR), London in the first edition of *Arbitration: Future Leaders 2017* as well as in *Who's Who Legal: Arbitration 2018*.

Prashant Kumar
Tel: +91 11 4129 9835 / Email: prashant.kumar@lakshmisri.com

Prashant Kumar is a Principal Associate in the International Arbitration Practice Group of Lakshmikumaran & Sridharan. Prashant obtained a Bachelor of Laws degree with first class honours from the Gujarat National Law University in May 2010. He has very good experience in arbitration and commercial matters and has appeared before the Supreme Court of India, and various High Courts and tribunals.

Lakshmikumaran & Sridharan

5, Link Road, Jangpura Extension, New Delhi 110014, India
Tel: +91 11 4129 9800 / URL: www.lakshmisri.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Ireland

Kevin Kelly & Heather Mahon
McCann FitzGerald

Introduction

Legislation and courts

In Ireland, the Arbitration Act 2010 (the "**2010 Act**") governs arbitration. It adopts the UNCITRAL Model Law (the "**Model Law**"), as amended on 7 July 2006 and applies it to all arbitrations, both domestic and international commenced in Ireland on or after 8 June 2010. The 2010 Act also gives effect to the Geneva Convention and Protocol 1923, the New York Convention 1958 and the Washington Convention 1965, thereby restating the position under earlier Irish legislation. Section 9 of the 2010 Act states that the High Court is the relevant court for the purposes of that Act.

Arbitration bodies

Arbitration Ireland (The Irish Arbitration Association) comprises members from bodies, firms and persons actively involved in the practice of international arbitration in Ireland. The Chartered Institute of Arbitrators also has an Irish branch. There are also industry-specific bodies which support arbitration, such as Engineers Ireland.

Arbitration agreements

In writing

The 2010 Act applies Option 1 of Article 7 of the Model Law to the requirements of an arbitration agreement. The arbitration agreement must be in writing, whether in the form of an arbitration clause in a contract or in the form of a separate agreement. An agreement will be in writing if its content is recorded in any form, notwithstanding that the arbitration agreement or contract may have been concluded orally, by conduct or other means. "*In writing*" is interpreted broadly.

Doctrine of separability

The doctrine of separability is not set out in Irish arbitration legislation but has been recognised by the Irish courts, *Doyle v National Irish Insurance Co plc* [1998] 1 I.R. 89.

Principle of competence-competence

Article 16 of the Model Law gives legislative effect to the doctrine of competence-competence, which provides that the arbitral tribunal has jurisdiction to rule on the question of whether it has jurisdiction to hear and determine a dispute. However, this power is not final as an appeal lies to the High Court under Article 16(3). There is no subsequent appeal from the High Court's decision. An assertion that the tribunal does not have jurisdiction must be raised no later than the submission of the statement of defence.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

In *Mayo County Council v Joe Reilly Plant Hire Ltd* [2015] IEHC 544, it was held that where the existence of an arbitration clause is not in dispute, the courts will be very slow to interfere with the arbitrator's ruling on his own jurisdiction. More recently, in *Achill Sheltered Housing Association CLG v Dooniver Plant Hire Ltd* [2018] IEHC 6, the High Court held that a preliminary ruling by the arbitrator that he had been validly appointed came within the scope of Article 16(3). However, if an arbitrator was incorrect in determining that he had been validly appointed, he had no *locus standi* to decide a challenge to his jurisdiction, let alone to arbitrate a dispute between the parties.

Disputes excluded from the 2010 Act

Section 30 of the 2010 Act clarifies that the Act does not apply to:

(i) disputes regarding the terms or conditions of employment or the remuneration of employees;

(ii) arbitrations conducted under Section 70 of the Industrial Relations Act 1946; or

(iii) arbitrations conducted by a property arbitrator appointed under Section 2 of the Property Values (Arbitration and Appeals) Act 1960.

Consumer disputes, where the arbitration clauses are not individually negotiated and where the disputes are worth less than €5,000, are only arbitrable at the election of the consumer. Subject to certain exceptions, a "consumer" is a natural person acting outside his trade, business or profession.

Joinder/consolidation of third parties

Irish law will only allow an arbitral tribunal to assume jurisdiction over individuals or entities where the parties so agree. Section 16 of the 2010 Act provides that an arbitrator may not direct that different proceedings be consolidated or heard together without the agreement of the parties. Under Section 32 of the 2010 Act, the High and Circuit Courts may adjourn court proceedings which are otherwise properly before the courts to facilitate arbitration if the relevant court thinks it appropriate to do so, provided the parties consent.

In the case of *Maguire v Motor Services Ltd t/a MSL Park Motors* [2017] IEHC 532, the two plaintiffs brought proceedings seeking damages from the defendants for a breach of contract in relation to the purchase of a new motor vehicle. There was a binding arbitration agreement between one plaintiff, the owner of the vehicle, and the motor dealer who had supplied it. Proceedings between them had been stayed to allow for arbitration. The issue was whether, by virtue of this arbitration agreement, the court should also stay proceedings between that plaintiff and the vehicle manufacturer, and as between the second plaintiff and the vehicle manufacturer. Barrett J held that, while an arbitration agreement can apply to a non-party, they must meet a "sufficient connection" test, which was not met here. He held that the stay of the proceedings between the vehicle owner and the motor dealer was not appealable, but overruled the second stay, as the individual parties had not agreed between them that a dispute would go to arbitration.

Arbitration procedure

Commencement of arbitration

Section 7 of the 2010 Act provides that arbitral proceedings shall be deemed to be commenced on:

(a) the date on which the parties to an arbitration agreement so provide as being the commencement date for the purposes of the commencement of arbitral proceedings under the agreement; or

© Published and reproduced with kind permission by Global Legal Group Ltd, London

(b) where no provision has been made by the parties as to commencement of proceedings, the date on which a written communication containing a request for the dispute to be referred to arbitration is received by the respondent.

This provision should be read in conjunction with section 74 of The Statute of Limitations 1957 which sets out further detail here.

The applicable limitation period will depend on the particular cause of action in law which is the subject matter of the dispute. The limitation period for contractual claims where the contract is under hand is six years from the date of the commencement or accrual of the cause of action, and 12 years where the contract is under seal, unless the parties have agreed a different limitation period (which they may do).

Procedural rules

Article 19 of the Model Law provides that the parties may set their own procedure. When determining the procedure they wish to follow, parties may choose to adopt specific institutional or trade association rules into the arbitration agreement. If the parties can agree all of the procedures, they may provide an agreed note to the arbitrator. Failing agreement, it is for the arbitrator to conduct the arbitration in such manner as he or she considers appropriate. If the arbitrator is setting the procedure, this will generally be done at a procedural meeting between the parties and the tribunal, following which the tribunal will issue an order for directions. This meeting can be conducted in person or remotely, for example, by telephone.

Chapter V of the Model Law sets out detailed provisions regarding the conduct of arbitral proceedings. Article 24 provides that, subject to any contrary agreement by the parties, the tribunal shall decide whether to hold oral hearings, or whether the proceedings shall be conducted on the basis of documents and/or materials. If there is any question about conflicting evidence, an oral hearing is preferable so that witnesses can be examined and cross-examined. The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request the court's assistance in taking evidence.

Arbitrators are expected to treat both parties equally, with impartiality, and to give each side the opportunity to put forward their case. The maxims "*audi alteram partem*" and "*nemo index in causa sua*" ("always hear both sides" and "no-one should be a judge in his own cause" respectively) are basic principles of fair procedures which arbitrators should follow. Article 18 of the Model Law sets out that obligation in respect of fair procedures in express terms.

Under the 2010 Act, unless the parties agree otherwise, the tribunal has the power to direct that a party to an arbitration agreement or a witness be examined on oath or affirmation, and the tribunal can administer oaths for that purpose. Subject to the agreement of the parties, the 2010 Act also provides that the tribunal may: order consolidation of arbitral proceedings or concurrent hearing where the parties agree to the making of such an order; award interest; order security for costs; require specific performance of a contract (except in respect of land); and determine costs. The arbitrator is also expected to render a reasoned award in writing.

Privilege

Privileged documents will be exempt from production. The usual types of privilege claimed are: legal professional privilege applying to documents prepared in contemplation of legal proceedings ("litigation privilege"); and documents prepared for the purpose of seeking or giving legal advice ("legal advice privilege"). Generally, communications between a party and its lawyers, whether external or in-house, are treated in the same way. There is a limited exception in respect of in-house lawyers in certain European competition matters. Without-

© Published and reproduced with kind permission by Global Legal Group Ltd, London

prejudice communications, used when trying to reach settlement or narrow the issues in dispute, are exempt from production, subject to limited exceptions. In general terms, privilege may be waived by the party entitled to claim that privilege, and care should be taken not to waive privilege inadvertently.

Confidentiality

The 2010 Act does not provide that arbitration proceedings are to be confidential or that the parties are subject to an implied duty of confidentiality. However, in practice there is English authority (which is of persuasive effect in the Irish courts) to the effect that the existence and content of arbitration proceedings usually remain confidential. The implied duty of confidentiality was affirmed by the English Court of Appeal in *Ali Shipping Corp v Shipyard Trogir* [1999] 1 WLR 314. It recognised a number of exceptions to the duty, such as consent, court order, or leave of the court. In situations where preservation of the confidentiality of the arbitration is deemed crucial to both parties, it is advisable to explicitly detail the extent of the obligation in the arbitration clause.

Arbitrators

The parties may choose their arbitrator, and they can decide on whether to have one or more arbitrators. In the absence of agreement on appointment, or a default mechanism, the 2010 Act provides that the number of arbitrators shall be one. Given that agreement upon the identity of the arbitrator can be difficult to reach, especially when a dispute has arisen on some aspect of the substance of the agreement, it is prudent to include a mechanism for the appointment by an agreed nominating professional body, with provision that the parties will be bound by the choice made by such nominating professional body. There is no equivalent to the guides which are commonly used in international arbitration such as *Smit's Roster of International Arbitrators*, although members of the Chartered Institute of Arbitrators have their details displayed on the Institute's website.

If the parties' method for selecting an arbitrator does not produce a result, the High Court will, pursuant to Article 11 of the Model Law, appoint the arbitrator on application to it.

Challenge to an arbitrator

The arbitrator should not be biased and this is enshrined in Article 12 of the Model Law, which provides that where a person is approached in connection with appointment as an arbitrator, they are obliged to disclose any circumstances that are likely to give rise to justifiable doubts as to impartiality or independence. The duty to make such disclosure is ongoing and an arbitrator is obliged to disclose any such circumstances throughout the proceedings.

Article 12 also provides that an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality, independence, or if he does not possess the qualifications agreed upon by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

The arbitrator's decision in respect of the challenge can itself be challenged by application to the High Court under Article 13 of the Model Law. The decision of the High Court is not subject to appeal.

Termination of an arbitrator's mandate

Under Article 14 of the Model Law, if an arbitrator becomes unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws

© Published and reproduced with kind permission by Global Legal Group Ltd, London

from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court to decide on the termination of the mandate. Where the mandate of an arbitrator terminates, a substitute arbitrator is appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

Immunity

Section 22 of the 2010 Act provides that an arbitrator "shall not be liable in any proceedings for anything done or omitted in the discharge or purported discharge of his or her functions". Such immunity also extends to any agent, employee, advisor or expert appointed by the arbitrator.

Interim relief

Preliminary relief and interim measures

Article 17 of the Model Law provides that, unless otherwise agreed by the parties, and upon the application of one of the parties, the arbitrator has the power to order interim measures of protection as may be considered necessary and to make a preliminary order. The arbitrator can order a party to:

(a) maintain or restore the *status quo* pending the termination of the dispute;

(b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

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

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

The arbitrator does not need to seek the assistance of the court to make any of these orders. However, Article 9 of the Model Law, along with Section 10 of the 2010 Act, provide that, before or during arbitral proceedings, a party may itself also request an interim measure of protection from the High Court. However, unless otherwise agreed, the court may not rely on Article 9 of the Model Law to order discovery of documents or security for costs; those are matters to be addressed by the arbitrator. However, the arbitrator's power to order security for the costs is subject to certain qualifications. In particular, the arbitrator may not order security solely because an individual is resident, domiciled or carrying on business outside of Ireland or, in respect of a corporate, it is established, managed or controlled outside of Ireland.

Anti-suit injunction

There is no Irish case law on anti-suit injunctions in aid of arbitration. In a European context, anti-suit injunctions were prohibited by the ECJ in *Paul Turner v Felix Fareed Ismail Grovit* [2004] Case No C-159-02 and *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) and Generali Assiarazioni Generali SpA v West Tankers Inc* [2009] C-159-07, on the basis that they were inconsistent with the Brussels Convention and the principle of mutual trust between member courts. However, in *Gazprom OAO v Lithuania* Case [2015] C-536/13 that court ruled that an anti-suit injunction issued by an arbitral tribunal to prevent court proceedings in breach of an arbitral agreement was enforceable in the EU and that such an injunction was not covered by the Brussels I Regulation but rather the New York Convention. The court did not overrule its previous position in respect of a court's jurisdiction to grant anti-suit injunctions, but rather distinguished a court-issued injunction from one granted by an arbitral tribunal.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Where Irish court proceedings are involved and an arbitration agreement exists, rather than seeking an anti-suit injunction, a party may apply under Article 8 of the Model Law to stay any Irish court proceedings. The courts in this jurisdiction have long been supportive of the arbitral process. If there is an arbitration clause and the dispute is within the scope of the arbitration agreement, and there is no finding that the agreement is null and void, inoperative or incapable of being performed, then a stay must be granted, *BAM Building Ltd v UCD Property Development Company Ltd* [2016] IEHC 582.

Arbitration award

Making an award

Article 31 of the Model Law provides that the award shall be in writing, be signed by the arbitrator or, if there is more than one, the majority of the arbitrators, (provided that the reason for any omitted signature is stated). In general, it should also set out the reasons upon which it is based, unless the parties have agreed that no reasons are to be given. The award shall also state its date and the place of arbitration. Copies of the award as made are to be delivered to the parties.

If an award also deals with costs, the tribunal must also deal with the requirements set out in Section 21 of the 2010 Act. Usual practice for an arbitrator, in domestic arbitrations, is to obtain payment of any outstanding fees before making the award available to either party. This is usually achieved by writing to both parties to inform them that the award may be taken up upon the discharge of the outstanding fees and expenses. As both parties will usually be jointly and severally liable for the arbitrator's fees and expenses, if they cannot come to an agreement to split the fees as an interim approach, one or other party will typically pay the fees and expenses and then obtain the award. The question of costs (including who is ultimately liable for the arbitrator's fees and expenses), if not dealt with in the award, will be dealt with subsequently at either a hearing or by submissions or both, leading to an award on costs.

In a situation where the arbitrator delays unduly in making his or her award, it is possible for either party to apply to the High Court pursuant to Section 9(1) of the 2010 Act and Article 14 of the Model Law to terminate the mandate of the arbitrator for failure to render the arbitral award without undue delay.

Remedies

The law applicable to the dispute will dictate the remedies that may be sought in arbitration. Subject to that, an arbitrator may determine and award damages as an Irish court would and may order any of the common law and equitable remedies including specific performance of a contract (except relating to a contract for the sale of land) pursuant to Section 20 of the 2010 Act.

Interest

Section 18(1) of the 2010 Act states that the party to an arbitration agreement may agree on the arbitral tribunal's powers regarding the award of interest. Unless otherwise agreed, Section 18(2) permits the tribunal to award simple or compound interest from the dates agreed, at the rates and with the rests that it considers to be fair and reasonable. It can determine such interest to be payable on all or part of the award in respect of any period up to the date of the award, or on all amounts claimed in the arbitration and outstanding at the commencement of the arbitration but paid before the award in respect of any period up to the date of payment. Section 18 is without prejudice to any other power of the arbitral tribunal to award interest.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Fees and costs

Section 21(1) of the 2010 Act provides that, subject to an exception for consumers, the parties may make such provision with regard to the costs of the arbitration as they see fit. The parties may, therefore, agree in advance of any dispute as to how costs will be dealt with; for example, that each side will bear its own costs.

An agreement of the parties to arbitrate subject to the rules of an arbitral institution is deemed to be an agreement to abide by the rules of that institution as to the costs of the arbitration.

If there is no agreement pursuant to Section 21(1), or if the consumer exception applies, the tribunal shall determine, by award, those costs as it sees fit. This is subject to the proviso that in a domestic arbitration, the parties can request that the costs be taxed (measured by an expert officer of the court).

In making a determination as to costs, the tribunal is obliged to specify the grounds on which it acted, the items of recoverable costs, fees or expenses, as appropriate, and the amount referable to each, as well as by whom and to whom they shall be paid. "Costs" includes costs as between the parties, and the fees and expenses of the arbitral tribunal including any expert appointed by the tribunal.

The general principle in respect of costs for domestic arbitrations is that the costs are at the discretion of the arbitrator, who will exercise his/her discretion in the same manner as would a court, which is that costs usually "follow the event", and the loser pays unless there is some reason not to make such an order, such as the existence of an effective *Calderbank Offer* for an amount greater than the amount awarded by the arbitrator, or where the successful party grossly exaggerates its claim, *Shelley-Morris v Bus Atha Cliath* [2003] 1 I.R. 232.

Challenge to an arbitration award

There are two important principles which can be derived from the Irish cases in this area. First, the cases stress the importance of the finality of arbitration awards. Second, they make clear that an application to set aside an award is not an appeal from the decision of the arbitrator and does not afford the court the opportunity of second-guessing the arbitrator's decision on the merits, whether on the facts or on the law, *Ryan v Kevin O'Leary (Clonmel) Ltd* [2018] IEHC 660.

There is no appeal against an arbitral award under the 2010 Act. The exclusive recourse is an application to a court to set aside the award. The limited grounds upon which such an application may be made are set out at Article 34(2) of the Model Law as follows:

"(a) the party making the application furnishes proof that:

(i) the party to the Arbitration Agreement referred to in Article 7 was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State;

(ii) the party making application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(iii) the award deals with the dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

© Published and reproduced with kind permission by Global Legal Group Ltd, London

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provision of this Law from which the parties cannot derogate, or failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject matter is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State."

If satisfied that any of the above grounds are made out, the High Court can set aside the arbitral award. An applicant must bring its application within one of the grounds in order to succeed, *Snoddy v Mavroudis* [2013] IEHC 285. In *Delargy v Hickey* [2015] IEHC 436 the court stated that the grounds for setting aside an award "are to be construed narrowly and the onus in this regard is on the moving party". In *Hoban v Coughlan* [2017] IEHC 301, it was stated that the basis on which an award can be set aside under Article 34 of the Model Law is "very limited and it is a jurisdiction which the court should only exercise sparingly". The challenged decision must be one that was made on the merits of the case, and it must meet the formal requirements of Article 31. This can include a partial award if these criteria are met but procedural rulings and orders made during the course of the arbitration are not amenable to challenge under Article 34, *FBD Insurance Plc v Samwari Ltd* [2016] IEHC 32.

Public policy

The leading Irish case on public policy in the context of a challenge to an arbitral award confirms that the relevant public policy before the Irish courts is the public policy of Ireland, and not that of the seat of the arbitration or where the award has been rendered, *Broström Tankers AB v Factorias Volcano SA* [2004] IEHC 198. The judge said he would refuse enforcement only where there was "*some element [of] illegality, or possibility that enforcement would be wholly offensive to the ordinary responsible and fully informed member of the public*". He made it clear that the Irish courts would take a restrictive approach to the concept of public policy in Article 34 of the Model Law, similar to the approach in other jurisdictions. At 56 days, time limits for setting aside awards on grounds of public policy are shorter than in other cases.

Enforcement of the arbitration award

Enforcement of an award

Ireland ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1981 and no reservations have been entered. The relevant legislation is now the 2010 Act.

Ireland has not signed and/or ratified any regional conventions concerning the recognition and enforcement of arbitral awards.

Approach of the national courts to recognition and enforcement

There is no divergence in the rules on the enforcement of domestic and non-domestic awards (Article 35 of the Model Law). Article 36 of the Model Law applies in relation to the grounds for refusing recognition or enforcement of an award.

Section 23(1) of the 2010 Act deals with awards (other than awards under the Washington Convention). It provides that an arbitral award shall be enforceable in the State either by action or by leave of the High Court, in the same manner as a judgment or order of that court

© Published and reproduced with kind permission by Global Legal Group Ltd, London

with the same effect. The award shall, unless otherwise agreed by the parties, be treated as binding for all purposes on the parties between whom it was made, and may be relied on by any of those parties by way of defence, set-off or otherwise in any legal proceedings in Ireland. The 2010 Act expressly states that section 23 does not affect the recognition or enforcement of an award under the Geneva Convention, the New York Convention or the Washington Convention.

The Irish courts have shown a supportive approach to the enforcement of arbitral awards. The vast majority of challenges to the award of an arbitrator are rejected, and the strong presumption is in favour of upholding an arbitrator's award.

Investment arbitration

Ireland is a contracting party to the Energy Charter Treaty.

Ireland signed the Washington (ICSID) Convention in 1966. Ireland ratified the Washington Convention in 1981. Ireland has only ever been a party to one Bilateral Investment Treaty (with the Czech Republic), which was terminated by consent on 1 December 2011.

The Arbitration Act 2010 applies to all arbitrations, including treaty arbitrations. Certain provisions of the Arbitration Act 2010 do not apply to proceedings under the ICSID Convention. These are set out in section 25 of that Act.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Kevin Kelly
Tel: +353 1 607 1205 / Email: kevin.kelly@mccannfitzgerald.com

Kevin leads the firm's Construction Group. He has aligned his extensive construction practice, which includes construction disputes, with a recognised expertise in all aspects of public procurement law/tendering. Kevin is a Fellow of the Chartered Institute of Arbitrators. He has considerable experience in leading the construction advice on large-scale building and infrastructure projects, and advising on the resolution of disputes associated with such projects including via court, arbitration, mediation, conciliation and independent expert, particularly with a view to avoiding or minimising conflict during the construction phase and seeking to have subsequent disputes resolved in an efficient and cost-effective manner.

Heather Mahon
Tel: +353 1 607 1206 / Email: heather.mahon@mccannfitzgerald.com

Heather holds a degree in Law and German and an *M. Litt* from Trinity College Dublin, and qualified as a barrister in 2000. She was in practice at the Bar from 2000–2006. Heather then took up a position with the Office of Parliamentary Counsel to the Government, with responsibility for legislative drafting. She later held a position in the senior management of the Law Reform Commission, with responsibility for a long-running legislation project in the Commission. She has lectured at third level in a number of areas and is a fluent German speaker. She is currently a senior associate with McCann FitzGerald.

McCann FitzGerald

Riverside One, Sir John Rogerson's Quay, Dublin 2, Ireland
Tel: +353 1 829 0000 / Fax: +353 1 829 0010 / URL: www.mccannfitzgerald.ie

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Italy

Micael Montinari & Filippo Frigerio
Portolano Cavallo

Introduction

The provisions regulating arbitration proceedings in Italy are located in the last chapter of the last book of the Italian Civil Procedure Code ("**CPC**"), specifically in Sections 806 to 840.

In addition, there are several special laws that regulate arbitration in specific sectors, e.g.: (a) Legislative Decree no. 5 of 2003, providing specific rules on arbitration agreements included in companies' bylaws; (b) Legislative Decree no. 50 of 2016, regulating arbitration proceedings in public contracts; (c) Law no. 262 of 2005, concerning arbitration proceedings in financial markets; and (d) Law no. 183 of 2010 regulating the role of arbitration in the new labour proceedings.

Italy is a signatory party of the New York Convention, with no reservations. Its provisions were transferred into internal law by means of Law no. 62 of 1968.

Furthermore, Italy is also a party to: (a) the European Convention on International Commercial Arbitration signed in Geneva in 1961; (b) the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States signed in Washington in 1965; and (c) the United Nations Convention on Contracts for the International Sale of Goods signed in Vienna in 1980.

The CPC's provisions are applicable to both domestic and international arbitration, except when explicitly provided by the same CPC.

It should be highlighted that in Italy there are several institutions (mostly Chambers of Commerce) that have established Chambers of Arbitration. Most of them issue their own rules on arbitration.

The last issued report on ADR indicates that there are currently 143 Chambers of Arbitration in Italy, 66 of which were instituted by Chambers of Commerce.

Section 832 CPC recognises the relevance of such rules, stating that an arbitration agreement can refer to them. In case of contrast between the arbitration agreement and the Chamber of Arbitration's rules, the first shall prevail.

The most important institution is Milan's Chamber of Arbitration, which has issued very effective rules on arbitration which are translated into several languages and very flexible, so that they can be adapted to all kinds of arbitration proceedings.

The latter handled 131 arbitration proceedings in 2017 (last data available) and estimates an average duration of around 13 months (far below the average duration of civil proceedings, which is currently 840 days).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Arbitration agreement

Pursuant to Sections 807 and 808 CPC, the arbitration agreement shall be in writing and shall determine the boundaries of the controversy that the parties have devolved to arbitrators.

Section 806 of the CPC provides that the parties may refer any disputes to be heard by an arbitration tribunal except for:

- disputes involving inalienable rights; and
- disputes explicitly excluded by the law.

Italian law excludes the referral of employment matters to an arbitration, except when:

- the arbitration is established by the law; or
- provided in the appropriate collective employment agreements or contracts.

Pursuant to Section 817, par. 1 CPC, arbitrators have the exclusive competence to rule on their jurisdiction to hear the dispute before them, under the terms of the arbitration agreement. Therefore, the Italian legislative system fully recognises the *Kompetenz-Kompetenz* principle.

Section 817, par. 2 CPC reinforces the above by stating that arbitrators have exclusive competence to rule on their jurisdiction even when the latter is challenged before a court, and where there are new reasons which appear only at a later stage.

It is important to note that a party wishing to challenge the Arbitral Tribunal's jurisdiction must raise the question at the time of the first defensive act, i.e. the first defensive brief submitted or at the first hearing, following acceptance of the arbitrators. Failure to do so prevents the party from challenging the award at a later stage, claiming that arbitrators did not have the jurisdiction to award the controversy. On the contrary, the appeal is always permitted when the dispute cannot be referred to arbitration on the basis of Section 806 CPC.

The same limitation for appeals applies if, at the time of the first defensive act, a party fails to challenge a counterparty's arguments that do not fall within the boundaries of the arbitration agreement.

Where the tribunal confirms its jurisdiction to decide on a matter and orders the prosecution of the proceedings, the arbitrators can issue a non-final award. The latter can be challenged before the Court of Appeals only along with a final award pursuant to Section 827, par. 2 CPC.

On the contrary, when arbitrators ascertain and declare they do not have the jurisdiction to rule on a dispute, they will issue a ruling in the form of an award.

Moreover, pursuant to Section 819-*ter* CPC, arbitrators' jurisdiction is not excluded by the fact that the same dispute is currently pending before a court.

The decision of a court on its jurisdiction is always appealable before the Supreme Court of Cassation by means of a special petition called '*regolamento di competenza*'. The latter is aimed at securing a decision which will clearly state which is the competent body between the court or the Arbitral Tribunal to rule on the matter.

Filing of the *regolamento di competenza*'s petition under Section 819-*ter* CPC does not trigger the automatic suspension of the proceedings.

Reflecting the same timing required for raising jurisdictional objections before an arbitral tribunal, a party wishing to challenge the court's competence to rule on a matter must immediately raise the objection with the statement of defence ("*comparsa di risposta*").

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Failure to raise the objection implies that the Arbitral Tribunal's competence is definitely excluded for that specific controversy.

As noted by several authors, the abovementioned provisions do not provide the means for resolving a dispute in cases where both the Arbitral Tribunal and the court confirm or deny their competence to decide the specific controversy.

Section 816-*quater* CPC dictates a series of rules applicable to so-called multi-parties arbitrations, i.e. proceedings with more than two parties. Multi-parties arbitration proceedings can start under two conditions: (i) the arbitration agreement shall bind all the parties; and (ii) the Arbitral Tribunal shall be appointed, lacking an agreement between the parties, by a third party, or each party shall appoint its own arbitrator or instruct a third party to appoint him.

If both of the abovementioned conditions are not met and if the presence of all the parties is required by the law (so-called mandatory joinder or "*litisconsorzio necessario*"), the arbitration proceedings cannot move forward, and each party may start a dispute before the competent ordinary court.

Arbitrators

The party that wishes to start the arbitration proceedings shall, pursuant to an arbitration agreement that empowers the parties to appoint their own arbitrator, serve the other party (-ies) with a writ containing the invitation to appoint their own arbitrator(s) within 20 days. Failure to meet the deadline empowers the plaintiff to file a petition with the President of the competent court (where the arbitration has its seat) to appoint one or more arbitrators.

Absent such a determination in the arbitration agreement, the party that wishes to start the arbitration proceedings shall file a petition to the President of the competent court, i.e. the court of the seat of arbitration. The latter shall appoint the requested number of arbitrators.

The President of the court can refuse only when the arbitration agreement: (a) manifestly does not exist; or (b) manifestly provides for arbitration proceedings abroad (i.e. when the seat of arbitration is abroad).

In any case, Section 809 CPC requires an odd number of arbitrators.

In addition, the parties can provide for a third entity to appoint the arbitrators. Normally, arbitration agreements vest the power to appoint one or more arbitrators with Chambers of Arbitration, pursuant to their own rules.

Under Italian law, an arbitrator can be challenged for several reasons, specifically:

(a) if he/she does not have the qualifications explicitly agreed by the parties;

(b) if he/she, an entity, association, or company where he/she is a director has an interest in the controversy;

(c) if he/she or his/her spouse is: (i) a close relative up to the fourth degree of; or (ii) lives with; or (iii) regularly enjoys a close relationship with one of the parties, an authorised representative of one party or one of the attorneys;

(d) if he/she or his/her spouse has pending proceedings with or a severe hostility with one of the parties, an authorised representative of one party or one of the attorneys;

(e) if he/she is bound to one of the parties, or to a company controlled by it, or to a subject that controls the party or to a company placed under joint control, by a working relationship of any kind or by other patrimonial or associative relationship capable of reducing his/her independence, or if he/she is a legal guardian of one of the parties; or

© Published and reproduced with kind permission by Global Legal Group Ltd, London

(f) if he/she was a consultant, an assistant or the counsel of one of the parties in a previous phase of the dispute or was a witness in it.

The party which appointed an arbitrator can challenge him/her only if the reason that impedes his/her appointment becomes known only at a later stage.

The challenging of an arbitrator does not prevent the prosecution of the arbitration proceedings, unless so ordered by the Arbitral Tribunal. If, however, the arbitrator is discharged, the activities carried out by him/her or with his/her cooperation are ineffective.

Moreover, Chambers of Arbitration tend also to consider additional grounds that compromise the independence of arbitrators, e.g. the IBA Guidelines on Conflicts of Interest in International Arbitration.

Under Section 813-*ter* CPC, an arbitrator is personally liable towards the parties when:

(a) fraudulently or with gross negligence, he/she omits or delays his/her activity and for this reason he/she is discharged and replaced, or when he/she unjustifiably renounces his/her office; or

(b) fraudulently or with gross negligence, he/she omits or impedes the issuance of the award within the deadline established by the law.

Arbitration procedure

By the time decided by the Arbitral Tribunal, the parties shall appear at the first hearing. The rules of the arbitration proceedings can be freely decided by the parties. Absent an agreement, the rules (including seat and language) are determined by the Arbitral Tribunal.

Arbitrators are bound by the duty to ensure respect to the due process rules, granting the parties equal and reasonable opportunities to defend themselves.

With respect to the evidential phase, the parties or the Arbitral Tribunal may delegate specific acts to one or more arbitrators.

Witnesses may be heard also in places different from the seat of arbitration, such as the place where the arbitrator is located, or at the witness's home or office. The Tribunal may also authorise written witness testimony.

If a witness refuses to appear before the Arbitral Tribunal, and the arbitrators deem it appropriate, they may request the President of the court where the arbitration has its seat to order the witness' appearance.

Furthermore, the Arbitral Tribunal may appoint one or more technical experts (entities can also be appointed) to assist the arbitrators in some specific technical matters.

The arbitrators are also empowered to request a public administrative body to provide written information regarding an act or document of the latter that the arbitrators deem appropriate to examine.

Notably, each Chamber of Arbitration generally provides for its own rules of procedure and on the taking of evidence, which sometimes are similar to the general rules under the CPC. Arbitral Tribunals can also choose to follow the IBA Rules on the Taking of Evidence in International Arbitration.

Interim relief

Section 818 CPC prevents Arbitral Tribunals from issuing interim remedies (either provisional or conservative measures), unless otherwise provided by the law.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The applicant shall apply to the competent court for interim relief in support of arbitration under the general rules of the CPC. As a result, courts will generally have jurisdiction to grant interim measures.

Section 669-*quinquies* CPC states that when an arbitration proceeding is ongoing or there is an arbitration agreement in place, the court to which the party may apply to obtain an interim measure is the one that would have jurisdiction for the merits, absent the arbitration agreement.

Under general civil procedural laws, the remedies available on an interim basis are:

(a) judicial seizure, aimed at securing goods whose ownership is being challenged;

(b) cautionary seizure, aimed at securing assets when the alleged creditor fears that the debtor could dispose of them so that the guarantee on the credit might be lost;

(c) reporting of new works, or of potential damages in order to avoid damages taking place as a consequence of new work being started or of other goods placing the claimant's property or possessions in danger;

(d) preliminary investigation proceedings, aimed at securing evidence to be later used in a proceeding, when there is the risk that such evidence may be lost; or

(e) in all other cases, the court can issue any kind of measure it deems most appropriate for reasons of urgency (Section 700 CPC) when:

- the application is likely to be successful on the merits (so-called, *fumus boni iuris*); and
- there is danger in any delay (so-called, *periculum in mora*).

Given the above, Arbitral Tribunals are not vested with the power to issue interim remedies, therefore they do not have the power either to enforce them or to otherwise ensure their effectiveness.

By the contrary, there is only one provision under Italian law, relating to the arbitration of certain company disputes, that empowers arbitrators to issue an interim measure.

Article 35 of Legislative Decree no. 5 of 2003 states that companies' articles of association may authorise shareholders to determine, by way of arbitration, the validity of the company's resolutions.

Where an arbitration proceeding is started for such a purpose, article 35, par. 5, (D. Lgs. no. 5 of 2003) empowers the Arbitral Tribunal appointed pursuant to the arbitration agreement to provisionally suspend the enforceability of a company's resolutions while their validity is challenged. The order issued by the Arbitral Tribunal cannot be otherwise challenged.

Commentators generally exclude analogic interpretations of such a provision. Therefore, its scope cannot be extended beyond the strict limits of the Legislative Decree where the piece of law is placed.

From a more general standpoint, the same article provides that until the Arbitral Tribunal is established, the court which would be competent to determine the controversy absent the arbitration agreement retains the interim general power to suspend the enforceability of the company's resolution.

Arbitration award

Pursuant to Section 820, par. 2 CPC, if the parties have not determined the deadline for the arbitrators to issue the final award, the latter shall be rendered within 240 days from the acceptance of the appointment. Such term can be extended upon the agreement of the parties

© Published and reproduced with kind permission by Global Legal Group Ltd, London

or, upon the request of one party, by the President of the Tribunal, who shall give the chance to the other parties to rebut.

Section 820, par. 4 CPC states that the term is extended by 180 days, absent a different determination by the parties, in case: (a) preliminary activities are required; (b) the Tribunal appoints an expert; (c) the Tribunal issues a partial or interim award; or (d) one or more arbitrators are replaced.

Chambers of Arbitration tend to further specify these deadlines and provide for mechanisms of control aimed at keeping the duration of the arbitral proceedings as reasonable as possible.

The Arbitral Tribunal shall decide pursuant to the law, unless the parties declare that the arbitrators may decide on an equitable basis.

The award is rendered by the Arbitral Tribunal and signed by the arbitrators. The signature of the majority of arbitrators is sufficient only if the award is accompanied by a declaration that all arbitrators participated in the deliberation, but not all of them wanted to or could sign it.

Pursuant to Section 824-*bis* CPC, the award has the exact same effectiveness as a court's ruling.

With the award, the Arbitral Tribunal directs also which party shall fully or partially bear the costs of the proceedings, and the legal fees and expenses of the winning side. Chambers of Arbitration generally publicise the costs of arbitration proceedings, so that the parties can easily predict what will be the final costs they might have to bear.

Challenge of the arbitration award

Section 829 CPC states that a party can challenge the award only upon the following grounds:

1. if the arbitration agreement is invalid, provided that such an objection was raised in the first submission after the arbitrators' acceptance of the appointment;
2. if the arbitrators were not appointed pursuant to Sections 809-815 CPC and/or Section 832 CPC, provided that such an objection was raised during the proceedings;
3. if the award was rendered by a person who could not be appointed as an arbitrator, as set forth under Section 812 CPC;
4. if the award includes provisions that fall beyond the scope of the arbitration agreement, only if such an objection was raised during the arbitration proceedings;
5. if the award does not include the reasoning, the decision, and/or the signature of the arbitrators (within the limits analysed above);
6. if the award was rendered after the expiration of the timeframe provided by the law or by the arbitration agreement, only in case the appealing party – before the deliberation of the award – served the others and the arbitrators a declaration through which he/she intended to take advantage of this ground;
7. if the formalities required by the parties have not been respected, only in case such formalities were provided under express sanction of nullity and the latter was not otherwise healed;
8. if the award contradicts a previous award or a judicial decision between the parties not any longer appealable (i.e. *res judicata*), only if such award or decision was lodged during the arbitration proceedings;

© Published and reproduced with kind permission by Global Legal Group Ltd, London

9. if the Arbitral Tribunal failed to comply with the due process rules;
10. if the award does not decide on the merits of the proceedings when the merits should have been decided;
11. if the award contains contradictory provisions; or
12. if the award has not awarded on some claims and/or objections, pursuant to and within the boundaries of the arbitration agreement.

Notably, a party cannot challenge the award for a reason of nullity if: (i) he/she caused it; (ii) he/she waived it; or (iii) he/she did not immediately raise on the next defensive occasion the objection of a violation of a proceedings' rule.

Generally, the award cannot be challenged on the basis of errors of law, except when such ground is expressly provided in the arbitration agreement or is expressly provided by the law (e.g., in labour law controversies).

Nonetheless, it is always possible to challenge the award if it is in contrast with the public order.

In addition, the award can also be challenged with two other mechanisms: (i) revocation of the award; and (ii) opposition of a third party to the award.

The revocation proceeding is an extraordinary method of challenging the award provided by Section 395 CPC. It can be triggered only when there are serious vices that affect it, namely: fraud of a party; forgery; discovery of unknown documents; or if there is an award affected by a fraud of the arbitrator(s).

In addition, third parties may oppose the award and request it to be declared null if the award endangers their rights and they have not been in a position to take part in the arbitration proceedings. The proceeding is regulated by Section 404 CPC.

Material errors or omissions that do not impact the merits of the decision can be amended using the award-correction proceedings, pursuant to Section 826 CPC.

Within one year from the issuance of the award, each party may request the Arbitral Tribunal to amend the award in case: (i) there are material or calculation errors; or (ii) the award lacks the indication of the name of the arbitrator(s), the arbitration's seat or the parties' names. The Tribunal shall proceed within 60 days from the request, having heard the parties. If the Tribunal does not provide, the same request may be filed with the competent court (i.e. the court of the place which is the arbitration's seat).

Enforcement of the arbitration award

In accordance with Section 825 CPC, to enforce a domestic award the interested party shall lodge with the law clerk of the court in the area where the arbitration took place:

(a) the original or a certified copy of the award; and

(b) the original or a certified copy of the document including the arbitration clause.

Once the court ascertains the formal validity of the award, it will declare the enforceability of the award with a decree. The parties are informed by the law clerk of the lodging of the award.

The most evident difference between the enforcement of domestic and international awards is that Italian arbitral awards already have, from the date of their last signature, the same effect as a ruling of the judicial authority and can be appealed – notwithstanding the filing with the court – to obtain enforceability.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The analysis carried out by the court is merely formal. This is because the court cannot consider the merits of the arbitral award differently from what happens in relation to international arbitral awards.

An interested party may file an appeal ('*reclamo*') against a decree, denying or upholding enforceability. The parties will be summoned, and the court decides the controversy with an order issued in chambers.

Pursuant to Section 839 CPC, a party that wishes to enforce an international arbitral award in Italy must file a petition with the President of the Court of Appeals for the area in which the counterparty resides. If the counterparty is not located in Italy, the competent court is the Court of Appeals of Rome.

Along with the petition, and in accordance with article IV of the New York Convention, the petitioner shall lodge:

(a) an original copy of the award;

(b) the original or a certified copy of the document including the arbitration clause, or an equivalent document; and

(c) the certified Italian translations of these documents.

During this phase of the proceedings, the other party will not be summoned.

Having ascertained that the award is formally valid, the President of the Court of Appeals will declare the enforceability of the international award in a decree with a brief reasoning.

If the President's decree denies enforceability for merely formal reasons (such as that there is no Italian translation), the petitioner may file the petition again.

Enforceability of the award will be denied by the President on the merits, if: (i) under Italian law the arbitrators do not have jurisdiction to decide the dispute; or (ii) the award contains provisions contrary to public order.

In relation to disputes excluded under Italian law, in accordance with the second requirement, public order is ascertained in relation to domestic sources of law, such as the Italian Constitution, principles of criminal law and European law.

Commentators have noted that such proceedings should also be admissible in order to obtain enforceability for partial and non-final arbitral awards.

In addition, under article VIII of the Geneva Convention of 1961, an award is admissible even without the reasoning.

In contrast to the above, if the President's decree denies enforceability on the merits or if it upholds the petition and declares the award enforceable, the interested party may file an opposition brief with the Court of Appeals.

The opposition must be filed within 30 days from:

(a) the communication of the decree that denies enforceability; or

(b) the serving of the decree that declares the enforceability.

The proceedings are governed by the provisions of the ordinary proceedings.

Pursuant to Section 840, par. 3 CPC, which almost perfectly mirrors article V of the New York Convention, should the Court of Appeals ascertain that one or more of the following circumstances exist, the enforceability of the award will be denied if:

(a) the parties were under some incapacity;

(b) the arbitration agreement is invalid under the applicable law or, failing any indication thereon, under the law of the country where the award was made;

© Published and reproduced with kind permission by Global Legal Group Ltd, London

(c) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings;

(d) the unsuccessful party was unable to present its case;

(e) the award falls outside the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration. Decisions on matters falling within the submission that can be separated from those not within the submission may be recognised and enforced;

(f) there was an incorrect composition of the arbitral authority;

(g) the arbitral procedure was not in accordance with the arbitration agreement or, where there is no agreement, in accordance with the law of the country where the arbitration took place; or

(h) 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.

In relation to the final circumstance above, the Court of Appeals has the power to suspend the proceedings pending a judgment on the annulment or suspension requested to the foreign authority that issued the award. Upon the request of the petitioner, the court can suspend the proceedings and order the opposing party to provide adequate warranties. The provision of warranties is entirely at the discretion of the court.

In addition to the *ex parte* proceedings mentioned above, the enforceability may be denied if, under Italian law, the dispute cannot be devolved to arbitrators or if the award contains provisions which are contrary to public order.

The statutory limitation for enforcing an award is 10 years.

The final ruling of the Court of Appeals may eventually be appealed to the Supreme Court of Cassation only for violations of laws pursuant to Section 360 CPC.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Micael Montinari
Tel: +39 06/696661 / Email: mmontinari@portolano.it

Micael Montinari focuses on litigation; his clients include retail chains, fashion houses and brands, media/digital players. He heads the dispute resolution team (which is ranked by *The Legal 500* and *Chambers & Partners* since respectively 2006 and 2009). His experience includes a broad range of matters, including commercial and business and intellectual property disputes as well as arbitration, often with a significant cross-border element.

He is also ranked by *Chambers Global* for Dispute Resolution (both Europe and Global), and he was recognised as a Client Choice International Awards 2017 winner in the Litigation practice area.

Micael has almost 20 years of experience in all forms of commercial and corporate litigation (contractual disputes, corporate-related matters, unfair competition, passing-off, advertising issues, etc.), interim and injunctive proceedings, proceedings before the competition and consumers' authority and other Italian agencies (Communications Authority, Data Protection authority, etc.), arbitration proceedings (including *ad hoc* and managed arbitration) serving as counsel and arbitrator, and mediation.

Filippo Frigerio
Tel: +39 06/696661 / Email: ffrigerio@portolano.it

Filippo Frigerio joined Portolano Cavallo in 2015, under the terms of an intern work agreement secured through Bocconi University, becoming later in the year, upon earning his Law degree from the Luigi Bocconi Commercial University, one of the firm's attorneys-at-law.

While completing his university studies, Filippo attended courses at the Law School of the University of Minnesota, Minneapolis, USA, for a period of five months.

Filippo lends his expertise to both Italian and foreign clients in matters of disputes and arbitration on civil and commercial matters, as well as of new technologies, digital media, and Italian and European legislation concerning the protection of personal data. Furthermore, he provides legal assistance to operators in the broad life sciences field.

Portolano Cavallo

via Rasella 155, 00187 Rome || piazza Borromeo 12, 20123 Milan, Italy
Tel: +39 06/696661 / URL: www.portolano.it

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Japan

Yuko Kanamaru & Yoshinori Tatsuno
Mori Hamada & Matsumoto

Introduction

Japan is a member state to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**NY Convention**"), with a declaration to apply the NY Convention to the recognition and enforcement of awards made only in the territory of another contracting state (in accordance with Article 1.3 of the NY Convention). While Japan is not a party to any other convention on the recognition and enforcement of arbitration awards, its signature to the NY Convention soon after it came into force (on 20 June 1961) shows Japan's arbitration-friendly attitude. Moreover, from a practical point of view, Japanese courts generally take a pro-arbitration stance (See **Enforcement of the Arbitration Award** below).

In Japan, the rules on arbitration are provided by the Arbitration Act (Act No. 138 of 2003, the "**JAA**") which applies to "(a)rbitral proceedings where the place of arbitration is in the territory of Japan", whether the proceedings are domestic or international. The JAA is based on the UNCITRAL Model Law, and almost all the articles of the UNCITRAL Model Law are reflected in the JAA. However, there are provisions which are not in the UNCITRAL Model Law but are in the JAA, such as the authority of Japanese courts, including their authority to transfer cases regarding arbitration, court procedures for cases related to arbitration, and appeal procedures for court judgments. It is worth noting that, under the JAA, an arbitral tribunal may try to settle civil disputes subject to the arbitral proceedings, "if consented to by the parties" (Article 38.4) in writing (Article 38.5). This reflects Japanese court procedures which allow a judge to attempt to settle the dispute even without the initiative of any party (Japanese Code of Civil Procedures, Article 89). We understand that this is quite unique to Japan and may not be familiar to common law countries. The JAA makes it clear that any attempt toward settlement by arbitrators is different from attempts in court proceedings, and requires the initiation by the parties themselves.

Japan has no special court for international arbitration, and jurisdiction is decided in accordance with Article 5 of the JAA, which stipulates that the jurisdiction of cases related to arbitration is with: (a) the district court designated by agreement of the parties; (b) the district court with jurisdiction over the place of arbitration (only when the designated place of arbitration falls within the jurisdiction of a single district court); or (c) the district court with personal jurisdiction over the counterparty in the case (Article 5.1).

Japan has an arbitration institution, the Japan Commercial Arbitration Association (the "**JCAA**"). The JCAA was established in 1950 as part of the Japan Chamber of Commerce and Industry with the support of six other business organisations, including the Japan Federation of Economic Organizations, the Japan Foreign Trade Council and the Federation of Banking Associations of Japan, to settle commercial disputes and promote international trade.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Recently, the JCAA amended its arbitration rules, and there are now three sets of arbitration rules which came into force on 1 January 2019. These new arbitration rules are: (a) the Commercial Arbitration Rules (the "**JCAA Commercial Arbitration Rules**"); (b) the Interactive Arbitration Rules (the "**JCAA Interactive Rules**"); and (c) the Administrative Rules for UNCITRAL Arbitration (together with the UNCITRAL Arbitration Rules 2010, the "**JCAA UNCITRAL Arbitration Rules**"; and together with the JCAA Commercial Arbitration Rules and the JCAA Interactive Rules, the "**JCAA Rules**"). The JCAA Commercial Arbitration Rules will apply if the arbitration agreement provides for JCAA arbitration without specifying the applicable arbitration rules (Article 3.2 of the JCAA Commercial Arbitration Rules).

The following are brief summaries of the rules:

(a) *JCAA Commercial Arbitration Rules*

These rules were originally drafted based on the UNCITRAL Model Rules. The 2019 version, however, clearly defines the role of the presiding arbitrator, provides explicit rules on the tribunal secretary to be appointed by the sole or presiding arbitrator, and prohibits an arbitrator from disclosing his/her dissenting opinion in any manner.

(b) *JCAA Interactive Rules*

These new rules aim to address the perception that arbitration is too expensive (especially for Japanese companies which are used to the cost-efficient service of the court system and contingent attorneys' fees), by mandating the "communication" between the parties and the arbitral tribunals and adopting a fixed system for arbitrators' remuneration.

(c) *JCAA UNCITRAL Arbitration Rules*

These rules provide for the minimum essentials for the JCAA to administer arbitral proceedings in accordance with the UNCITRAL Arbitration Rules which were originally drafted as mere *ad hoc* arbitration rules. The JCAA UNCITRAL Arbitration Rules allow the JCAA to maintain its list of arbitrators, including those who are internationally recognised as leading experts, in order to provide the highest-quality dispute-resolution services.

In this article, we assume that the readers are familiar with the JCAA UNCITRAL Arbitration Rules; thus, we will focus on the JCAA Commercial Arbitration Rules and the JCAA Interactive Rules.

We also wish to highlight that, separately from the JCAA, the Japan International Dispute Resolution Centre (the "**JIDRC**") was established in February 2018 as a joint undertaking of the public and the private sectors. The JIDRC started its operations in Osaka (JIDRC-Osaka) in May 2018. Like the Maxwell Chambers in Singapore, the JIDRC provides facilities specialised for arbitration and other types of ADR in Japan.

Arbitration agreement

An arbitrable case under the JAA is a "civil dispute that may be resolved by settlement between the parties (excluding that of divorce or separation)" (Article 13.1). However, two special rules under the JAA must be noted. *One*, individual labour-related disputes (as described in Article 1 of the Act on Promoting the Resolution of Individual Labour Dispute (Act No. 112 of 2001)) are excluded from the scope of arbitrable cases (Article 4 of the Supplementary Provisions to the JAA). *Two*, there are special rules regarding the arbitration agreement between a consumer and a business operator, which allow the consumer to cancel

© Published and reproduced with kind permission by Global Legal Group Ltd, London

the arbitration agreement (Article 3.2 of the Supplementary Provisions to the JAA). These rules stem from the fact that arbitration involving individuals is not common in Japanese culture. On the assumption that arbitration cost is much more expensive than going to court and an arbitration agreement will deprive an individual of the choice of court actions, these rules seek to protect individuals in dispute-resolutions.

Under the JAA, an arbitration agreement must be in writing, such as a document signed by all the parties or a letter or telegram exchanged between the parties (including those sent by facsimile or other communication devices which provide the recipient with a written record of the transmitted contents) (Article 13.2). An arbitration agreement may of course be included in a contract, and the validity of that arbitration agreement is not necessarily affected even if any or all of the other contractual provisions are found to be void (separability, Article 13.6). The JCAA's website provides for the following standard arbitration clause: "All disputes, controversies or differences arising out of or in connection with this contract shall be finally settled by arbitration in accordance with the Commercial Arbitration Rules of The Japan Commercial Arbitration Association. The place of arbitration shall be [city and country]" (sample from the JCAA Commercial Arbitration Rules).

The JCAA Rules, but not the JAA, provide for the joinder or consolidation of third parties to an arbitration case. Article 56 of the JCAA Commercial Arbitration Rules and Article 57 of the JCAA Interactive Rules respectively stipulate the rules on joinder, and Article 57 of the JCAA Commercial Arbitration Rules and Article 58 of the JCAA Interactive Rules respectively stipulate those on consolidation.

Under these rules, a third party can join (or be involved at the initiative of the parties) if: (a) all the parties and the third party agree in writing to the joinder; or (b) all claims are made under the same arbitration agreement. The third party's written consent to the joinder is necessary if the third party is requested to join as respondent after the constitution of the arbitral tribunal.

A consolidation is allowed if: (a) all the parties have agreed in writing; (b) all claims arise under the same arbitration agreement (See Article 57(2) for the detailed rules); or (c) all claims arise between the same parties and all of the followings are satisfied: (i) the same or a similar question of fact or law arises from the claims; (ii) the dispute is referred by the arbitration agreement to arbitration under the JCAA Commercial Arbitration Rules or to the JCAA; and (iii) the arbitral proceedings are capable of being conducted in a single set of proceedings with regard to the place of arbitration, the number of arbitrators, language of the arbitral proceedings and other issues governed by the arbitration agreement under which the claims arise.

It is worth noting that, under the expedited procedure of the JCAA Commercial Arbitration Rules, joinders and consolidations are not allowed (Article 90 of the JCAA Commercial Arbitration Rules).

The issue of the existence or validity of an arbitration agreement, together with its jurisdiction, is within the competence of an arbitral tribunal (competence-competence principle, Article 23.1of the JAA).

Arbitration procedure

Under the JAA, arbitral proceedings in respect of a particular civil dispute commence on the date when one party gives the other party notice to refer that dispute to arbitration (Article 29.1). Meanwhile, under the JCAA Commercial Arbitration Rules, the claimant is required

© Published and reproduced with kind permission by Global Legal Group Ltd, London

to submit to the JCAA a written request for arbitration (the "**Request for Arbitration**") in order to start arbitral proceedings, and the arbitral proceedings are deemed to have commenced on the date when the JCAA (not the respondent) receives the Request for Arbitration (Articles 14.1 and 14.6).

The parties can agree on the place of arbitration (Article 28.1 of the JAA). If there is no such agreement, it is the arbitral tribunal that will decide the place of arbitration under the JAA (Article 28.2), while the JCAA Commercial Arbitration Rules stipulate that the place shall be the city of the JCAA office to which the Request for Arbitration was submitted, i.e., Tokyo or Osaka (Article 39.1). Meanwhile, it should be noted that under both the JAA and the JCAA Commercial Arbitration Rules, hearings may be conducted at any place the arbitral tribunal considers to be appropriate (Article 28.3 of the JAA; and Article 39.2 of the JCAA Commercial Arbitration Rules).

The parties can agree on the rules of the arbitral proceedings which the arbitral tribunal must comply with; and if there is no agreement between the parties, the arbitral tribunal may conduct the arbitral proceedings in the manner which it considers appropriate (Articles 26.1 and 26.2 of the JAA). The JAA further stipulates and makes clear that the power conferred upon the tribunal in case there is no agreement between the parties includes the power to determine the admissibility, relevance, materiality and weight of any evidence (Article 26.3). In this regard, the JCAA Commercial Arbitration Rules do not have specific rules and in most cases, the rules regarding evidence are decided by the arbitral tribunal based on discussion with the parties; there are many cases where the IBA Rules on the Taking of Evidence in International Arbitration are taken into account.

On a separate note, it is worth noting that it is not only the parties that can retain expert witnesses; arbitral tribunals may appoint experts and ask them to report their findings orally or in writing (Article 34.1 of the JAA; and Article 55.1 of JCAA Commercial Arbitration Rules).

Under the JCAA Commercial Arbitration Rules, arbitral proceedings are held in private; all records are closed to the public; and the parties involved, including the arbitrators and counsels, generally owe confidential obligations (Article 42).

Arbitrators

How many arbitrators and how they will be appointed, in general, depend on the agreement between the parties. Both the JAA and the JCAA Rules have default rules for cases where such an agreement is lacking (Articles 16 and 17 of the JAA; Articles 25 to 30 of the JCAA Commercial Arbitration Rules; Articles 25 to 30 of the JCAA Interactive Rules).

Just as in the UNCITRAL Model Law, the JAA stipulates the grounds for challenging an arbitrator (Article 18), namely: (a) the arbitrator does not possess the qualifications agreed by the parties; or (b) there are circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence. In this regard, because of the actual case regarding a conflict of interests of an arbitrator, as explained in "Challenge of the Arbitration Award" below, the new JCAA Rules highlight and enhance the impartiality and independence of arbitrators (Article 24 of the JCAA Commercial Rules and Article 24 of the JCAA Interactive Rules).

In addition, the new JCAA Rules stipulate the rules regarding the tribunal secretary (Article 33 of the JCAA Commercial Rules and Article 33 of the JCAA Interactive Rules), which clarify that it is only arbitrators who may perform tasks that substantially influence the

© Published and reproduced with kind permission by Global Legal Group Ltd, London

arbitral tribunal's decision, including the arbitral award (Article 33.1), and entitle a sole arbitrator and a presiding arbitrator to appoint a third person to assist that arbitrator in his or her mandate (Article 33.2) with the impartiality and independence requirements and the confidential obligation (Article 33.3).

The remuneration and expenses of the tribunal secretary are deemed to be expenses of the sole arbitrator or the presiding arbitrator, and the remuneration of the tribunal secretary is included in the remuneration of that arbitrator for purposes of calculating the upper limit of the remuneration of that arbitrator (Article 33.4).

Apart from the challenge, any party may request a court (under the JAA) or the JCAA (under the JCAA Rules) to remove an arbitrator: (a) if the arbitrator becomes *de jure* or *de facto* unable to perform his/her function; or (b) for reasons other than those in the proceeding item, if the arbitrator acts with undue delay (Article 20 of the JAA, Article 35 of the JCAA Commercial Rules and Article 35 of the JCAA Interactive Rules). In addition, under the JAA, an arbitrator's mandate terminates upon the occurrence of: (a) his/her death; (b) his/her resignation; (c) his/her removal upon the agreement of the parties; (d) his/her issuance of a decision that confirms the existence of grounds to challenge him/her; or (e) the issuance of a decision by the relevant arbitration institution to remove him/her based on the relevant arbitration rules.

The JCAA Commercial Rules (Article 13) and JCAA Interactive Rules (Article 13) each stipulate the immunity of arbitrators, i.e., "(n)either the arbitrators nor the JCAA (including its directors, officers, employees and other staff members) shall be liable for any act or omission in connection with the arbitral proceedings unless such act or omission is shown to constitute wilful misconduct or gross negligence".

Interim relief

Article 24.1 of the JAA provides that, unless otherwise agreed by the parties, the arbitral tribunal may, upon the request of a party, order any party to take such interim or provisional measures as the arbitral tribunal considers necessary in respect of the subject matter of the dispute. The JCAA Rules further set out examples of interim measures that can be granted by the arbitral tribunal, such as orders to maintain or restore the *status quo*; to 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; to provide means of preserving assets out of which a subsequent arbitral award may be satisfied; or to preserve evidence that may be relevant and material to the resolution of the dispute (Article 71.1 of the JCAA Commercial Arbitration Rules; and Article 72.1 of the JCAA Interactive Rules).

The parties, however, are at liberty to apply to either Japanese courts or arbitral tribunals for such interim measures. In contrast to a main action on the merit before a Japanese court, where the Japanese court shall dismiss an action regarding a dispute which is the subject of an arbitration agreement (Article 14.1 of the JAA), Article 15 of the JAA provides that an arbitration agreement does not preclude the parties from filing a petition before a Japanese court, before or during the course of the arbitration, for interim measures in respect of the dispute which is the subject of the arbitration agreement.

It is worth noting that interim orders rendered by arbitral tribunals are not considered to be enforceable in Japan. Under Article 45.2(vii) of the JAA, the fact that the arbitral award is "not final and binding" is one of the grounds to deny the enforceability of such an award in Japan. Therefore, the parties usually apply for interim measures to arbitral tribunals with the expectation of voluntary performance by the parties. In such cases, however, given that

© Published and reproduced with kind permission by Global Legal Group Ltd, London

the parties have agreed on the arbitration agreement, and that it will be difficult for them not to follow the order of the arbitral tribunal, the voluntary performance of the parties can be expected to a reasonable degree. It is also said that, in practice, in a majority of cases, the parties voluntarily comply with interim orders of arbitral tribunals.

With respect to security, Article 24(2) of the JAA provides that the arbitral tribunal may order any party to provide appropriate security in connection with such interim or provisional measures. The JCAA Rules also provide for the same (Article 72 of the JCAA Commercial Arbitration Rules; and Article 73 of the JCAA Interactive Rules).

Arbitration award

Article 39 of the JAA provides for the formal requirements of an arbitral award. Among others, an arbitral award must be made in writing and signed by the arbitrators who made it. However, if there is more than one arbitrator, the signatures of a majority of the members of the arbitral tribunal will suffice if the award states the reason for the absence of the signatures of the other members. An arbitral award must also state the reasons upon which it is based, unless otherwise agreed by the parties. If the reasons are omitted, the JCAA Commercial Arbitration Rules and the JCAA Interactive Rules require the arbitral tribunal to state the reason for such omission in the arbitral award (Article 66.3 of the JCAA Commercial Arbitration Rules; and Article 67.3 of the JCAA Interactive Rules).

The JAA does not provide for any specific time frame for issuing the arbitration award. For arbitration proceedings under the JCAA Commercial Arbitration Rules and the JCAA Interactive Rules, the arbitral tribunal must use reasonable efforts to render an arbitral award within nine months and seven-and-a-half months, respectively, from the date when the arbitral tribunal is constituted (Article 43.1 of the JCAA Commercial Arbitration Rules and the JCAA Interactive Rules).

With respect to the allocation of the costs, Articles 49.1 and 49.2 of the JAA provide that the costs for the arbitration proceedings shall be apportioned in accordance with the agreement of the parties, and that if the parties fail to reach agreement, each party shall bear the costs it has incurred for the arbitration proceedings. However, Article 49.3 of the JAA allows the arbitral tribunal to determine the allocation of the costs in an arbitral award or in an independent ruling, if the parties so agree. Therefore, if the parties agree on the application of any of the JCAA Rules, the provisions of the JCAA Rules regarding the allocation of the costs will apply. Under the JCAA Commercial Arbitration Rules and the JCAA Interactive Rules, the arbitral tribunal may apportion the costs between the parties, taking into account the parties' conduct throughout the course of the arbitration proceedings, the determination on the merits of the dispute, and any relevant circumstances (Article 80.1 of the JCAA Commercial Arbitration Rules; and Article 81.2 of the JCAA Interactive Rules).

Challenge of the arbitration award

The unsuccessful party in an arbitration proceeding may file a petition with a competent Japanese court to set aside the arbitral award within three months from the date when it received the copy of the award and before any enforcement decision of a Japanese court (detailed below) has become final and binding (Article 44.1 and 44.2 of the JAA). The grounds for setting aside an arbitral award are stipulated in Article 44.1 of the JAA, which substantially mirror those set out in the New York Convention and the UNCITRAL Model Law. In other words, most of the grounds are limited to serious procedural defects such as invalidity of the arbitration agreement, defective composition of the arbitral tribunal, and

© Published and reproduced with kind permission by Global Legal Group Ltd, London

the failure to give the party the opportunity to appear or present its case in the arbitration proceedings. In addition, if the contents of the arbitral award are in conflict with public policy or good morals in Japan, that would constitute another ground to set aside the award (Article 44.1(viii) of the JAA).

As a recent judicial precedent, on December 12, 2017, the Supreme Court of Japan rendered a decision regarding the issue of setting aside an arbitral award on the ground of a conflict of interests of an arbitrator (Supreme Court of Japan Dec. 12, 2017, Hei 28 (Kyo) No. 43). In that case, the presiding arbitrator was an attorney at the Singapore office of an international law firm. A new attorney, who joined the San Francisco office of the same law firm after the commencement of the arbitration proceedings, represented a sister company of one of the parties in an unrelated litigation in California, but the presiding arbitrator failed to disclose this fact. Although the presiding arbitrator made an advance declaration and a waiver of potential future conflict of interests before the commencement of the proceedings, the Supreme Court held that such an abstract declaration did not constitute proper disclosure and that further fact-finding was necessary to determine whether the presiding arbitrator was actually aware of the conflict, and whether he would have been aware of it had he exerted reasonable efforts.

Another recent case involving the setting-aside of an arbitral award is a Tokyo High Court decision dated August 1, 2018. In that case, the unsuccessful party in an arbitration argued various grounds to set aside the arbitral award, but the Tokyo High Court denied most of them by simply pointing out that they do not constitute grounds to set aside an arbitral award under the JAA. In addition, the court ruled that, even if the "cause of action" written in the request for arbitration (i.e., damages) was different from that granted in the arbitral award (i.e., unjust enrichment) from the perspective of Japanese civil procedure law, that did not constitute a ground to set aside the award, as long as the legal structure adopted in the arbitral award can be reasonably expected from the economic and social facts provided in the request for arbitration. The decision also clarified that including a minority opinion in the arbitral award is not prohibited under the JAA or the JCAA Rules and, thus, does not constitute a ground to set aside the award.

As for the correction of an arbitral award based on clear clerical errors, Article 41 of the JAA provides that the parties may request the correction within 30 days from the date when they received the copy of the award. However, under the JCAA Commercial Arbitration Rules and the JCAA Interactive Rules, that request must be filed within four weeks (Article 68.2 and Article 69.2, respectively).

Enforcement of the arbitration award

As mentioned above, Japan is a member state to the NY Convention subject to the reciprocity reservation and, thus, an arbitral award made in a signatory state is enforceable in Japan. Further, the JAA does not actually require reciprocity in enforcing a foreign arbitral award, so a foreign arbitral award is enforceable in Japan as long as it satisfies the requirements of the JAA, even if it was made outside a signatory state to the New York Convention.

An arbitral award (whether or not the place of arbitration is in Japan) shall have the same effect as a final and binding judgment of a Japanese court if it satisfies the requirements of Article 45 of the JAA. The requirements for the enforcement of an arbitral award set out in Article 45 of the JAA substantially mirror those of the New York Convention and the UNCITRAL Model Law. In particular, if an arbitral award is set aside or suspended by a court in the place of arbitration, that arbitral award cannot be enforced (Article 45.2(vii) of

© Published and reproduced with kind permission by Global Legal Group Ltd, London

the JAA). As is the case under the New York Convention and the UNCITRAL Model Law, the grounds for a court to refuse the enforcement of an arbitral award are quite limited. In addition, although we have not found any clear statistics, it is said that Japanese courts generally take a pro-arbitration stance in respect of the recognition and enforcement of arbitral awards.

A party seeking to enforce an arbitral award should first file a petition for an enforcement decision before a competent Japanese court, and submit a copy of the arbitral award together with a document certifying that the content of the copy is identical to the arbitral award and a Japanese translation of the arbitral award. The obligor (i.e., the opposing party) shall be involved in the proceedings as a respondent. After the court renders an enforcement decision and the decision becomes final and binding, the party can then apply for compulsory execution based on the arbitral award (Article 22(vi-2) of the Civil Execution Act of Japan).

Investment arbitration

Japan is a member of the International Centre for Settlement of Investment Disputes (ICSID). It is also a signatory to the Energy Charter Treaty (ECT), and the agreement among Japan, the Republic of Korea and the People's Republic of China for the promotion, facilitation and protection of investment. Further, Japan is a signatory to more than 20 bilateral investment treaties and around 10 economic partnership agreements containing the Investor-State Dispute Settlement (ISDS) procedure. We have not found any recent investment arbitration cases against Japan.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Yuko Kanamaru
Tel: +81 3 6266 8542 / Email: yuko.kanamaru@mhmjapan.com

Yuko Kanamaru is a partner at Mori Hamada & Matsumoto and is admitted in Japan and New York. Ms. Kanamaru deals with a wide range of domestic and international disputes, especially in commercial, transactional and labour-related matters, including litigation and labour tribunal proceedings. Her expertise includes advising international clients in a wide range of corporate matters involving the Companies Act and the Financial Instruments and Exchange Act, data protection, and labour and employment. She is fluent in both Japanese and English.

Yoshinori Tatsuno
Tel: +81 3 6266 8785 / Email: yoshinori.tatsuno@mhmjapan.com

Tatsuno is a senior associate at Mori Hamada & Matsumoto, admitted in Japan and California, and has extensive experience representing clients in international disputes and transactions, which include international arbitration cases at the ICC and the SIAC, disputes involving litigations in multiple jurisdictions, and pre-litigation negotiations and dispute resolutions in cross-border transactions. He earned his LL.M. from Harvard Law School in 2015 and worked at Weil, Gotshal & Manges LLP, New York office, in 2015–2016 and at MHM's Singapore office in 2016–2017, on multi-jurisdictional litigations and international arbitrations.

Mori Hamada & Matsumoto

Marunouchi Park Building, 2-6-1 Marunouchi, Chiyoda-ku, Tokyo 100-8222, Japan
Tel: +81 3 6212 8330 / Fax: +81 3 6266 8442 / URL: www.mhmjapan.com/en

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Kenya

Collins Namachanja
Namachanja & Mbugua Advocates

Introduction

Kenya sits as an important regional, continental and global commercial centre, and as a gateway into East Africa. It is one of the important regional hubs on the continent of Africa alongside South Africa, Nigeria and Egypt. As a commercial hub, dispute resolution mechanisms then play a key role in resolving emerging disputes arising from the different trade partners, both at the domestic and international level.

The key statute governing arbitration practice in Kenya is the Arbitration Act, Act No. 4 of 1995 ("Arbitration Act") (as amended in 2010) which is wholly modelled after the UNCITRAL Model Law. The 2010 amendments sought to incorporate recent developments in arbitration practice. The Arbitration Act governs both domestic and international arbitration. The Act is divided into eight parts covering different aspects of the arbitral process, from preliminaries to general provisions, composition and jurisdiction of the arbitral tribunal, conduct of arbitral proceedings, award and termination of arbitral proceedings, recourse to the High Court, and recognition and enforcement.

The Act incorporated the New York Convention on Enforcement of Foreign Awards to provide for recognition and enforcement of foreign awards in Kenya. Kenya ratified the New York Convention in 1989.

Kenya has also ratified the International Convention on Settlement of Investment Disputes between States and Nationals of other States (ICSID).

It is also important to mention that the Nairobi Centre for International Arbitration (NCIA) was established in 2013 under the Nairobi Centre for International Arbitration Act. The Act establishes an arbitral court with jurisdiction to hear and determine disputes referred to it. The Centre published its Arbitration Rules in 2015. Currently, the NCIA is in the process of establishing a working partnership with CAJAC, the China-Africa Joint Arbitration Centre.

The Constitution of Kenya 201 vests judicial authority in the judiciary and prescribes certain guiding principles for the exercise of judicial authority under Article 159. Of note is Article 159 (2)(c), which prescribes the promotion of alternative forms of dispute resolution.

The hierarchical order of Courts in Kenya runs from the Magistrate's Courts to the High Court, Court of Appeal and the Supreme Court. However, the High Court is generally clothed with jurisdiction to hear any matters relating to arbitral proceedings under the Arbitration Act. Appeals may be made to the Court of Appeal in a domestic arbitration, but such appeals are limited to points of law with the agreement of the parties.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Arbitration agreement

Section 4 of the Arbitration Act deals with the form of an arbitration agreement. The requirements are that the arbitration agreement has to be in writing. An agreement will be deemed to be in writing if it is contained in a document signed by the parties, or if it is an exchange of letters or other means of communication that provide a record of the agreement, or 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.

Further, the reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract. Courts have held that it is sufficient that the contract in question is in writing, notwithstanding that one party may not have signed it.[1]

There is no express provision under the Arbitration Act for disputes which may or may not be arbitrated. However, under the rubric of public policy, where there are allegations of bribery, fraud and corruption in a dispute, such may not be arbitrable. Arbitration may also not be appropriate in matters of a criminal nature.

The Arbitration Act is silent on the issue of joinder, but going by the fact that arbitration is largely consensual and party-driven, a party who is not privy to an arbitration agreement may not be party to any arbitral proceedings unless the parties so agree.

The principles of competence-competence and separability are recognised under Section 17 of the Arbitration Act. The arbitral tribunal has power to rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of the contract is to be treated as an agreement independent of the other terms of the contract.

Arbitration procedure

In line with Section 22 of the Arbitration Act, parties are free to agree when arbitral proceedings may commence, but if they fail to agree, then arbitral proceedings in a dispute commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent.

As to where hearings may take place, Section 21 of the Act provides for parties to agree on the juridical seat of arbitration and the location of any hearing. The implication here is that subject to the agreement of the parties, hearings can take place outside the seat of arbitration.

No express rules on evidence are laid out in the Act. However, under Section 20 of the Arbitration Act, the arbitral tribunal has power to determine the admissibility, relevance, materiality and weight of any evidence. Similarly, every witness giving evidence and every person appearing before the tribunal has at least the same privileges and immunities as witnesses and advocates in proceedings before a Court.

There is a fallback on the general principles of law governing disclosure and privilege, because there are no express rules on this. Of course, this will only arise where parties have failed to agree on the procedure for disclosure. It will then fall to the arbitral tribunal to make a determination.

The Court can also assist a tribunal in taking evidence.[2] This may be at the request of the tribunal, or a party with the approval of the tribunal.

It cannot be said with certainty that IBA Rules on the taking of evidence in international

© Published and reproduced with kind permission by Global Legal Group Ltd, London

arbitration are used often, but they do come into play where parties fail to agree and the arbitral tribunal is called upon to make a determination. The same can be said for guidelines for Counsel to take into account the new LCIA and IBA Guidelines.

In as far as expert evidence is concerned, there are no specific rules formulated to that effect, but Section 27 of the Arbitration Act allows for the arbitral tribunal to appoint an expert or experts, subject to agreement by the parties. The expert is then required to attend the oral hearing, where the parties will have the opportunity to put questions to him and also to present their own expert witnesses in order to testify on the points at issue.

Confidentiality is a key tenet of the arbitral process as it is one of the attractive features of arbitration. Parties and the arbitral tribunal are bound by confidentiality which extends to the pleadings, evidence and the witnesses.

Arbitrators

Parties are free to determine the number of arbitrators,[3] failing which the number shall be one. Where an arbitration agreement provides for two arbitrators, unless there is a contrary intention expressed in the agreement, the agreement is deemed to include a provision that the two arbitrators will appoint a third.

Section 12 of the Arbitration Act provides that parties are free to agree on a procedure of appointing the arbitrator. Should the parties fail to agree, an elaborate default procedure is provided under the section. Ultimately, the appointment process may end up before the High Court should the default procedure equally fail.

An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality and independence, or if he does not possess qualifications agreed to by the parties, or if he is physically or mentally incapable of conducting the proceedings, or there are justifiable doubts as to his capacity to do so.[4]

Section 14 of the Arbitration provides for the challenge procedure. Parties are free to agree on a procedure. If they do not, a party wishing to challenge an arbitrator may do so by sending a written statement of the reasons for the challenge to the arbitral tribunal. This has to be within a period of 15 days after the concerned party becomes aware of the composition of the arbitral tribunal, or after becoming aware of any of the grounds for challenge.

Such a challenge if successful will bring to an end the arbitrator's mandate. Equally under Section 15 of the Arbitration Act, an arbitrator's mandate will terminate where he withdraws from his office, or where he is unable to perform the functions of his office, or where the parties agree in writing to terminate his mandate.

The IBA Guidelines on Conflict of Interest do bear on the proceedings at an international level, and as a reference point at the domestic level, but largely only if cited by the parties.

On immunity, an arbitrator is not to be liable for anything done or omitted to be done in good faith in the discharge of his functions.[5]

The practice of using secretaries to the arbitral tribunals has not taken root in this jurisdiction.

Interim relief

Parties are at liberty to apply both to the Courts and tribunals for interim relief, since both have jurisdiction to grant interim measures of protection under sections 7 and 18 of the Arbitration Act. The Court's powers under section 7 are primarily driven by the need to extend support to the arbitral process.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The categories and nature of reliefs are not restricted in definition and form but depend on the facts of each case. As such, the interim measure of protection may take the form of preserving or accessing evidence, or for security for costs, or for preservation of assets. An arbitral tribunal has the power under Section 18 of the Arbitration Act to entertain an application for security for costs.

The Courts have readily stayed proceedings in favour of arbitration under Section 6 of the Arbitration Act. It is unlikely that a Court will issue an anti-arbitration injunction under this provision, unless it finds that the arbitration agreement is null and void or that there is actually no dispute between the parties.

Arbitration award

Section 32 of the Arbitration Act prescribes the formal requirements of an award. It is to be in writing, signed by the arbitrator or arbitrators, or a majority of them, so long as the reasons for any omitted signatures are stated, reasoned (unless it is on agreed terms) and the award is to be dated with the juridical seat indicated. There is no timeframe provided within which the arbitration award is to be made.

The Arbitral Tribunal has latitude and discretion to order costs for the parties under Section 32B of the Act unless the parties agree otherwise. No criteria is specified, but in practice, the principle that costs follow the event is often applied, unless circumstances exist to negate its application.

Section 32C of the Arbitration Act provides that an arbitral award may include provision for the payment of simple or compound interest. The Act is silent as to whether interest can be included in the award on costs, but post-award interest may not be objectionable in principle.

Challenge of the arbitration award

There is no provision for an appeal against an arbitral award. The option is to apply to set aside under Section 37 of the Arbitration Act, which covers the grounds for refusal of recognition or enforcement. Nor are there options for the award to be modified.

The grounds mirror those under Article V of the New York Convention.

These are that:

1. a party to the arbitration agreement was under some incapacity;
2. the arbitration agreement is not valid under the law to which the parties have subjected it, or under the law of the state where the award was made;
3. proper notice was not given of the appointment of an arbitrator to the party against whom the arbitral award is invoked;
4. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference;
5. the composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
6. the arbitral award has not yet become binding on the parties or has been set aside at the seat;
7. the making of the arbitral award was induced or affected by fraud, bribery, corruption or under influence;

© Published and reproduced with kind permission by Global Legal Group Ltd, London

8. the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya, or
9. the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

In a recent decision in *Kenya Airports Authority v World Duty Free Company Limited*,[6] the High Court set aside a domestic award on the grounds that the arbitral award was in conflict with public policy. Primarily, the Court noted that the arbitral tribunal ought to have taken note of undertones of bribery and corruption which had been picked up in a prior ICSID Award[7] in which the tribunal had more or less dealt with the same subject matter.

Enforcement of the arbitration award

With regard to enforcement and recognition of the arbitral award, Kenyan law is consistent with the New York Convention. Section 36(2) of the Arbitration Act provides that an international arbitration award shall be recognised as binding and enforced in accordance with the provisions of the New York Convention, or any other convention to which Kenya is a signatory and relating to arbitral awards.

Under subsection 3, a party applying to the High Court for enforcement must furnish the original arbitral award or a duly certified copy, and the original arbitration agreement or a duly certified copy. If the award or arbitration agreement is not in English, a certified translation in English has to be furnished.

The Kenyan Courts have exhibited a pro-arbitration tendency as far as enforcement of awards is concerned. In a case[8] where a party sought to set aside a foreign award, the question considered by the High Court was whether the Court had jurisdiction to set aside an arbitral award where the seat of arbitration is outside its jurisdiction. The High Court took the view that the seat of arbitration is the most preferred forum for setting aside an international award.

The approach of the Courts has been to recognise the existence of international public policy that prevents a party from invoking restrictive provisions of its domestic or national laws in order to prevent *a posteriori* arbitration agreed between the parties.

This is well captured by the observations of the presiding Judge in a case[9] where an award made by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation seated in Moscow had been challenged; that the duty of the Court should be to encourage and support international arbitration or arbitration generally, and that there is a pro-enforcement theme which runs through the New York Convention and which must be transposed domestically as well.

With this approach, it is unlikely that an arbitration award can be enforced in Kenya where it has been set aside in the Courts of the seat of arbitration.

Investment arbitration

Notable Bilateral Investment Treaties signed by Kenya, and which are in force, are with the UK, Switzerland, the Netherlands, Germany, France, Finland and Japan. Others are with Kuwait and the Republic of Korea.

The portfolio of investment arbitrations against the government of Kenya is very lean.

The first investor–state dispute involving Kenya was in 2000 where World Duty Free Company Limited, as claimant under an investment contract, referred a dispute against the

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Republic of Kenya[10] to an ICSID Tribunal. The arbitral tribunal declined jurisdiction after citing evidence of corruption in the matter.

In *Cortec Mining Kenya Limited and Stirling Capital Limited v The Republic of Kenya*,[11] after hearing the dispute both on jurisdiction and the merits, an ICSID Tribunal dismissed the claim in October 2018. The Claimants had alleged that the Government of Kenya wrongfully terminated their mining concession.

Pending determination is the case filed against the State by WalAm Energy Inc.,[12] following cancellation of its geothermal prospecting licence.

So far, there have been no adverse investment arbitration awards against Kenya.

* * *

Endnotes

1. *National Hospital Insurance Fund v Eng. Peter Scott & Another* [2018] eKLR.
2. Section 28 Arbitration Act.
3. Section 11 Arbitration Act.
4. Section 13 Arbitration Act.
5. Section 16B Arbitration Act.
6. [2018] eKLR.
7. *World Duty Free Company Limited v The Republic of Kenya*, ICSID Case No. ARB/00/7.
8. *Tracer Limited v SGS Kenya Limited & Another* [2017] eKLR.
9. *Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited* [2017] eKLR.
10. ICSID Case No. ARB/00/7, Award - October 4, 2006.
11. ICSID Case No. ARB/15/29.
12. *WalAm Energy Inc v Republic of Kenya* (ICSID Case No. ARB/15/7).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Collins Namachanja
Tel: +254 20 271 2202 / Email: cnamachanja@nmadvocates.com

Mr. Collins Namachanja is the senior partner in the firm of Namachanja & Mbugua Advocates based in Nairobi. Mr. Namachanja is an Advocate of the High Court of Kenya and was admitted to the Bar in 1995. He holds an LL.B. Degree from the University of Nairobi and an LL.M. from the University of London in International Dispute Resolution. He is a Fellow of the Institute of Chartered Arbitrators, Chartered Arbitrator and an Accredited Mediator. He is also a tutor and trainer with the Chartered Institute of Arbitrators (Kenya) Branch. Mr. Namachanja currently sits on the Board of Directors of the Nairobi Centre for International Arbitration. He is actively involved in arbitration practice both at the domestic and international level as arbitrator.

Namachanja & Mbugua Advocates

Hurlingham Park, A4, Argwings Kodhek Road, P.O. Box 16301-00100, Nairobi, Kenya
Tel: +254 20 271 2202 / +254 20 272 0078

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Kosovo

Dr Christian W. Konrad, Konrad Partners
& Virtyt Ibrahimaga

Introduction

On 17 February 2019, Kosovo celebrated its 11th anniversary of independence. Within little more than a decade of this state-building process, it has successfully established its institutions and a parliamentary system, consolidated its statehood and continuously strengthened its international subjectivity. Objectives such as sharing international responsibilities have helped Kosovo to achieve diplomatic recognition as a sovereign state by more than half of the 193 members of the United Nations, including 23 out of 28 European Union Member States.

Notwithstanding the fact that EU policy towards Kosovo remains divided, with five of its Member States (Cyprus, Greece, Romania, Slovakia and Spain) not recognising its independence, this has not prevented the EU from substantial engagement in Kosovo or from regarding Kosovo as a potential candidate for EU membership.

In September 2008, only a few months after its declaration of independence, in recognition of the role of arbitration in economic development, the Assembly of Kosovo adopted the Law on Arbitration of Kosovo (No. 02/L-75) (**Law on Arbitration**), which largely mirrors the UNCITRAL Model Law on arbitration. This law is considered to satisfy the formal and substantive requirements of a modern arbitration law; its provisions have *lex specialis* character in relation to the Law on Contested Procedure with regard to arbitration procedure.[1] The Law on Arbitration regulates domestic and international arbitration and sets forth the procedures for enforcing domestic (Article 38) and foreign (Article 39) arbitral awards. The Law on Foreign Investment (Law No. 04/L-220), enacted in 2014, further favours the use of arbitration in international relationships. With the adoption of international standards, Kosovo has the necessary framework to promote itself as an arbitration-friendly jurisdiction.

Since 2011, arbitration services have been available within the Kosovo Chamber of Commerce at the Kosovo Permanent Tribunal of Arbitration and within the American Chamber of Commerce in Kosovo (**AmCham**) at the Alternative Dispute Resolution Center. In June 2011, the Kosovo Chamber of Commerce introduced the Kosovo Arbitration Rules, based on the UNCITRAL Arbitration Rules (as revised in 2010). The Kosovo Arbitration Rules are also applied by the Alternative Dispute Resolution Center at AmCham.

Due to divergent positions on its statehood, the Republic of Kosovo is not yet eligible to become a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**). Nonetheless, Kosovo's courts recognise foreign arbitral awards (Law on Arbitration, Article 39.1). The documents to be filed before the Kosovo courts when applying for the recognition and enforcement of an international award (Law on Arbitration, Article 39.3) are similar to those to be filed under

© Published and reproduced with kind permission by Global Legal Group Ltd, London

the corresponding provision of the New York Convention (Article IV). In addition, the Law on Arbitration substantially reflects the grounds for refusal of recognition and enforcement under Article V of the New York Convention (Law on Arbitration, Articles 39.4–39.5). Furthermore – again, in spite of Kosovo not being a contracting state to the New York Convention – the Foreign Investment Law expressly stipulates that international arbitral awards "shall be enforceable in accordance with the New York Convention, regardless as to whether or not that convention is otherwise binding on Kosovo" (Foreign Investment Law, Article 16.4). There are therefore express provisions for international awards to be recognised and enforced in accordance with the New York Convention in Kosovo.

Arbitration agreement

An arbitration agreement can either be signed as a separate agreement attached to the main contract, or may be included as an arbitration clause within the contract. In either case, the consent of the parties to arbitrate disputes must be in writing and clearly state the parties' intention to settle contractual disputes through arbitration. The Law on Arbitration states that the conclusion of an arbitration agreement by letter, telegraph, fax, email or any other electronic form is considered to fulfil the requirement of a written form. For consumer contracts, the agreement is only deemed to be validly concluded when all parties personally sign the document containing the arbitration clause, including via electronic signature (Article 6).

Under Article 5 of the Law on Arbitration, all disputes are arbitrable as long as the relief sought has a "civil-judicial and economic-judicial" character. Public law disputes, criminal law cases and family matters, are not arbitrable.

Disputes arising from consumer contracts are arbitrable.

It is disputable whether the Labour disputes are arbitrable within the current legal framework in Kosovo. The Labour law provides that an employee may initiate court proceedings against the decisions of their employer related to rights deriving from the labour law. The Law on Labour expressly provides for mediation in its provisions for settling labour law disputes.[2] The law does not expressly foresee the possibility of arbitration for settling labour law disputes.

The Law on Arbitration accepts the *competence-competence* doctrine (Law on Arbitration, Article 14). This principle vests an arbitral tribunal with the right to decide whether it has jurisdiction over the dispute presented before it, and whether the arbitration agreement is valid. The *competence-competence* principle is also provided under Article 24 of the Kosovo Arbitration Rules.

The validity of an arbitration agreement may not be challenged on the grounds of invalidity of the underlying contract. The separability principle is set forth in Article 14.1 of the Law on Arbitration, which provides that an arbitral tribunal should decide on the validity of an arbitration agreement and that "*for that purpose, an arbitration clause, which forms part of a contract, shall be treated as an agreement independent of the terms of the contract*".

Arbitration procedure

Under Article 18 of the Law on Arbitration, unless otherwise agreed by the parties, the arbitration proceedings commence on the date the Respondent receives the Request for Arbitration. The Respondent is deemed to have received the Request for Arbitration on the day that it is delivered physically to it, or deemed to have been received if it is delivered at

© Published and reproduced with kind permission by Global Legal Group Ltd, London

its habitual residence, place of business or mailing address of the addressee (Law on Arbitration, Article 4).

The Law on Arbitration follows the Model Law's guarantees of two fundamental arbitration principles: equal treatment of the parties; and the opportunity to present one's case (Article 16.1). The parties to an arbitration are free to determine the procedural rules applicable to the dispute. The Law on Arbitration provides that in the absence of an agreement by the parties on the procedural rules, the arbitral tribunal shall determine the applicable rules.

The hearing of the case does not necessarily have to take place at the place of arbitration. The place of arbitration is agreed upon by the parties or, in the absence of an agreement, is established by the arbitral tribunal, taking into consideration the circumstances of the case and the convenience of the parties and the arbitral tribunal. Unless otherwise agreed, the arbitration proceedings are not public (Law on Arbitration, Article 21.1), and the arbitrator and other participants must keep all information confidential.

The parties may agree the language of the proceedings, failing which this is determined by the arbitral tribunal. The language applies to all written and oral submissions. The arbitral tribunal may order prompt translation of all relevant documents into the language or languages to which the parties have agreed (Law on Arbitration, Article 19). Similar provisions are included in Article 19 of the Kosovo Arbitration Rules.

The Law on Arbitration stipulates that each party shall have the burden of proving the facts relied upon to support its claim or defence. The arbitral tribunal has the discretion to decide what evidence is relevant and admissible, and to exclude evidence it deems irrelevant (Article 23.2). Courts may assist the arbitral tribunal or a party (with the approval of the arbitral tribunal) in the taking of evidence, or to perform judicial acts which the arbitral tribunal is not authorised to carry out (Law on Arbitration, Article 28).

The arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period as the arbitral tribunal deems appropriate (Law on Arbitration, Article 23.4).

Evidence of witnesses may be presented in the form of testimonies or written statements signed by a witness, provided that the witness is made available at the hearing, if their examination is requested. The details of each witness (name, address, etc.) shall be communicated to the other party at least 15 days before the hearing (Law on Arbitration, Article 24).

Apart from witness testimonies and evidence presented by the parties, the arbitral tribunal may appoint one or more experts to produce a written report on specific issues to be determined by the arbitral tribunal. The arbitral tribunal may ask the parties to provide to the expert all documents that the expert might need in order to prepare an expert opinion. After the delivery of a written expert report, the parties and/or the arbitral tribunal (where necessary) may request that the expert appear at a hearing to be cross-examined. "At this hearing", the parties have the right to submit their own expert reports (Law on Arbitration, Article 25).

Arbitrators

Under the Law on Arbitration, the parties are free to determine the number of arbitrators (provided that the panel is composed of an uneven number of arbitrators) and to choose any selection method for appointing the arbitrator or arbitrators. In the event of no consensus on the selection method or number of arbitrators,[3] the arbitral tribunal shall consist of a panel of three arbitrators. The Law on Arbitration follows the Model Law's default rules and

© Published and reproduced with kind permission by Global Legal Group Ltd, London

provides that each party shall appoint one arbitrator, and these two arbitrators shall appoint the chair. If any appointments are not made within the required time period (30 days), the Kosovo courts will, upon request of one of the parties, make a default appointment (Law on Arbitration, Article 9.4).

Article 5 of the Kosovo Arbitration Rules regulates the issue in a slightly different manner. It provides that "*if the parties have not previously agreed, the appointing authority shall decide whether the case shall be referred to a sole arbitrator or to a three-member arbitral tribunal, taking into account all relevant circumstances*".

The Law on Arbitration does not establish any restrictions regarding the citizenship of arbitrators. It establishes the general requirements for arbitrators, i.e. an arbitrator shall be impartial and independent of the parties. The arbitrator does not have to be a qualified lawyer. The parties may, however, require an arbitrator to have certain skills or qualifications.

Before accepting an appointment, a prospective arbitrator must disclose any circumstances that might raise justifiable doubts regarding the arbitrators' impartiality or independence. Even after the appointment, an arbitrator is obliged to disclose any such circumstances as soon as they arise (Law on Arbitration, Article 10.1).

Non-disclosure of the abovementioned circumstances may give rise to a challenge of an arbitrator by the parties. Arbitrators may be challenged only if there are circumstances that give rise to justifiable doubts as to the arbitrators' impartiality or independence, or if the arbitrator does not have the qualifications required by the parties (Law on Arbitration, Article 10.2).

Article 11 of the Law on Arbitration allows the parties to freely designate the procedure for challenging arbitrators. Absent such agreement, Article 11.2 provides that "*the party which intends to challenge an arbitrator shall within fifteen days after the appointment of an arbitrator, or after circumstances listed in article 10, par.2, became known to that party, send notice of its challenge to the other party and the other members of the tribunal*". In case the other party does not agree to the resignation of the respective arbitrator, or the arbitrator under challenge does not resign, the tribunal shall decide on the challenge. If the challenge is not successful, a dissatisfied party may initiate court proceedings within 15 days of receipt of the rejection decision, in order to have the question of an arbitrator's challenge decided by the state court. While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and render an award (Law on Arbitration, Article 11.4). Similar provisions are contained in the Kosovo Arbitration Rules (Articles 12–14).

Furthermore, the arbitrator's mandate terminates if the arbitrator becomes *de jure* or *de facto* unable to perform his or her function or, for other reasons, fails to act without undue delay. In such a case, if the arbitrator does not resign or if the parties do not agree on the termination of the arbitrator's mandate, the law allows the state court to render the final decision. The court can make that decision upon the request of any party or member of the tribunal. No appeal is allowed against a court's decision on this matter (Law on Arbitration, Article 12).

The Arbitration Law does not contain any provisions concerning the liability of arbitrators. Article 16 of the Kosovo Arbitration Rules provides that, save for intentional wrongdoing, the parties waive to the fullest extent permitted under the applicable law any claim against the arbitrators, the appointing authority, the Permanent Tribunal and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Interim relief

Regardless of the wording of the arbitration agreement or the commencement of arbitration proceedings, according to the Law on Arbitration, each party is entitled to request interim measures from state courts and the state court is further empowered to grant the requested measure if the party proves that it may suffer immediate or irreparable damage or loss if such a measure is not taken (Article 8).

Article 15.1 of the Law on Arbitration provides that an arbitral tribunal may issue interim measures if requested by a party. The arbitral tribunal has to be provided with credible evidence that, in the event such a preliminary order is not issued, the party requesting it will suffer immediate or irreparable injury, loss or damage. The arbitral tribunal may order any interim measure against the other party that it deems appropriate and may order any party to provide "appropriate security". A court may order the enforcement of an interim measure issued by an arbitral tribunal unless a party has already requested a court to enforce an interim measure on the same matter (Law on Arbitration, Articles 8 and 15.2).

Interim measures issued by an arbitral tribunal based in Kosovo become effective after having been declared for enforceable by the court. Competent court for such declaration is the Basic Court in Pristina – Department for Commercial Matters, the only competent court for commercial matters for the whole of Kosovo.

The Law on Arbitration does not provide an exhaustive list of admissible types of interim measures that may be granted by the arbitral tribunal. Kosovo Arbitration Rules provide for interim measures that take into account the preservation of property and evidence, i.e. under Article 27(2), a party may apply: (i) for an order to preserve the other party's property; (ii) for an order to preserve evidence that may be relevant and material to the resolution of the dispute; or (iii) require the other party to take or refrain from taking certain actions that are likely to cause current or imminent harm or prejudice the arbitral process itself.

If a preliminary order issued by an arbitral tribunal proves to be unjustified, the party in whose favour the interim measure was issued is obliged to compensate the party against which the order was issued and enforced. The arbitral tribunal also has the power to decide on the justification of the preliminary order and matters related to the compensation of damages referred to above (Law on Arbitration, Article 15.3).

Arbitration award

An arbitration award is final and may not be appealed against. The Law on Arbitration does not provide for any specific timeframe within which the arbitration award shall be rendered. With regard to the decision-making, form and correction of an award, the Law on Arbitration largely follows the Model Law standards. The award must be in writing, shall include the reasons on which it is based unless the parties have agreed otherwise, signed by the majority of arbitrators, provided that the award states the reasons for the absence of a signature, and shall contain the place and date on which the award was rendered. The Law on Arbitration does not address the issue of dissenting opinions, namely whether the arbitral tribunal is to issue the dissenting opinion of an arbitrator.

The Law on Arbitration contains provisions on settlement of disputes. According to Article 32, the parties may settle their dispute at any time during the proceedings, as long as the award has not been rendered. In such a case, the parties are to inform the arbitral

© Published and reproduced with kind permission by Global Legal Group Ltd, London

tribunal about the settlement and may request to convert their settlement agreement into an award, unless the settlement is in violation of public policy (*ordre public*). The law ensures that the resulting award has the same force and effect as any other arbitral award on the merits of the case.

In its award, the arbitral tribunal shall determine the costs of the arbitration and, unless the parties have otherwise agreed, decide which parties are to bear these costs, and in what proportion. Pursuant to Article 34.1 of the Law on Arbitration, the costs of the arbitration include the fees of the arbitral tribunal, the arbitrator's costs, counsel's fees, and expenses and representatives of the parties (claimed during the proceedings and to the extent that the arbitral tribunal finds them reasonable), travel and other witness expenses (as approved by the arbitral tribunal), and fees and expenses of the court when acting as the appointing authority of arbitrators. Unless otherwise agreed by the parties, costs are borne by the unsuccessful party (Law on Arbitration, Article 34.3). The Law on Arbitration does not contain any provisions on whether the parties are entitled to recover interest.

Challenge of the arbitration award

Vesting the parties with an unlimited right to appeal an award would take away one of the main advantages of arbitration – its ability to deliver fast and cost-effective dispute resolution. Consistent with this interest, the law provides only limited grounds for the annulment of an award.

An award may be annulled if the contesting party resisting proves that (Law on Arbitration, Article 36.2):

(a) a party to the arbitration agreement did not have the capacity to act;

(b) the arbitration agreement is not valid under the law determined as applicable by the parties or the arbitral tribunal or, in the absence of such determination, under the law applicable in Kosovo;

(c) the applicant was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(d) the award deals with an issue not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;

(e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the provisions of [the Law on Arbitration] or a valid arbitration agreement, under the condition that such defect had an impact on the arbitral award; or

if the court finds that:

(a) arbitration is prohibited by law; or

(b) the enforcement of the award leads to a result which is in conflict with public policy.

The timeframe for requesting a court to set aside an arbitral award can be stipulated by the parties in their arbitration agreement. In the absence of an agreement on this issue, the request for setting aside shall be brought within ninety (90) days from the day on which the Claimant in the annulment proceedings receives the award. Once the request is submitted, the court may, where appropriate, set aside the award and resubmit the case

© Published and reproduced with kind permission by Global Legal Group Ltd, London

to the arbitral tribunal to resume the arbitral proceedings or to take such other action as, in the arbitral tribunal's opinion, will eliminate the grounds for setting aside. According to Article 37 of the Law on Arbitration, the decisions of the court shall have the form of a court order. Prior to the issuance of a court order regarding the challenge of an award, the court shall hear all parties.

Enforcement of the arbitration award

The Law on Arbitration sets forth the legal requirements for the enforcement of domestic arbitral awards and recognition and enforcement of foreign arbitral awards (awards made outside Kosovo). Its Article 38.1 provides that "*an arbitral award made by an arbitral tribunal in Kosovo shall be enforced when declared enforceable by the Court*". A request to declare an arbitral award enforceable shall be accompanied by the arbitral award or a certified copy thereof. However, a request shall be rejected if the court determines that one or more grounds for setting aside an award are satisfied (Law on Arbitration, Article 38.2).

Arbitral awards rendered outside Kosovo are subject to recognition and enforcement. In order to have an arbitral award enforced, the requesting party shall file with the Basic Court in Pristina – Department for Commercial Matters an application, accompanied by the authenticated original award or a certified copy thereof and an original arbitration agreement or its duly certified copies. When the arbitral award or arbitration agreement is written in a foreign language, the party shall supply a duly certified translation of the abovementioned documents into an official language of Kosovo (Albanian or Serbian).

Grounds for refusing the enforcement and recognition of an award

Although the Law on Arbitration does not expressly refer to the New York Convention, the provisions dealing with recognition and enforcement (Law on Arbitration, Article 39) mirror the correlating provisions under Article V of the New York Convention. Similar to the New York Convention, refusal of recognition or enforcement may be raised by a party or by the court.

A party may raise the following grounds for refusal (Law on Arbitration, Article 39.4):

(a) lack of capacity of the parties to conclude an arbitration agreement;

(b) invalidity of the arbitration agreement under the applicable law;

(c) lack of a fair opportunity to be heard during arbitral proceedings;

(d) the award deals with matters not covered by the submission to arbitration;

(e) the composition of the arbitral tribunal or the conduct of the arbitral proceedings was not in accordance with the applicable law;[4] or

(f) the final award has not yet become binding on the parties, or has been set aside or suspended by a competent authority.

Recognition and enforcement of an award "may" be refused by a court based on any one or more of the above grounds.

Recognition and enforcement of an award, however, "shall" be refused by a court if it finds that the subject matter of the dispute is not capable of settlement by arbitration under the laws of Kosovo, or the recognition or enforcement of the award would be contrary to the public policy (*ordre public*) of Kosovo (Law on Arbitration, Article 39.5).

If no grounds for refusal exist and recognition is granted, enforcement proceedings may be initiated in accordance with Article 21 *et seqq* of the Law on Enforcement Procedure.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Investment arbitration

In 2009, Kosovo joined the International Center for Dispute Resolution (**ICDR**). As of January 2019, Kosovo has ratified investment agreements providing for investor-state arbitration with the following countries: Albania, Austria, Belgium, Luxembourg, Macedonia, Turkey, Switzerland, United Arab Emirates and Canada.

Placing economic growth as its first priority, Kosovo has undertaken numerous economic and legal reforms in order to make the country more attractive to foreign investors. The Law on Strategic Investments (Law No. 05/L-079), which came into force in February 2017, supplements the legal and regulatory framework for investments by providing investors in strategic economic sectors with several opportunities and thus increasing Kosovo's competitiveness in attracting foreign investments.

The Law on Foreign Investment, enacted in 2014, incorporates international standards on investment protection, including fair and equitable treatment, full and constant protection, security and the transfer of rights. In the absence of an agreement on the settlement of disputes between a foreign investor and the state, the Law on Foreign Investment allows foreign investors to require that investment disputes are settled through domestic or international arbitration with the procedural rules as chosen by the foreign investor. The Foreign Investment Law stipulates that investors may utilise the following alternative dispute resolution mechanisms:

(a) the ICSID Convention, if both the foreign investor's country of citizenship and Kosovo are parties to the said Convention at the time of the request for arbitration;

(b) the ICSID Additional Facility Rules, if the jurisdictional requirements for personal immunities *per* Article 25 of the ICSID Convention are not fulfilled at the time of the request for arbitration;

(c) the United Nations Commission on International Trade Law (UNCITRAL) Rules. In this case, the appointing authority referred to therein will be the Secretary General of ICSID; or

(d) the International Chamber of Commerce Rules.

Pursuant to Article 2 of the Law on Foreign Investments, the minimum capital amount that has to be contributed by a foreign investor, directly or indirectly, to a business organisation established in Kosovo in order to be considered as a foreign investment organisation, is 10%.

On 3 May 2018, an ICSID tribunal dismissed claims brought by German Company ACP Axos Capital GMBH (Axos) against Kosovo, seeking compensation over the suspension of the privatisation of state-owned Post and Telecom of Kosovo, PTK. The case arose in 2013, when Axos was awarded a tender to purchase 75% of PTK's shares. At the end of 2013, however, the government of Kosovo terminated the transaction. The claim was based on Germany's bilateral investment treaty with Yugoslavia and was the first ever investment treaty case brought against Kosovo. The tribunal found that it lacked jurisdiction over the arbitration on the grounds that no valid contract had been concluded between Axos and Kosovo for the purchase of the shares of PTK.

Kosovo is currently facing one investment treaty claim – *Mabco Construction SA v. Republic of Kosovo* (ICSID Case No. ARB/17/25). The claim was filed by a Swiss construction company in July 2017 under the bilateral investment treaty between Kosovo and Switzerland and relates to the acquisition of shares in a tourism venture. The case is still pending.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Endnotes

1. Law No. 04/L-118 on Amending and Supplementing the Law No.03/L-006 on Contested Procedure, Article 26.
2. Law No. 03/L-212 on Labour of Kosovo, Article 81.
3. The consensus should be reached within 15 days after the receipt of the notice of arbitration by the Respondent (Law on Arbitration, Article 9.3).
4. Article 39.4(d) of the Law on Arbitration omits the wording of Article V(1)(d) of the New York Convention that "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" (emphasis added), being "a distinction which is of no material significance." (A. Gojani; "Recognition and Enforcement of Kosovo made Arbitral Awards in New York Convention Countries: A Comparative Study", *Journal of Alternative Dispute Resolution in Kosovo*, Vol. 2, June 2016, p. 72.)

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Dr Christian W. Konrad
Tel: +431 512 95 00 / Email: c.konrad@konrad-partners.com

Dr Christian W. Konrad is the founding and managing partner of Konrad Partners. He is an advocate in the fields of international arbitration, international litigation and public international law. He has extensive experience in arbitral practice, procedure and advocacy both in civil and common law systems. His practice covers inter-state, international and commercial disputes. He has represented international organisations and businesses in a broad range of cases involving, *inter alia*, long-term energy contracts, concession agreements, and entitlement to natural resources, immunities from jurisdiction, infrastructure projects, mergers and acquisitions. He also advises clients on the protection of their investment and enforcement of arbitral awards and court judgments. He frequently acts as arbitrator and is a member of panels of various arbitral institutions worldwide. He also serves as Vice-President of the Kosovo Permanent Tribunal of Arbitration.

Virtyt Ibrahimaga
Tel: +381 38 404 505 / Email: virtytibrahimaga@si.legal

Mr Virtyt Ibrahimaga is attorney at law and the President of the Kosovo Permanent Tribunal of Arbitration in Kosovo. He is a lawyer educated in Germany and has represented local and international companies in domestic and international litigation and arbitrations concerning telecommunications contracts, concession agreements, entitlements to natural resources, immunity from jurisdiction, distribution and agency contracts, as well as property matters. Virtyt regularly advises clients on the protection of their investments and on the enforcement of arbitral awards and court judgments, and has served as co-arbitrator and as chairman of the Arbitral Tribunal in domestic arbitration proceedings.

Konrad Partners

Rotenturmstrasse 13, 1010 Vienna, Austria
Tel: + 431 512 95 00 / URL: www.konrad-partners.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Liechtenstein

Dr Manuel Walser
Walser Attorneys at Law Ltd.

Introduction

Liechtenstein: an overview

With about 38,000 inhabitants and an area of 160 km^2, the Principality of Liechtenstein is the sixth-smallest country in the world and is located in the heart of Europe. Although Liechtenstein is located right in the middle of Europe, the principality is not a member of the European Union. As a result of its membership of the European Economic Area (EEA) and the European Free Trade Association (EFTA), the country still takes part in European regulatory developments. These international ties, and the small size of the country, contribute to the fact that various legal provisions have been adopted from neighbouring countries, and that private international law is of particular importance.

New arbitration legislation in the Code of Civil Procedure

On 1 November 2010, the new arbitration law entered into force in Liechtenstein. It is part of the Code of Civil Procedure (*Zivilprozessordnung*, ZPO) and is regulated in §§ 594 *et sqq*. ZPO. The model on which it is based is the Austrian Arbitration Law Amendment Act (*Schiedsrechts-Änderungsgesetz* [SchiedsRÄG] 2006), the provisions of which are in turn based on the UNCITRAL Model Law.

The intention behind the new arbitration legislation was to strengthen Liechtenstein as a place of business and place of arbitration and to make the country a more attractive location for national and international courts of arbitration. Compared with its neighbouring countries Austria and Switzerland, Liechtenstein has created a strategic advantage and has implemented specific strengths and features of the Liechtenstein legal system; in some areas, the Liechtenstein legislation differs from the Austrian model. In particular, the Liechtenstein legislator has provided for fast proceedings to review arbitral awards; the Princely Court of Appeal (*Fürstliches Obergericht*) is the sole and last instance for handling an action to set aside the award. Following the principle of confidentiality, the Liechtenstein legislator has also included specific provisions on confidentiality, such as the exclusion of the public in setting-aside proceedings to the greatest possible extent.

Together with the reform of arbitration law, the requirement under the old law, of the public authentication of arbitration agreements if the court of arbitration was located abroad (§ 53a(2) of the old Jurisdiction Act (*Jurisdiktionsnorm*, JN), was abolished. The current Liechtenstein arbitration law also does not differentiate between institutional and *ad hoc* arbitration proceedings and between purely national and international arbitration proceedings.

The Liechtenstein legislator optimised arbitration law even further in the course of a part

© Published and reproduced with kind permission by Global Legal Group Ltd, London

reform in 2017. A new wording of the provision on consumer protection (§ 634 ZPO) now makes it possible for consumers – subject to certain requirements – to enter into an arbitration agreement even before the dispute has arisen. In matters of labour law, the protective provisions of § 634 ZPO do not apply to managing directors and board members of legal entities. The general admissibility of arbitration clauses in articles of association, company charters, foundation deeds and trusts, is now laid down in the law expressly. In addition, the requirement of a special power of attorney for entering into an arbitration agreement was removed. This makes for even more essential differences of Liechtenstein arbitration law as compared to the Austrian law on which it is based.

Accession to the New York Convention

In order to enhance the attractiveness of Liechtenstein as a location for arbitration, Liechtenstein created the requirements for the recognition and enforcement abroad of arbitral awards issued in Liechtenstein, and *vice versa*. On 19 May 2011, in the course of the complete revision of arbitration legislation, Liechtenstein joined the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention, NYC) as its 148th member state. This is all the more remarkable since, up to then, Liechtenstein had not joined any multilateral convention in the field of the recognition and enforcement of foreign decisions. So far, there are only two bilateral treaties with the neighbouring countries Switzerland (since 1968) and Austria (since 1973). Both of these are a convention simple, which merely regulates the recognition and enforcement of decisions by courts of law and of courts of arbitration. In contrast to the New York Convention, these two bilateral treaties provide for a review of the indirect jurisdiction of the court of arbitration, and also for the recognition and enforcement of arbitral settlements.

When joining the New York Convention, Liechtenstein made use of the reservation of reciprocity in terms of Art. I(3) NYC. Accordingly, in Liechtenstein the New York Convention only applies to arbitral awards that have been issued on the territory of another member state; it does not have any effect *erga omnes*. However, the limitation to commercial cases was refrained from, since Liechtenstein arbitration is not limited to commercial matters.

Own arbitration rules

In 2011, experienced litigation lawyers and interested parties joined and formed the Liechtenstein Arbitration Association (*Liechtensteinischer Schiedsverein*, LIS). Together with the Liechtenstein Chamber of Commerce and Industry (LCCI), the LIS created arbitration rules particular to Liechtenstein, the *Liechtenstein Rules*, which have existed since May 2012. These are based on the UNCITRAL Arbitration Rules, are a development of the Swiss Rules, and are tailored to the requirements of Liechtenstein as a financial centre. The *Liechtenstein Rules* aim at fast, simple, and cost-effective proceedings, and contain special rules on the confidentiality of the arbitral proceedings; for example, only persons who are subject to a legal obligation of secrecy can be appointed as an arbitrator.

The *Liechtenstein Rules* provide for quasi-institutional arbitration proceedings: in an individual case, experienced experts may be brought in to ensure the efficient handling of the proceedings (e.g. appointment or dismissal of arbitrators or review of their costs), and these experts are in turn subject to an obligation of secrecy. Thus, the *Liechtenstein Rules* are particularly suitable for proceedings with a personal character, such as disputes in family enterprises or in company, foundation, or trust law.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Arbitration agreement

Term and required content

An arbitration agreement is an agreement of the parties to make all or individual disputes that have arisen or will arise between them with regard to a specific contractual or non-contractual legal relationship subject to decision by a court of arbitration (§ 598(1) ZPO). Thereby, the courts of law are excluded in a binding way for these legal disputes.

The arbitration agreement may be entered into in the form of an independent contract (so-called arbitration contract) or in the form of a clause as part of a main agreement, a will, articles of association, or other unilateral orders (so-called arbitration clause). In the latter case, the provisions of §§ 594 *et sqq*. ZPO apply *mutatis mutandis*.

The minimum content of an arbitration agreement includes the designation of the parties, the designation of the dispute/specific legal relationship, and the agreement that the court of arbitration has jurisdiction.

The arbitration agreement is a procedural contract. Its interpretation is subject to the provisions of procedural law. In this, the interpretation that favours the validity of the arbitration agreement must prevail (*in favor validitatis*). However, the parties' wish to waive the courts of law must be expressed clearly and unequivocally in the arbitration agreement.

Formal requirements

§ 600(1) ZPO requires that the arbitration agreement must generally be entered into in writing as laid down in § 886 of the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, ABGB). In addition, the arbitration agreement may also be contained in letters, facsimiles, or emails exchanged between the parties, and now also in other forms of transmitting messages that ensure proof of such agreement (e.g. texting, audio recording, or video recording). These alternative forms of arbitration agreement do not require a signature. Also, all of the forms of conclusion are equivalent.

Pursuant to § 600(2) ZPO, an arbitration agreement may also be entered into by reference in a contract to another document that contains an arbitration clause (e.g. general terms and conditions). However, the main contract must in turn meet the formal requirements of § 600(1) ZPO. Furthermore, the arbitration clause contained in the other document must become part of the main contract. A general reference to the separate document is sufficient, even without expressly mentioning the arbitration clause.

The requirement of written form only applies to the minimum content of the arbitration agreement. Under Liechtenstein arbitration law, a formal defect of the arbitration agreement is mended (§ 600(3) ZPO) if it is not objected to at the latest when appearance is entered in the arbitration proceedings.

Where the arbitration agreement is entered into by a representative, it is the opinion of this author that the formal requirement does not extend to the power of attorney. Under the new law, it is also no longer necessary to have a special power of attorney for entering into an arbitration agreement. A general (*ad litem*) power of attorney will now suffice (§ 1008 ABGB); with legal entities, a commercial power of attorney in terms of Art. 47 of the General German Commercial Code (*Allgemeines deutsches Handelsgesetzbuch*, ADHGB) is required.

Additional formal requirements are laid down in § 634 ZPO for arbitration agreements between enterprises and individuals (formerly: consumers). Pursuant to this provision, the

© Published and reproduced with kind permission by Global Legal Group Ltd, London

arbitration agreement may be entered into even before the dispute has arisen, provided that: a) the individual is himself or herself an entrepreneur; or b) the arbitration agreement is contained in a separate document that contains only provisions on arbitration proceedings, and the individual has been advised by a lawyer before and/or represented by a lawyer during the conclusion of the arbitration agreement. The fact of having given advice must be confirmed by the lawyer in writing. Thus, the problems of consumer protection in entering into an arbitration agreement have been mitigated in Liechtenstein.

Excurse: arbitration clause in articles of association

Arbitration clauses in articles of a legal entity are admissible. Pursuant to § 598(2) ZPO, what is required for this is that such articles have been formed in a legally admissible manner. This requires merely (but at least) that firstly, the admissibility of arbitration clauses in articles of association is not legally excluded in the specific case, and secondly, that the arbitration clauses are issued in accordance with the requirements of the applicable company laws (such as on procedure and quora to issue and/or amend provisions of articles).

Under the new law, the admissibility and binding nature of arbitration clauses in articles of association, company charters, foundation deeds, or trusts is expressly laid down in § 634(2) ZPO. Arbitration is therefore an established fact in Liechtenstein company, foundation, and trust law.

In the event of disputes from the company relationship, arbitration clauses in articles of association are binding on the shareholders, the company itself, and its governing bodies. With foundations, it is the practice of the Liechtenstein courts that an arbitration clause contained in the articles of foundation is also binding on the foundation's beneficiaries (Court of Appeal 16 May 2012, LJZ 2012, 67).

Principle of separability

If the arbitration agreement is part of a contract, it is independent from the main contract. Under the principle of separability, the arbitration clause remains in force and the jurisdiction of the court of arbitration is maintained even if the main contract becomes void. The arbitration clause therefore does not share the legal fate of the main contract. An exception from this principle exists where the main contract and the arbitration clause are affected by the same defect (absence of consent).

Objective arbitrability

In the old legal situation, a claim was objectively arbitrable if the parties had the power to enter into a settlement agreement on it. When arbitration law was amended in 2010, the provision on objective arbitrability was also altered substantially. Now, it is laid down in § 599(1) ZPO that all pecuniary claims that are subject to decision by the courts of law are objectively arbitrable. It is the legislator's wish that this shall generally apply without limitation; if in doubt, a claim is to be qualified as pecuniary. Thus, all claims from consumer law, labour law, company law, foundation law, trust law, succession law, tenancy law, law of obligations, insurance law, property law, execution law, banking law, and sports law as well as civil-law disputes from intangible property law, antitrust law and competition law, are objectively arbitrable in general and without limitation. To a limited extent, this also applies to matters of bankruptcy law.

Pursuant to § 599(1) ZPO, non-pecuniary claims are also objectively arbitrable, provided that the parties have the power to enter into a settlement agreement on them. Thus, claims from moral rights (such as from copyright) or under company law, as far as economic

© Published and reproduced with kind permission by Global Legal Group Ltd, London

interests are secondary (e.g. with a charitable company object, associations, cooperative societies, etc.), may be brought before a court of arbitration.

In § 599(3) ZPO, the legislator created an exception from arbitration that is unique for Liechtenstein. According to this provision, the jurisdiction of the courts of law cannot be excluded in matters of public supervision in company law. Under the current law, the dismissal of governing bodies of foundations (Supreme Court 07 Oct 2011, LES 2011, 187) or the challenging of resolutions of the foundation council (Supreme Court 05 Feb 2016, LES 2016, 66) are reserved for the supervisory court of law.

Competence-competence of the court of arbitration

The court of arbitration decides itself on its jurisdiction, and thus also on the formal and substantive validity of the arbitration agreement (so-called competence-competence). What was considered an unwritten international standard under the old law, is now expressly laid down in the law in § 609(1) ZPO.

The competence-competence of the court of arbitration is mandatory law; it cannot be abolished by agreement of the parties. However, the decision of the court of arbitration on its own jurisdiction is just preliminary and not final, since it is subject to review by the court of law. The jurisdiction check by the court of arbitration must therefore be considered to be merely a "relative competence-competence". Also, the competence-competence of a Liechtenstein court of arbitration is limited insofar as it must be accompanied by a final domestic decision, or foreign decision by a court of law or another court of arbitration, if it is to be recognised. A different decision of the court of arbitration as to its jurisdiction would be contrary to the *ordre public* and would therefore – if an action to set aside were to be brought – lead to the issued arbitral award being set aside *ex officio* (§ 628(2)(8) ZPO).

Objection of the court of arbitration's lack of jurisdiction

If a party wants to challenge the jurisdiction of the court of arbitration, the objection must be submitted no later than with the first pleading on the merits of the case (§ 609(2) ZPO). In practice, the objection must therefore be submitted with the statement of defence or, if that has not yet been submitted, during the first hearing before the court of arbitration, and before an appearance in the main case is entered. Cooperation in the appointment of the court of arbitration does not yet constitute entering an appearance.

If the respondent in arbitration fails to submit the objection of lack of jurisdiction in time before defending against the claim and the pleadings in the main case, a later objection of lack of jurisdiction is excluded as a matter of principle both in the setting-aside proceedings and in the execution proceedings. It may be submitted later as an exception if, in the arbitrators' opinion, there is sufficient excuse for the delay in submission.

Res iudicata of the arbitral award

Many jurisdictions do not have express rules on *res iudicata* in their *lex arbitri*. Liechtenstein arbitration law, however, refers in § 624 ZPO to the provisions on final judgments by courts of law as to the assessment of the legal implications of an arbitral award, and therefore to the rules of domestic procedural law. These rules are mandatory for domestic arbitral awards. If an arbitral award issued abroad meets the requirements for recognition in Liechtenstein, its effects also extend to Liechtenstein. If the award is final in formal terms, this already constitutes the legal obstacle of *res iudicata*. If it is final in substantive terms, however, it is binding upon courts (of arbitration) and public authorities in follow-up lawsuits; no deviation from the decision of a court of arbitration is permitted

© Published and reproduced with kind permission by Global Legal Group Ltd, London

in assessing a preliminary question (precedent). If a court of arbitration disregards the *res iudiciata* effect of a prior decision, the arbitral award is subject to rescission pursuant to § 628(2)(5) ZPO. However, this ground to set aside need not be considered by the Princely Court of Appeal *ex officio* but merely on application of a party.

Arbitration proceedings

Structuring of the arbitration proceedings

Pursuant to § 611(1) ZPO, the parties may structure the arbitration proceedings as they like, but they may also refer to a set of procedural rules (such as the *Liechtenstein Rules*). If there is no such agreement, however, the court of arbitration may proceed at its discretion. In any case, however, the mandatory provisions of Liechtenstein law on arbitration proceedings (§§ 594 *et sqq*. ZPO) remain reserved. The parties must always be treated fairly, and every party must be suitably heard in court.

Beginning of the proceedings

§§ 594 *et sqq*. ZPO do not give any express rules as to the time when arbitration proceedings start and accordingly, the case becomes pending in arbitration. According to practice and doctrine, the disputes become pending in arbitration as soon as the arbitration claim or any other notice or notification about the intention to have a certain dispute settled by arbitration is served upon the respondent. Thus, the relevant point in time for a matter being pending in arbitration is the service of the arbitral claim and/or the notification of the respondent and his knowledge of the proceedings. However, it is required here that the subject of the matter in dispute of the arbitration proceedings has already been determined in advance; the claim/notice must therefore be worded in a suitably concrete way.

The arbitration claim/notice may be served by the court of arbitration itself or (before it has been constituted) directly by the claimant. In contrast to this, cooperation in the establishment of the court of arbitration – such as by appointing an arbitrator – does not cause the matter to be pending in arbitration, since the parties have not yet subjected to the court of arbitration.

Seat of the court of arbitration

The parties may agree on the seat of the court of arbitration at their discretion (§ 612(1) ZPO). The selection of the court of arbitration's seat is therefore entirely subject to freedom of contract. This can be agreed upon either in the arbitration agreement or later. Where there is no such agreement, the court of arbitration may determine its seat at its discretion pursuant to § 612(1) ZPO, taking into account the circumstances of the case and the suitability of the location for the parties.

The seat of the court of arbitration is not necessarily the place where the arbitration proceedings must be carried out. It is not even mandatory for procedural acts to be carried out at that location. Rather, the court of arbitration may, pursuant to § 612(2) ZPO, carry out procedural acts at any location that it deems suitable unless the parties have agreed otherwise. Thus, the court of arbitration's seat is merely the legal domicile of the court of arbitration and thus a purely legal or "fictitious" seat. This has the advantage that no (official) acts of mutual legal assistance are required to carry out the arbitration proceedings; rather, the court of arbitration may take the required evidence itself at the location in question.

The mandatory venues of Liechtenstein law that are provided for e.g. legal entities (Art. 114 of the Persons and Companies Act, *Personen- und Gesellschaftsrecht*, PGR) do not affect the free choice of seat for the court of arbitration.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Publicity

In contrast to proceedings before a court of law, the public is excluded from proceedings before a private court of arbitration.

For the preservation of confidentiality, the *Liechtenstein Rules* include special provisions on confidentiality (Art. 29): all participants of the proceedings are obliged to keep strict secrecy and must keep secret all arbitral awards and rulings of the court of arbitration as well as any documents received or facts learned during the arbitration proceedings. The court of arbitration may order additional measures for this purpose. The *Liechtenstein Rules* provide for a contractual penalty in the event of violation.

In the proceedings to set aside the arbitral award, the Princely Court of Appeal must carry out a public oral trial on the action for rescission (§ 171 *et sqq.* ZPO). However, to preserve confidentiality, the Liechtenstein legislator has provided for less stringent requirements for excluding the public here than in normal civil proceedings. For pursuant to § 633(2) ZPO, the public may be excluded on application of one party already, if there is a justified interest in exclusion.

Taking of evidence

The court of arbitration has a wide range of discretion in carrying out the proceedings. It may therefore generally lay down the rules on the taking of evidence freely and on the basis of the individual case, or may refer to existing rules (e.g. the IBA Rules on the Taking of Evidence in International Arbitration). The court of arbitration has the power to decide on the admissibility of a particular taking of evidence, carrying it out, and valuating its result at will (§ 616(1) ZPO). Therefore, evidence that is unknown to domestic law may be taken in arbitration proceedings.

Pursuant to § 618 ZPO, the court of arbitration may in principle appoint one or more independent and unbiased experts to prepare an expert's opinion on certain questions to be laid down by the court of arbitration. To this end, the court of arbitration may ask the parties to give information or submit documents or make these accessible to the expert. On application of a party or if the court of arbitration considers this necessary, the expert shall take part in the oral trial and reply to questions after submitting his expert's opinion. Grounds for refusal or exclusion may be asserted against the expert. The parties may also submit opinions by their own experts.

To support the taking of evidence, the court of arbitration or (with its consent) the parties themselves may pursuant to § 619 ZPO apply to a court of law to carry out judicial acts which the court of arbitration does not have the authority to carry out. To this end, the court of law may e.g. order the summons of witnesses or order them to testify on penalty of coercion, order the delivery of important documents, or send a letter of request to another (foreign) authority. The court of arbitration and the parties then have the right to take part and ask questions in the proceedings before the court of law.

Arbitrators

Appointment of arbitrators

It is up to the parties' discretion how to appoint the arbitrators. Pursuant to § 603(1) ZPO, they may agree on the number of arbitrators at will. But if the parties have agreed on an even number of arbitrators, the latter must appoint another person as the umpire. If the parties have not agreed on anything, the law (§ 603(1) ZPO) provides that three arbitrators must be appointed.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The written request to appoint an arbitrator must also include information as to what claim is being asserted and what arbitration agreement the party refers to. If a party fails to appoint its arbitrator within four weeks from receipt of this request, the arbitrator must (on application by a party) be appointed by the court of law. The decision of the court of law is not subject to appeal (§ 604(8) ZPO). This has the advantage that in tie situations between the parties, the court of arbitration may be formed quickly through the assistance of the court of law.

Challenging and dismissal of an arbitrator

An arbitrator may be challenged if there are circumstances that raise "justified doubts" as to him being independent and unbiased, or if the arbitrator does not meet the requirements agreed between the parties (any more). However, the parties must have learned of such circumstances only after the arbitrator has been appointed or after they have participated in the arbitrator's appointment (§ 605(2) ZPO); otherwise the challenging of the arbitrator in question is no longer possible. Pursuant to § 606(1) ZPO, the parties may freely agree upon the challenging procedure in this connection. If the parties have not laid down such procedure and the opposing party does not agree with the intended course of action, the court of arbitration – including the arbitrator challenged by the party in question – decides on the challenge on application of a party (§ 606(2) ZPO).

If an arbitrator is challenged unsuccessfully, the challenging party may within four weeks apply to the court of law and apply for a decision on the challenge (§ 606(3) ZPO). The decision of the court of law is not subject to appeal.

Premature termination of the position of arbitrator

As a result of the parties' wide-ranging freedom of disposal in arbitration proceedings, the activities of an arbitrator may also be terminated prematurely by agreement (§ 607(1) ZPO). Of course, any arbitrator is also free to resign from office on his own.

Apart from that, each party may apply to the court of law for a decision on the termination of the position of arbitrator if the arbitrator is unable to carry out the duties assigned to him or fails to carry them out within a reasonable term, and if the arbitrator does not intend to resign and the parties cannot agree on his dismissal.

Interim relief

Alternative jurisdiction of the court of law and the court of arbitration

Pursuant to § 602 ZPO, an arbitration agreement does not obstruct an application to a court of law (in Liechtenstein or abroad) for the granting of interim relief. This mandatory provision of the Liechtenstein *lex arbitri* exists in the alternative to the competence of the court of arbitration. The court of arbitration may itself grant interim relief (§ 610 ZPO). The parties are therefore free to choose.

Types of provisional measures

Pursuant to § 610 ZPO, the court of arbitration may, on application of a party, order provisional or securing measures against another party after hearing such other party, as the court of arbitration deems fit with regard to the matter in dispute, on the grounds that otherwise enforcing the claim could be thwarted or complicated considerably or there is the threat of irretrievable damage. Generally, courts of arbitration have wide-ranging discretion in ordering provisional measures. They may also order measures unknown to domestic law; however, such orders may only be issued against a party of the arbitration proceedings. The provisional orders of the court of arbitration are not subject to separate appeal.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

As a result of the nature of the arbitration proceedings, certain forms of provisional measure may only be issued by the court of law. For example, decisions without hearing the other party (so-called *ex parte* measures) or third-party prohibition are excluded before the court of arbitration. Also, only the court of law may issue coercive measures, enforce provisional injunctions against the parties or third parties, or order measures before the court of arbitration has been constituted.

Support of international arbitration proceedings

The court of law has the power to issue and enforce provisional measures even if the seat of the court of arbitration is located abroad (§ 592(2) ZPO). Thus, the Liechtenstein courts may issue and enforce provisional injunctions to support foreign arbitration proceedings. When enforcing a measure, however, the court of law must *ex officio* examine whether certain minimum requirements of domestic law are met, such as the existence of a comparable means of securing or a reason for denying recognition and enforcement (§ 610(4) ZPO).

Arbitral award

Formal requirements to an arbitral award

Pursuant to § 623 ZPO, an arbitral award must be issued in writing and must be signed by the arbitrator (if the court is composed of several arbitrators, by all of them). The arbitral award must state the date on which it was issued and the seat of the court of arbitration. Unless the parties have agreed otherwise, the award must come with grounds. Each party must be provided with one counterpart signed by the arbitrators. The ZPO does not provide a time limit for issuing the arbitral award.

Decision on costs

If the arbitration proceedings are concluded, the court of arbitration must decide in the form of an arbitral award on the parties' obligation to reimburse costs, provided that the parties have not agreed otherwise (§ 626(1) ZPO). In this, it must – at its discretion – take into account the circumstances of the individual case, in particular, the outcome of the proceedings. However, the court of arbitration may only decide on the costs between the parties; not on the reimbursement of the costs of the arbitrators themselves.

Challenge of the arbitral award

Action to set aside and proceedings

Liechtenstein arbitration law does not provide for any ordinary appeal to review the arbitral award. The only relief available is the action for setting aside the arbitral award pursuant to § 628 ZPO, which must be brought within four weeks from receipt of the arbitral award. This is not an ordinary appeal but an appeal action, by which proceedings in the first instance are initiated at the court of law. The Princely Court of Appeal is the first and only instance.

The action to set aside may expressly be brought also against arbitral awards in which the court of arbitration has decided on its jurisdiction and against decisions of the court of arbitration on costs. However, what is always required is that the arbitral award meets the formal requirements of § 623 ZPO, meaning that it is an "arbitral award" in the proper sense.

The setting-aside proceedings are subsidiary and may be initiated only after all instances that may have been provided in the arbitration agreement have been expired. The action to set aside is a mandatory institution, and the parties cannot lawfully waive its assertion in advance, such as in the arbitration agreement.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Grounds for challenging an arbitration award

§ 628(2) ZPO provides an exhaustive list of the grounds for setting aside. An arbitral award shall be set aside on application of a party if:

- there is no valid arbitration agreement;
- the court of arbitration has incorrectly denied its jurisdiction;
- a party has not been suitably informed of the appointment of the arbitrator or of the arbitration proceedings, or if it was unable for any other reason to assert its means of attack or defence;
- the arbitral award is about a dispute to which the arbitration agreement does not apply, or if it contains decisions that exceed the limits of the arbitration agreement or the parties' applications for relief;
- the court of arbitration has been formed or is composed in a defective manner;
- carrying out the arbitration proceedings is inconsistent with Liechtenstein's procedural *ordre public*;
- the matter of dispute is not objectively arbitrable under Liechtenstein law; or
- the arbitral award violates the substantive *ordre public* of Liechtenstein.

A review of the merits by a court of law is not admissible (prohibition of *révision au fond*). On the other hand, certain grounds for challenging the award, such as defects in the composition of the court of arbitration, formal defects of the arbitration agreement, lack of jurisdiction of the court of arbitration, or exceeding the court of arbitration's scope of authority, may be mended by entering an appearance in the arbitration proceedings, so that these cannot be asserted later by way of the action to set aside. Pursuant to § 601(2) ZPO, such action is also excluded where the court of arbitration has denied its jurisdiction and the claimant has brought legal action in the main case at a court of law.

If the action to set aside the award is successful, it generally does not affect the effectiveness of the underlying arbitration agreement. However, if an arbitral award on the same matter has already been rescinded twice and another arbitral award issued on this matter is to be rescinded, the court must – on application of any of the parties – at the same time declare the arbitration agreement ineffective as regards this matter (§ 628(5) ZPO).

Correction, explanation, or supplementation of the arbitral award

Pursuant to § 627(1) ZPO, the arbitral award may be altered by the court of arbitration itself in certain cases. If no time limit has been agreed between the parties in this regard, each of the parties may request from the court of arbitration, within four weeks from receipt of the arbitral award, to correct clerical or computational errors, to explain a certain part of the arbitral award, or to issue a supplementary arbitral award on claims that have been asserted in the arbitration proceedings but have not been dealt with in the arbitral award. All of this, however, will not trigger a new time limit for bringing the action for rescission.

Enforcement of the arbitral award

Enforcement proceedings

A domestic arbitral award that cannot be appealed to any superior arbitration instance automatically constitutes a title for enforcement. Pursuant to § 631(1) ZPO, the recognition and enforcement of foreign arbitral awards is subject to the provisions of the Execution Act (*Exekutionsordnung*, EO), unless international treaties or declarations of reciprocity provide otherwise.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

According to the latest practice of the Liechtenstein courts, there is not a separate *exequatur* procedure in Liechtenstein; rather, the enforceability of the arbitral award is merely (but at least) examined as a preliminary question when granting enforcement (Supreme Court 07 Sep 2017, LES 2017, 173). It must be explained in the application for enforcement on the basis of what arbitral award enforcement is applied for, to what extent there is domestic jurisdiction, and/or to what extent assets of the debtor are located in Liechtenstein. At the same time, the measures of enforcement applied for must be stated. A copy of the arbitral award must be submitted together with a confirmation by the arbitrators that it is final and enforceable (§ 623(6) ZPO).

Arbitral award from a members state of the New York Convention

Since Liechtenstein has acceded to the New York Convention, not only are arbitral awards issued in Liechtenstein subject to recognition and enforcement in all member states (and thus almost worldwide), but in turn all arbitral awards issued in another member state will be recognised and enforced in Liechtenstein. As a result of the reservation of reciprocity made by Liechtenstein, the provisions of the NYC are applicable in Liechtenstein only to arbitral awards issued by a court of arbitration issued by a foreign court of arbitration in another member state of the Convention. The NYC therefore does not have effect *erga omnes* in Liechtenstein.

The application for enforcement must be submitted together with the suitably authenticated (legalised) original or a legalised copy of the arbitral award in German. The arbitral award must have been translated into German by a translator entered in the list of interpreters and translators admitted at the Liechtenstein courts and authorities and must be certified by that translator (Supreme Court 07 Jun 2013, LES 2013, 147). The original or certified copy of the arbitration agreement need only be submitted if so requested by the Court of Justice (*Landgericht*) (§ 631(2) ZPO). A confirmation of the arbitrators on the finality and enforceability of the arbitral awards in the seat country is not required.

Arbitral awards from Austria and Switzerland

Liechtenstein has entered into treaties on the recognition and enforcement of court decisions and arbitral awards with its two neighbouring countries, Switzerland and Austria. Since both Switzerland and Austria are member states of the New York Convention, these bilateral treaties have been of next to no separate significance since the accession of Liechtenstein. They are significant only where they provide for alleviations in recognition and enforcement in comparison to the NYC. This applies, in particular, to the recognition and enforcement of arbitral settlements, since these are not included in the scope of application of the NYC.

Arbitral awards from a third country

The recognition and enforcement of arbitral awards from a third country is subject to the provisions of the Execution Act (EO). Pursuant to Art. 52 EO, acts and documents executed and subject to enforcement abroad under the rules applicable there may serve as the basis for enforcement in Liechtenstein only to the extent provided for in international treaties and declarations of reciprocity by the Government. Such declarations of reciprocity do not exist in Liechtenstein. This is why under the provisions of the EO, arbitral awards and arbitral settlements from a third country cannot be directly recognised or enforced in Liechtenstein. The only way to make them enforceable in Liechtenstein is the so-called *Rechtsöffnungsverfahren* (simplified proceedings for obtaining an enforceable title, Art. 49 *et sqq*. RSO [*Rechtssicherungsordnung*, Act Concerning the Securing of Rights]).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Enforcement proceedings and action to set aside the award

The proceedings on the recognition and enforcement of a (foreign) arbitral award are basically independent from the action to set aside the award in the country where the seat of the court of arbitration is located. Thus, recognition and enforcement may be applied for in Liechtenstein in parallel to an action to set aside that has been brought. However, there is the option of applying to the Court of Justice to suspend enforcement if such enforcement would lead to a direct and irretrievable disadvantage (Art. 24 *et sqq*. EO and Art. VI NYC). It is only the final rescission of the arbitral award by the courts of law at the seat of the court of arbitration that constitutes a reason for denying or discontinuing enforcement (Art. 21(1)(a) EO).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

***Dr. iur.* Manuel Walser, LL.M.**
Tel: +423 265 80 80 / Email: manuel.walser@walser-law.li

Manuel Walser is a lawyer and head of Walser Attorneys at Law Ltd. in Vaduz. Since 2014 he has been a Board member of the Liechtenstein Arbitration Association as well as a Board member of the Liechtenstein Bar Association. He regularly acts as counsel and arbitrator in international and national arbitration cases. Since 2017 he has been the official arbitrator of the Principality of Liechtenstein at the Court of Conciliation and Arbitration of the OSCE. His track record also includes the representation of private and institutional clients in civil and commercial disputes before the state courts, in particular, in international corporate, foundation and trust matters.

In 2018 Manuel published the monograph *Arbitrability in Liechtenstein Law*; the work provides the first manual for arbitration in Liechtenstein and across the borders. In 2019, he will publish his work, *Seat of Arbitration in Liechtenstein Law*. Furthermore, he regularly publishes on matters of arbitration law and speaks at national and international conferences.

Walser Attorneys at Law Ltd.

Lettstrasse 37, Postfach / P.O.Box 580, LI-9490 Vaduz, Liechtenstein
Tel: +423 265 80 80 / Fax: +423 265 80 81 / URL: www.walser-law.li

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Malaysia

Gan Khong Aik, Foo Joon Liang & Kang Mei Yee
Gan Partnership

Introduction

The Malaysian Arbitration Act 1952 ("**the 1952 Act**") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ("**the 1985 Act**") formed the earliest legislative framework in Malaysia for laws relating to arbitration. The 1952 Act was incorporated in one of Malaysia's states, Sarawak, as early as 18 June 1952, and this act was subsequently incorporated in other states of Malaysia on 1 November 1972. Meanwhile, the 1985 Act was enacted to give effect to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, passed at New York on 10 June 1958 ("**the New York Convention**").

In 2005, both these acts were replaced by the Arbitration Act 2005 ("**the Act**") which, amongst others, sought to reform the law relating to domestic arbitration, provide for international arbitration, and the recognition and enforcement of awards. It seeks to promote international consistency of arbitral regimes based on the model law adopted by the United Nations Commission on International Trade Law on 21 June 1985.

The Act came into force on 15 March 2006, is modelled on the UNCITRAL Model Law 1985 on International Commercial Arbitration 1985 and is similar to the New Zealand Arbitration Act 1969.[1] It applies to both domestic and international arbitrations conducted in Malaysia and varies only with regard to certain aspects of the Act such as enforcement. The 1952 Act is still applicable but only in relation to arbitral proceedings commenced before 15 March 2006.[2]

With effect from year 2006, the Act is the principal source of law and regulation relating to international and domestic arbitration.

An international arbitration is defined in the Act as an arbitration where one of the parties to the arbitration agreement, the seat of arbitration, the subject matter of the dispute or a substantial portion of the commercial obligations of the parties lie in a state outside Malaysia. An international arbitration could also arise where parties expressly agree that the arbitration relates to more than one state. On the other hand, a domestic arbitration is defined as any arbitration that is not an international arbitration.

In relation to international arbitration, the arbitral tribunal shall determine the dispute according to the laws agreed upon by the parties as applicable to the substance of the dispute, failing which the dispute shall be decided based on the law determined by the rules on the conflict of law based on Section 30(4) of the Act.

In year 2011, the Act was amended to promote and encourage arbitration. Among others, the amendments passed in this bill[3] limit court intervention and discourage the use of inherent

© Published and reproduced with kind permission by Global Legal Group Ltd, London

powers. The Act was further amended in year 2018 *vide* the Arbitration (Amendment (No. 2) Act 2018[4] ["**the 2018 Amendment (No. 2) Act**"] to follow the latest revision of the UNICITRAL Model law with enhancement of interim measures, and also abolished the avenue for an award to be challenged on the ground of question of law.

Malaysia is a signatory to the New York Convention as of 5 November 1985. Therefore, an arbitral award from Malaysia is enforceable in more than 148 countries which are contracting states to the New York Convention.[5] As for foreign awards where seats of arbitration are from these 148 countries, Section 38 of the Act allows such foreign awards to be recognised and enforced in Malaysia, including an award made in international arbitration with a seat in Malaysia.

Apart from the New York Convention, Malaysia is also a signatory to the Comprehensive Investment Treaty between members of the Association of Southeast Asia Nations[6] (ASEAN), as well as a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID Convention).[7]

The main arbitral institution in Malaysia that both carries out the administration function and provides a venue for commercial arbitrations is the Kuala Lumpur Regional Centre for Arbitration (KLRCA) established in 1978. KLRCA was renamed the Asian International Arbitration Centre ("AIAC"), on 28 February 2018, pursuant to the Arbitration (Amendment Act) 2018.[8]

Effective from 9 March 2018, AIAC will use the AIAC Arbitration Rules 2018 as its latest arbitration rules. The contents of the AIAC Arbitration Rules 2018 are the same as the KLRCA Rules (as revised in 2017), and both sets of rules adopt the UNCITRAL Arbitration Rules as revised in 2013, with some modifications. Similarly, other existing rules, such as the KLRCA i-Arbitration Rules and the KLRCA Fast Track Arbitration Rules, which were introduced to cater for the growing demands of the global business community, were renamed accordingly to "AIAC i-Arbitration Rules 2018" and "AIAC Fast Track Arbitration Rules" in 2018. The i-Arbitration Rules regulate arbitration of disputes arising from commercial transactions premised on Islamic principles, whereas the Fast Track Arbitration Rules are designed for parties who wish to obtain an award in the fastest way with minimal costs.[9]

Apart from the AIAC, arbitrations are also administered by a number of other professional institutions such as the Association of Architects of Malaysia and the Institute of Engineers Malaysia for disputes arising from the standard forms of contract provided by these institutions.

Arbitration agreement

Section 9 of the Act provides a statutory definition and form of an arbitration agreement. An arbitration agreement is defined as an agreement by the parties to submit to arbitration all or certain disputes which have arisen, or which may arise, between them in respect of a defined legal relationship, whether contractual or not. The 2018 Amendment (No. 2) Act widened the definition of an arbitration agreement to include any content which is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

Other forms of arbitration agreements in writing, i.e.: (a) an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other; and (b) reference in an agreement to a document containing an arbitration clause, are still preserved under the Act.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

To keep up with the development of technology, a new Section 4A of the Act provides that an arbitration agreement is deemed to be in writing by any electronic communication that the parties make by means of data message, if the information contained therein is accessible so as to be useable for subsequent reference, and this would include emails or telegrams.

With the latest amendments, it is clear that an arbitration agreement may be concluded orally or by conduct, as long as the contents are recorded and written requirement has been dispensed with.

Most civil disputes (as opposed to criminal matters) are arbitrable in Malaysia under the Act, so long as the parties have agreed to submit to arbitration under an arbitration agreement. Under Section 4 of the Act, there is no requirement that the dispute be commercial in nature or arise out of a contractual relationship. However, an arbitration agreement which is contrary to public policy will not be arbitrable, in which case the public policy must be considered in a Malaysian context. Also, if the subject matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia, it is not arbitrable in Malaysia. Being consistent with the principle of privity of contract, an arbitration agreement does not bind a non-party or strangers to the agreement. Despite so, a party to an arbitration agreement is able to assign its rights under the agreement to a third party, by which the third party who then becomes the assignee is bound.

In line with the modern arbitral practice, the doctrine of severability/separability and the concept of *Kompetenz-Kompetenz* is well recognised under Section 18 of the Act, which provides power for an arbitral tribunal to rule on its own jurisdiction, including on any objection with respect to the existence or validity of the arbitration agreement. This is consistent with Article 16 of Model Law.

Meanwhile, Section 18(2) of the Act provides that an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement, and a decision by the arbitral tribunal that the agreement is null and void shall not *ipso jure* entail the invalidity of the arbitration clause.

Therefore, it is very clear from the Act that an arbitration clause can still be considered valid even if the rest of the contract in which it is included is determined to be invalid and the arbitral tribunal is empowered under Section 18(1) of the Act to make such ruling.

Given that an arbitration agreement is a contract, the grounds on which a contract can be avoided are equally applicable to a party to an arbitration agreement who intends to challenge the said arbitration agreement.

Under the Malaysian Contracts Act 1950, a contract may be avoided where it is entered without free consent, for example, when it is entered by coercion, undue influence, fraud, misrepresentation or mistake. Thus, when any of these is proven, such an arbitration agreement would become void.

Rights to arbitrate disputes falling within a valid arbitration agreement may be waived by both parties by initiating proceedings in court and taking steps in such proceedings. However, if a party initiates a court proceeding and the other party objects to the same on the ground that there is a valid arbitration agreement, the latter party may apply to stay the court proceeding and refer the disputes to arbitration, and Section 10(1) of the Act provides that it is compulsory for the court to stay the court proceeding in the presence of a valid arbitration agreement. This shows the pro-arbitration stance intended by the parliament under the Act.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Arbitration procedure

Unless parties otherwise agree in their arbitration agreement, arbitral proceedings commence on the date on which a request is issued by one party to the other for the dispute to be referred to arbitration. Pursuant to Section 23 of the Act, the request is to be in writing. Other than this, there are no formal requirements under the Act for making the request. Some institutional rules, if adopted by the parties, may require specific matters to be stated in the request for arbitration.

An example of this is Rule 2 of the KLRCA/AIAC Arbitration Rules, requiring the submission of a copy of the notice of arbitration to the director of the KLRCA/AIAC, together with a copy of the arbitration agreement, confirmation of service of the notice of arbitration on all other parties, and payment of a registration fee.

Parties are also free to reach consensus on the procedures of the arbitration pursuant to Section 21 of the Act. In the absence of such agreement, the Act allows the appointed arbitrator to make directions for the rules and procedures to be followed. In international arbitration, it is not uncommon for parties to adopt memorial-style directions to be adopted, with parties following the sequence of submitting their pleadings, witness statements, documents and experts' reports.

On the issues of evidence law for arbitration, the Malaysian Evidence Act 1950, which sets out strict rules of evidence, is inapplicable to arbitration proceedings.[10] In practice, some evidential requirements are agreed by parties in which rules of evidence in common law are applied.

While the International Bar Association Rules on the Taking of Evidence in International Arbitration (IBA Rules on Evidence) are not incorporated into the Act, it is not uncommon for experienced arbitrators in Malaysia, when dealing with domestic and international arbitrations, to take guidance from and include the IBA Rules in their procedural orders.

Under the Act, there is no specific requirement or prohibition of expert evidence. As such, whether or not evidence of experts is to be taken is dependent on the nature of the dispute, and thus the necessity of expert evidence. In accordance with Section 28 of the Act, the arbitral tribunal may appoint an expert to assist it, unless otherwise agreed by the parties.

Rule 16 of the KLRCA/AIAC Arbitration Rules 2017 provides that the arbitral tribunal, the parties, all experts, all witnesses and the KLRCA/AIAC shall keep confidential all matters relating to the arbitral proceedings including any award, except for the purposes of enforcement or challenge of an award, or to adhere to any legal duty to disclose.

The 2018 Amendment (No. 2) Act also introduced Sections 41A and 41B of the Act in ensuring confidentiality of arbitration and arbitration-related court proceedings and this is the first time the duty of confidentiality of arbitral proceedings and information is codified into our legislation.

New Section 41A of the Act provides that all information related to the arbitral proceedings and arbitral award are confidential information and exceptions to the general rule of confidentiality are when parties subsequently agree to the contrary to waive the confidentiality requirement, or it is for the pursuance of legal rights, enforcement or challenge of the arbitral award. New Section 41B of the Act provides that court proceedings under the Act are to be heard otherwise than in an open court.

Although these two provisions have provided for the duty of non-disclosure and its exceptions, each document filed in the courts is generally considered a public document and the confidentiality of the arbitral proceedings may be lost in the event that the award is challenged and the arbitration documents are produced in the High Court. For comparison,

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Section 23 of the Singaporean International Arbitration Act provides that on application of the parties, the parties may apply to restrict publication of information in this proceeding. However, there is no such corresponding provision under the Act.

Arbitrators

The Act promotes parties' autonomy, according to which parties are free to determine the number of arbitrators of their own volition. In the absence of agreement, the Act provides that there shall be three arbitrators in an international arbitration, and one arbitrator in a domestic arbitration (Section 12).

Section 13 of the Act further provides that parties have freedom to determine the procedure for appointing the arbitrator or the presiding arbitrator. Otherwise, the Act provides procedures on the same, which generally cover three circumstances which may possibly arise, i.e.: (i) if there is no agreement between the parties on the appointment procedure in their arbitration agreement; (ii) if there is disagreement between the parties; or (iii) if they refuse to exercise the right to appoint a member of the arbitral tribunal. In any of these situations, parties may request the Director of AIAC to appoint the arbitrator, who must do so within 30 days, failing which the parties may apply to the High Court for such appointment.

An arbitrator owes a statutory duty to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence under Section 14(1) of the Act. The circumstances which can raise an issue as to impartiality, among others, are that the arbitrator is engaged in a personal, business or professional relationship with one party to a dispute, or that he has an interest in the outcome of the dispute.

As such, the issue as to the impartiality or independence of an arbitrator is one of the grounds to challenge an arbitrator. To bring such a challenge, parties must be able to show justifiable doubts as to the impartiality or independence of the arbitrator.

Apart from this, an arbitrator may be challenged if he does not possess the necessary qualifications agreed to by the parties, as provided under Section 14(3) of the Act.

In practice, the application of the IBA Guidelines on Conflicts of Interest, which require all arbitrators to be free of bias, has been pervasive in Malaysia. There are specific declaration forms given by both Pertubuhan Arkitek Malaysia (PAM), which is the Malaysian Institute of Architects, and the AIAC which must be signed by every arbitrator before confirmation of their appointment. In Malaysia, experienced arbitrators who deal with domestic and international arbitrations are well aware of the said guidelines.

Interim relief

Prior to the coming in force of the 2018 Amendment (No. 2) Act, the Act has conferred power on the arbitral tribunal to order interim relief under some limited circumstances. After the amendment, other than security for costs, the arbitral tribunal has the wider power to grant additional type of interim measures such as: (a) maintain or restore the *status quo* pending determination of the dispute; (b) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself; (c) provide a means of preserving assets out of which a subsequent award may be satisfied; (d) preserve evidence that may be relevant and material to the resolution of the dispute. Similar rights are also given to the High Court under Section 11 of the Act.

There are also 10 new additional Sections 19A to 19J of the Act providing comprehensive, yet balanced provisions dealing with the High Court's and arbitral tribunal's powers to grant

© Published and reproduced with kind permission by Global Legal Group Ltd, London

interim measures.[11] These provisions are similar to the provisions in the 2006 amendments to the UNCITRAL Model Law on interim measures. Conditions for granting interim measures have been set out in Section 19A. There is also the introduction and conditions for preliminary orders under Sections 19B and 19C of the Act. Termination, suspension or modification of interim measure are possible under Section 19D. Section 19E provides that the arbitral tribunal may require any party to provide appropriate security in connection with measures that are ordered. Section 19F gives the arbitral tribunal power to require a party to disclose any material change in the circumstances on the basis of which the interim measure or preliminary order was requested, or applied or granted.

On the issue of costs and damages, Section 19G provides that the party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused. Sections 19H and 19I of the Act deals with the recognition and enforcement of interim measures which attract the application of Section 39 under the Act relating to the recognition and enforcement of an award. Section 19J provides that the High Court has the power to issue an interim measure in relation to arbitration proceedings, irrespective of whether the seat of arbitration is in Malaysia.

In the absence of parties' agreement or adoption of rules of arbitration in the arbitration agreement in relation to the procedures for applying interim reliefs, it is at the discretion of the arbitral tribunal to determine such procedures. The arbitral tribunal will need to apply the conditions set out in Section 19A and Section 19B of the Act, respectively, in considering an application for interim measures or preliminary orders.

Despite the fact that the High Court may grant interim reliefs in support of arbitrations in an international arbitration regardless of whether the seat of arbitration is in Malaysia, the High Court should be mindful of Sections 8 and 10 of the Act, which set a limitation on court intervention. Section 8 expressly provides that "no court shall intervene in matters governed by this Act, except where so provided in this Act". Meanwhile, the use of the word "shall" in Section 10 renders it mandatory for the court to grant a stay of court proceedings unless the arbitration agreement is null and void, inoperative or incapable of being performed.

An arbitrator has the power equivalent to that of a judge in court after the constitution of the arbitral tribunal. However, parties should first make an application to the arbitral tribunal unless such an interim order is to bind third parties, or is to be enforced effectively where it cannot be done by the interim order made by the arbitrator.[12]

The parliament's intention of this is demonstrated in Section 11(2) of the Act, which provides that "[W]here a party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the application, the High Court shall treat any findings of fact made in the course of such ruling by the arbitral tribunal as conclusive for the purposes of the application." This corresponds to the rationale that the arbitrator is in a better position to make an expeditious and informed decision on the interim relief sought, given that the arbitrator has already had all facts and possibly documents presented before him in the pending arbitration.

Section 2 of the Act after the amendment also provides that an arbitral tribunal may make use of an emergency arbitrator. In cases of *ex parte* and urgent applications, parties should be allowed to apply to the courts for such interim relief, as such similar application to the arbitrator may prevent the necessary element of surprise, or result in delay.

It is a matter of discretion whether or not an arbitral tribunal is to make an award for security for costs. It may depend on whether there is evidence of a real risk that the respondent would not be able to recover the costs incurred from the claimant, and the likely effect of awarding

© Published and reproduced with kind permission by Global Legal Group Ltd, London

such security for costs on stifling a genuine claim of the party against whom the security is sought.

Arbitration award

The requirements for an arbitration award are provided under Section 33 of the Act which provides that an award shall be made in writing and be signed by the arbitrator(s). In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall be sufficient, provided that the reason for any omitted signature is stated (Section 33(2)).

Additionally, an award shall state the reasons upon which it is based, unless the parties have agreed otherwise or the award is an award on agreed terms. An award shall also state its date and the seat of arbitration. Unless otherwise agreed by the parties, an award has to be a reasoned award whereby it should set out the facts, the explanation of the arbitral tribunal's findings, and how the arbitral tribunal reached its conclusion. This is to enable the parties to comprehend the award and understand why certain points were decisive.

Nothing in the Act requires the award to be rendered within a specific time frame. Section 46 of the Act gives the High Court power to grant an extension to any limitation of time in the arbitration agreement for an award be issued. This intervention by the court can, nonetheless, be excluded by the agreement of the parties. Under Rule 11 of the KLRCA/AIAC Arbitration Rules, the default period for rendering of final award is limited to three months from the date of final submissions, extendable by consent of parties and consultation of the Director of the AIAC.

Article 12 of the Fast Track Arbitration Rules even provides that for a document-only arbitration, the arbitral tribunal shall publish the final award no later than 90 days from the commencement of the arbitration. With regard to an arbitration with a substantive oral hearing, the arbitral tribunal shall publish the final award expeditiously and no later than 160 days from the commencement of the arbitration, extendable by agreement.

As for costs, in the absence of agreement, Section 44 of the Act vests in arbitral tribunals the discretion to award costs. The principles for awarding costs are derived from the common law, and the arbitral tribunal may refer to existing Malaysian case laws and the relevant provision in the Rules of Court 2012, where appropriate. The general rule is that costs follow the event, wherein the unsuccessful party will bear the costs. In any event, if parties wish not to follow the general rule, they should state the reasons for doing so. Articles 40 to 42 of the UNCITRAL Rules, adopted in the KLRCA/AIAC rules, provide jurisdiction on determination and allocation of costs.

In practice, the arbitral tribunal may take into account, amongst others, the following factors in considering the quantum of cost to be awarded:[13]

- the complexity of the matter;
- the requirement of skill, specialised knowledge and responsibility, and the expenditure of time and labour, by the solicitor or counsel;
- the value of the subject matter in dispute; and
- whether there are other solicitors or counsel who get paid for the work done, and so the amount of work required has been reduced.

Unless otherwise agreed by the parties, Section 33(6) of the Act provides that the arbitral tribunal may award interest on any sum of money ordered and determine the rate of interest,

© Published and reproduced with kind permission by Global Legal Group Ltd, London

where the tribunal is allowed to make reference to the interest rates that may be awarded by the Malaysian courts. With the 2018 Amendment (No. 2) Act, it is expressly provided that the arbitral tribunal may award simple or compound interest from such date, at such rate and with such rest as the arbitral tribunal considers appropriate, for any period ending not later than the date of payment, unless otherwise agreed by parties.

Challenge of the arbitration award

An arbitral award is final and binding against the parties to an arbitration agreement and those parties cannot appeal the award under the Act.[14] However, where the seat of the arbitration is in Malaysia, the parties may apply to have the award set aside by the High Court. It appears that such right to set aside the award cannot be excluded by the parties.

An application to set aside an award must be made within 90 days of receipt of the award under Section 37 of the Act. Parties may apply to set aside an award based on the grounds and circumstances set out in Section 37, which include but are not limited to the following:

- the award is in conflict with the public policy of Malaysia;
- the making of the award was induced or affected by fraud or corruption; or
- a breach of the rules of justice occurred.

Nonetheless, an application to set aside an award does not automatically stay the enforcement of the award, and parties have to make an application to stay such enforcement.

The 2018 Amendment (No. 2) Act also abolished parties' rights to refer questions of law arising out of an award to the High Court under Section 42 of the Act. This has further enhanced the principles of parties' autonomy, minimal court intervention and finality of arbitral awards.

However, it is to be noted that parties may waive such rights to appeal to the High Court, as evidenced in rule 1(c) of the KLRCA/AIAC Rules, which says that where the seat of arbitration is Malaysia, Section 41, Section 42, Section 43 and Section 46 of the Malaysian Arbitration Act 2005 (Amended 2011) shall not apply.

Section 35 of the Act provides for correction and interpretation of an award or additional award. In any event, if the arbitral tribunal considers the request made to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request, and such interpretation shall form the award. Also, the arbitral tribunal may correct any error of the type referred to in part (a) abovementioned on its own initiative within 30 days of the date of the award.

In furtherance to that, unless otherwise agreed by the parties, a party may, within 30 days of receipt of the award and upon notice to the other party, request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. Should the arbitral tribunal consider the request justified, it shall make the additional award within 60 days from receipt of such request.

In any event, the arbitral tribunal may extend the period of time within which it shall make a correction, interpretation or an additional award, when it thinks necessary.

Enforcement of the arbitration award

Generally, an arbitration award is enforceable by making an application under Section 38 of the Act to recognise such award. As mentioned earlier, a foreign arbitration award can be enforced in Malaysia, subject to and in accordance with Section 38 of the Act.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

To enforce an arbitration award, registration of the award as a judgment of the High Court is required. An application for enforcement is made *ex parte* and is usually ordered as of right, whereupon the arbitration agreement and a duly certified copy of the award (with a translation into English if it is neither in the national language nor the English language) are produced. The order for registration of the award is to be served on the respondent, who has 14 days to make an application to set aside the registration. Pending the disposal of the application to set aside the registration, the enforcement of the award will be stayed.

Registration or enforcement of an award may be refused based on the grounds set out in Section 39 of the Act. None of the grounds concern the merits of the arbitration award. This simply shows that the Malaysia courts, when determining whether an award ought to be registered, will not sit on appeal over the correctness of the award. However, if the merits of the award may be challenged under the laws of the country which issued the award and on which basis the award is set aside; such an award is not capable of registration in Malaysia.

Recent authorities in Malaysia have suggested that the Malaysian courts are maintaining friendly attitudes towards arbitration and are therefore more inclined to recognise and enforce arbitration awards. This is demonstrated in a Federal Court decision in ***Government of India v. Cairn Energy India Pty Ltd & Anor***.[15]

Investment arbitration

Malaysia is a signatory to a number of bilateral investment treaties. Thus far, Malaysia has entered into 71 bilateral investment treaties (BITs), starting with its first BIT signed with the Netherlands on 15 June 1971,[16] and last BIT signed with Syrian Arab Republic on 7 January 2009.[17]

* * *

Endnotes

1. Sundra Rajoo, WSW Davidson, "The Arbitration Act 2005", Introduction, Sweet & Maxwell Asia, 2007 (page 2).
2. Section 51(2) of the Act.
3. The Malaysian Parliament's website at http://www.parlimen.gov.my/files/billindex/pdf/2010/DR422010E.pdf.
4. The Malaysian Parliament's website at http://www.federalgazette.agc.gov.my/outputaktap/20180504_A1569_BI_Act%20A1569.pdf.
5. New York Convention Arbitration's website at http://www.newyorkconvention.org/countries.
6. Nuclear Threat Initiative's website at http://www.nti.org/learn/treaties-and-regimes/association-southeast-asian-nations asean/.
7. International Centre for Settlement of Investment Disputes's website at https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf.
8. The Kuala Lumpur Regional Centre's website at https://klrca.org/ and the Asian International Arbitration Centre's website at http://www.aiac.world.
9. The Kuala Lumpur Regional Centre's website at https://klrca.org/Arbitration-Fast-

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Track-Arbitration for existing rules and visit http://www.aiac.world/Arbitration-Fast-Track-Arbitration for new rules applicable in year 2018.

10. Section 2 of the Malaysian Evidence Act 195011. https://www.aiac.world/news/254/The-Arbitration-(Amendment)-(No.-2)-Act-2018-Comes-Into-Force—%E2%80%93-The-New-Era-of-Arbitration-in-Malaysia.
11. *Lady Muriel (Owners) v Transorient Shipping Ltd (The Lady Muriel)* [1995] 2 HKC 320.
12. *Lady Muriel v Transorient Shipping Ltd* [1995] 2 HKC 320.
13. Order 59 Rule 16 of the Rules of Court 2012.
14. Section 36 of the Act.
15. [2011] 6 MLJ 441.
16. The United Nations Conference on Trade and Development's website at http://investmentpolicyhub.unctad.org/IIA/CountryBits/127.
17. *Ibid*.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Gan Khong Aik
Tel: +603 7931 7060 / Email: khongaik@ganlaw.my

Khong Aik is a litigation and dispute resolution partner at Gan Partnership with more than 20 years of practice experience. He has an extensive dispute resolution & litigation practice experience focusing on corporate and commercial disputes including property disputes involving joint venture agreement, development work and acquisition of land.

In 2010/2011 issue of the *Legal 500 Asia Pacific*, Khong Aik was described as an 'experienced litigation lawyer' who has a 'depth of knowledge' and 'trouble shooting skills' that are complemented by a 'meticulous and thorough approach'. The 2017 publication of the *Legal 500 Asia Pacific* described Khong Aik as 'very competent and commercial in his approach'. Khong Aik is a Mediator with the Malaysian Mediation Centre and Adjunct Professor to the Shi Liang College of Law, University of Changzhou, Jiangsu, China.

Foo Joon Liang
Tel: +603 7931 7060 / Email: joonliang@ganlaw.my

Joon Liang started his practice in 2000 in dispute resolution in one of the largest law firms in Malaysia where he practised some eight years, and has extensive experience in complex arbitrations and litigation, including in securities and construction disputes.

He has advised a wide range of clients including amongst others, the state government, Ministry of Works, insurers, foreign contractors, and government-linked companies, across a broad spectrum of litigation matters in court and in arbitration, with his main focus being construction and securities transaction disputes.

Joon Liang is a Fellow of the Chartered Institute of Arbitrators, United Kingdom, and committee member of the Malaysian Branch of the Chartered Institute of Arbitrators. He also sits on the panel of arbitrators and adjudicators of the Kuala Lumpur Regional Centre of Arbitration.

Kang Mei Yee
Tel: +603 7931 7060 / Email: meiyee@ganlaw.my

Mei Yee graduated from University of Malaya with Bachelor of Laws (Hons) in 2014 and was called to the Malaysian Bar in 2015. Mei Yee gained her experience as a young advocate and solicitor by assisting Khong Aik in handling civil and commercial disputes in the Malaysian courts involving shareholder and director disputes, employment disputes, civil claims based on breach of contracts and/or tortious conducts (professional negligence and defamation).

Gan Partnership

D-32-02 Menara SUEZCAP 1, KL Gateway, No. 2 Jalan Kerinchi, Gerbang Kerinchi Lestari
59200 Kuala Lumpur, Malaysia. Tel: +603 7931 7060 / Fax: +603 7931 8063 / URL: www.ganlaw.my

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Morocco

Amin Hajji
Hajji & Associés – Avocats

Introduction

It is anticipated that in 2019, a new arbitration code will be published in Morocco, as the project law is under discussion by the Moroccan parliament and the government. This new law should replace the former one of December 6th, 2007 and aims at encouraging international investment in particular, with better and more efficient international arbitral legislation. This would coincide with the kick-off in 2019 of the Casablanca international arbitration and mediation centre ("CIMAC"), which is part of the new Casablanca Finance City.

It should be noted that this new arbitration law, comprising 85 articles together with four miscellaneous end law articles, has not come with very deep changes, as it confirmed the *inter partes* enforcement proceeding which has existed since the 2007 law application, giving extensive recourse to dilatory proceedings for defendant parties. However, electronic messages duly acknowledged with read receipts are now seen as valid notification for the arbitration agreement or for the arbitral award.

In the same way, the definition of international arbitration has been confirmed as involving the interests of international trade, in which one of the parties at least has its domicile or headquarters abroad. In addition, with the application of the Moroccan State to become a member of the African ECOWAS organisation, OHADA laws and regulations, and especially the arbitral ones applicable to 17 African States with whom Morocco has extensive commercial and investment projects, should be naturally considered as adjacent laws, which Moroccan judicial and legal professionals should familiarise themselves with without delay.

Unless otherwise provided, the following references to "Articles" relate to the applicable articles 306 to 327-54 of the Moroccan civil procedure code of 1974 ("CPC") devoted to domestic and international arbitration. Those aforesaid articles have been published under a specific law n° 08-05 of December 6th, 2007 ("the Law") which is included with the civil procedure code.

Arbitration agreement

Article 307 CPC provides that an arbitration agreement is an agreement by which the parties commit to use arbitration in order to solve an arising or future dispute related to a defined legal relationship regardless of its contractual or non-contractual nature. The Law clearly distinguishes domestic arbitration from international arbitration.

The Law provides that an arbitration may be in the form of an arbitration clause or an arbitration agreement. Article 316 CPC specifies that the arbitration clause is stipulated within a contract, and Article 314CPC defines the arbitration agreement as the contracting parties' decision to submit their dispute to an arbitral tribunal.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Additionally, the minimum essential content of an arbitration agreement will differ depending on the nature of the arbitration agreement, whether domestic or international.

With respect to domestic arbitration, the Law mentions some minimum essential content that will differ depending on whether it is an arbitration clause or an arbitration agreement. Thus, and under penalty of nullity, the arbitration clause must either nominate the arbitrator(s) or at least provide the modalities for their designation. Alternately, Article 315 CPC provides that under penalty of nullity, the arbitration agreement should: (i) determine the subject matter of the dispute; (ii) designate the arbitral tribunal or provide for the terms of its designation; and (iii) determine the litigation scope of the dispute. In addition, under penalty of nullity, the arbitration clause must be stipulated in writing and unequivocally in the main agreement or in a document to which it refers. The same conditions are necessary for the arbitration agreement, which must be in writing, either by authentic instrument or private deed or by minutes drawn up before the arbitral tribunal selected (Article 313 CPC).

With regard to international arbitration, Article 327.41 CPC provides that "*the arbitration agreement may, directly or by reference to arbitration rules, appoint the arbitrator or arbitrators or set down the terms of their appointment as well as those of their replacements*". Indirectly, this Article implicitly provides for the international arbitration agreement to be in written form. Moreover, Morocco is party to the 1958 New York Convention, which provides in Article II that contracting states should recognise "*an agreement in writing, under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration (...)*". Therefore, in order for an international arbitration agreement to be recognised in Morocco, the agreement must be in written form.

Arbitration procedure

The Law contains provisions regarding the determination of the rules governing procedure for both domestic and international arbitration.

First, domestic arbitration may be *ad hoc* or institutional. In the context of an institutional arbitration, the rules of procedure will be those of the arbitration institution selected by the parties to settle their dispute. In the context of an *ad hoc* arbitration, the Law provides that the rules of procedures may be determined by the parties or by the arbitral tribunal. However, should the parties fail to determine the rules of procedure, the elected arbitral tribunal will have to organise them in compliance with the Law on such rules of procedure (Article 319 CPC).

Second, in the context of international arbitration, the arbitral tribunal enjoys free decision in determining the rules of procedure in international arbitration. Indeed, Article 327-42 CPC provides that "*The arbitration agreement may, directly or by reference to rules of arbitration, determine the procedure to be followed in the arbitration proceedings. It may also submit it to the procedural law that it decides on. If the arbitration agreement does not specify, the arbitral tribunal shall regulate the procedure as necessary, either directly or by reference to a law or rules of arbitration.*" In addition, the parties have the ability to choose among three options when they need to decide the rules of procedure that will be applied in the context of their arbitration proceedings. They may submit their arbitration proceedings to the rules of procedure of a specific arbitration institution or of a specific law, or they can agree a procedure of their own provided that it complies with the principles and provisions of Moroccan public policy.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

It should be noted that the provision set forth in Article V.1 (d) of the New York Convention indicated clearly that in the absence of any contractual provisions fixing the rules of procedure of the arbitral proceedings, the law of the seat of the arbitration should apply. Therefore, the arbitral tribunal may only regulate the arbitral proceedings by referring to the rules of procedure of the law of the seat of arbitration, in order to avoid any subsequent dispute concerning the recognition or enforcement of the arbitral award.

In respect to both domestic and international arbitration, whether *ad hoc* or institutional, the Law explicitly specifies in its Article 327-36 CPC that notwithstanding any stipulation to the contrary, arbitral awards may be subject to an annulment appeal if the parties and/or the arbitral tribunal do not comply with certain mandatory provisions set forth in the Law. These provisions are listed in Article 327-36 CPC and pertain to: (i) the validity of the arbitration agreement; (ii) the arbitration proceedings, specifically the time limit, the procedural rules, the applicable law and respect of the rights of defence; (iii) the valid constitution of the arbitral tribunal and its defined scope of mission; (iv) the award, which should indicate the names of the arbitrators and the date of the award; and (v) the respect of public order – which is indeed a complex and undefined concept of law.

The seat of arbitration may be freely chosen by the parties. However, the determination of the seat of arbitration is not without effect, because it determines the legal framework for arbitration. The parties must pay particular attention to the choice of the seat of arbitration, since it can have significant implications for the conduct of the arbitration and the enforcement of the final award. Indeed, the seat of arbitration determines the law that will be applicable to the procedure and the competent courts that may intervene during the arbitral process and after the award is rendered. The seat of arbitration also plays an essential role in the execution of the sentence.

Article 327-14 paragraph 7 CPC provides that, unless otherwise agreed by the parties, the arbitral tribunal shall hold hearings to allow the parties to explain the purpose of the arbitral proceedings and to present their evidence. The hearings before the arbitral tribunal are done after swearing-in, and the parties may be represented or assisted by any person of their choice. The Law also allows the arbitral tribunal to be limited to the production of briefs and written documents.

The Law allows the arbitral tribunal to organise the arbitral proceedings, provided that the procedure complies with certain fundamental procedural principles – specifically, the fundamental principles of respect for the rights of defence, and the *inter partes* principle. In order to comply with these principles, the parties to the litigation should be summoned by the arbitral tribunal, and they should receive all the elements produced during the arbitration proceedings from the arbitral tribunal. It should be noted that Article 327-36 paragraph 5 CPC provides that arbitral awards may be subject to annulment proceedings "*(...) When one of the parties was not able to defend himself because it was not properly informed of the appointment of an arbitrator, arbitration proceedings or for any other reason relating to the duty of respect for the rights of defence;(...)*".

Article 327-14 CPC requires the claimant to produce to the arbitral court a written submission. The claim should contain, among other details: the name and address of the respondent; an explanation of the facts concerning the arbitral proceeding; and the points which are in disagreement and which are the origin of the dispute. The claimant must attach to its request for arbitration all supporting documents and evidence it intends to use.

The respondent should answer with a written submission within the period agreed between the parties or imposed by the arbitral tribunal and produce his arguments in defence, with all

© Published and reproduced with kind permission by Global Legal Group Ltd, London

supporting documents and evidence it intends to use.

The parties may determine a deadline for the arbitration proceeding and thus compel arbitrators to draft their award within a specified period, which is by Law generally limited to six months unless otherwise agreed by the parties.

According to Article 327-14 paragraph 9 CPC, the failure of a party to attend any hearings session or to submit the required documents will not affect the arbitral proceedings. The arbitral tribunal may continue the arbitral proceedings and render its award on the dispute.

On another point, Article 327-17 CPC explicitly provides that the arbitral tribunal is not competent to rule on issues concerning claims of forgery regarding a document submitted in arbitration. As such, the arbitral tribunal can continue its examination of the case if it considers that the outcome of the forgery proceedings is not obstructing the arbitration proceedings. Otherwise, it would have to suspend the proceedings until a final judicial judgment in the forgery case is rendered.

With regard to the burden of proof and evidence before Moroccan courts, the procedure is inquisitorial. The court is actively involved in investigating the facts of the case and it can *ex officio* or at the request of one or both parties, order different investigative measures such as independent expertise, site visit, authentication of handwriting or any other investigative measures before ruling on the merits. In addition, the arbitral tribunal may investigate the dispute by hearing witnesses, involving experts or by requesting documents from a party who holds a piece of evidence (Article 327-11 CPC).

Arbitrators

The Law does not contain any provisions regarding the status and qualifications of arbitrators. However, Article 327-2 CPC specifies that, in any case and under penalty of nullity of the arbitration, the number of arbitrators designated by the parties should be an odd number. Moreover, Article 327-2 CPC provides that in the event that the parties fail to agree on the number of arbitrators, the number shall be three.

According to the Law, only natural persons who benefit from their full capacity to exercise their civil rights may fulfil the mission of an arbitrator. These persons who wish to act as arbitrators should not be subject to any final convictions stripping them of their civil rights or of their ability to perform commercial acts.

The Law provides that the arbitral tribunal may be constituted of a sole arbitrator or of a panel of arbitrators (Article 312 CPC). It also provides that the arbitration may be *ad hoc* or institutional (Article 319 CPC). In ad hoc arbitrations, the arbitral tribunal is appointed by the parties, whereas in institutional arbitration it is appointed by the arbitration institution that was agreed upon by the parties in their arbitration agreement.

Article 327-4 CPC provides that if the parties or the arbitrators fail to reach an agreement in order to appoint the additional arbitrator(s), the president of the jurisdiction will proceed to the designation of the arbitrator(s) pursuant to an order, with no possible judicial recourse.

The arbitral tribunal is constituted as soon as all the arbitrators have accepted their mission (Article 327-6 CPC). By accepting their mission, the arbitrator(s) are obliged to start the arbitration process and conduct it until its completion. Thus, an arbitrator is not permitted to resign from his position as an arbitrator in the arbitral tribunal unless he or she has legitimate reason (Article 327-6 CPC).

With respect to international arbitration, the Law provides that the arbitration agreement may designate the arbitrators directly or by reference to institutional rules of arbitration, or provide

© Published and reproduced with kind permission by Global Legal Group Ltd, London

for the terms of their designations and replacements (Article 327-41 CPC). However, in the event that parties face difficulties in the constitution of the arbitral tribunal, the Law provides that: (i) if the arbitration takes place in Morocco, the most diligent party may seize the president of the jurisdiction; or (ii) if the arbitration takes place abroad and the parties agree on the application of the Moroccan civil procedure law to their arbitration, the most diligent party may seize the President of the Commercial court of Rabat (Article 327-41 paragraph 2 CPC). The law allows the parties to provide otherwise in their arbitration agreement or choose ways of resolving this kind of difficulty without involving any judge from national courts.

In addition, there are no specific provisions in the Moroccan international law of arbitration pertaining to the resignations of arbitrators. However, the law provides that in the event the parties choose to apply Moroccan law of procedure and, provided they have not agreed otherwise, the provisions regarding the resignation of arbitrators that apply to domestic arbitration will be applicable to their international arbitration proceeding (Article 327-43 CPC).

By accepting their mission, the arbitrators *de jure* enter into an agreement with the parties. The arbitrators must be independent and impartial, available and diligent and, last but not least, they should protect the confidentiality of the arbitral proceedings. Indeed, the arbitrators must be independent from each party – which means that, in order to avoid any conflict of interest issue, they should not have any personal or professional relationship with any of the arbitrators whether a relation of subordination, joint business interests or a family's relations. They should also be impartial in their decision-making, and not foster a party against another in their approach to the arbitration case. In the event an arbitrator is aware of any circumstances which might give rise to justifiable doubts as to his independence or impartiality, he must reveal them spontaneously and in writing to the parties at the time he accepts his mission (Article 327-6 CPC).

By accepting their mission, the arbitrators must discharge their obligations until the litigation case comes to a conclusion (Article 327-6 CP). Moreover, the Law provides that information which arbitrators receive in the exercise of their function is covered by rules relating to professional secrecy (Article 326 CPC).

Finally, the arbitrators have the right to be paid for their arbitration services and to be reimbursed for their expenses. This right is a contractual right that directly derives from the arbitration agreement which the arbitrators have entered into with the parties by accepting their mission. In the context of an *ad hoc* arbitration, the amount and the modalities of payment of the fees will be freely agreed upon by the arbitral tribunal and the parties. With respect to institutional arbitration, the payment of the arbitrators' fees depends on the institutional rules which are binding to the parties, to the arbitrators and to the institution itself, as matters of contract.

It should be noted that the challenge/exclusion of an arbitrator can arise at the initiative of either party before the start of the arbitration proceedings or during the course of the arbitration proceedings. This procedure is available to the parties when any of them questions the impartiality and/or independence of an arbitrator. In the same meaning, the mission of an arbitrator can be terminated by its revocation by the parties on the ground, for example, that the arbitrator does not fulfil or stops fulfilling its mission, causing an undue delay to the arbitration proceedings. The law provides that any of the parties can request from the president of the competent jurisdiction to revoke an arbitrator from the arbitral tribunal by issuing an order that cannot be subject to any recourse (Article 325 CPC).

The effect of the removal is clearly specified by the Law when the decision to remove the arbitrator is issued by the court; like in the case of a challenge of procedure, the Law provides

© Published and reproduced with kind permission by Global Legal Group Ltd, London

that when a request for removal is submitted to the competent court, the arbitration procedure is suspended until there is a ruling on the request, unless the arbitrator accepts to resign (Article 327-8 CPC). According to the Law, when the mission of an arbitrator is terminated for any reason whatsoever, he or she will be replaced by a substitute arbitrator who will be appointed under the same rules that led to the appointment of the arbitrator being replaced (Article 325 CPC).

Last but not least, by accepting their missions, arbitrators may potentially engage their civil or criminal responsibility because of breaches of the obligations incumbent upon them in connection with the execution of their arbitration mission.

Interim relief

Pursuant to Article 327-15 CPC, the arbitral tribunal may, at the request of either party take interim measures. Indeed, this article provides that "*[u]nless otherwise agreed by the parties, the arbitral tribunal may order, at the request of one of the parties, any provisional or conservatory measure it deems necessary within the limits of its mission. If the party against whom the award was rendered did not execute it, the party in whose favour the decision was rendered may seize the President of the court having jurisdiction to issue an enforcement order*".

Therefore, the arbitral tribunal can take any interim measures it deems necessary, as long as those measures are within the scope of its mission and to the extent that the parties do not provide otherwise in their arbitration agreement. Thus, the arbitral tribunal does not have the power to take provisional measures *ex officio.*

In case the party targeted by the order granting the interim measure obstructs the order, the other party is entitled to file a claim before the local judicial court that has jurisdiction in order to obtain an enforcement order.

Alternatively, the arbitral tribunal does not have exclusivity as regards interim measures. The judicial court can also intervene in the process of interim measures, either to deliver an order for interim measures before the start of the arbitration proceedings or to enforce an order during the arbitration proceedings (Article 327-1 CPC).

The Law does not contain any provisions specifying the kind of interim measures that may be ordered in arbitration proceedings. Therefore, the type of interim measures that may be granted are provided in the general provisions of the CPC. The interim measures that may be ordered by the national judge, as well as the arbitral tribunal, are provisional attachments of assets.

Arbitration award

A final award is the decision of the arbitral tribunal that rules on the substance of the case that was submitted to it. The issue of the final award by the arbitral tribunal terminates the arbitrators' mission over the dispute that was submitted to them (Article 327-28 CPC).

There are no specific rules pertaining to partial awards or to interim awards in the Law. However, the arbitral tribunal can issue interim awards which order interim measures (Article 327-15 CPC).

Consent awards are settlement agreements recorded by arbitration tribunals as awards. As such, the arbitral tribunal puts an end to the arbitration procedure and issues an award. This award produces the same effect as any other arbitral award pronounced on the merits of the case (Article 327-19 CPC).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Articles 327-23 CPC, 327-24 CPC and 327-25 CPC provide for the content of the award. However, pursuant to Article 327-36 CPC, only failure to comply with certain of these provisions can entail nullity of the award. Indeed, the only grounds for annulment which apply specifically to awards made in Moroccan domestic arbitration are where the arbitrators must indicate the grounds of the award. However, the same Article indicates two exceptions when the parties agree that the award is rendered *exaequo et bono* and when the procedural law – necessarily a foreign law at this point – that applies to the arbitration proceeding does not require the motivation of the award.

The arbitral award is made after deliberation and should result from a decision of the majority of arbitrators in case the arbitral tribunal is constituted by a panel of arbitrators. Article 327-22 CPC specifically provides that the arbitral award shall be made by majority vote. This also applies to awards made in international arbitration as long as the arbitral proceeding is subject to Moroccan law of procedure and the parties have not agreed otherwise.

The award is executed by each of the arbitrators. In the event a tribunal arbitral is constituted of several arbitrators and a minority of them refuse to sign the award, the other arbitrators should mention it in the award and indicate the reasons for their refusal to sign the award. As long as the majority of the arbitrators have signed the award, it has the same effect as if it had been signed by each of the arbitrators (Article 327-25).

Once the award has been executed by the arbitrator(s), it must be notified to the parties. The Moroccan domestic law of arbitration provides that the arbitral tribunal shall deliver to each of the parties a copy of the arbitration award, within seven days from its issuance. The arbitral tribunal cannot publish the entire arbitral award or any part of it without authorisation of the parties to the arbitration proceeding (Article 327-27 CPC).

It should be noted that the Law does not address the issue of dissenting opinions.

Once an award is made, the dispute resolved by the arbitral tribunal become *res judicata* which means that no party may submit the same case again before the any arbitral tribunal or any national court (Article 327-26 CPC). The award is binding to the parties unless it has been declared null or void.

The Law provides that the arbitral tribunal may correct or interpret the final award it has made. However, in the event the arbitral tribunal cannot be reconvened, such power shall be vested to the president of the jurisdiction within which jurisdiction the arbitral award was made. The president of the jurisdiction must rule within 30 days by order which cannot be subject to any means of recourse (Article 327-29 CPC).

Furthermore, the final award may contain material errors. The arbitrators can, within a time limit of 30 days from the making of the arbitral award, *ex officio* correct those errors. Any of the parties may also request from the arbitral tribunal to correct such errors, as long as the request is made within 30 days from the notification of the arbitral award. The arbitral tribunal must issue its corrected award within one month from the date it is seized to do so (Article 327-28 CPC).

Under some specific conditions, the arbitral tribunal may deliver an additional award, as provided for in Article 327-28 CPC. The Law provides that the arbitral tribunal can, at the request of either party, within 30 days of the notification of the final award, make an additional award relating to a claim on which it was failed to rule, unless otherwise agreed by the parties. The request is notified to the other party, who will have a period of 15 days to submit, if need be, its conclusions. The arbitral tribunal shall pronounce its complementary sentence within 60 days from the date of its referral (Article 327-28 CPC).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Finally, the Law does not contain any specific provision pertaining to the costs of the arbitration. It only provides that, in the context of an *ad hoc* arbitration, the arbitral award shall fix the fees of the arbitrators, arbitration expenditures and the modalities of their repartition between the parties. If the parties and the arbitrators do not agree on fixing the arbitrators' fees, such fees are fixed by independent decision of the arbitral tribunal (Article 327-24 CPC). This decision is subject to appeal before the President of the competent jurisdiction of which the decision is definitive and not subject to appeal. In the context of an institutional arbitration, the cost of the arbitration is calculated according to the schedule of costs attached to the sets of rules of the concerned arbitration institution.

Challenge of the arbitration award

The Law provides that the arbitral award cannot be subject to appeal (Article 327-34 CPC). However, arbitral awards can be subject to revision (Article 327-34 CPC) or third-party(ies) opposition (Article 327-35 CPC). Moreover, the arbitral award may also be subject to annulment if any of the grounds provided in the CPC are fulfilled (Article 327-36 paras 1 to 7, Article 327-49 CPC and Article 327-51 CPC).

Article 327-36 CPC gives a limitative list of causes that may be used as legal grounds for nullification of a domestic arbitral award. There is a total of seven legal grounds that could lead to the annulment of such award. Some of them refer to factual and precise considerations which are generally not subject to interpretation by courts whereas others refer to more procedural and legal issues. The latter can potentially enlarge the scope of legal grounds that could be used for challenging an arbitral award.

As for an example, Article 327-36 paragraph 5 CPC provides that the respect of rights of defence of any of the parties to an arbitral proceeding is a fundamental principle. The principle of an *inter partes* proceeding conducive to equal treatment of the parties by the arbitral tribunal is the natural effect of such rights and such non-compliance could be viewed as a breach of Moroccan public policy.

Pursuant to the provisions of Article 327-51 CPC, "*an award rendered in Morocco in respect an international arbitration may be subject to an annulment appeal in the cases provided for in article 327-49*". The annulment appeal should be filed before a competent Moroccan court "*within fifteen days of notification of the award declared enforceable*".

Specifically, Article 327-51 CPC provides that an arbitral award can be subject to an annulment if any of the conditions set forth in Article 327-49 CPC is fulfilled as "*in the event (i) the arbitral tribunal has ruled without an arbitration agreement or on an invalid agreement or after expiry of the arbitration period, (ii) the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly appointed, (iii) the arbitral tribunal ruled without complying with the mission entrusted to it, (iv) the rights of the defence were not respected and (v) the recognition or the enforcement is contrary to international or national public order policy*".

The court of appeal examining the annulment appeal may decide the arbitral award annulment *ex officio* when it is contrary to the Moroccan public order or if it establishes that the subject of the dispute concerns a matter that may not be submitted to arbitration. The court of appeal rules under a summary procedure.

The time period for exercising the annulment appeal suspends the enforcement of the arbitral award. The appeal exercised within the period is also suspended.

Revision and third party(ies) opposition proceedings are an extraordinary procedure. The

© Published and reproduced with kind permission by Global Legal Group Ltd, London

legal grounds for such procedures are provided for Articles 327-34 and 327-35 CPC and are organised under Articles 402 *seq*. and Article 303 *seq.* CPC. Revision may be based, for example, on a fraud which would have occurred during the arbitral proceeding or the discovery of certain essential facts or documents previously hidden to the arbitral tribunal by the adversarial party which would likely have changed the result of the arbitral award. Third party(ies) opposition proceeding is also available to any party that was not involved in the arbitration proceeding when such an award gives prejudice to their rights.

Enforcement of the arbitration award

Article 327-31 CPC of the Law provides that "*The award is subject to enforcement only by virtue of an exequatur order of the President of the jurisdiction in whose jurisdiction the award has been rendered*". The proceedings before competent lower court jurisdiction and appellate court for obtaining an enforcement order are conducted *inter partes*.

The enforcement request is to be filed by the most diligent party with the relevant jurisdiction, in compliance with Article 327-31 paragraph 2 CPC which provides that "*(...) the original of the award, accompanied by a copy of the arbitration agreement, with a translation, if applicable, in Arabic, is deposited by one of the arbitrators or by either party at the Registry of the jurisdiction within seven days of its pronouncement*". The order granting the enforcement of the arbitral award cannot be challenged by any recourse (Article 327-32 CPC). However, the order refusing the enforcement must be reasoned and can be appealed within 15 days from its notification (Article 327-33 CPC).

With respect to the application for recognition and enforcement of foreign arbitral awards rendered abroad, this may be carried out before a Moroccan jurisdiction. However, such a recognition and enforcement are applicable if they are not manifestly contrary to the Moroccan national or international public policy (Article 327-46 CPC).

The recognition of a foreign award means that the award is given the same effect in Morocco as in its country of origin, and will then carry the effect of res judicata. The enforcement of a foreign award means that its terms are enforced by an exequatur and by judicial coercive and or interim measures, if necessary.

The enforcement procedure of an international arbitral award is also conducted *inter partes*, which may lead to the same lengthy proceedings as for domestic arbitration.

Moreover, and as Morocco has been party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1959, the recognition and enforcement of foreign arbitral awards in Morocco are governed by both Article 327-46 CPC and the 1958 New York Convention.

With respect to investment arbitration, Morocco has been since 1967 party to the Washington ICSID Convention, which Convention provides that the contracting states must recognise as binding awards rendered pursuant to the ICSID Convention for the benefit of an investor of a contracting State, and enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in that state.

Additionally, Morocco has entered into multiple bilateral investment treaties with countries on all of the five continents, which mostly refer to the ICSID arbitration rules in case of a dispute born between the contracting parties or further a litigation raised between a contracting state national or company and the other state party.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Amin Hajji
Tel: +212 522 487474 / Email: a.hajji@ahlo.ma

Amin Hajji is a professor of international commercial law and business law at the faculty of law of Casablanca-Ain Chok, and has been an attorney at law at the Casablanca Bar since 1994. His main clients are international and he has intervened in major projects in Morocco including renewable energy, the Tanger Med maritime port and facilities developments, oil & gas exploration and exploitation, the international financing of corporations and public entities with Euro loans, Eurobond issuings, securitisation or derivative transactions, local and international mergers and acquisitions. Amin Hajji represents clients before national and international arbitration courts as counsel or arbitrator.

Hajji & Associés – Avocats

28 Bld Moulay Youssef – 20070, Casablanca, Morocco
Tel: +212 522 487 474 / URL: www.ahlo.ma

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Netherlands

Richard Woutering & Ingmar Wassenaar
Lemstra Van der Korst

Introduction

Arbitration is a frequently used mechanism for the resolution of domestic and cross-border disputes in The Netherlands. Most arbitrations are institutional. Dutch arbitration practitioners are typically very familiar with the rules of leading international arbitral institutions such as the ICC. The foremost Dutch institutions are the Netherlands Arbitration Institute (NAI) and the Permanent Court of Arbitration (PCA). There are also sector-specific institutions such as the Arbitration Board for the Building Industry.

Dutch laws on arbitration are contained within the Dutch Arbitration Act, which is laid down in Book 4 of the Dutch Code of Civil Procedure and is based on the UNCITRAL model law (but does contain deviations). It does not distinguish between domestic and international arbitral proceedings. An amendment of the Dutch Arbitration Act came into force as of 1 January 2015 and applies to arbitrations commenced on or after that date (and to court proceedings relating to such arbitral proceedings). The 2015 amendment is more of an update, and not a complete revision, of the earlier 1986 Act, which was broadly considered to function well.

The most relevant treaties The Netherlands has adopted are the New York Convention (only applying it to the recognition and enforcement of awards made in the territory of another contracting state – the 'reciprocity reservation' that is commonly seen) and the 1965 Washington Convention.

On 1 January 2019, the Netherlands Commercial Court (NCC) was created. Matters may be submitted to the NCC if the following criteria are met:

1. the Amsterdam District Court or Amsterdam Court of Appeal has jurisdiction;
2. the parties have expressly agreed in writing that proceedings will be in English before the NCC (the 'NCC agreement');
3. the action is a civil or commercial matter within the parties' autonomy; and
4. the matter concerns an international dispute.

While it is not a specialised arbitration court, the creation of the NCC is still noteworthy from an arbitration perspective. For instance, parties may consider adding to their arbitration clause, a clause opting to bring any disputes relating to their international arbitration (such as any setting-aside proceedings) before the NCC. NCC proceedings are conducted in English and judgments are rendered in English as well. The NCC judges are well-versed in handling large, complex, commercial cross-border disputes. The NCC itself has noted that it may be appropriate to bring setting-side proceedings before the NCC (insofar as the abovementioned criteria are fulfilled). The challenge of arbitral awards will be covered in more detail further below.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Arbitration agreement

Parties can enter into an arbitration agreement verbally. However, if the existence of a valid arbitration agreement is contested, the agreement must be proven by a written instrument (which includes, explicitly, electronic information). The same applies to any multi-party arbitration agreement.

The NAI and other arbitral institutions provide model/recommended arbitration agreements, which are often used.

The arbitration agreement is considered to be a separate agreement (i.e. the separability principle applies in The Netherlands).

Multi-tier clauses, in which the parties must first negotiate or mediate before turning to arbitration, are not unusual. Parties may try to obtain specific performance (which is a generally available contractual remedy in The Netherlands) of such 'first-tier' obligations. Depending on the facts of the case and the specific wording of the multi-tier clause in question, an arbitral tribunal may or may not accept jurisdiction if the first tier was allegedly 'skipped'.

In general, courts are very familiar with and look favourably upon arbitration agreements. The one exception may be arbitration agreements involving consumers. There is a well-established body of EU case law, and also rules that are laid down in Dutch national legislation, that enable courts to scrutinise such arbitration agreements. Broadly speaking, consumers must have clearly and voluntarily chosen for arbitration. An arbitration clause laid down in general conditions is in principle not binding on consumers, unless the arbitration clause gives the consumer a term of a least one month to opt to go to the normal state court instead after the arbitration clause is invoked.

In principle, third parties are not bound to the arbitration agreement and as such, they cannot be joined to any arbitral proceedings. There may be exceptions, which are mostly based on the general law of contract in The Netherlands. Also, if an entity has validly entered into an arbitration agreement but is then declared bankrupt, its bankruptcy trustee will, in principle, be bound by the arbitration agreement.

The principle of competence-competence applies in The Netherlands: the arbitral tribunal may decide whether it has jurisdiction and whether the matter at hand is arbitrable. Matters that have an *erga omnes* effect or that are considered an issue of public policy may not be arbitrated. Examples include certain applications of corporate law, bankruptcy law, family law and intellectual property law. The tribunal's decision over jurisdiction and/or arbitrability may be scrutinised in setting-side proceedings.

Arbitration procedure

The current Dutch Arbitration Act provides for a set of rules governing the arbitral proceedings (in particular, in the second section of the Act), from which parties may deviate. This is often done by adopting a set of arbitration rules, such as those of the NAI, which are then considered to form part of the arbitration agreement.

In principle, hearings can take place outside of the seat of arbitration. Insofar as the parties' arbitral agreement or the Dutch Arbitration Act do not provide guidance, the arbitrators have discretionary power to govern the proceedings. In doing so they are limited by fundamental principles of procedural law. Tribunals are fairly commonly assisted by an arbitral secretary. They are subject to the same rules of independence and impartiality as the arbitrators themselves (and can be challenged similarly).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Regular arbitral proceedings that are administered by the NAI take approximately one year. Generally, arbitral proceedings may be slightly quicker than similar proceedings that are conducted before the state courts. However, complex commercial arbitrations may take years to resolve. On the other hand, the Dutch Arbitration Act and the NAI rules provide for arbitral summary proceedings which, in some cases, can result in an order or award providing interim relief in weeks or even days. Additionally, the NAI rules have a fast track for proceedings on the merits relating to claims smaller than €100,000 (the so-called *Traject Geringe Vorderingen*).

The arbitration agreement – and more specifically, the arbitration rules that are considered part of the agreement – typically provides how arbitration proceedings are commenced. If the agreement does not contain such a provision, the Dutch Arbitration Act states that arbitration proceedings are commenced by written notice stating that the sender wishes to commence arbitral proceedings. The notice also has to set out what the topic of the arbitral proceedings will be.

The arbitral tribunal has to honour any choice of substantive law that the parties have made. If the parties have not agreed on the applicable law, the arbitral tribunal may decide what substantive law it will apply. In making that decision, it is not bound to formal conflicts-of-law rules, but will nevertheless typically follow those.

Arbitral proceedings are considered to be confidential. However, this is not codified in the Dutch Arbitration Act itself. The NAI rules do contain an explicit confidentiality clause. Absent adoption of those rules or any other arbitral rules that provide for a confidentiality regime, it is recommended that parties enter into an explicit confidentiality agreement in large commercial disputes, if confidentiality is an important issue. In some cases, it may suffice to request the tribunal to order certain confidentiality arrangements. In line with the international trend, public law arbitrations (e.g. investor-state arbitrations) are conducted in a more transparent manner.

It is important to note that hearings conducted as part of proceedings before the Dutch state courts – including proceedings related to any arbitration proceedings, such as setting-aside proceedings – will be public. Any judgments rendered by Dutch state courts are public as well (though typically anonymised insofar as they pertain to natural persons), and are often published in a register that can be searched online.

Arbitral tribunals are not bound by the rules of evidence that are laid down in the Dutch Code of Civil Procedure. However, they may take inspiration from those rules. Additionally, the IBA Rules on the taking of evidence in international arbitration are frequently taken into account. There are no restrictions as to who can appear as a witness. The usage of written witness statements is not unusual. Cross-examination – which is not part of proceedings before the Dutch state courts – may then occur. The arbitrators have full power to weigh the evidence provided. As such, they may decide that evidence provided by related witnesses has less importance, but they are not obligated to draw that conclusion. The same principles generally apply to expert testimony, although experts are required to be independent and impartial. An arbitral tribunal may appoint experts on its own initiative (barring any agreement between the parties preventing it from doing so), but this is not very common. 'Hot-tubbing' does not seem to be an often-used practice.

Disclosure in arbitral proceedings is fairly broad when compared to the regime that applies to Dutch litigation cases, which is fairly restrictive and which may influence the extent to which Dutch arbitrators allow for disclosure in arbitral proceedings. Disclosure typically pertains to written/electronic documents.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Arbitrators

The tribunal must consist of an uneven amount of arbitrators. The arbitration agreement – or the arbitral rules that are incorporated into the agreement – typically provides for the mechanism by which arbitrators are appointed. For instance, the NAI rules provide that, where the parties have agreed that the tribunal will consist of three arbitrators, they must each appoint one arbitrator. The two designated arbitrators then jointly appoint a chair. Alternatively (i.e. this is not the default position, at least under the newest version of the NAI rules), the parties can agree to follow the NAI's list procedure. In that case, the NAI sends each of the parties an identical list of persons' names and the parties may strike out names against whom they have strong objections, while numbering the remaining names in their order of preference. The NAI will then invite persons named on the list to serve as arbitrators with due observance of the parties' preferences and objections. If insufficient names remain, the NAI may appoint others not mentioned on the list.

If there is no agreement on the appointment mechanism, the Dutch Arbitration Act states that the parties must agree on whom to appoint. If they are unable to do so within three months, they may request the court to make appointments.

Arbitrators must have legal capacity and be a natural person, and they must be independent and impartial. The IBA Guidelines on conflict of interest in international arbitration are often taken into account. There are no specific ethical/professional rules that apply to arbitrators. However, other professional rules may be applicable, e.g. if the arbitrator in question is a practising Dutch lawyer admitted to the bar (an *advocaat*), which is often the case.

Arbitrators must disclose potential reasons for which he/she may be challenged. In general, an arbitrator can be challenged if there is rightful doubt on his/her impartiality or independence.

Under the Dutch Arbitration Act, the state courts are competent to decide on any challenges (but note that the parties are free to agree otherwise and e.g. have an arbitral institution such as the NAI decide instead – and indeed, the NAI rules themselves contain a separate procedure for the challenge of arbitrators that deviates from the regime laid down in the Dutch Arbitration Act). A party wishing to challenge an arbitrator must file a written notice to the tribunal and counterparties within four weeks of disclosure or having learned of any potential challenge grounds. If the arbitrator who is challenged does not resign within two weeks, parties may refer the matter to the state courts (or, if agreed between the parties, e.g. the arbitral institution) which may then render a decision.

The parties can jointly terminate the arbitral tribunal's mandate.

Interim relief

The interim relief regime that is applicable in The Netherlands is noteworthy.

Arbitral tribunals have the power to provide interim relief and they can do so in the form of an order or, alternatively, an enforceable award. Parties may also turn to the state courts to seek interim relief, if the requested measure cannot be obtained quickly enough in arbitral proceedings. Tribunals can grant interim relief in pending arbitral proceedings, or in separate arbitral summary proceedings (which, for instance, the NAI rules provide for).

The interim relief that is available to parties is far-reaching, especially when compared to other jurisdictions. In general, in this respect, arbitral tribunals have the same broad powers as the state courts, with the exception of being able to provide approval to levy formal

© Published and reproduced with kind permission by Global Legal Group Ltd, London

prejudgment attachments of assets ('seizure') and the lifting thereof, which are both exclusive powers of the state courts. Although the measures requested often seek to maintain a certain *status quo*, as is typical in other jurisdictions, they may go far beyond that, and may even have repercussions that cannot be factually undone at a later stage. For instance, parties can ask for specific performance, or for injunctions, e.g. blocking the transfer of assets or the signing/closing of certain transactions.

All this is even more notable because the granting of interim relief is not conditional on bringing a claim on the merits (with the exception of a formal prejudgment attachment that can only be levied with the state courts' approval, which does require timely lodging of a claim on the merits afterwards).

In Dutch legal doctrine, it has been noted that the interim relief regime that is applicable may be too far-reaching and may lend itself to abuse of process. In particular, it has been observed that it is fairly easy to obtain the courts' approval to levy a prejudgment attachment. Courts seem to have picked up on these criticisms and have become more critical when reviewing prejudgment attachment applications over the past few years.

Arbitration award

Under the Dutch Arbitration Act, an arbitration award must adhere to certain formal requirements.

It must be made in writing and it must be signed by all arbitrators. If a minority of the arbitrators refuses to, or cannot, sign the award, the other arbitrators must note that fact in the award.

Additionally, the award must contain (further to the decision itself) the names and places of residence of the arbitrators, the names and places of residence of the parties, the date of the award, the place where the award was made, and the grounds for the decision that is laid down in the award.

The parties can agree to relieve the arbitral tribunal from the obligation to lay down the grounds of the decision in the award, after the commencement of the arbitral proceedings. This may happen if all parties have sufficient trust in the arbitral tribunal and are benefited by a quick award (as it saves the arbitral tribunal time).

The Dutch Arbitration Act does not itself contain a time limit within which the arbitral tribunal must render a decision. However, the applicable arbitral rules may provide guidance. For instance, under the NAI rules, the arbitral tribunal must decide expeditiously and must communicate to the parties (after the final hearing or after the final written statement was submitted) at which time it will render its award. It is, however, authorised to extend that time limit one or more times if necessary.

Although the Dutch Arbitration Act does not contain a specific provision on this topic, the arbitral tribunal may order costs for the parties. The costs allocation depends on the agreement between the parties and any costs requests made. Typically, the unsuccessful party will bear most of the costs. Costs that are often claimed and awarded are costs of counsel, of any experts, and the costs of the arbitration itself. Costs awards are typically fairly modest, which is in line with how costs awards function in litigation before the Dutch state courts.

Challenge of the arbitration award

It should be noted that an arbitral appeal is *not* possible unless agreed upon by the parties. If the parties have agreed that an arbitral appeal is possible but have not agreed on a time

© Published and reproduced with kind permission by Global Legal Group Ltd, London

limit, the Dutch Arbitration Act states that a party may lodge an appeal within three months.

An appeal is not always necessary. Parties always have three months to ask the arbitral tribunal to fix an obvious mistake that can easily be made undone (e.g. a slip of the pen). Similarly, if the arbitral tribunal has failed to render a decision on any of the claims that were brought forward, a party always has three months to issue a request to the arbitral tribunal to render an additional award.

Last but not least, it is possible to challenge an arbitral award. To do so, the relevant party has to initiate proceedings with the Court of Appeal in the district of the arbitration seat. The Court of Appeal's decision is only subject to the limited scrutiny of the Dutch Supreme Court. Parties can waive their right to lodge a Supreme Court appeal.

The grounds for challenge are limited and are summed up the Dutch Arbitration Act:

- There is no valid arbitration agreement.
- The constitution of the arbitral tribunal is not in accordance with the rules applicable thereto.
- The arbitral tribunal has breached its mandate.
- The arbitral award is not signed or does not contain the grounds for a decision.
- The arbitral award, or the manner in which it was made, violates public policy.

Two different time limitations apply. These time limits expire three months after: (a) the award was sent to the parties, or, if the parties have agreed to it, the award was deposited with the competent district court; and (b) service of process of an award with an *exequatur*. If the first time limit has lapsed, the time window within which an award can be challenged can be re-opened if the award is thus served (with *exequatur*) on the unsuccessful party.

A court may also partially set aside an award, insofar as the part of the award that is being challenged is sufficiently separable from the rest of the award. The court can do so even if the claimant has not explicitly asked the court to set aside the award in part.

The Dutch state courts do not often overturn arbitral awards on the basis of the abovementioned challenge grounds. However, at the same time, they do not shy away from overturning arbitral awards if they feel the grounds for challenge have merit. For instance, most famously, in 2016, the Hague District Court overturned the US$ 50 billion awards rendered under the Energy Charter Treaty in the *Yukos* case.

In exceptional cases, the Dutch Arbitration Act provides for the possibility of revocation of an arbitral award. This remedy is only available in cases where there was fraud, forgery or in which important documents were withheld. In such cases, the relevant party must bring a case before the Court of Appeal in the district of the arbitration seat within three months of having discovered the fraud, forgery or the fact that important documents were withheld.

Enforcement of the arbitration award

As mentioned, The Netherlands is party to the New York Convention (albeit with the reciprocity reservation that is commonly seen), and as such, the recognition and enforcement of an international arbitration award is primarily governed by the criteria set forth in that Convention. On the basis of article V, recognition and enforcement may be refused if proof is furnished that:

(a) the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties

© Published and reproduced with kind permission by Global Legal Group Ltd, London

have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(d) 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

(e) 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.

Additionally, paragraph 2 of article V of the New York Convention stipulates that recognition and enforcement of an award may also be refused if: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

In cases where the New York Convention does not apply – for instance, when the award was rendered in a state that is not a party to the Convention – the Dutch Arbitration Act provides for a recognition and enforcement regime applicable to international arbitration awards. In that case, the recognition and enforcement may be refused if the party against whom the recognition or enforcement is sought, proves: (i) that there is no valid arbitration agreement under the applicable law; (ii) the constitution of the arbitral tribunal was not in accordance with the rules applicable thereto; (iii) the arbitral tribunal has breached its mandate; (iv) the award may still be appealed in the jurisdiction where it was made; (v) the arbitral award was set aside by a competent authority in the jurisdiction where it was made; or (vi) if recognition and enforcement violate public policy.

In principle, initiating setting-aside proceedings does not stay enforcement in The Netherlands. The party against which enforcement is sought may attempt to stay enforcement via summary proceedings.

Dutch courts generally have a pro-enforcement disposition and grant *exequatur*s fairly easily. Once an exequatur is obtained, the party who is enforcing the award may engage a bailiff to do so. Further assistance from the courts is typically not required at this stage.

Investment arbitration

Investment arbitration is an area of particular interest in The Netherlands. As noted above, the Hague District Court made the international legal press in 2016 by overturning the US$ 50 billion awards rendered under the Energy Charter Treaty in the *Yukos* dispute. Furthermore, The Netherlands has entered into more than 100 bilateral investment treaties (BITs) and is also party to the Energy Charter Treaty and the Washington Convention (as was noted above). The many Dutch BITs, and a favourable tax regime, add to making The Netherlands an attractive jurisdiction for investors.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

As such, the *Achmea* decision rendered by the Court of Justice of the European Union on 6 March 2018 (Case C-284/16, *Achmea v Slovak Republic*) and the subsequent events stemming from that decision have been followed rather eagerly by Dutch arbitration practitioners. In the *Achmea* decision, the ECJ held that:

> *"Articles 267 and 344 [...] of the Treaty on the Functioning of the European Union] must be interpreted as precluding a provision in an international agreement concluded between Member States, [...] under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept."*

Although the *Achmea* decision garnered more than a few critical notes in the arbitration community, and further to guidance issued by the European Commission on 19 July 2018, in January 2019, EU member states issued various declarations on the legal consequences of the Achmea judgment and on investment protection in the EU.

Inter alia, member states have undertaken to terminate all bilateral investment treaties concluded between them. Additionally, it seems not unlikely that the Achmea decision will have consequences for intra-EU arbitrations under the Energy Charter Treaty too, although this view has been similarly criticised in legal literature (among other things, because the EU is itself a party to the Energy Charter Treaty) and has not yet been adopted by all EU member states.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Richard Woutering
Tel: +31 20 2050534 / Email: r.woutering@lvdk.com

Richard Woutering specialises in commercial dispute resolution. Richard has experience at all Dutch civil court levels (including the Supreme Court) and in arbitration proceedings under a variety of rules. He regularly acts in complex cross-border cases.

Richard joined Lemstra Van der Korst in September 2016, after having worked at Houthoff for six years. In 2015, he spent two months at One Essex Court, one of London's leading commercial barristers' chambers.

He graduated from Erasmus University Rotterdam in 2010, having completed an LL.B and LL.M degree there. He regularly teaches, *inter alia* in the '*Beroepsopleiding voor advocaten*' (the bar professional training course for Dutch trainee lawyers).

Ingmar Wassenaar
Tel: +31 20 2050532 / Email: i.wassenaar@lvdk.com

Ingmar Wassenaar specialises in corporate law litigation and international arbitration. He assists clients in international arbitration proceedings under a variety of rules, and in proceedings before the state courts, including the Enterprise Chamber of the Amsterdam Court of Appeal.

He is a staff member with the *Corporate Law Practice* journal (TOP). He is a regular guest lecturer at the universities of Leiden, Nijmegen and Amsterdam and a member of the Corporate Litigation Association. He has an international network through the International Bar Association (IBA) and the Association Internationale des Jeunes Avocats (AIJA).

In 1996, Ingmar both graduated from Utrecht University and from the Rotterdam Music Academy, where he studied clarinet and piano. From 1993 to 1996, he was a clarinetist in the Rotterdam Philharmonic Orchestra.

Lemstra Van der Korst

Prins Hendriklaan 16, 1075 BC Amsterdam, The Netherlands
Tel: +31 20 2050567 / URL: www.lvdk.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

North Macedonia

Kristina Kragujevska
Konrad Partners

Introduction

The demand for a transparent, time-efficient and cost-effective forum for dispute resolution has grown stronger with the steady increase of foreign investments in South-Eastern Europe. This has resulted in legislation being passed in North Macedonia that allows parties to custom-tailor their arbitration proceedings using internationally recognised standards and instruments.

To bring Macedonian arbitration law in line with international standards, the commission for drafting the 2006 Law on International Commercial Arbitration (**LICA**) decided to adopt the original text and structure of the 1985 UNCITRAL Model Law (**1985 ML**) to the greatest extent possible. LICA applies exclusively to international commercial arbitration where the place of arbitration is in North Macedonia. The legal framework under which domestic entities can bring their disputes to arbitration is provided for in Chapter 30 of the Law on Civil Procedure (**LCP**).

A major revision of LICA was planned to be published by the end of 2018, however the working group postponed the announcement of the draft text. It is not yet disclosed whether this revision will result in an arbitration law applicable both to international and domestic arbitration. In any case, the revision will incorporate the 2006 amendments of the 1985 ML.

The main arbitration institution in North Macedonia – the Permanent Court of Arbitration – has the authority to administer both domestic and international disputes. In 2011, consistent with its intention to incorporate the well-established international practices, the Court altered its structure with the adoption of the new Rulebook of the Court (the **Rulebook**). These changes led to immediate results, especially with regard to the shortening of the proceedings.

North Macedonia is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**). North Macedonia, as then part of Yugoslavia, had acceded to the New York Convention on 26 February 1982. In September 2009, the Government of North Macedonia notified the UN Secretary General of its decision to withdraw the reciprocity reservation; no other reservations have been made. North Macedonia is also a party to the 1961 European Convention on International Commercial Arbitration and the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**ICSID**).

Arbitration agreement

The agreement to arbitrate under LICA can be concluded in the form of a contractual clause in a contract or as a separate contract. Regardless of the choice, the will of the parties to have their dispute finally resolved through arbitration has to be expressed in writing. The

© Published and reproduced with kind permission by Global Legal Group Ltd, London

written form requirement is fulfilled if the clause is contained in (i) a document signed by the parties, or (ii) in an exchange of letters, telex, telegrams or other means of communication which will provide a record of the agreement. Any defect of the written form requirement is cured 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 the other. Any reference to a contract, including reference to general terms and conditions, which contains an arbitration clause, constitutes an arbitration agreement, but only if the written form is met and the reference is such as to make that clause part of the contract (Art.7 LICA).

In addition to the writing requirement, an arbitration agreement has to refer to a defined legal relationship, whether contractual or not (Art.2.6 LICA). Naturally, such a relationship can only be established on the assumption that the prerequisites for subjective arbitrability are met, i.e. the parties to the agreement to arbitrate had legal capacity to enter into such a contract.

With regard to objective arbitrability, LICA stipulates that any dispute for which an exclusive jurisdiction of a court in North Macedonia is not provided can be submitted to arbitration. With this, and in line with the Model Law, the term "commercial" is given a wide interpretation as to cover all relationships of a commercial nature. If a claim is filed with a court for the same dispute and between the same parties, the court shall reject the claim, unless it finds that the arbitration agreement is null and void, or incapable of being performed.

The principle of competence-competence is incorporated under Art.16 LICA. The arbitral tribunal may rule on its own jurisdiction, and rule thereby on any objections with respect to the existence and validity of the arbitration agreement. The principle of separability is also recognised, providing that an arbitration clause which is part of a main contract will be treated as an agreement independent of the other terms of the contract. LICA does not deviate from the original text of the 1985 ML with regard to these principles and further provides that the decision of the arbitral tribunal that the contract is null and void does not entail *ipso jure* the invalidity of the arbitration clause.

Arbitration procedure

The arbitration proceedings, unless otherwise agreed by the parties, commence on the date on which the request for the dispute to be referred to arbitration is received by the respondent (Art.21 LICA). LICA further provides for the possibility for the parties, or the arbitral tribunal, to state the facts supporting the claim, the points of issue and the relief or remedy sought within a determined period of time.

The Rulebook provides a detailed list on the information that has to be contained in the statement of claim, such as a detailed description of the parties, the arbitration agreement, the statement of facts and the request for relief, the name(s) of the arbitrators, determination of the value of the dispute, and all the evidence that is considered to be relevant (Art.42 Rulebook).

The place of arbitration, if not otherwise chosen by the parties, shall be Skopje. The arbitral tribunal may, if such decision is considered appropriate, meet at another place.

The parties are free to determine the rules of the procedure. In the absence of such agreement, the arbitral tribunal will conduct the procedure in such manner as it deems appropriate (Art.19 LICA).

Further, the parties are free to agree on the procedure for taking of evidence. Therefore, the

© Published and reproduced with kind permission by Global Legal Group Ltd, London

parties may also agree on the IBA Rules on the Taking of Evidence. In the absence of any such agreement, the arbitral tribunal has wide discretion regarding the conduct of the evidentiary proceedings, subject to the mandatory provision of the law such as equal treatment of the parties, the right to be heard, public policy, etc. This discretion entitles the arbitral tribunal to determine the admissibility, relevance and weight of any evidence. Although there are no special provisions in LICA regarding the hearing of witnesses, both written statements and oral hearings, including cross-examinations, are possible.

The arbitral tribunal is authorised to request the parties disclose certain documents. If the party does not comply with a request of the arbitral tribunal, the arbitral tribunal can request assistance from the competent court in North Macedonia (Art.27 LICA).

The arbitral tribunal may also appoint experts. Furthermore, the tribunal may request from the parties to provide the expert with all relevant information or to produce or provide access to any relevant documents, goods or other property for his/her inspection. If a party and an expert (either appointed by one of the parties or the arbitral tribunal) disagree on the relevance of the requested information and documents, the opposing party can request a decision in relation to the issue. Upon submission of the expert report, the parties can request the expert to attend an oral hearing to be cross-examined on the findings of his/her expert report (Art.52 Rulebook).

Subject to any agreement to the contrary, the arbitral tribunal can decide to hold an oral hearing or to conduct the proceedings without a hearing, solely based on the documents and other materials. In case of an oral hearing, the parties must be given advance notice. All statements, documents and other information submitted to the arbitral tribunal by one of the parties must also be delivered to the other party in due time.

LICA provides for confidential proceedings, such that unless otherwise agreed by the parties, the arbitration procedure is not open to the public.

Arbitrators

Consistent with the 1985 ML, LICA allows the parties to determine the number of arbitrators and does not require an odd number of arbitrators to be selected. If the parties cannot reach an agreement, then as a default rule the arbitral tribunal will consist of three arbitrators (Art.10 LICA). Parties are free to agree on a procedure for the appointment of the arbitrators. Failing such agreement, each party will appoint one arbitrator, and the two arbitrators thus designated will appoint the President of the arbitral tribunal.

The Rulebook provides for a slightly narrowed choice and gives the parties the right to decide whether the dispute shall be settled by a sole arbitrator or an arbitral tribunal composed of three arbitrators. Subject to any provision to the contrary, the Rulebook specifies the threshold of €30,000 in dispute as the upper limit, above which an arbitral tribunal of three arbitrators will be appointed. In this case, each party will appoint one arbitrator and the President of the Court will appoint the President of the arbitral tribunal (Art.28 Rulebook).

The President of the arbitral tribunal is always chosen from the list of arbitrators provided by the Court. Such limitation is not set for the parties – they are free to nominate an arbitrator not enrolled in the list (Art.30 Rulebook).

Generally, any natural person having full legal capacity can be appointed as an arbitrator. This implies that an arbitrator does not have to be a qualified lawyer, although the parties can agree on certain (professional) qualifications required for being appointed as an arbitrator.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Prior to his/her appointment, any arbitrator must disclose any circumstances which might raise doubts as to her/his impartiality or independence. The challenge of an arbitrator on the basis of his/her impartiality has to indicate any potential link to the parties, direct or indirect financial income or potential possession of confidential information in relation to the dispute, or any other information that might affect the impartiality of the arbitrator. In case the respective arbitrator does not resign, or the other party does not agree to the exemption, the decision regarding the exemption will be made by the arbitral tribunal, respectively, by the President of the Court. The right to challenge is also given to the party who nominated the arbitrator, but only for reasons that were not disclosed at the time of the appointment and discovered thereafter (Art.35 Rulebook).

The mandate of the arbitrator will be terminated if, due to legal or factual reasons he/she becomes unable to perform his/her function, or for other reasons fails to perform without undue delay, the respective arbitrator resigns, or the parties agree on the termination. If the parties cannot agree on the termination of the arbitrator's mandate, each party may request the President of the Court to decide on the termination of the mandate of the arbitrator (Art.37 Rulebook).

In case of termination of the mandate, a substitute arbitrator will be appointed under the same requirements that were applicable for the appointment of the arbitrator being replaced. In case an arbitrator has been replaced, unless otherwise agreed by the parties, the hearing has to be repeated. The repetition of the hearing is mandatory in case the procedure was conducted by a sole arbitrator (Art.39 Rulebook).

Interim relief

The arbitral tribunal may, at the request of a party, order interim measures against the other party which the arbitral tribunal considers necessary in respect of the subject matter of the dispute. The arbitral tribunal may also request the party to provide appropriate security in connection with the interim measure (Art.17 LICA).

Under Macedonian arbitration law, it is possible to apply both to domestic courts and to the arbitral tribunal for the issuance of an interim measure either before or during the arbitral proceedings. However, considering the arbitral tribunal's lack of enforcement powers, in case the party does not comply with the interim measure ordered by the arbitral tribunal, the party upon whose proposal the measure was issued may address the competent court for legal assistance. Taking into consideration that there are no special courts for arbitration matters in North Macedonia, legal assistance, if such is required, is provided by the Basic Courts (Art.17(2) LICA; Art.56(2) Rulebook).

Both the LICA (in relation to international arbitration) and the LCP (in relation to domestic arbitration) provide that the Court shall immediately reject any claim that is filed before the Basic Court for the same dispute and between the same parties for which an arbitration agreement has been concluded. Accordingly, anti-arbitration injunctions are not stipulated under Macedonian law.

Arbitration award

The arbitration award shall be in writing, and shall be signed by the sole arbitrator, the arbitrators, or respectively by the majority of the arbitrators. In the latter case, the arbitral award has to state the reason for any omitted signatures. If majority cannot be reached, the chairing arbitrator shall have a deciding vote.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The award shall state the reasons upon which it is based, unless the parties agreed otherwise. The award shall state the date on which it was made and the place of arbitration. The award shall be deemed to have been rendered on that day and at that place (Art.31 LICA).

Neither LICA nor the Rulebook prescribe a time limit for the rendering of the award. The Arbitration statistics for the year 2015 show that the average timeframe in which the proceedings are finalised, including the rendering of the arbitral award, was from four to twelve months.

A copy of the signed award is to be delivered to each party. Within 30 days of receipt of the award, a party can request the arbitral tribunal to correct any errors in computation, any typographical errors or errors of a similar nature in the award, or the arbitral tribunal can be requested to provide an additional interpretation of a specific part of the award. In case the request is considered to be justified, the arbitral tribunal will provide the correction or the interpretation. The interpretation shall be considered to be part of the original award (Art.33 LICA).

In addition, each party can request an additional award to be rendered with regard to issues that the arbitral tribunal failed to address in the original award. The additional award has to be rendered within 60 days of receipt of the request, provided that the same was justified (Art.33 LICA).

The arbitral tribunal shall allocate the costs of the proceedings, taking into account the outcome of the dispute. If the claim was successful only in part, the tribunal shall allocate the costs on a *pro rata* basis. The parties may, however, depart from this general rule, and allow for the tribunal to allocate the costs in a manner it deems fit (Art.7 Rules on Costs).

Challenge of the arbitration award

A claim for annulment shall be filed with the competent Basic Court, and must be based on at least one of the limited grounds for setting aside the award:

- a party in the procedure was incapable of concluding the arbitration agreement or to be a party to the arbitration agreement;
- a valid arbitration agreement does not exist under the applicable law to the agreement;
- the party has not been duly informed about the appointment of the arbitrators or the initiation of the arbitration proceedings or was otherwise unable to present its case;
- the arbitral award deals with a dispute not covered by the arbitral agreement, or contains decisions on issues beyond the scope of the arbitration agreement. If the default concerns only a part of the award that can be separated, only that part of the arbitral award shall be set aside;
- the composition of the arbitral tribunal or the arbitration procedure were not in accordance with the arbitration agreement, unless such agreement was in conflict with a provision of LICA from which the parties cannot derogate;
- the subject matter of the dispute cannot be settled by way of arbitration; or
- the arbitral award is in conflict with the public policy.

The claim for annulment can be filed within three months from the day of receipt of the award. LICA provides the possibility for the Court to postpone the commencement of the procedure for annulment and to provide the arbitral tribunal with additional time to correct the defects that could lead to the setting-aside of the award. However, so far there is no recorded case in which an arbitral award has been annulled in North Macedonia.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Enforcement of the arbitration award

An arbitral award (in conformity with the provisions of LICA) has the effect of a final judgment and can be enforced.

Any award enacted outside of the Republic of North Macedonia is considered a foreign arbitral award, and will thus be recognised and enforced in accordance with the New York Convention.

The procedure for recognition of a foreign arbitral award is conducted before the Basic Court where the opposing party has its seat of business. The procedure is initiated with an application for recognition of a foreign arbitral award. In accordance with the formal requirements of the New York Convention, the application shall be filed with originals, or certified copies of the arbitration award and the arbitration agreement.

Investment arbitration

There are 38 bilateral investment treaties in force in North Macedonia, with an additional two in process of ratification. North Macedonia is a party to the ICSID Convention. The Convention provides for arbitration in case of a dispute between the state and a foreign investor.

To date, North Macedonia has been involved in four investor-state disputes:

In 2007, the Greek company Hellenic Petroleum brought proceedings against the Republic of North Macedonia before the International Chamber of Commerce (ICC), and succeeded on the grounds of violation of a contract for the sale of the oil refinery OKTA.

In 2009, the electricity provider EVN AG brought proceedings against the Republic of North Macedonia under the ICSID Rules of Arbitration. In 2011 upon the request of both parties, the arbitral tribunal issued an award on agreed terms pursuant to Rule 43(2) of the ICSID Rules of Arbitration, incorporating the settlement reached by the parties.

In addition, in 2009 the Swiss confectionary affiliate Swisslion brought proceedings against the Republic of North Macedonia before ICSID. In its decision of July 2012, the arbitral tribunal decided that the Republic of North Macedonia breached its obligations under public international law by failing to accord fair and equitable treatment to the Claimant's investment. However, all other claims of the Claimant were dismissed and the Respondent was ordered to pay €350,000.00 of the Claimant's legal costs and expenses.

In 2015, Guardian Fiduciary Trust, Ltd. brought proceedings against North Macedonia before ICSID. The arbitral tribunal dismissed the Claimant's claim due to lack of jurisdiction, and ordered the Claimant to pay the costs of the proceedings.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Kristina Kragujevska
Tel: +389 230 65 441 / Email: k.kragujevska@konrad-partners.com

Kristina Kragujevska is an Associated Attorney at Konrad Partners. She represents and advises clients in variety of commercial and corporate transactions and disputes, with particular focus on protection of foreign investment. She is a member of the Macedonian Bar Association.

Konrad Partners

Bulevar Kiro Gligorov 4, 1000 Skopje, Republic of North Macedonia
Tel: +389 230 65 441 / Fax: +389 230 65 441 / URL: www.konrad-partners.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Norway

Erlend Haaskjold
Arntzen de Besche Advokatfirma AS

Introduction

Arbitration is the preferred method of dispute resolution in commercial matters. In Norway, the majority of commercial disputes of any importance are resolved by arbitration, not by litigation in the ordinary courts. There may be a number of possible explanations for this. In arbitration, the parties are free to elect the arbitrators of their choice. An arbitration panel established by mutual agreement may be tailored so as to secure the required expertise for the particular dispute. As there is normally no right to appeal an arbitral award, the parties will have a binding decision after one hearing. Finally, the parties normally retain control over the arbitration process; this flexibility is normally not available within the ordinary court system.

A particular feature of arbitration in Norway is the extensive use of *ad hoc* arbitration. Whereas institutional arbitration is widely used in Denmark and Sweden, there is no generally recognised arbitration institute in Norway. Arbitration *ad hoc* provides the parties with the necessary dynamics to resolve a commercial dispute as quickly and correctly as possible. The parties are at liberty to appoint the arbitrators of their choice, and to agree on a binding time frame for the case preparation. Specific rules for the proceedings may be established if this is required. The Norwegian legislation is generally regarded as "arbitration friendly". The courts will normally assist with the services usually rendered by an arbitration institute, such as the appointment of arbitrators and legal service of documents.

A large proportion of the arbitrations in Norway are international. Norwegian arbitrators are, due to their neutrality, in high demand. The similarity of the law in Denmark, Norway, and Sweden has created a common Scandinavian market for arbitration. Thus, it is not uncommon for a Norwegian arbitrator to sit in a case in Sweden, or for a Danish arbitrator to accept appointment in Norway. Scandinavian law is often described as a hybrid between the typical common law and civil law jurisdictions. In international commercial disputes, Scandinavian law is therefore often regarded as a convenient compromise, both for choice of law and for seat of arbitration. The international flavour of commercial arbitration is increasing.

The Norwegian Arbitration Act 2004 provides the legal framework for arbitration in Norway. The Act applies equally to national and international arbitrations. As only a few of the rules are mandatory, the parties retain autonomy over the dispute-resolution process. The Arbitration Act is to a large extent based on the UNCITRAL model law. There are few significant differences between the Arbitration Act and the Model Law. One important difference is, however, that the Norwegian Arbitration Act does not require that arbitration agreements are entered into in writing. Nevertheless, it is very unusual that the parties enter into an arbitration agreement that is not made in writing.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Norway is a signatory to the New York Convention. The Convention was ratified in 1961. There are no reservations to the general obligations of the Convention, and its provisions are incorporated in the Norwegian Arbitration Act of 2004.

Arbitration agreement

An agreement to arbitrate may be made in nearly any commercial matter. The agreement may concern a dispute that has already arisen, or the parties may agree that all potential disputes in a particular relationship, typically a contract, shall be resolved by arbitration. Today, most commercial contracts contain an arbitration clause. There are no formal requirements to such agreements, and even an oral agreement to arbitrate is enforceable in principle. However, the importance normally attached to an agreement to arbitrate, will inevitably lead the courts to look for clear evidence that an arbitration agreement has, in fact, been entered into. If the arbitration agreement is not in writing, it may be difficult to establish the competence of the arbitral tribunal, and there may be difficulties at the later stage of enforcement. In consumer disputes, arbitration agreements may only be entered into after the dispute has arisen.

An arbitration agreement may be drafted in different ways. At the initial stage of arbitral proceedings, it is not uncommon that the parties disagree as to the extent of the arbitration agreement they have entered into. Much effort is therefore made to ensure that an arbitration clause in a commercial contract is properly drafted so as to correspond to the common intention of the parties at the time of entry into of the contract. In the event that a contract with an arbitration clause is later supplemented with an addendum or an amending agreement, it is assumed that the arbitration clause in the original agreement will also apply to any dispute arising under the subsequent agreement.

When the parties agree to refer to arbitration a dispute that has already arisen, the arbitration agreement will often take the form of "terms of reference". Such terms will often set out in detail the elements in dispute that the parties submit to arbitration. In order to save time and costs, the parties may even agree on some basic facts that the arbitration tribunal can use as a factual background for the award.

The Arbitration Act is based on the principle of separability. When a contract contains an arbitration clause, the agreement to arbitrate is treated as an agreement separate and distinct from the main contract of which it is a part. It is fully possible that the arbitration agreement is governed by a different choice of law than the main contract. More importantly, the termination or invalidity of the main contract does not necessarily affect the arbitration agreement.

The arbitration agreement will normally contain the parties' express choice of the law applicable to the substance. The law thus chosen shall be applied by the arbitral tribunal. Accordingly, the Arbitration Act states that the arbitral tribunal shall apply the rules of law that have been chosen by the parties as applicable to the merits. A reference in the arbitration agreement to the law or legal system of a country shall, unless otherwise indicated, be construed as a reference to the substantive law of that country and not to its rules on choice of law. If the parties have not chosen a law in the arbitration agreement, the arbitral tribunal shall apply the rules of law as designated by applying Norwegian choice of law rules. The arbitral tribunal shall only decide a case on the basis of fairness if the parties have expressly authorised it to do so.

A dispute is considered non-arbitrable if the subject matter is not capable of being settled by agreement between the parties. A dispute is also likely non-arbitrable in cases where a

© Published and reproduced with kind permission by Global Legal Group Ltd, London

third party's consent is required, and in some aspects as far as it concerns rights *in rem*. Furthermore, a claim is non-arbitrable if the relief sought may only be granted by a state authority or the courts. Such cases include declaration of bankruptcy, taxation, the existence and validity of patents, certain competition law disputes such as imposition of fines, ordering a company to cease and desist activities harmful to competition, and granting clearance for acquisitions of businesses.

Arbitration procedure

The arbitration process is normally initiated by the issuance of a "notice to arbitrate". This is a formal letter from one of the parties to the other where particulars of the dispute are given, and a request to resolve the dispute by arbitration is made. A particular point to note is that such notice will prevent prescription of a claim.

As most arbitrations in Norway are *ad hoc*, the parties will then agree on a panel of arbitrators. Normally, the panel will consist of three arbitrators, and it is not uncommon that the parties reach agreement on all the arbitrators. The advantage of such procedure is that the arbitration tribunal will have the necessary expertise to resolve the dispute expediently. Alternatively, each of the parties may nominate one arbitrator, who then appoint the third arbitrator together. Once the arbitration panel has been established, the chair will invite to a case management conference. The purpose of such a conference is to agree on the procedural steps towards the oral hearing, to fix a date for the main hearing and to agree on a time frame and format of the written submissions. The parties will also agree on the presentation of evidence and witnesses.

In smaller disputes, the parties may agree to appoint a sole arbitrator. As there is no requirement for an oral hearing, the arbitration award may in certain circumstances be given on the basis of the case documents.

Arbitrators

The Arbitration Act requires that the arbitrators be impartial and independent of the parties, and qualified for the appointment. As most arbitration tribunals are established by the agreement of the parties, it is relatively rare to see disputes as to the suitability of a particular arbitrator. In commercial disputes, counsel will normally conduct extensive scrutiny of potential candidates in order to avoid complications at the enforcement stage. However, the Arbitration Act empowers the ordinary courts to decide on objections made against an arbitrator appointed in accordance with the prescribed procedure. Appointment of an arbitrator may only be challenged on specific grounds. Such grounds may be that there is serious doubt as to the arbitrator's impartiality or independence, or that the arbitrator does not have the qualifications expressly agreed between the parties in the arbitration agreement.

As a main rule, the panel will consist of three arbitrators. It is not uncommon that the parties reach agreement on all the arbitrators. The advantage of such procedure is that the arbitration tribunal will have the necessary expertise for the dispute. Alternatively, each of the parties may nominate one arbitrator, who then together appoint the third arbitrator. Alternatively, the parties may agree on a neutral body to make a default appointment.

The courts may not intervene in the selection of arbitrators. However, if the arbitral panel cannot be constituted in accordance with the arbitration agreement, each of the parties may request that the local courts appoint the missing arbitrator(s). The appointment made by the court is final and cannot be appealed.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

There is no provision to the effect that arbitrators are immune from liability. There is a general consensus that an action based upon error in fact or in law, will not succeed. However, there may be basis for a claim against an arbitrator in the event of serious misconduct or breach of the criminal law, such as corruption. There have been no such cases in Norway.

Interim relief

Unless otherwise agreed between the parties, an arbitral tribunal has the power to order the parties to undertake certain measures, such as preserving assets or the production of evidence. An order to this effect, however, is not enforceable. Failure to comply with an order made by the tribunal may influence the assessment of the evidence. The parties may ask the ordinary courts to issue an order for interim relief. Such court order will be enforceable.

The arbitral tribunal may request the ordinary courts to take depositions from witnesses and make an order for the production of documentary evidence. The arbitrators have the right to attend the court hearing when the witnesses are examined, and they may ask questions.

Arbitration award

The arbitration award shall be in writing and signed by all the arbitrators. The Arbitration Act contains a provision (which is rarely used) to the effect that the majority of the tribunal may sign, provided that the reason for all arbitrators not signing is stated in the judgment. The place and date of the award must be given. There is no fixed time limit for the award. However, most arbitrators do their utmost to avoid delay. If time is of the essence, a separate agreement may be made as to time limits for the award. According to the Arbitration Act, a signed copy of the arbitration award shall be filed with the local court and kept in the court's archive. Non-compliance with this provision does not make the award unenforceable.

The law does not impose any limits on the available remedies. In principle, an arbitration tribunal has the same power as the ordinary courts. The most common remedy in commercial disputes is damages in the event of breach. However, the arbitration tribunal may also grant the remedy of specific performance, which will be enforced by the relevant authorities on the basis of the arbitration award. The only limit to the power of the arbitration tribunal is interim measures.

The arbitration tribunal is empowered to make such cost order as it deems just. Although the rules of cost in the Civil Procedure Act are not directly applicable in arbitration, these rules may nevertheless exert some influence on the cost award. In essence, the winning party is entitled to have his cost paid by the other party. However, exemption from the cost liability may be made if there has been doubt about the result, or if there is some other justification for each of the parties paying their own costs and expenses.

Challenge of the arbitration award

An arbitration award is final and binding. There is no right of appeal. It is, of course, possible for the parties to agree on a right to appeal, but this is rarely seen in practice.

An arbitration award may be challenged on the grounds of procedural impropriety. Such challenge must be made within three months of receipt of the arbitration award. The most frequent grounds for challenging an award are: that a party has not been given notice of the arbitration; that the award falls outside the scope of the arbitration agreement; or that there has been a violation of the basic principles of due process. The Norwegian courts are

© Published and reproduced with kind permission by Global Legal Group Ltd, London

generally taken to be arbitration-friendly, and it is very rare indeed that a claim for the setting-aside of an arbitration award succeeds.

A claim that an arbitration award is invalid must be made in the form of a lawsuit before the local courts of first instance, and the lawsuit must be filed within three months from the day the party received the arbitral award. After this date, no objections may be made.

The parties may not waive the right to challenge an award by agreement before the dispute has arisen. The statutory provisions on the right of challenge to an award are therefore mandatory. It is generally assumed that waiver would violate the basic principles of justice and fairness, and that the statutory grounds for the setting-aside of an award are minimum rights in a democratic society. The Norwegian act does not adopt the view that waiver of the right to challenge may be based on the principle of party autonomy.

Enforcement of the arbitration award

Norway ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1961. The Convention has since been in effect, and its provisions are now incorporated into the 2004 Arbitration Act.

An arbitral award shall be recognised and enforceable, irrespective of the country in which it was made. Recognition and enforcement of an award requires that an original or certified copy of the award is made available. In addition, if the award has not been rendered in Norwegian, Swedish, Danish or English, the party shall also provide a certified translation. Documentary proof of the arbitration agreement or other basis for arbitration may also be requested.

Investment arbitration

Norway is currently party to 15 bilateral investment treaties (BITs) and 29 treaties with investment provisions (TIPs). Norway signed the ICSID Convention in 1966, the Energy Charter Treaty in 1995, and the International Energy Charter in 2015. So far, there has been no investment arbitration case against Norway.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Erlend Haaskjold
Tel: +47 23 89 46 08 / Email: erh@adeb.no

Erlend Haaskjold is a leading arbitration practitioner in Norway. He is Partner in the Litigation and Dispute Resolution Group at Arntzen de Besche law firm in Oslo. He is admitted to the Supreme Court of Norway and has presented a great number of cases before all instances of regular courts. He has extensive experience as an arbitrator in national and international disputes. He lectures commercial law at the Law Faculty at the University of Oslo.

Arntzen de Besche Advokatfirma AS

P.O. Box 2734 Solli, 0204 Oslo, Norway
Tel: +47 23 89 40 00 / Fax: +47 23 89 40 01 / URL: www.adeb.no

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Oman

Omar Al Hashmi & Syed Faizy
Al Hashmi Law

Introduction

Arbitration as an alternative dispute resolution mechanism is fast becoming popular in the Sultanate of Oman ("Oman"), with many international companies doing business in Oman and many Omani businesses engaging in international business.

In our experience, most corporate entities in Oman are increasingly turning to arbitration to resolve their disputes as opposed to court litigation, mainly due to the flexibility it offers and the shorter time taken for resolution of disputes, despite the generally higher costs of arbitration.

The court processes can often be lengthy, particularly where technically complex issues are involved, besides offering three tiers of courts, Primary, Appeal and Supreme, which naturally means a longer process.

Oman is party to 37 Bilateral Investment Treaties, of which 10 are signed but not in force and two have been terminated. Oman is also a signatory to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965).

The Law of Arbitration in Civil and Commercial Disputes, Royal Decree 47/1997 (as amended) (the "**OAL**") governs arbitrations in Oman. An arbitration agreement in Oman must have the following elements:

- the seat of the arbitrator (Article 3 of the OAL);
- the law governing the arbitration (Article 6 of the OAL);
- the parties submit to arbitration disputes arising out of a legal relationship, contractual or otherwise, and scope of the arbitration (Article 10(1) of the OAL);
- it should be made between competent persons, whether natural or juristic (Article 11 of the OAL);
- it must be in writing (Article 12 of the OAL);
- the number of arbitrators (Article 15 of the OAL);
- the appointment process (Article 17(1) of the OAL);
- the matters related to the interim and precautionary measures (Article 24(1) of the OAL);
- the rules of the arbitration procedures (Articles 25 of the OAL); and
- the language for the arbitration (Article 29 of the OAL).

In addition, subject to the agreement between the parties, they may also include the following in an arbitration agreement:

- notice requirements (Article 7(1) of the OAL);
- the nationality of the arbitrator(s) (Article 16(2) of the OAL);

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- date from when the arbitration is deemed to commence (Article 27 of the OAL), and the duration of the arbitral proceedings (Article 45(1) of the OAL);
- the time within which the claimant must submit the Statement of Claim and that of the defendant for filing the Statement of Defence or any counterclaim (Article 30 of the OAL);
- whether in the absence of a Statement of Defence, the claimant may be entitled to a default award (Article 34(2) of the OAL);
- the parties' respective claims of waiver of a breach and the limitation periods thereof (Article 8 of the OAL);
- the arbitration to be conducted in writing – the pleadings to be in writing with documentary evidence attached thereto, and the exclusion of any oral testimonies or submissions (Article 33(1) of the OAL);
- each arbitration session to be recorded in minutes (Article 33(3) of the OAL);
- the right of the parties to present an expert opinion evidence in response to any report submitted by an expert appointed by the arbitral tribunal who is summoned for examination (Article 36(4) of the OAL);
- in case the governing law is not that of Oman, the applicability of the governing law related to conflicts of laws (Article 39(1) of the OAL); and
- in case the arbitral tribunal consists of more than one arbitrator, whether the award must be unanimous (Article 40 of the OAL).

Enforcement of arbitral awards

Omani courts tend to uphold and enforce strictly those arbitration agreements which satisfy the requirements of the OAL. The laws provide very limited options for an appeal against an arbitral award, which invariably reduces the jurisdiction of the courts.

Governing legislation

The OAL governs the arbitration proceedings in Oman, including domestic arbitration as well as the implementation of foreign arbitral awards in Oman.

The OAL is broadly based on the UNCITRAL Model Law, which provides a greater degree of confidence to the international businesses to opt for arbitration under the OAL.

It is, however, a mandatory rule for international commercial arbitrations that the Court of Appeal at Muscat has supervisory jurisdiction, whereas for domestic arbitrations the Primary Court has jurisdiction (Article 9 of the OAL).

Jurisdiction

Matters involving elements of crime or criminal allegations are not dealt with through arbitration. For an arbitration proceeding, the dispute between the parties must emerge from a legal relationship between them and the parties must agree to resolve the matter through arbitration, as stated above.

The arbitral tribunal has authority to decide a question on its own jurisdiction (Article 22 of the OAL).

The courts in Oman generally decline to entertain claim petitions where an arbitration agreement is applicable to resolve the dispute in question. However, the conduct of the parties is also considered by the courts in such matters – for instance, in cases where a claimant files a petition in the court to resolve a matter which is otherwise supposed to be

© Published and reproduced with kind permission by Global Legal Group Ltd, London

resolved through arbitration, and where the defendant has continued to defend himself before raising an objection to the court's jurisdiction at a later stage. In such cases, the court exercises its discretion to decide whether to continue hearing the matter before it, or to direct the matter for arbitration. The OAL law does not allow arbitral tribunals to assume jurisdiction over legal persons which are not party to the arbitration agreement, except in cases where the non-party submits to the jurisdiction of the arbitral tribunal.

The courts may refuse an application for *ex parte* relief where the matter is subject to arbitration to govern the dispute. The courts may address the issue of jurisdiction of an arbitral tribunal only on application for nullification of the final arbitral award (Articles 22(3) and 53(1)(f) of the OAL).

Rules regarding the choice of law

If the parties fail to agree on the governing law, the arbitral tribunal uses its discretion to determine the most appropriate governing law in view of the facts of each case (Article 39(2) of the OAL). The Civil Transactions Law of 2013 provides rules related to conflict of laws that may be followed by the tribunal in determining the governing law, subject to its discretion.

The arbitral tribunal

There are certain elements that should be noted for formation of an arbitral tribunal in addition to the language of the arbitration proceedings and nationality of the arbitrator(s), such as providing that the arbitrator is not an un-rehabilitated bankrupt, or convicted of a serious offence, or that he may not be under a guardianship, and that he may not be banned from exercising some of his civil rights because of a criminal conviction or misdemeanour offence for breach of honour or trust (Article 16(1) of the OAL).

Court's intervention in appointment of arbitrators

The parties may choose the procedure for appointment of the arbitral tribunal. In case the parties are unable to agree on the appointment of a sole arbitrator, either party may apply to the President of the Court of Appeal for the appointment of the arbitrator. If a party requests that the other party appoint an arbitrator to a tribunal of three arbitrators but the other party fails to do so within 30 days of such request, the requesting party may apply to the President of the Court of Appeal for the appointment of an arbitrator on behalf of the other party; similarly, if the two arbitrators appointed by or on behalf of the parties fail to nominate a third arbitrator to chair the arbitral tribunal, a party may apply to the President of the Court of Appeal for the appointment of the chief arbitrator (Article 17(1)(b) of the OAL).

Court's intervention in recusal of arbitrators

An arbitrator is required to disclose any circumstances, existing or potential, which may cause doubt or suspicion as to his neutrality or independence before accepting an appointment as an arbitrator (Article 16(3) of OAL). A party may apply to the tribunal for recusal of an arbitrator if circumstances appear giving rise to serious doubt and suspicion concerning his impartiality or independence during the proceedings. In case the tribunal declines such application, the applicant may apply to the courts to intervene. The OAL also provides for the court's intervention to recuse an arbitrator from hearing the matter on grounds of lack of partiality or independence (Article 19(3) of the OAL).

Procedural rules

The OAL provides procedural rules to govern arbitral proceedings, however, it also provides greater flexibility to the parties, allowing them to decide on most procedural matters provided the agreed procedures do not contravene the Omani laws (Articles 1 and 25 of the OAL).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The following procedural steps are required pursuant to the OAL:

- Where the arbitral tribunal consists of three arbitrators, a party must nominate its arbitrator within 30 days of receipt of a request from the other party. Once the two arbitrators are nominated (or appointed by the court), they must nominate the chief arbitrator of the tribunal within 30 days of the nomination of the last two arbitrators (Article 17(1)(b) of the OAL).
- It is mandatory that the arbitrator gives his acceptance of the appointment in writing (Article 16(3) of the OAL).
- The pleadings are required to comprise of, at a minimum, a Statement of Claim (Article 30(1) of the OAL) and a Statement of Defence (Article 30(2) of the OAL).
- The award must be translated into Arabic if written in another language, and then submitted to the court secretariat for its execution (Article 47 of the OAL). As a matter of practice, the party to whom the award is more favourable gets it translated and submitted for execution.

Powers and duties of the arbitrators

The OAL sets out the following powers of the arbitral tribunal:

- the arbitral tribunal determines the place and time of hearings and, if applicable, of inspection of property and any other similar actions (Article 28 of the OAL);
- it also decides on its own jurisdiction, and on the existence, validity or relevancy of an arbitration agreement (Article 22(1) of the OAL);
- except if otherwise provided for by the arbitration agreement, it determines the language of the arbitral proceedings (Article 29 of the OAL);
- if the parties have not agreed on any arbitration procedures, the arbitral tribunal has powers to decide on those (Article 25 of the OAL);
- making procedural orders, as may be applicable (Article 42 of the OAL);
- determining the governing law if the parties have not agreed on such (Article 39(2) of the OAL);
- if the matter so requires, appointing one or more experts for specific tasks and specifying the applicable scope of their respective mandate(s) (Article 36(1) of the OAL);
- convening a hearing for examination of the expert pursuant to his report (Article 36(4) of the OAL);
- in case a witness fails to appear before the arbitral tribunal or refuses to answer questions posed to him by the arbitral tribunal, the arbitral tribunal may apply to the President of the Primary Court to penalise such witness (Article 37(1) of the OAL); and
- consideration of applications for clarification of the operative pronouncement of the award, correction of any typographical or mathematical errors in the arbitral award, and passing an additional award in respect of any claim not adjudicated on in the arbitral award (Articles 49, 50 and 51 of the OAL).

The OAL imposes the following duties on the arbitrators:

- to disclose any circumstance which may cause doubt as to the arbitrator's independence or impartiality (Article 16(3) of the OAL);
- if there exists an arbitration agreement between the parties, the arbitrator must apply the terms of the arbitration agreement in the arbitral proceedings (Article 39(1) of the OAL);

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- treating the parties equally fairly, and giving them adequate and sufficient opportunity to make their submissions (Article 26 of the OAL);
- sufficiently notifying the parties of hearings of the proceedings (Article 33(2) of the OAL) and recording the proceedings of each hearing in minutes and providing it to the parties (Article 33(3) of the OAL);
- providing the parties with full copies of expert reports and any accompanying documents and evidence submitted to the arbitral tribunal by an expert (Articles 31 and 36(2) of the OAL);
- providing the parties with sufficient opportunity to respond to expert reports (Article 36(3) of the OAL) and, if the tribunal convenes a hearing for examination of an expert, providing the parties with the right to present their own experts to provide their opinion in respect of the issues contained in the report of such expert to be examined (Article 36(4) of the OAL);
- endeavouring to pass the final award within the time agreed between the parties. In case there is no agreement between the parties with respect to the time, the arbitral tribunal should decide the matter within 12 months from the commencement of the arbitration. The arbitral tribunal may take an extension for up to an additional six months, however, any further extension may only be taken with the consent of the parties (Article 45(1) of OAL);
- delivering to the parties a signed copy of the award in writing within 30 days of passing the award (Article 45(2) of OAL); and
- providing justifications in the arbitral award, and the grounds on which the award is based (Article 43(2)).

Preliminary relief and interim measures

The arbitral tribunal is permitted to award preliminary or interim relief if the parties have requested it, including injunctive relief. The type of interim or preliminary relief must be necessitated by the nature of the dispute and must be temporary in nature, to serve the interim purpose (Article 24(1) of the OAL).

The relevant party, however, may need to approach the courts if the execution of such interim or preliminary relief requires enforcement through courts (Article 14 of the OAL). Additionally, a party may also apply for court's intervention where the arbitral tribunal does not have the power to grant such interim relief or has the power by agreement of the parties but refuses to grant such interim relief.

Making an award

The OAL requires an arbitral award to have the following elements:

- unless otherwise agreed between the parties, it shall contain the reasons and the grounds on which it is based (Article 43(2) of the OAL);
- it shall, at the minimum, contain certain details of the parties, the arbitrator(s), the issues at hand, the summary of the claims, the governing law, applicable procedures, pleadings and documentary evidence, in addition to the operative part of the arbitral award. (Article 43(3) of the OAL); and
- it shall be signed by at least a majority of the arbitrator(s) (Article 43(1) of the OAL).

The parties have 30 days to apply for the following after passing of the arbitral award:

- clarification on the operative pronouncement of the award (Article 49 of the OAL);

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- correction of any typographical or mathematical errors in the award (Article 50 of the OAL); and
- an additional order in respect of any claim originally pleaded but not adjudicated on in the award (Article 51 of the OAL).

Challenge of an award

Arbitral awards passed in arbitration proceedings governed by the OAL cannot be appealed (Article 52(1) of OAL); however, a party may file a suit with the Court of Appeal seeking nullification of an award (Articles 52(2) and 54(2) of the OAL) on the following grounds:

- there is no arbitration agreement, or the agreement is void or voidable, or the time provided in the agreement to bring arbitration proceedings had expired at the time of commencement of the arbitral proceedings;
- at the time of entering into the arbitration agreement, one of the parties was incompetent or incapacitated;
- either due to insufficiency of notice or otherwise for any reason beyond its control, one of the parties was unable to present its case;
- the constitution of the arbitral tribunal or appointment of the arbitrator was in contradiction to the law or the arbitration agreement;
- the arbitral tribunal exceeded its jurisdiction by adjudicating on issues outside the scope of the arbitration agreement or otherwise amends the award in purporting to correct any typographical or mathematical errors; or
- the award is contrary to the public order of Oman (Articles 50(2) and 53 of the OAL).

It may be noted that a suit for nullification on one or more of the grounds set out above must be filed with the Court of Appeal within 90 days of notification of the arbitral award (Article 54(2) of OAL).

Enforcement of an arbitral award – Foreign and domestic

Oman became a signatory to the New York Convention on 25 February 1999 following proclamation of a royal decree concerning Oman's membership in the convention (R.D. 36/98).

Additionally, Oman is a contracting state of:

- the Riyadh Convention on Judicial Cooperation between States of the Arab League; and
- the Gulf Cooperation Council Convention for the Execution of Judgments, Delegations and Judicial Notifications.

As such, Omani courts provide a ready platform for the enforcement of the qualified foreign and domestic judgments passed pursuant to OAL; however, in case the court considers an award conflicting with a decision of the Omani courts in respect of the subject matter of the dispute adjudicated in the arbitral award or otherwise contravenes the social/public order in Oman (Article 58(2) of OAL), the award may not be enforced by the courts in Oman.

Further, since there is a 90-day period of applying for the nullification of the arbitral award on one of the grounds provided in the OAL and mentioned hereinabove, the relevant party must wait for a period of 90 days before applying for enforcement of the arbitral award (Article 58(1) of the OAL).

In case the arbitral award is made in a country which is not a signatory to either of the conventions to which Oman is a signatory, there must be a bi-lateral agreement between Oman and that country.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

In addition, requirements for the enforcement of foreign arbitration awards are set out in the Law of Civil and Commercial Procedure (the LCCP), R.D. 29/2002 as amended, including the reciprocity provisions. (Article 353 of LCCP). The following elements are required to be noted (Article 353 of LCCP):

1. the award is made by an arbitral tribunal having jurisdiction in the country where it was made;
2. it is final according to the law of such country and not grounded on a deception;
3. the claim on which the award is based would not be a breach of Omani law;
4. the award does not contradict any judgment or order previously passed by the Omani courts; and
5. the award does not contravene public policy or conduct in Oman.

An application to execute a foreign arbitration award is made to a three-judge bench of the Primary Court, (Article 352(2) of LCCP), which summons the opposite party. It can also hear questions related to the invalidity of the award on one of the grounds provided under the LCCP.

Any arbitration governed by the laws of Oman would be limited to the civil remedies available in the courts. Interest may be recovered for a debt in respect of commercial activities (Article 79 of the Commercial Law) or otherwise pursuant to any interest payable as per the contract between the parties subject to the dispute (Article 80 of the Commercial Law). The Ministry of Commerce and Industry, in agreement with the Oman Chamber of Commerce and Industry, sets yearly interest rates, which may apply in case the parties have not set any contractual rate of interest (Article 80 of the Commercial Law).

The way forward

Oman is considered to be the biggest untapped market for investment and business opportunities in the Middle East. With the Omani Rial being among the strongest currencies in the world, Oman's economy is considered stable in spite of the general economic slowdown in the region. The International Monetary Fund forecast Oman to be the "*Fastest Growing Economy in the GCC in the year 2019*" in the World Economic Outlook in October 2018. Further, Oman was ranked 2nd globally in the world Wellness Index released in March 2019. Such factors not only make Oman a favourable destination for foreign investment, but also attract high-net-worth individuals to consider making Oman their base.

Oman is the ideal business location for investors interested in expanding the Gulf markets. Oman was ranked 1st in Starting a Business criteria, by the World Bank, among the MENA's 20 countries, and 32nd globally, in addition to being ranked as the world's 33rd most competitive country in the World Economic Forum's Global Competitiveness Index.

The above reasons amply justify the increasing popularity of arbitration in Oman versus court procedure, which trend we can reasonably expect to increase in the coming days.

In 2015, it was announced that an arbitration centre would be established in Oman under the supervision of the Oman Chamber of Commerce and Industry, although this has not yet happened. Although not having a dedicated arbitration centre does not generally hinder the popularity of arbitration in Oman since the parties normally choose the arbitrator's office or another neutral place as the venue of the arbitration, a dedicated arbitration centre would boost the confidence of the international parties, and we hope that such a facility will open in Oman soon.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Omar Al Hashmi
Tel: +968 2449 3121 / Email: omar@ohlaw.net

Mr Omar Al Hashmi is the chairman and founding partner of Al Hashmi Law and an acclaimed Omani lawyer. He is a graduate of the prestigious Sultan Qaboos University and has established the law firm's practice with various other lawyers and associates from US, UK, Spain, India, Middle East and some other countries.

Omar is an acclaimed lawyer and advises in the areas of general corporate, litigation, arbitration, M&A, property, administration, policy & regulatory issues, and has represented clients in several landmark transactions in Oman and abroad. He has also co-authored the exclusive Oman chapter in *Global Legal Insights – Employment & Labour Law* in the years 2018 & 2019 as the exclusive law firm from Oman, and the exclusive Oman Chapter in the *International Comparative Legal Guide to Corporate Immigration* 2018 edition, besides having advised on some headline-making landmark deals in Oman.

Syed Faizy
Tel: +968 2449 3121 / Email: syed.faizy@ohlaw.net

Mr Syed Ahmad Faizy is the Head of Corporate and Chief Legal Director at the Firm and advises in various areas, including general corporate, M&A, employment, arbitration and dispute resolution.

Syed Faizy has several years' work experience with some leading names in India, Malaysia and Oman. He is also on the Board of a group of companies based in UAE and on senior advisory panels of some Non-Government Organizations and commercial bodies in India.

He writes on various legal issues and some of his writings have been published in different international publications in Malaysia, Oman, and India in areas of corporate law, Islamic banking & finance, and labour law. He co-authored the exclusive Oman chapter on Employment Law in *Global Legal Insights – Employment & Labour Law* 2018 and 2019 editions, and the exclusive Oman chapter in the *International Comparative Legal Guide to Corporate Immigration* 2018 edition, besides having advised on some headline-making landmark deals in Oman.

Al Hashmi Law

Al Ghoubra Plaza, Al Ghoubra, Muscat, Oman
Tel: +968 2449 3121 / Fax: +968 24493120 / URL: www.ohlaw.net

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Portugal

Nuno Albuquerque, Luís Paulo Silva & Maria Amélia Mesquita
N-Advogados & CM Advogados

Introduction

Nowadays, arbitration as a dispute resolution method has become a true success in Portugal and has been increasingly used in both international and domestic disputes, involving both private and public law.

The Portuguese Voluntary Arbitration Law (VAL) is regulated in the Annex to Law no. 63/2011, of December, which is based on the Model Law on International Commercial Arbitration, UNCITRAL / UNCITRAL of 1985, remodelled in 2006, which entered into force in March 2012.

This arbitration law aimed to introduce a more modern arbitration regime and promote Portugal as a seat for international arbitrations, and also tried to reconcile – whenever it saw usefulness in this – the solutions already tested in the application of Law no. 31/86, with the guidelines and inspirations in several national laws regulating arbitration that have been approved in the last 15 years in other countries.

The Law is characterised by the following fundamental points:

- it is characterised by the autonomy of the arbitration process (as stated in the UNCITRAL Model Law);
- as advocated by UNCITRAL, formal validity of the arbitration agreement is required in order to give greater flexibility to compliance with the written form requirement; and
- VAL also confers jurisdiction on state courts to rule on the competence of arbitral tribunals only where the arbitration agreement is manifestly null and void, inoperative or incapable of being performed.

Portugal also joined the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("CNI 1958") on 16 January 1995. However, it is in force in the Portuguese legal system with an express reservation of reciprocity (but not with the commercial reserve), which means that it applies only in relation to arbitration decisions rendered in states that are also party to this Convention. The grounds for the refusal of recognition and for the annulment of arbitral awards are, in the Portuguese law, broadly in line with the grounds for refusal of recognition laid down in CNI 1958.

Regarding the international arbitration legal regime, this is regulated by Chapter IX of the VAL. According to Article 49, international arbitration is a private and voluntary means of resolving a dispute, with a contractual nature or not, where the interests of international trade are at stake.

Thus, the VAL states, in Article 49 no. 2, that the same internal rules are applicable to international arbitration, *mutatis mutandis*.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The VAL also integrates the general arbitration regime and must be applied to all arbitral proceedings, including the necessary arbitration and certain special arbitrations, unless a special law expressly determines otherwise. Only those special laws may punctually or generically derogate from the application of the PAL or by establishing a procedural regime different from that provided for therein.

The most prominent commercial arbitration institution in Portugal is the Arbitration Centre of the Portuguese Chamber of Commerce and Industry, whose rules entered into force in March 2014 and reflect both the changes introduced by the PAL and international best practice. The Centre may act as an appointing authority, if agreed between the parties in the arbitration agreement.

There are no international arbitration bodies based in Portugal, although the ICC has a national committee in Portugal, which assists the Court in the appointment of Portuguese arbitrations.

Arbitration agreement

The first chapter of the VAL is dedicated to the arbitration agreement.

Any litigation concerning patrimonial interests may be submitted by the parties, through an arbitration agreement, to the decision of arbitrators, unless the same litigation is subject exclusively to the courts of the State (e.g., criminal and insolvency disputes) or to compulsory arbitration (e.g., certain labour disputes and disputes regarding the introduction of generic drugs in the market), according to the Article 1.

As determined by Article 1, no. 3 of the VAL, the arbitration agreement may have as its subject matter a present dispute, even if it concerns a State court (arbitration agreement), or any litigation arising out of a contractual or non-contractual legal relationship (arbitration clause).

The State and other public law bodies can also celebrate arbitration conventions if such agreements have the object of private law disputes and since they are authorised by law.

In order to be valid and effective, those agreements must comply with several requirements. In fact, the arbitration agreement must be in written form, and this requirement is fulfilled when it appears in a document signed by the parties, an exchange of letters, telegrams, fax or other means of communication.

It is considered that the arbitration agreement meets the requirement in written form when it appears in electronic, magnetic, optical, or other type of support, offering the same guarantees of reliability, intelligibility and conservation.

Also referred to as an arbitration agreement is the reference made to a contract containing an arbitration clause, provided that such contract complies with the written form and the remission is made in such a way as to make that clause an integral part, thereof, of the contractual clauses.

One of the main requirements of the arbitration agreement is the determination of the subject-matter of the dispute, and specifying the legal relationship underlying the disputes from which they may emerge.

In fact, the arbitration clause shall include a detailed statement of the dispute in order to ensure that no matter submitted to arbitration is excluded, since the arbitral court may only know of the issues contained therein.

According to Article 3 of the VAL, any arbitration clause that does not fulfil the requirements

© Published and reproduced with kind permission by Global Legal Group Ltd, London

stated in Articles 1 and 2 of the VAL is void.

Article 4 of the VAL, for its part, provides that the arbitration agreement may be modified, revoked and expiry:

- *Modification*: it may be modified by the parties until the acceptance of the first arbitrator, or with the agreement of all the arbitrators, until the delivery of the arbitral award.
- *Revocation*: can be revoked until the delivery of the arbitration award.
- *Expiry*: the death or extinction of the parties does not terminate the arbitration agreement nor extinguish the arbitration.

Regarding the competence of the arbitral tribunal, Article 18 refers that this tribunal may decide on its own jurisdiction, even if for that purpose, it becomes necessary to assess the existence, validity or effectiveness of the arbitration agreement – see Article 18/1 of the VAL.

This legal provision gives a letter of law to the fundamental principle of arbitration, the principle of competence-competence: the arbitral tribunal has full competence to solve all questions raised in the arbitral proceedings relating to it, whether of a substantive nature relating to the merits of the case, or a procedural nature. The principle of competence-jurisdiction enshrines the autonomy of the arbitral tribunal in relation to the jurisdiction of the state courts.

Arbitration procedure

The parties are free to agree on the procedural rules, including those with respect to the commencement of the arbitration (e.g., by adopting institutional rules that provide for a different procedure).

According to Article 33 of the VAL, the arbitration procedure begins when the defendant receives the submission request of that dispute – this will happen if nothing is stipulated in the Agreement of the parties. Usually, the arbitration dispute request is known as "notice to arbitration". The Law does not provide for the minimum contents of that request.

This will happen even before the constitution of the arbitral tribunal, outside the jurisdiction of that court. Within the time limits determined by arbitral tribunal or stipulated by the parties, the claimant submits his petition, expressing his request and the facts on which it is based. On the other hand, the defendant presents his complaint, explaining his position in relation to the plaintiff's petition.

With the application and the objection, the claimant and defendant, respectively, may join documents which they deem relevant, and mention in the written pieces other documents or other evidence that may emerge.

The arbitral tribunal may admit, or not, any means of proof, and it has the power to deliberate the value of the evidence.

The defendant may file a counterclaim if the object is covered by the arbitration agreement.

Even though the Law is silent on this exact point, the truth is that the arbitration notification should contain the following elements:

- parties' names;
- summary description of the dispute;
- clear formulation of the intention to submit the dispute to arbitration;
- arbitration agreement identification;

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- number of arbitrators to be constituted by the arbitral tribunal;
- identification of the arbitrator that should intervene as sole arbitrator, if the Claimant has expressed such wish;
- identification of the referee of the appointing party; and
- place of arbitration.

Regarding the place of arbitration, the Portuguese Arbitration Law also gives wide discretion to the parties, according to Article 31. In the absence of the parties' agreement, the arbitral tribunal sets the location, taking into account the circumstances of the case and the convenience of the parties. The arbitral tribunal also can – if the parties have not agreed anything to the contrary – gather in certain locations that it deems convenient.

With respect to disclosure in the arbitral process, the Portuguese jurisdiction considers the IBA guidelines, also known as "soft law", which address legal loopholes between the different jurisdictions and the way the courts operate. Those orientations provide to the arbitrators a relative strength to admit, or reject, the means of evidence and its suitability to which case.

Such guideline is also stated in the second part of Article 19, no. 2 of the UNCITRAL Model Law – and, by its influence, Article 30, no. 4 of the VAL which, however, as was clear from the preparatory work, should be considered non-imperative.

In relation to the other matters regulated in this article, the hierarchy of norms is the following:

- contractual freedom of the parties;
- fundamental principles of the process and other mandatory rules established by law; and
- the arbitral powers of the arbitral tribunal in matters of procedure.

The Portuguese Legislator took into consideration, in the VAL's preparation, the guidelines of all major international arbitration institutions, for their efficiency, flexibility, antiquity and neutrality to all parties involved in resolving a dispute under its auspices.

The Portuguese Arbitration Law also took into consideration the combination of the best civil law features and the equity of the common law system, in its several legal provisions; for example, in the case of third parties' intervention, stated in Article 36 of the VAL.

Arbitrators have a legal duty to be independent and impartial and are also subject to the rules of suspicion and impediment that apply to judges.

Furthermore, the arbitration procedure is confidential and that duty shall also apply to all the arbitrators, parties and the arbitration institutions involved, according to Article 30 no. 5 of the VAL. This duty shall also apply at all pre-procedural stages, in the course of the proceedings and after the proceedings have been completed, and shall relate to the whole content of the arbitration proceedings.

Arbitrators

The parties are free to choose the number of arbitrators, through the arbitration agreement or subsequent written document signed by the parties, according to Article 10 no. 1 of the VAL.

Nevertheless, if the arbitration tribunal is to be constituted by a single arbitrator and there is no agreement between the parties on such designation, such arbitrator is appointed by the

© Published and reproduced with kind permission by Global Legal Group Ltd, London

state court at the request of either party – Article 10 no. 2 of the VAL. If the arbitral tribunal is to be composed by three or more arbitrators, each party chooses an equal number of arbitrators and those arbitrators choose the presiding arbitrator – Article 10 no. 3 of the VAL. No-one may be forced to act as arbitrator until the full acceptance of that nomination.

In accordance with Article 12 of the VAL, if the arbitrator accepts the nomination, only the excuse based on a supervening case that prevents the arbitrator from performing such function is legitimate.

Each appointed arbitrator shall, within 15 days of the notification of his designation, declare in writing the acceptance of the charge to the party appointing him (unless otherwise agreed by the parties). If, within this period, nothing is declared, the non-acceptance of the order by the arbitrator shall be understood.

Anyone who is invited to serve as an arbitrator must disclose all circumstances that may give rise to doubts as to his impartiality and independence – Article 13 of the VAL.

It should also be pointed that if an arbitrator who has accepted the charge, unjustifiably excuses himself from the exercise of his function, he is liable for damages caused – Article 12 no. 6 of the VAL.

This last question also converges with the matter of the immunity of judges. The Portuguese Arbitration Law opted for the express provision of the two cases which may incur arbitrator's liability, namely:

- Article 12 no. 6: "The arbitrator who accepted the charge, unjustifiably excused himself from the performance of his duties shall be liable for damages caused."
- Article 43 no. 4: "Arbitrators who unjustifiably prevent the decision from being delivered within the prescribed period shall be liable for the damages caused."

At first sight, it is believed that the mere arbitrator's fault may be enough. However, as a general rule, the responsibility of the arbitrators is only the result of particularly serious situations, and fraud is often required. Usually, however, it is the rules of the institutionalised arbitration centres themselves that serve as a reference to cases of immunity of arbitrators.

Non-Portuguese nationals can, and indeed do, act as arbitrators in arbitrations seated in Portugal or where hearings are held in Portugal. There are no specific immigration or other requirements.

Interim relief

The Interim Relief and preliminary orders are regulated in Chapter IV of the Portuguese Arbitration Law. Article 20 determines that the arbitral tribunal has the legal power to issue interim measures, at the request of one of the parties, and hearing the opposing party. The interim measures are temporary measures, decreed by sentence, through which the arbitral tribunal intimates or orders one party to:

(a) maintain the current situation, or restore the *ex-ante* situation, while the dispute is ongoing;

(b) not perform such acts that may cause prejudice to the arbitral process;

(c) ensure the preservation of assets or rights concerning the arbitral award; and

(d) preserve evidence which may be relevant to the outcome of the dispute.

In the arbitral process, Portugal does not have specific precautionary measures, which are thus all unnamed.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Indeed, the Portuguese Arbitration Law precautionary measures coincide with those foreseen for Portuguese civil proceedings, between Articles 362 to 409 of the Portuguese Code of Civil Procedure, such as the enrolment of assets. But these are not exhaustive because, in arbitration, what matters is to resolve the conflict as soon as possible and in the most effective manner, irrespective of the scope and nature of the measure.

An interim measure required under Article 20 of the VAL can only be decreed if:

- there is a serious likelihood of the existence of the right claimed by the applicant and he can show sufficiently founded fear of his injury; and
- the damage resulting to the defendant from the order does not considerably exceed the damage that the applicant intends to avoid.

Still in this matter, there are still two concrete situations that need to be distinguished: the decree of the injunction, and the execution of it.

In fact, the arbitral tribunal may order the precautionary measures required and timely to the good outcome of the litigation. However, certainly, due to lack of coercive powers of the arbitral tribunal, it cannot ensure the execution of the decreed measures. Thus, the injunction can be decreed by the arbitral tribunal and be enforced through recourse to the state court in accordance with Articles 27 and 28 of the VAL.

Despite the fact that the arbitral procedure is strictly based on the principle of adversarial proceedings, the truth is that reality does not apply to the interim measures, under penalty of losing its useful effect. To solve this issue, the Law, inspired by the UNCITRAL Model Law in its 2006 version, in Article 17-B, solved the problem with "preliminary orders", foreseen and regulated in Article 22.

These measures, the specific regime of which is provided for in Article 23 of the VAL, allow the arbitral tribunal to take a decision on the conduct to be taken by one party, at the request of the other, without hearing the requested party.

While both interim measures and preliminary orders are binding upon the parties, only the first may be enforced by state courts.

Anti-suit injunctions are expressly forbidden by Article 5(4) of the VAL.

Arbitration award

The arbitrators judge the dispute under the law, unless the parties agree that they shall decide *ex aequo et bono* or as *amiable compositeur* (Article 39).

In an arbitral proceeding with more than one arbitrator, any decision of the arbitral tribunal shall be taken by a majority of its members, excepting the cases in which is not possible to form a majority, in which case the decision is taken by the president of the court – Article 40 no. 1.

The requirements regarding the sentence are foreseen in Article 42 of the VAL, this being quite important, because non-fulfilment of the requirements may lead to the nullity of the sentence.

Form of decision

The sentence should be reduced to writing and signed by the arbitrator or arbitrators.

Content of award

- The award must mention the date on which it was given and the place of arbitration (determined in accordance with Article 31 of the VAL).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- The award must state the reasons upon which it is based, unless the parties agree to waive the reasoning or if the parties have reached an understanding – Article 41 of the VAL.
- The award must include in the judgment the apportionment by the parties of the costs directly resulting from the arbitration proceedings.

The awards must be pronounced within the term of 12 months since the acceptance of the last arbitrator. However, these deadlines can be freely extended by mutual agreement, or by court decision, once or twice, always for consecutive periods of 12 months, well-founded. Nevertheless, the parties may object to deadline extension.

The arbitral award is always notified to the parties and a copy is always signed and sent to the parties by the arbitrator or arbitrators, producing the award's effect on the date of its notification.

Challenge of the arbitration award

There is no specialist arbitration court for voluntary arbitration in Portugal. State courts, in particular, Courts of Appeal – which are the default courts for assistance and control under the VAL – are familiar with the law and practice of international arbitration, generally applying the VAL in a predictable and consistent manner.

As a rule, arbitral awards will only be subject to appeal if expressly foreseen by the parties; hence, the grounds on which an award may be appealed against before state courts will vary according to party specification. In international arbitrations seated in Portugal, appeal will only be possible to another arbitral tribunal if the parties so have agreed and regulated its terms.

Correction and clarification of the award

Within 30 days of receiving notice of the award, any party may ask the arbitral tribunal to make an additional award concerning parts of the claim or claims submitted in the arbitral proceedings but omitted from the award. Any additional award must be rendered within 30 days of the request. (Article 45, no. 5.)

Challenge of the award

According to Article 46 of the VAL, the challenge of an arbitration award may only take the form of an annulment request. The challenge of the award must be submitted to the competent state court accompanied by the following elements:

- certified copy of the arbitral award; and
- translation of the award delivered in a foreign language (if applicable) to Portuguese.

The Portuguese Arbitration Law, like the New York Convention, sets narrow grounds to set aside the award. Indeed, the arbitral award can only be annulled by the competent state court if:

A) the party making the request demonstrates that:
   I. one party to the arbitration agreement was affected by incapacity, or that the agreement is not valid under the law to which the parties have subjected it or even the terms of this law;
   II. some of the fundamental principles referred in the Article 30 (1) were infringed and it had a decisive influence on the resolution of the dispute;
   III. the composition of the arbitral tribunal or the arbitration proceedings were not in accordance with the agreement of the parties, unless this agreement conflicts with

© Published and reproduced with kind permission by Global Legal Group Ltd, London

a provision of this law from which the parties cannot derogate or, in the absence of such an agreement, which has not complied with this Law and, in any case, that this disagreement had a decisive influence on the resolution of the dispute;

IV. the judgment has been given on a dispute not covered by the arbitration agreement or contains decisions that go beyond the arbitration agreement;

V. the arbitral tribunal ordered a higher amount or a different object of the request, knew of issues that it should not have taken a decision on, or did not decide on questions that it had to consider;

VI. the judgment was rendered in violation of the requirements established in Article 42, no. 1 and no. 3; and

VII. the judgment was notified to the parties after the maximum deadline for the effect fixed in accordance with Article 43; or

B) the court finds that:

I. the subject-matter of the dispute cannot be settled by arbitration under Portuguese law; or

II. the content of the award offends the principles of the international public order of the Portuguese State.

The annulment request may be filed only within 60 days of the date on which the party seeking such annulment has received the notification of the judgment or, if an application has been made in accordance with Article 45, from the date on which the arbitral tribunal rendered a decision on that request.

In the process of annulment of an arbitration award or in other circumstances, with the exception of an appeal, the state court may not know the merits of the matter decided by the arbitral tribunal, and such questions must be referred to another arbitral tribunal for consideration – Article 46, no. 9 of the VAL.

Enforcement of the arbitration award

There is no specific trend of Portuguese courts regarding the enforcement of arbitral awards. But Portuguese courts are fairly knowledgeable on the matter and quite prone to enforce awards.

Portuguese courts will reject recognition and enforcement of awards that have been set aside or suspended by the courts of the country in which the award was rendered, or under the law of such country.

National awards

According to Article 46 of the Portuguese Arbitration Law, it is possible to execute the sentence if the part that requests the execution of the award to the competent state court provides, with the enforcement request, the following documents:

- the original of the judgment or a certified copy thereof; and
- translation of the award into Portuguese, if it is written in a foreign language.

In the case of a generic award of condemnation, their settlement is made in accordance with paragraph 6 of Article 716 of the Portuguese Code of Civil Procedure. This liquidation may also be requested from the arbitral tribunal according to paragraph 5 of Article 45, in which case the arbitral tribunal, hearing the other party, and producing evidence, makes a complementary decision, judging equally within the limits proved.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

It should be noted that an arbitral award, even if it has been the subject of an application for the annulment of a judgment, may be enforced. However, the challenging party may request that the challenge have suspensive effect on the execution provided, for that purpose, it offers a bond within the period set by the court. In this case, the provisions of Article 733 of the Portuguese Code of Civil Procedure apply.

International awards

As established in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Portugal recognises and enforces arbitration awards handed down in other Contracting States under the rules laid down in national law.

Investment arbitration

Portugal is party to several bilateral and multilateral treaties regarding the recognition and enforcement of arbitral awards. The most important bilateral treaties include those between Portugal and Portuguese-speaking countries, such as Angola, Cape Verde, Guinea-Bissau, Mozambique and Sao Tome and Principe. As for multilateral treaties, Portugal is a party to the Geneva Convention on the Execution of Foreign Arbitral Awards, the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States, and the Inter-American Convention on International Commercial Arbitration.

Despite the fact that the legal arbitration framework is relatively recent in Portugal, it is curious that between 1851 and 1930, a number of disputes were recorded in a book by Francisco Castro Caldas, dating from 1935, of which Portugal was a part, 13 of which were international investment arbitrations, and where one of the parties was the State. These arbitrations were related, namely, to compensate British and American "loyal subjects" for the termination of the concession of the railroad of Lourenço Marques to the border of the Transvaal, and for its appropriation by the Portuguese Kingdom.

In the last 20 years, Portugal has ratified a vast range of Investment Protection Treaties (TIPs), which are integrators of arbitration clauses, and with a broad protection of investment.

The ICSID Convention

The Convention for the Resolution of Disputes stands among the various instruments that have focused on investment arbitration in recent decades, relating to investments between States and Nationals of other States, held in Washington, DC, in 1965, which established the International Center for the Settlement of Investment Disputes (ICSID), of which Portugal has been a member since 1984.

Energy Charter Treaty

The Energy Charter Treaty, also signed in Lisbon in 1994, is another multilateral treaty that covers rules about the resolution of disputes occurring specifically in the energy sector.

In fact, from the late 1960s onwards, several States began to enunciate a program of bilateral treaties for the promotion and protection of investment ("Bilateral Investment Treaties" or "TBI"), mechanisms of the Washington Convention. In recent decades, Portugal has been following, along with other countries of the European Union, ratifying and signing bilateral agreements and treaties.

However, nowadays, investment arbitration has been expanding in Portugal, counting on the diligent performance of companies that are already aware of this reality and have started to adopt investment arbitration as a mean of settling disputes.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Third-party funding

No regulation on third-party funding of arbitration exists in Portugal, but the market is still small if we compare it with countries like the United States and the United Kingdom. However, even though it is not yet fully developed in Portugal, third party funding continues to take strides in that direction. Regulation could deal with issues like costs related to arbitration and the responsibility of the funder for such costs; the definition of third party funding; the relationship between the funders, the assisted parties and the parties' counsel regarding attorney-client privilege, as well as the question of disclosure of the existence of a funding agreement and conflicts of interest.

Given the high costs of some commercial claims and the need for small and medium-sized Portuguese companies to finance the pursuit of their claims, coupled with the increase in international arbitration and the steady economic growth in size and complexity of commercial transactions in Portugal, third-party funding is expected to feature increasingly in commercial and international disputes in Portugal.

Given the fact that there is no regulation on third-party funding, it would seem prudent for arbitration agreements to include certain provisions to ensure less uncertainty in potential claims, and in particular: (1) the obligation to disclose the existence of funding agreements in the event of disputes, and the content to be disclosed; and (2) acknowledgement by the parties that, as a security measure to avoid a potential annulment of the award or refusal of its recognition and enforcement under the 1958 New York Convention, the funder's eventual uplift should not comprise any recovery of costs or indemnity due to the prevailing party in the arbitration or litigation.

If the practice of third party funding is to grow in Portugal, its use and practice must be tailored to the particularities of Portugal's legal system, otherwise there is a risk of driving participants away instead of encouraging them to develop this industry.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Nuno Albuquerque
Tel: +351 253 609 310/330 / Email: nunoalbuquerque@nadv.pt

Born on July 19, 1964, in Angola. Nuno has a law degree, University of Coimbra (1988). Nuno has been inscribed in Portugal's Bar association, as a lawyer, since 1990; in Angola's bar association, since 2008; in Paris' Bar association, since 2014. He is an insolvency administrator, inscribed in the official list since 1995. Nuno is the executive director of CAAL – Angolan Arbitration Centre for Litigation, since 2012. He is a certified mediator – public and private mediation ICFML, Catholic University, Oporto, 2014. Arbitrator for CAAD – Administrative Arbitration Centre; for TAD – Sports Arbitral Court (where he is also Vice-President) since 2015; for the Arbitration Centre for Property and Real Estate, since 2016. Nuno is the founding partner of "N-Advogados & CM Advogados".

Luís Paulo Silva
Tel: +351 253 609 310/330 / Email: luispaulosilva@nadv.pt

Born on September 29, 1983, in Guimarães, Portugal. Luís has a law degree, University of Minho (2006). Luís is inscribed in Portugal's Bar association, as a lawyer, since 2008. He is a post graduate in Tax Law, Corporate Law, Judiciary Law and Arbitration. Luís is a member of the Spanish Club of Arbitration, since 2012. Presently, he is a lawyer at "N-Advogados & CM Advogados".

Maria Amélia Mesquita
Tel: +351 253 609 310/330 / Email: ameliamesquita@nadv.pt

Born on November 4, 1986, in Braga, Portugal. Amélia has a law degree, University of Minho (2010) and a Masters in Judiciary Law, University of Minho (2013). Amélia has been inscribed in Portugal's Bar association, as a lawyer, since 2014. She is a certified mediator – public and private mediation ICFML, Catholic University, Oporto, 2016 and she has also been legally qualified to give professional training, since 2010. Amélia has also been a member of the Spanish Club of Arbitration, since 2013 and a ICC YAF member, since 2015. Presently, she is a lawyer at "N-Advogados & CM Advogados". Since 2017, she is also a postgraduate on Fashion Law, by the Portuguese Catholic University.

N-Advogados & CM Advogados

Rua Bernardo Sequeira, n.º 78, 1st floor, 4715-671 Braga, Portugal
Tel: +351 253 609 310/330 / URL: www.nadvogados.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Russia

Sergey Kovalev, Sergey Kislov & Evgeny Lidzhiev
Kovalev, Tugushi & Partners

Introduction

Generally, international commercial arbitration is regulated by the Law of the Russian Federation dated 7 July, 1993 No. 5338-1 "On International Commercial Arbitration" (the Law on ICA). Procedural rules on the enforcement of arbitral awards and challenges to them are provided by the Commercial (Arbitrazh) Procedural Code, which makes references to international treaties – for example, the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.

That Law on ICA is based on the provisions of the UNCITRAL Model Law on International Commercial Arbitration 1985. Thus generally, most of the rules regarding the arbitration agreement, arbitration procedure and arbitral award comply with UNCITRAL Model Law, except for a few issues especially adopted in 2006 and later. For instance, the competence of an arbitral tribunal to grant interim measures is stipulated in current legislation but tribunal orders are not enforceable under the procedure.

In 2015, amendments to the Law on ICA in Russia affected both domestic arbitration and international commercial arbitration. The new Federal Law of 29 December, 2015 "On Arbitration (*treteyskiy* proceedings) in the Russian Federation" came into force 1 September, 2016 (the New Law). At the end of 2018, the New Law was amended by the Federal Law of 27 December, 2018 No. 531-FZ (the Amendments).

The New Law predominantly regulates domestic arbitration (both institutional and *ad hoc* arbitration), but some provisions are applicable to international arbitration:

(a) registration of arbitration institutions by the Russian Ministry of Justice (with a preliminary recommendation of the Council on modernisation of arbitration proceedings under the auspices of the Ministry of Justice (the Council)), establishing strict rules for launching and functioning of arbitration institutions;

(b) an obligation to deposit arbitral awards and store case materials in arbitration institutions (for *ad hoc* arbitration – in an arbitration institution specified in an arbitration agreement or a clause, or in the commercial court at the place of the enforcement of an award);

(c) compulsory enforcement of an arbitral award, if the arbitral award provides for any changes in state or other registers (including shareholders' register); and

(d) arbitrability of corporate disputes, but the arbitration proceedings may be conducted only under the auspices of an arbitration institution, in accordance with the special rules on corporate dispute resolution – the rules have to be approved, published and deposited in the register.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Launching arbitration institutions in Russia and arranging their everyday work is getting harder due to unnecessary complications regarding access to Alternative Dispute Resolution (ADR). Initially this was predetermined by the need to avoid the use of domestic arbitration institutions for fraudulent purposes, and to reduce the activity of in-house *treteyskiy* arbitration institutions. This new approach also applies to international arbitration seated in Russia:

- International arbitration institutions have to be approved by a recommendation of the Council and registered by the Russian Government (from March 2019 according to the Amendments – by the Ministry of Justice).
- Rules on international commercial arbitration, on corporate or other disputes, and on expedited arbitration, must be approved, published and deposited in accordance with the rules of the Ministry of Justice.
- Foreign arbitration institutions have to be well known and recognised worldwide to be registered.

One of the key amendments is the broadening of the scope of "international arbitration" under Russian law.

Previously, arbitration was deemed to be international if a dispute arose out of foreign trade relations or other international relations, or concerned a foreign party or a Russian company with foreign investments.

Recently the scope has been extended: a dispute is now considered to be international if it arises out of foreign trade relations or other international relations, concerns a foreign party or a Russian company with foreign investments, a foreign company with Russian investments, or if obligations are to be performed abroad or closely connected to a foreign state.

The Council has registered only two domestic arbitration institutions in the last two years given the total amount of 14 applications (including one dismissed application by a foreign arbitration institution). Two other arbitration institutions are entitled to administer arbitration in accordance with the federal law, without special registration: the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry; and the Maritime Arbitration Commission at the Chamber of Commerce and Industry of the Russian Federation.

The number of authorised arbitration institutions has not increased as of March 2019.

There are several benefits of arbitration compared to litigation in Russia:

- Arbitration provides a higher level of professionalism and the people who resolve the disputes are more qualified to do so. Judges in state courts, especially the district courts, do not generally have sufficient qualifications and knowledge to resolve cross-border disputes due to the high caseload of straightforward cases, although judges in commercial (*arbitrazh*) courts can generally deal with complicated cases with a foreign element.
- Arbitration, unlike litigation, provides confidentiality and privacy. In commercial courts in Russia, judgments and hearings are made public, with the final judgment containing all information about the dispute, including sums, names and contents of documents, although courts of general jurisdiction do not provide full publicity about a dispute.

Arbitration in Russia does, however, have a few serious drawbacks:

- Arbitration in Russia generally takes more time than litigation. The average length of court proceedings in commercial courts is about six months; while the usual situation at the International Commercial Arbitration Court (ICAC) is that arbitration takes about

© Published and reproduced with kind permission by Global Legal Group Ltd, London

10 or 12 months, Russian parties to arbitration rarely execute the award voluntarily. Generally, it can take up to six months to enforce an arbitral award in Russia.

- Arbitration is much more expensive than litigation. The state can charge a court fee of up to US$3,000 to consider a dispute in the commercial court, in contrast with the typically higher costs of arbitration.

Reform of Russian arbitration law is deemed to be quite controversial because it provides some arbitration-friendly steps, while arbitration institutions' activity in Russia is becoming more strictly regulated.

The Amendments might be considered as a second wave of arbitration reform in Russia which mostly concerns the registration procedure for arbitration institutions.

The Amendments came into force on 29 March, 2019. The main purposes of these amendments are to: (1) clarify the procedure of domestic and international arbitration involving *inter alia* foreign parties; and (2) reflect the most important wake-up calls to arbitration in Russia. We hereby list and briefly comment on these amendments.

First of all, the authority of the Russian Government to approve and grant the functions of a Permanent Arbitration Institution to non-governmental organisations is now transferred to the Russian Ministry of Justice, which is a lower level of state body.

Such amendment may make the procedure of decision-making on new arbitration institutions' registration simpler and less time-consuming. Simultaneously, all decision-making process is now concentrated in the Ministry of Justice, hugely increasing its powers.

As previously stated, foreign arbitration institutions previously had to register an office and hire staff in Russia in order to obtain a right to govern disputes involving Russian parties. From March 2019 they have to do so only in order to govern Russia-based (i.e. fully domestic) disputes.

Therefore, due to the Amendments, international arbitration institutions can now resolve international disputes in Russia as Place of Arbitration, which simplifies the procedure of further enforcement of such arbitral awards.

This amendment may be deemed as very important and a positive step towards the global arbitration community, because it simplifies registration in Russia for well-known arbitration institutions.

In order to obtain a right to resolve international disputes involving Russian parties, widely recognised foreign arbitration institutions should now provide to the Council the amended list of documents, which is as follows:

1. an application (signed by authorised staff of arbitration institutions);
2. reference information about the history and activity of an arbitration institution;
3. extract from the state register of legal entities or other official document regarding the status of an institution;
4. arbitration rules for corporate disputes verified by an institution (if an institution is to administer corporate disputes); and
5. documents confirming the creation of a separate office of an institution in Russia, if an institution is to administer Russian domestic arbitration disputes (except disputes arising between parties in a specific administrative district in Kaliningrad region and Primorsky region).

As Amendments provide that if the Russian Ministry of Justice rejects the application of an

© Published and reproduced with kind permission by Global Legal Group Ltd, London

institution to obtain the functions of Permanent Arbitration Institution, the refusal now has to be just and reasoned, as provided by the New Law. This amendment provides greater opportunity to challenge the refusal in court.

One of the matters of high criticism of Russian arbitration reform was the lack of criteria for recognition of institution as widely recognised. Now, one of the Amendments provides that the Ministry of Justice has to enact the list of criteria of this wide recognition, which is not published yet (as of March 2019).

According to the Amendments, disputes arising out of public procurement and state contracts relations (i.e. Federal Law 223-FZ dated 18 July 2011) are now arbitrable, which will allow international companies working with Russian state companies to enjoy the benefits of arbitration as a more confidential and faster way to resolve disputes out of state contracts and public procurement relations.

Arbitration agreement

An agreement is required to be in writing. An agreement can be concluded in written form by:

- Exchange of letters, messages on teletype, telegraph or other electronic means so long as it provides the identity of the other party.
- Exchange of procedural documents, if one party states the existence of the agreement, and the other party does not protest.
- Reference to another document, if the nature of the reference makes the arbitration agreement part of the main agreement, including the rules of on-exchange trading, for example, tenders for concluding contracts of sale of goods, securities, foreign currency repurchase agreements, and sale of financial derivatives.

The Law on ICA provides another way to conclude an arbitration agreement in written form. This includes a clause on resolving disputes in the articles of incorporation of a legal entity, by means of arbitration.

Separate arbitration agreement

An arbitration agreement can be concluded either as a clause in the main contract or as a separate arbitration agreement. The clause in the main contract is considered to be independent from the rest of the contract. This means that a clause in the main contract is sufficient for an arbitration agreement to exist.

A reference to another document which contains the arbitration agreement is enforceable and qualifies as a written form of arbitration agreement (see above, *Substantive/formal requirements*). A reference to the rules of an arbitration institute is considered to be an arbitration agreement; however, in that case the clause referring to the institute is considered to be a clause of the main contract.

As for the common approach, an arbitration agreement is not affected if the main contract is found to be invalid.

Parties are now entitled to conclude an arbitration agreement to resolve corporate disputes, but the clause has to be included in the chapter of a legal entity. (Shareholders of joint stock companies who number more than 1,000, or shareholders of public joint stock companies, cannot enter into arbitration agreements.)

The Amendments in 2018 have not concerned the regulation of an arbitration agreement.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Arbitration procedure

Russian law does not stipulate any mandatory procedural rules for arbitration proceedings. Arbitration must be confidential, and hearings held in camera, if agreed by parties. In general, the rules on arbitral procedure are unified with UNCITRAL Model Law on International Commercial Arbitration.

Russian law does not provide default rules on arbitration, except that:

- If the respondent does not present any response or evidence to a claim, the arbitral tribunal may still continue proceedings. This does not mean, however, that the respondent is taken to have accepted these claims. The arbitration agreement can alter the application of this rule.
- The inappropriate conduct of the parties in arbitration proceedings is a ground for refusal to enforce. In that case, it is important to determine the applicable law.

Other rules on arbitration procedure (the commencement, language of arbitration, hearings, presenting evidence) comply with provisions of UNCITRAL Model Law on International Commercial Arbitration and respect the autonomy of parties to arbitration and arbitral tribunal to determine the procedure.

The rules applicable to the court proceedings are not applicable to private dispute resolution, such as arbitration. The HCCH Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965 is not applicable to the service of Russian parties, as concluded by the Supreme Court of the Russian Federation in its Ruling on November 5, 2015 in the case No. A08-4781/2014. The issue of appropriate service by the arbitral tribunal depends on the applicable procedural rules, including arbitration rules and the law of the seat of arbitration.

The New Law and further amendments introduce new rules on state courts' powers in support of arbitration. For instance, an arbitral tribunal with a seat of arbitration in Russia, or a party to arbitration with the preliminary consent of an arbitral tribunal, may apply to a competent state court for assistance in obtaining evidence.

The state court assists in obtaining written, material evidence or other documents. The request has to be submitted to the state court at the place where the evidence is located. The court conducts hearings to consider the request for obtaining evidence. The court will dismiss the request of an arbitral tribunal or a party to arbitration if: (1) the requested evidence does not comply with requirements for the evidence in accordance with the Russian procedural rules; (2) rights and interests of third parties may be involved; (3) a dispute being considered by an arbitral tribunal is not arbitrable; and (4) the requested information involves state secrets or any other secret information of third parties.

The Amendments in 2018 have not concerned the arbitration procedure.

Arbitrators

The Law on ICA provides general rules on the impartiality and independence of arbitrators. Only reasonable doubts as to an arbitrator's impartiality and/or its independence may lead to impartiality or independence being challenged. Russian legislation does not explain what circumstances may constitute such reasonable doubts or what the requirements are. Additional requirements to an arbitrator's candidacy may be agreed by parties to the arbitration agreement.

Recent amendments introduce several requirements for a sole arbitrator (or at least one arbitrator out of three):

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- An arbitrator must have higher education.
- An arbitrator must be aged 25 or older.
- An arbitrator cannot be a natural person who does not have full legal capacity or is under custody or guardianship.
- An arbitrator cannot hold a post as a judge, advocate or other professional, where a conflict of interest would arise.
- An arbitrator cannot be appointed if the person's profession does not allow them to act as an arbitrator. For example, according to Art. 3 of the Law on the Status of Judges in the Russian Federation, a judge cannot be an arbitrator (save retired judges).
- An arbitrator cannot be appointed if their capacity as a judge, prosecutor, attorney, notary, etc. has been terminated due to an offence incompatible with their profession.

Parties are free to choose the number of arbitrators and the appointment procedure.

The only requirement is that the number has to be odd. If parties fail to agree on the number of arbitrators, the number is three. The competent state court may assist if any party or a third person ignores its obligations on appointment under an arbitration agreement.

In proceedings with three arbitrators, both parties appoint one of the arbitrators and the appointed arbitrators appoint the third one. If within 30 days of their appointment the appointed arbitrators have not appointed the final arbitrator, a state court appoints the third arbitrator upon the party's request.

The same rule applies to the sole arbitrator if parties fail to agree on the candidacy. The arbitrator will be dismissed if the arbitrator recuses him or herself, or the parties agree to cease the arbitrator's mandate. If the parties do not agree, the dispute is resolved by the competent court.

There are two main grounds for challenging an arbitrator:

- The existence of any facts that cause doubts concerning the impartiality and independence of the arbitrator.
- Failing to comply with requirements set by the federal law or parties' agreement.

The Amendments in 2018 have not affected the arbitrators.

Interim relief

There are two options in order to obtain interim relief in the Russian Federation, either via state courts or arbitrations.

As a rule of thumb, interim measures issued by foreign courts or arbitral tribunals are not enforceable in Russia because they do not meet the criteria of finality and are not 'awards on the subject matter of the case', as required by clause 26 of Information Letter No. 78 of the Presidium of the Supreme Arbitrazh Court, dated July 7, 2004, and clause 33 of the Ruling of the Plenary session of the Supreme Arbitrazh Court of the Russian Federation No. 55 rendered on October 12, 2006.

In *AB Living Design (Sweden) v Sokos Hotels St. Petersburg (Russian Federation)* (ruling of the Presidium of the Supreme Arbitrazh Court of the Russian Federation, No. 6447/10, October 5, 2010) the Supreme Arbitrazh Court confirmed that since an interim award issued by the arbitration tribunal is of preliminary character and can be subsequently amended by the tribunal, it cannot be enforced via the New York Convention.

The court also expressed the concern that awards on interim measures are rendered in

© Published and reproduced with kind permission by Global Legal Group Ltd, London

summary fashion and without proper and in-depth examination of the available evidence.

The Law on ICA confers its jurisdiction on international arbitration tribunals located in the territory of Russia, i.e. with a Russian 'seat', apart from arts. 8–9 and 35–36, which apply irrespective of the seat of the arbitration. Clauses of the Law on ICA dedicated to interim measures, namely 9 and 17, mirror the provisions of the Model Law. Art. 9 is of special relevance since it gives parties to the arbitration the power to seek interim measures in support of international commercial arbitration from the arbitrazh court.

Specifically, according to art. 9 of the Law on ICA, it is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure of protection and for a court to grant such measure.

Meanwhile, art. 90(3) of the APC provides that 'the arbitrazh court at the location of the arbitration tribunal or at the location or residence of the debtor or the debtor's property may grant interim measures upon the motion of a party in arbitral proceedings'.

Citing art. 90(3) in *AB Living Design (Sweden)*, the Supreme Arbitration Court clarified that refusal to enforce interim measures issued in arbitration does not in itself preclude a party from applying for interim measures from the state courts.

Therefore, the parties are able to use interim measures issued directly by Russian arbitrazh courts to leverage their advantage in ongoing international commercial arbitration.

The principles laid down in *Edimax Limited (Cyprus) v S.P. Chigirinsky (Russian Federation)* (No. A40-19/09-0T-13) are of particular interest here.

After failing to recover losses suffered from an unperformed contractual obligation via personal guarantee, issued by the defendant for the benefit of his company, Edimax simultaneously filed a suit with LCIA for damages and the Moscow Arbitrazh Court for a freezing order on the defendant's assets in support of ongoing arbitration.

The Moscow Arbitrazh Court (first instance) took a formalistic approach and dismissed the suit, reasoning that art. 90 APC does not expressly provide for the right of the arbitrazh court to issue interim measures in support of international commercial arbitration. Edimax managed to overturn the decision in its favour in the appellate court (Arbitrazh Appeal Court). Then the defendant's wife, arguing that the court of appeal lacked jurisdiction to hear the case because Mr Chigirinsky had issued a guarantee in his personal capacity, successfully annulled the appeal court's decision.

In the hearing before the Supreme Arbitrazh Court of the Russian Federation, Edimax maintained that the courts had incorrectly applied the law. That final appeal was successful and the case was once again directed at the cassation court, which upheld the freezing order.

Although the primary legal issues discussed by the Supreme Arbitrazh Court concerned the possibility of conferring jurisdiction of the arbitrazh court on the individual after a divorce, the important collateral conclusion was that it is possible to protect assets located in Russia during international commercial arbitration by obtaining interim measures directly from Russian state courts. In such a case, general rules governing interim measures in domestic litigation should be applied.

Wrapping up the abovementioned, interim measures obtained via arbitration are not enforceable in Russia and, unfortunately, abiding by them is a rare occasion for Russian parties. Interim measures issued by a state court in support of arbitration are effective, but generally speaking, Russian courts are reluctant to order any interim relief.

The Amendments in 2018 have not affected the interim relief rules.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Arbitration award

Art. 31 of the Law on ICA mostly replicates the one in the Model law and therefore provides similar requirements, stating that an award has to be made in writing, and be signed either by the sole arbitrator or by all three arbitrators, or the majority of the arbitrators if the reason for any omitted signature is stated in the award.

The award shall state the reasons upon which it is based, arbitration fee and costs as well as the method of distributing them between the parties. The award shall state its date and the place. The award shall be deemed to have been made at that place. After the award is made, a copy signed by the arbitrators shall be delivered to each party.

Art. 33 of the Model law on "Correction and interpretation of award; additional award" is literally incorporated in the Law of ICA with one addition: a state court that is considering challenging the award may adjourn the case to provide arbitration time to correct, interpret or render an additional award in order to eliminate grounds for challenging the original award.

The Amendments in 2018 have not concerned the regulation of an arbitration award.

Challenge of the arbitration award

A party to arbitration is entitled to file the application challenging the arbitral award within three months from when the party obtained the arbitral award.

The current legislation provides that a party to arbitration has the right to apply to a state competent court in the seat of arbitration for challenging the final arbitral award. This is an exclusive right of the parties to arbitration.

Parties are entitled to waive the right to challenge the arbitral award. The parties may agree in an arbitration agreement or a clause that the arbitral award is final and no party has the right to challenge the arbitral award. Any objections may be heard in enforcement proceedings.

The parties may change the jurisdiction for challenging the awards in the arbitration agreement to the court that is local to one of the parties. The non-parties to arbitration are entitled to challenge an arbitral award which concerns their rights.

The Law on ICA provides exclusive grounds for challenging international arbitral awards seated in Russia:

- A party to an arbitration agreement was incapable: that is, a party was lacking legal capacity at the time when the arbitral proceedings took place, or the arbitration agreement is invalid according to the applicable rules.
- A party to the arbitration was not duly served or notified of the arbitration, including the time and place of the hearings, or has not been given the possibility to present its reasonable objections.
- The arbitral award rendered over the dispute is not covered by the arbitration agreement or exceeds the scope of arbitration agreement. If the part which is not covered by the agreement can be separated from the rest of the award, only that part would be invalid. This provision is to prevent arbitral awards being given without jurisdiction.
- The arbitral tribunal or the arbitration procedure did not comply with the arbitration agreement or with federal law.
- The dispute resolved by the arbitral award is not subject to arbitration under federal law.
- The arbitral award contradicts the public policy of the Russian Federation.

The two last grounds for challenging may be applied by the court without a party's request.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The other grounds have to be stated and proved by a party challenging an arbitral award.

An application to challenge an arbitral award must be submitted within three months from the moment it was delivered to the party. A state court must not revise an arbitral award on its merits or in any other way review the factual circumstances.

A court order for the annulment (setting aside) of an arbitral award or the denial of an application for the annulment (setting aside) cannot be revised by the commercial court of appeal and can only be appealed in the cassation appeal.

The competent court may stay the setting-aside proceedings by a motion of one of the parties and remit the award to a tribunal for eliminating grounds for annulment (setting aside) of the award (save non-arbitrability and public policy).

The Amendments in 2018 have not concerned the challenging procedure of arbitral awards.

Enforcement of the arbitration award

The Russian Federation is one of the contracting states to the New York Convention. The Union of Soviet Socialist Republics, as the predecessor to the Russian Federation, signed the New York Convention on December 29, 1958, which was ratified in August 1960 and came into force on November 22, 1960.

A foreign arbitral award may be enforced on the territory of the Russian Federation if an application on its enforcement is filed within three years from the moment that such a foreign arbitral award came into force. Foreign arbitral awards are enforceable in Russia if they meet certain requirements (please see below). For example, an award will not be enforceable if it includes punitive damages, because awarding such damages contradicts the public policy of the Russian Federation.

The local commercial court has to consider an application for the recognition and enforcement of the foreign arbitral award within one month from the date of its filing. However, in practice, the enforcement proceedings at the court of first instance take about four to six months because of high volumes of caseloads in the commercial courts and potential adjournments.

If an arbitral award is declaratory and the international treaties of Russia stipulate the recognition of such awards, it has to be recognised in Russia without a further enforcement procedure. The procedure for the enforcement of an arbitration award is the same for awards made both in the jurisdiction of the Russian Federation and for foreign arbitration awards.

The application for the enforcement of the award has to be filed to the competent state court of the subject of the Russian Federation at the:

- debtor's place of stay or residence; or
- location of the debtor's property, if the debtor's place of stay or residence is unknown.

The parties are entitled to change court jurisdiction – an application for enforcement on the parties' agreement may be submitted to the competent court in the seat of arbitration, or to a competent court which is local to the winning party.

An award cannot be enforced if:

- The arbitral award has not yet become binding on the parties.
- The party against whom an arbitral award was issued has not been timely and properly notified.
- The arbitral award over the dispute is not covered by the arbitration agreement or exceeds the scope of the arbitration agreement. If the part which is not covered by the agreement can be separated from the rest of the award, only that part would be invalid.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- The arbitral tribunal or procedure do not comply with the parties' agreement or applicable law in the seat of arbitration.
- The dispute is not arbitrable under the Russian legislation.
- The enforcement of the arbitral award would contradict the public policy of the Russian Federation.

The Amendments in 2018 have not concerned the enforcement procedure or grounds of refusal in enforcement itself.

Investment arbitration

Russia does not have a law that governs investment treaty arbitration. Any investment arbitration with its seat within Russia's territory would be conducted in accordance with the Law on International Commercial Arbitration, July 7, 1993 (as amended).

Russia signed the Washington Convention on June 16, 1992 but has not ratified it and Russia does not take advantage of its right to arbitrate disputes under the Washington Convention.

The Energy Charter Treaty was signed by the Russian Federation and provisionally applied until October 18, 2009, but it is not currently effective for the state (see Yukos case).

As for the regional conventions, Russia is a party to the Moscow Convention on Protection of the Rights of the Investor dated March 28, 1997. The Convention is applicable for investment disputes between the following CIS states: Armenia, Belarus, Republic of Moldova, Tajikistan, Kazakhstan and Kyrgyzstan. The Convention stipulates obligations of host states towards foreign investors and provides for a dispute-resolution mechanism (art. 11): state courts, the Economic Court of the Commonwealth of Independent States (the Economic Court); other international courts and international arbitration institutions. On September 23, 2014, the Economic Court ordered that the provisions of art. 11 were not an arbitration agreement for the purposes of investment dispute-resolution under the Convention, and the right to refer a dispute to a particular international court shall be stipulated in national legislation, agreed by parties or enshrined in a separate treaty between them. This approach reduces the Convention's attractiveness for foreign investors.

Russia is a party to numerous bilateral treaties (BITs). Almost all Russian BITs in force provide for a fair and equitable treatment clause. BITs that were concluded in the 1990s stipulate arbitration under the Rules of the Arbitration Institute at the Stockholm Chamber of Commerce (SCC) or *ad hoc* arbitration under the UNCITRAL Rules as dispute-resolution tools.

BITs of the 2000s envisaged arbitration under the ICSID Convention or the ICSID Additional Facility Rules, or *ad hoc* arbitration under the UNCITRAL Rules. A number of BITs only provide for *ad hoc* arbitration, with no rules stipulated.

Many Russian BITs also stipulate a competent court of arbitration of the Contracting Party and competent state courts as forums for dispute resolution.

The Russian government issued a resolution of September 30, 2016 No. 992 "On conclusion of international treaties on investment promotion and protection" (not yet effective), which are deemed to be guidelines for negotiating BITs. The guidelines set up the contents of future BITs and dispute-resolution tools. As for the guidelines, both institutional and *ad hoc* arbitration are possible, and institutional rules are not specified.

Currently the Russian Federation negotiates investment treaties with states where Russian investors have significant commercial interests.

The Amendments in 2018 have not affected investment arbitration.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Sergey Kovalev
Tel: +7 495 902 72 72 / Email: s.kovalev@ktaplaw.ru

Sergey is a recognised practitioner with vast experience in the areas of bankruptcy and distressed assets recovery in Russia, and 23 years of dispute resolution experience. From 2011 to 2017, Sergey successfully headed a dispute resolution department at Egorov Puginkiy Afanasiev and Partners Law Offices, managing a team of 60 lawyers.

Sergey has advised on over 1,000 successful litigation and arbitration cases. He has vast experience in representing his clients' interests before the Russian Supreme Courts. He has also participated in foreign litigations and was involved in preparing and holding legal positions for arbitration institutions and foreign courts including: ICAC, the High Court of Justice in England, LCIA, CAS, civil and criminal Swiss courts, and the Dutch Courts.

Sergey is the author of more than 150 articles and commentaries. He is also a speaker for Vedomsti, broadcasting channel RBK, St. Peterburg's International Legal Forum, Adam Smith Conferences, the International Bar Association, Minsk Legal Forum, and C5, C-bonds.

Sergey Kislov
Tel: +7 495 902 72 72 / Email: s.kislov@ktaplaw.ru

Sergey Kislov is a distinguished practitioner in the area of insurance and corporate litigations, complex bankruptcy proceedings and disputes with state authorities, with 14 years of dispute resolution experience.

His extensive experience is based on his efficient approach and methods, while providing a complex defence of his clients' interests both before commercial courts, courts of common jurisdiction and non-judicial procedures.

Sergey has successfully represented his clients in litigations from Kalinigrad to Vladivostok. He has represented major corporations from Russia, the USA, Germany, China, France, Sweden, Brazil, Portugal, South and North Korea. Many of these were large, complex projects that benefited from his approach and experience. In addition to extensive expertise in the area of dispute resolution, Sergey Kislov specialises in representation in relation to white-collar crimes. Sergey is an attorney-at-law, an arbitrator of the Independent Arbitration Chamber, and an arbitrator of the Russian Arbitration Association.

Evgeny Lidzhiev
Tel: +7 495 902 72 72 / Email: e.lidzhiev@ktalaw.ru

Evgeny specialises in debt recovery and bankruptcy proceedings, representing different large Russian and foreign companies in various commercial disputes in litigation and arbitration proceedings in the United Kingdom, Belgium, Sweden, US, Germany, France, Japan, Belarus as well as more than in 25 regions of Russia. His seven years' experience includes debt recovery, contractual, administrative, insurance, labour, tort and intellectual property disputes. He has wide practice in protecting creditors' interests in bankruptcy proceedings, including challenging deals, preventing inclusion of claims, subsidiary liability, damages recovery, restoration of liquidated debtors, etc.

Kovalev, Tugushi & Partners

7th Rostovskiy lane, 15, 1st floor, Moscow, 119121, Russia
Tel: +7 495 902 72 72 / URL: www.ktaplaw.ru

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Singapore

Margaret Joan Ling
Allen & Gledhill LLP

Introduction

Singapore is pro-arbitration and has adopted a policy of minimal curial intervention in respect of arbitration proceedings. In line with its pro-arbitration stance, the city-state has set up Maxwell Chambers as the world's first integrated dispute resolution complex. Maxwell Chambers houses best-of-class hearing facilities, as well as various international arbitration institutions, such as the Singapore International Arbitration Centre (SIAC), the International Court of Arbitration of the International Chamber of Commerce (ICC) and the Arbitration and Mediation Centre of the World Intellectual Property Organization (WIPO).

The relevant arbitration legislation in Singapore comprises the Arbitration Act (Cap. 10) (the "**AA**") and the International Arbitration Act (Cap. 143A) (the "**IAA**"). Both the UNCITRAL Model Law on International Commercial Arbitration (the "**Model Law**") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**") (which Singapore is a party to) have the force of law in Singapore through the IAA.

The AA governs domestic (or non-international) arbitrations while the IAA governs international arbitrations. For domestic arbitrations seated in Singapore, the IAA and Model Law only apply if the parties agree so in writing. In this connection, arbitrations are considered "international" under the IAA if:

- at least one of the parties to an arbitration agreement, at the time of the conclusion of the agreement, has its place of business outside Singapore;
- one of the following places is situated outside the state in which the parties have their places of business:
  - (i) the seat of arbitration;
  - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
- the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

In addition, there is an Arbitration (International Investment Disputes) Act (Cap. 11) which, as the name suggests, pertains to international investment disputes. This Act was enacted to implement the International Convention on the Settlement of Investment Disputes between States and Nationals of other States (or ICSID).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Arbitration agreement

The requirements for a valid arbitration agreement are expressly set out in the AA and the IAA. Both Acts require that an arbitration agreement must be in writing, and this requirement is satisfied so long as the content of the arbitration agreement was recorded – regardless of whether the agreement was concluded orally, by conduct or other means.

The concept of separability of the arbitration agreement from the main contract is recognised in Singapore, and is connected to the competence-competence rule. In particular, the AA and the IAA expressly allow an arbitral tribunal to rule on its own jurisdiction, including any objections regarding the existence of validity of an arbitration agreement; and state that for this purpose, an arbitration clause which forms part of a contract shall be treated as independent of the other terms in the contract.

The concept of arbitrability is recognised in Singapore, and is reflected in various statutory provisions. In particular, s 11 of the IAA provides that any dispute may be submitted to arbitration unless it is contrary to Singapore's public policy to do so. While there is no corresponding provision in the AA, s 48(1)(b)(i) states that the non-arbitrability of a dispute is a ground for setting aside an arbitral award. In determining whether a dispute is arbitrable, the Singapore Courts will look at whether the dispute has an impact on third parties other than the arbitrating parties. In sum, disputes which have public interest elements are generally non-arbitrable. These include disputes that concern issues that only arise upon the onset of insolvency due to the operation of the insolvency regime. The reason for this is simple: there is a need to consider the wider public interest at stake, such as the protection of creditors.

Lastly, given the Singapore Courts' recognition that an arbitral tribunal's jurisdiction is founded on consent, an arbitral tribunal does not have the jurisdiction to join a non-contracting party to the dispute. A third party may only be bound by an arbitration clause by consent (including consent of the arbitrating parties), or where the provisions of the Contracts (Rights of Third Parties) Act (Cap 53B) apply.

Arbitration procedure

The mode of commencing proceedings under the AA and IAA entails the respondent receiving a request from the claimant that the dispute is to be referred to arbitration, unless otherwise agreed by the parties. In non-*ad hoc* arbitrations, the mode of commencing arbitration proceedings is detailed in the rules of the relevant arbitral institution. For instance, the SIAC Rules (2016) state that arbitration proceedings are commenced by way of the claimant filing a Notice of Arbitration with the Registrar of the SIAC.

The AA and IAA contain some broadly worded provisions regarding the conduct of the arbitration proceedings. For instance, both Acts require the arbitrating parties to be treated with equality and be given a full opportunity of presenting their case. Other than this mandatory rule, the parties are generally free to determine the arbitral procedure, and the tribunal may conduct the arbitration in the manner it thinks appropriate if parties cannot agree. The Acts expressly provide that an arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence. Hence, for instance, the arbitral tribunal may decide to adopt the IBA Rules on the Taking of Evidence in International Arbitration in the arbitration. The adoption of the IB Rules is a relatively common occurrence in Singapore-seated arbitrations.

Moreover, an arbitral tribunal is not required to conduct hearings at the seat of arbitration.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Singapore law in this regard makes a clear distinction between the seat of arbitration (the laws of which govern the procedural aspects of the arbitration proceedings), and the physical venue where the arbitral hearing is held. An arbitral tribunal may decide on the physical venue of the hearings after taking into account the circumstances of the case, including the convenience of the parties.

Although the AA and IAA do not expressly provide for the confidentiality of arbitration proceedings, the Singapore Courts have found that there is an implied duty of confidentiality imposed on the parties to the arbitration. This duty of confidentiality would extend to the pleadings as well as all other documents submitted in the arbitration. In any event, many institutional rules provide for confidentiality, such as Rule 39 of the SIAC Rules 2016. Further, should an arbitration-related matter proceed to litigation (for example, if an application were filed in the Singapore Courts to set aside an award), a party may apply to the court to have the matter heard in chambers and for, among other options, the parties to be anonymised if any written judgment is released in respect of the court proceedings.

Arbitrators

The AA and IAA provide that no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

In terms of the appointment procedure, the AA and IAA provide that the parties are free to agree on this. Failing such agreement, the statutory provisions provide that:

- In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the parties shall by agreement appoint the third arbitrator. Where the parties fail to agree on the appointment of the third arbitrator within 30 days of the receipt of the first request by either party to do so, the appointment shall be made, upon the request of a party, by the relevant appointing authority, i.e. the President of the Court of SIAC.
- In an arbitration with a sole arbitrator, the arbitrator shall be appointed, upon request of a party, by the appointing authority.

In terms of a prospective arbitrator's disclosure obligations, the Acts provide that when a person is approached in connection with his possible appointment as an arbitrator, he must disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. Moreover, this duty of disclosure is a continuing one: It arises from the time of an arbitrator's appointment, and exists throughout the arbitral proceedings.

An arbitrator may be challenged if there are circumstances which give rise to justifiable doubts as to his impartiality or independence; or he does not possess the qualifications agreed to by the parties. In this regard, the IBA Guidelines of Conflicts of Interest in Arbitration are often used as a reference in Singapore-seated arbitrations.

In terms of procedure, the Acts provide that the arbitrating parties are free to agree on the procedure for challenging an arbitrator. In the absence of such agreement, the statutory framework for the challenge procedure is as follows:

- A party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance giving rise to justifiable doubts about his impartiality or independence, send a written statement of the reasons for the challenge to the arbitral tribunal.
- Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- If a challenge before the arbitral tribunal is unsuccessful, the aggrieved party may, within 30 days after receiving notice of the decision rejecting the challenge, apply to the court to decide on the challenge and the court may make such order as it thinks fit.

The mandate of an arbitral tribunal terminates upon the issuance of the award unless a party seeks the correction of an award or the issuance of an additional award. The Acts provide that unless another time limit has been otherwise agreed between the parties, within 30 days of receipt of the award, the following are permissible:

- a party may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature (the arbitral tribunal may also correct such an error on its own initiative within 30 days of the date of the award); or
- if so agreed by the parties, a party may request the arbitral tribunal to give an interpretation of a specific point or part of the award (if the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request); or
- a party may request the arbitral tribunal to make an additional award in respect of 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 60 days).

An arbitrator is statutorily protected from liability for negligence for anything done or omitted to be done in the capacity of arbitrator, or any mistake in law, face or procedure made in the course of proceedings or in making the award. Various institutional rules also afford arbitrators immunity. For instance, Rule 38 of the SIAC Rules (2016) provides for similar immunity for arbitrators in connection with SIAC-administered arbitrations.

Interim relief

The Acts provide that an arbitral tribunal has the powers to make orders or give directions to any party in respect of various matters, specifically: (a) security for costs; (b) discovery of documents and interrogatories; (c) giving of evidence by affidavit; (d) the preservation, interim custody or sale of any property which is or forms part of the subject matter of the dispute; (e) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject matter of the dispute; (f) the preservation and interim custody of any evidence for the purposes of the proceedings; (g) securing the amount in dispute; (h) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and (i) an interim injunction or any other interim measure.

In relation to the power of an arbitral tribunal to make an order for security of costs, the Acts provide that such an order cannot be made solely on the basis that the claimant is a foreign individual, corporation or association. The Acts further state that all orders or directions made or given by an arbitral tribunal in the course of an arbitration shall, by leave of the court, be enforceable in the same manner as if they were orders made by the court.

As for the Singapore Courts, they have the power to make similar orders for interim relief in support of arbitration proceedings. However, in line with Singapore's policy of minimal curial intervention, such orders (or part thereof) will cease to have effect in whole or in part (as the case may be) if the arbitral tribunal makes an order which expressly relates to the whole or part of that order of the courts.

In the event that litigation is commenced in breach of an arbitration agreement, the Singapore

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Courts have the power to issue an anti-suit injunction. However, the Singapore Courts may decline to grant such an injunction if there was undue delay on the part of the applicant in applying for the injunction, and the court proceedings have reached an advanced stage.

Arbitration award

The Acts prescribe that an award has to be in writing, and must be signed by the arbitral tribunal. If there is a dissenting arbitrator, the award would normally be signed by only the majority arbitral members. An arbitral tribunal is also required to give reasons for its award. There is no time limit for making the award, although the rules of certain arbitral institutions have fixed timelines for doing so.

In terms of the remedies or reliefs which may be granted, the Acts state that an arbitral tribunal is entitled to grant any remedy or relief that a High Court in Singapore could have ordered if the dispute had been the subject of civil proceedings in that court. This also includes the award of any interest. In this connection, interest may be awarded on a simple or compound basis on the whole or any part of any sum claimed. An arbitral tribunal may also apply a contractual rate of interest on sums due under an agreement, where appropriate. Otherwise, there is no mandatory rate of interest. In determining an appropriate rate of interest, arbitral tribunals will sometimes be guided by the statutory rate of interest on a judgment debt in Singapore.

In addition, the arbitral tribunal has broad discretion to award costs as well. A party may recover fees paid and costs incurred from another party if so determined by the tribunal. As a general rule, the losing party pays the successful party its costs.

Challenge of award

As a starting point, a distinction needs to be drawn between domestic and international arbitrations. Under the AA, a party to arbitral proceedings may (upon notice to the other parties and to the arbitral tribunal) appeal to the Singapore Courts on a question of law arising out of an award. Such a right of appeal is not available under the IAA.

An arbitrating party may also challenge an arbitral tribunal's award of jurisdiction. The Singapore Courts will conduct a *de novo* review of the award in such case, and it is possible for a party to adduce fresh evidence.

Apart from the above grounds, a party may only challenge an award through a setting-aside application. Such an application must be filed within three months from receipt of the award or from the date corrections or an interpretation of the award are made by the tribunal. In this connection, the grounds for setting aside are narrowly circumscribed. In particular:

- a party to the arbitration agreement must have been under some incapacity; or the said agreement is not valid under the applicable law;
- the party applying to set aside 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 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 (if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside);
- the composition of the arbitral tribunal or the arbitral procedure was not in accordance

© Published and reproduced with kind permission by Global Legal Group Ltd, London

with the agreement of the parties, or the applicable law;

- the subject matter of the dispute is not capable of settlement by arbitration under the law of the seat;
- the award is in conflict with the public policy of this state;
- the award was induced or affected by fraud or corruption; or
- a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

Enforcement

As stated above, the Singapore Courts have long adopted a policy of minimal curial intervention in arbitration matters. This policy is reflected in their approach to the enforcement of arbitral awards. In particular, the Singapore Courts have opined that enforcement is a mechanistic process in which one of the statutory grounds for refusal must be made out, and that they have no residual discretion to refuse to enforce an award outside those grounds.

In terms of the enforcement procedure, a party is required to seek leave from the High Court to enforce an arbitral award. The application is made *ex parte* and must be supported by an affidavit:

- exhibiting the arbitration agreement and the original award or, in either case, a copy thereof;
- stating the name and the usual or last known place or business of the applicant and the person against whom it is sought to enforce the award; and
- stating either that the award has not been complied with or the extent to which it has not been complied with.

The award is not immediately enforceable once leave to enforce an award is granted. The debtor has 14 days from service of the order granting leave to enforce to set aside the said order. If the order is served out of jurisdiction, the period is usually 21 days. The grounds for resisting enforcement in Singapore mirror the grounds set out in the New York Convention.

Under the IAA, if an arbitral award has been set aside or suspended by the courts in the seat of arbitration, the Singapore courts may refuse enforcement of such an award. Under Singapore law, a successful party is not required to set aside an arbitral award first, but can choose to wait and invoke a passive remedy only in response to enforcement proceedings at the seat.

Investment arbitration

Singapore has entered into numerous bilateral and multilateral investment treaties. At present, Singapore has not been a party as a host state or respondent to an investment dispute with foreign investors.

The city-state has also been chosen as the seat of arbitration in investor-state arbitration matters. In August 2017, the Singapore Courts decided on the first case in Singapore in which an investor-state arbitral award on the merits was sought to be set aside. In this case, the Singapore court set aside the award on the basis that the arbitral tribunal lacked jurisdiction.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Margaret Joan Ling
Tel: +65 6890 7156 / Email: margaret.ling@allenandgledhill.com

Margaret's areas of practice comprise wide-ranging matters including shareholder disputes, employment matters, defamation and sale of goods. She specialises in international commercial arbitration and litigation.

Margaret regularly advises and acts for multinational corporations in domestic and international arbitrations. In addition, she has substantial experience regarding the enforcement and setting-aside of international arbitral awards.

Margaret is on the Reserve List of SIAC's (Singapore International Arbitration Center) Panel of Arbitrators and has experience as a sole arbitrator. She was also a Council Member of the Singapore Institute of Arbitrators and is the subject editor (arbitration) for the SAL (Singapore Academy of Law) Practitioner.

She has also been appointed *amicus curiae* under the Supreme Court's inaugural Young Amicus Curiae Scheme.

Allen & Gledhill LLP

One Marina Boulevard, #28-00, Singapore 018989
Tel: +65 6890 7188 / Fax: +65 6327 3800 / URL: www.allenandgledhill.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Spain

Luis Cordón Procter & Diana del Moral Bernal
Cases & Lacambra

Introduction

Law on arbitration

The Spanish legal provisions on arbitration currently in force were enacted by the Spanish Arbitration Act 60/2003, of 23 December 2003 (SAA). This Law is clearly inspired by the Model Law adopted by the United Nations Commission on International Trade Law on 21 June 1985 (UNCITRAL Model Law). The Model Law constitutes the point of departure of the Spanish legislation in order to include technical advances and to meet the new needs arising in arbitration practice, particularly as regards the requirements of the arbitration agreement and the adoption of interim measures.

The Model Law embraces both continental European and Anglo-Saxon legal traditions. Consequently, its terms do not entirely respond to the traditional canons of Spanish law; however, such terms do facilitate the application of the law by actors working out of economic areas where Spain maintains active and growing commercial relations.

New York Convention

The New York Convention on Recognition and Enforcement of Arbitral Awards was signed by Spain on 29 April 1977. Spain has adhered from such date without making any reservation to this Convention, and applies it to the enforcement of arbitral awards made in non-Member States.

The New York Convention has been adhered to by many States. Some of them apply this Convention *erga omnes*, which means from the rest of the world, without limiting its applicability to arbitrations connected to other Member States. Due to this *erga omnes* effect, this Convention has become the general rule for such Member States.

Recognition and enforcement of arbitration awards

Spain has signed the European Convention on International Commercial Arbitration of 21 April 1961, ratified by Spain on 5 March 1975, as well as the Geneva Convention of 1961 on International Commercial Arbitration.

International arbitration

SAA constitutes a sole and uniform legislative body in Spain due to the monistic approach on which SAA is based. This means that, except for unusual exceptions, the same provisions are applicable to both domestic and international arbitration. Therefore, instead of having different rules, Spain has only one law in force for both type of arbitrations: the SAA.

Notwithstanding the foregoing, in any case, Spanish legislation is inspired by provisions regarding international arbitration laid down in treaties ratified by Spain or contained in laws with special provisions on arbitration.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Having said the above, article 3 of the SAA determines when an arbitration is considered international:

- when the parties are domiciled in different States at the time when the arbitration agreement is concluded;
- when the following places are located outside the State in which the parties are domiciled: (a) the place of the arbitration, as determined in the arbitral agreement, (b) the place where the obligations deriving from the discussed legal relationship are to be performed, or (c) the place to which the subject matter of such dispute is most closely related; or
- when the legal relationship from which the dispute stems affects the interests of international trade.

Overview of arbitration institutions

The main internal bodies providing arbitration services in Spain are the following:

- The Madrid Court of Arbitration (*Corte de Arbitraje de Madrid*).
- The Civil and Trade Court of Arbitration (*Corte Civil y Mercantil de Arbitraje* – CIMA).
- The Spanish Court of Arbitration (*Corte Española de Arbitraje*).
- The Arbitral Tribunal of Barcelona (*Tribunal Arbitral de Barcelona*).

Additionally, the extraordinary work of the International Chamber of Commerce (ICC), headquartered in Barcelona, is noteworthy.

Nevertheless, the proliferation of different arbitral bodies in Spain over the last few years is starting to be seen as a problem by stakeholders. For this reason, in December 2017 the Madrid Court of Arbitration, CIMA and the Spanish Court of Arbitration signed an agreement to unify such three arbitral bodies into only one. The main purpose of this arrangement is to reinforce the image of Spain as an attractive forum to hold arbitration.

Special national courts

There are no special national courts to hold international arbitration proceedings in Spain. Nevertheless, international arbitration bodies such as the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC) and the International Center for Settlement of Investment Disputes (ICSID) usually rent out offices for local arbitration bodies in order to practise oral hearings.

Notwithstanding the aforementioned, some national courts have powers regarding international arbitration. For example, the Civil and Criminal Section of the Autonomous Supreme Court of the region of the domicile of the party against whom the recognition is applied, and the First Instance Courts are entitled to recognise and enforce international arbitration awards according to article 8.6 of the SAA.

Arbitration agreement

What formalities are needed for the arbitration agreement?

The answer to this question is found in article 9.1 of the SAA. According to this article, the arbitration agreement may adopt the form of either a separate agreement or an arbitration clause established in a broader contract, so long as it expresses the parties' willingness to submit to arbitration all or certain disputes arising between them in respect of a given legal relationship, whether contractual or otherwise.

The arbitration agreement must be made in writing, in a document signed by the parties or in an exchange of letters, telegrams, telexes, faxes or other telecommunication methods that

© Published and reproduced with kind permission by Global Legal Group Ltd, London

ensure a record of the agreement is kept (article 9.3 of the SAA). In any case, this formality should be additionally complied with when an arbitration agreement is stated on a separate document and the parties make reference to it in the contract.

When the arbitration agreement is contained in an adhesion contract, its validity and interpretation will be governed by the specific rules applicable to such contracts (article 9.2 of the SAA).

Regarding international arbitrations, article 9.6 of the SAA specifically stipulates that the arbitration agreement will be reputably valid, and the dispute arbitrable, if the requirements of the rules of law chosen by the parties to govern the agreement, or by the applicable substantive law, or by Spanish law, are complied with.

What disputes are arbitrable?

The guiding principle in Spain is the freedom of choice of the parties, which allows for the arbitrability of those matters within the free disposition of the parties. In this sense, the parties can choose a different dispute resolution method, out of the jurisdictional authorities of their respective States, submitting their dispute to the decision of the individual and offering a guarantee of objectivity and impartiality.

This is why, under certain circumstances, the Spanish judicial system allows the removal from jurisdiction of some ongoing matters to the benefit of the reduction of the terms (as arbitration proceedings are usually associated with shorter terms than jurisdiction ones), and the principle of speciality of the arbitrator.

By contrast, matters excluded from the free disposition of the parties – such as criminal matters – are considered non-arbitrable. The former Spanish Arbitration Act 36/1988, of 5 December 1988, listed in article 2 the disputes which are considered non-arbitrable:

- Those matters in which a final judicial resolution has been issued, except for aspects related to their enforcement.
- Matters inseparably united to other matters excluded from the free choice of the parties.
- Matters in which the law requires the intervention of the Public Prosecution in representation of those without capacity or representation to act in trial.
- Labour arbitrations.

Although the Spanish Arbitration Act 36/1988 was abolished by the SAA, the aforementioned exclusions are still being considered applicable.

Rules for joinder/consolidation of third parties

The SAA does not contain any specific provision on joinder or consolidation of a third party, and does not provide for a regulatory framework for consolidation of arbitral proceedings either.

However, most of the Spanish arbitral institutions have regulated this issue in their own regulations. By way of example, the ICC Code on Arbitration drafted on 1 January 2012 (lately modified on 1 March 2017), on efficiency and a more affordable arbitration model, introduces a change in the previous system by which arbitrators or the arbitral institution are entitled to decide directly about any type of judicial objection, as well as any question related to joinder or consolidation of several claims in a sole process (in article 6(3)).

Competence-competence and separability

The principle of competence-competence is expressly recognised in article 22 of the SAA, which states that arbitrators may rule on their own jurisdiction, including any pleas with

© Published and reproduced with kind permission by Global Legal Group Ltd, London

respect to the existence or validity of the arbitration agreement, or any others whose acceptance would prevent consideration of the merits of the case. Their decision may only be challenged by means of an application to set aside the final or a separate award on jurisdiction.

A plea that the arbitrators are exceeding the scope of their authority must be lodged as soon as the matter alleged to lie beyond the scope of their authority arises during the arbitral proceedings. Arbitrators may only admit a tardy plea if they consider the delay to be justified.

Arbitrators may rule on a plea referred to in this article either as a preliminary question or in an award on the merits.

Under the SAA, the principle of competence-competence includes the separability principle in the sense that the validity of the arbitration agreement established as a clause of a contract does not depend on the validity of the contract itself, the arbitrator having competence to judge and declare the validity of the arbitration agreement even if the contract is declared null.

Arbitration procedure

Commencing arbitration proceedings

According to article 27 of the SAA, arbitration commences on the date on which a request to submit the dispute to arbitration is received by the respondent, unless otherwise agreed by the parties.

With regards to the specific requirements needed by such request in order for it to be valid and to allow the arbitration proceeding commences, it depends on each arbitration institution's internal rules. A way of example, ICC rules contain in article 4 an exhaustive list of the formalities and the information that the request of arbitration must contain.

Hearings outside the seat of arbitration

Under article 26 of the SAA, the parties can freely determine the place of the arbitration. Failing such agreement, it will be determined by the arbitrators, taking into consideration the circumstances of the case and the convenience of the parties. Arbitrators may, unless otherwise agreed by the parties, meet at any place they deem appropriate for hearing witnesses, experts or the parties, inspecting goods or documents, or examining persons.

Rules on evidence

The general rule is that parties are free to choose the applicable rules on evidence, subject in any case to the requirements of the institution in which the arbitration takes place, as well as observing the equality, review and rebuttal principles.

The framework provided by the SAA is stated in article 30 by which, subject to any contrary agreement of the parties, arbitrators will decide whether to hold oral hearings for the presentation of the statements of evidence and the issuance of conclusions, or whether the proceeding will be conducted only in written form. Unless the parties have agreed that no hearings will be held, the hearings will be announced by arbitrators at an appropriate stage of the proceedings, if so requested by a party.

In case of oral hearings, the parties must be provided with sufficient advance notice, and may appear before the arbitration tribunal directly or by proxy.

All written statements, documents or other instruments received by arbitrators from one party will be communicated to the other party. The parties will likewise be notified of any

© Published and reproduced with kind permission by Global Legal Group Ltd, London

documents, expert reports or other evidentiary material on which arbitrators may base their decision.

Additionally, the IBA rules on evidence of 29 May 2010 can be taken into consideration by arbitrators by way of an inspiration guide (not compulsory), particularly regarding international arbitrations.

Applicable rules regarding privilege and disclosure

There are no rules or laws providing for an arbitrator's privilege or immunity. Nevertheless, article 21.1 of the SAA establishes the arbitrator's liability for damages in case of improper performance of their duties based on bad faith, temerity or wilful misconduct. This is why arbitrators, or arbitral institutions on their behalf, are bound to take liability insurance or equivalent security for the amount established in their internal rules.

With regard to the disclosure rules, according to article 24.2 of the SAA, the arbitrators, the parties and the arbitral institutions are bound to honour the confidentiality of the information received on the occasion of arbitration, on the confidentiality principle. This principle is one of the main advantages of the arbitration system and one of the reasons for its success, since it allows the parties to protect their public reputation. However, occasionally courts may require arbitrators or arbitral institutions to disclose part of the information or documentation provided during an arbitral proceeding if the substantive matter is linked to the merits of a judicial dispute and disclosure is absolutely necessary to resolve it.

IBA Rules on the taking of evidence in international arbitration

IBA Rules on evidence are not compulsory in Spain, since they are not considered to be definitive law. Nevertheless, this does not preclude arbitrators of proceedings being inspired by such rules. The nature of the IBA Rules on evidence in Spain is merely indicative, not binding. Our courts have specifically declared that Spanish arbitrators are only subject to the SAA and the specific regulations of each arbitral institution.

Rules regarding expert evidence

The specific provisions regarding expert evidence are given by article 32 of the SAA, which empowers arbitrators to appoint – unless otherwise agreed by the parties – one or more experts, at their own initiative or at the request of a party. If the parties have no objections to it, after delivering their reports, experts appointed by the arbitral tribunal shall participate in the hearing in order to be interrogated.

Within this framework, however, there is not any specific standard under the SAA which regulates the treatment and timings of expert evidences; the reason why it is common to apply the general provisions contained in our Procedural Law for judicial proceedings (Act 1/2000, of 7 January 2000) by analogy. This law stipulates that expert reports must be submitted by the parties at least five days prior to the hearing taking place.

New LCIA and IBA guidelines

Currently, there are no directions to take the new LCIA and IBA guidelines into consideration, beyond the consideration of their principles as mere inspirations for international arbitrations held in Spain. These rules are still not considered as positive law in our country.

Confidentiality of evidence and pleadings

Confidentiality is one of the governing principles of the Spanish arbitration proceedings. This principle is expressly enacted by article 24.2 of the SAA, which stipulates that the arbitrators, the parties and the arbitral institutions are bound to honour the confidentiality of the information received on the occasion of arbitration.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The main advantage that confidentiality provides to the Spanish arbitration system is to duly preserve the reputation of the parties, which is one of the reasons that motivates most investors, traders and companies to choose arbitration as their dispute-resolution mechanism.

Besides, this principle informs the information and documentation regarding the substance of the dispute, as well as any type of document or evidence connected to the arbitration proceeding (awards, submissions, etc.).

Arbitrators

Appointment of arbitrators

Under article 15 of the SAA, in arbitration that is not to be decided *ex aequo et bono* or conducted by a single arbitrator, such person will be required to be an attorney if acting as such, unless otherwise agreed by the parties. When arbitration is conducted by three or more arbitrators, at least one must be an attorney.

Additionally, the parties are free to agree on a procedure for appointing the arbitrator or arbitrators, providing the principle of equality is honoured. Failing such agreement, the SAA establishes some rules for the appointment of an arbitrator:

- In an arbitration with a sole arbitrator, he will be appointed by the court at the request of a party.
- In an arbitration with three arbitrators, each party will appoint one arbitrator, and the two arbitrators thus appointed will appoint the third arbitrator, who will preside over the proceedings. If a party fails to appoint the 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 latest acceptance, the appointment will be made by the court at the request of a party. Where more than one claimant or respondent is involved, the latter will appoint one arbitrator, and the former another. If claimants or respondents cannot agree on the appointment, all arbitrators will be appointed by the court at the request of a party.
- Where more than one claimant or respondent is involved, the latter will appoint one arbitrator, and the former another. If claimants or respondents cannot agree on the appointment, all arbitrators will be appointed by the court at the request of a party.
- In an arbitration with more than three arbitrators, they will be appointed by the court at the request of a party.

If arbitrators cannot be appointed under the procedure agreed by the parties, any party may apply to the competent court to appoint the arbitrators or, as appropriate, to adopt the necessary measures therefor. When arbitrators have to be appointed by the court, it will draw up a list of three names for each arbitrator to be appointed. Where a sole or a third arbitrator is to be appointed, the court will also have regard to the advisability of appointing an arbitrator of a nationality other than those of the parties and, as appropriate, of those of the arbitrators already appointed, in light of the prevailing circumstances. The arbitrators are subsequently appointed by lot.

Moreover, it is common that each specific arbitral institution demands additional requirements of arbitrators in order to compose the list of eligible arbitrators. The secrecy of some arbitral institutions in preparing and giving access to the lists of eligible arbitrators has been highly criticised.

Challenging arbitrators

As provided in article 17.3 of the SAA, an arbitrator may be challenged only in the event of

© Published and reproduced with kind permission by Global Legal Group Ltd, London

justifiable doubts affecting his impartiality or independence arising, or if he does not possess the qualifications agreed by the parties. A party may challenge an arbitrator appointed by them, or in whose appointment they have participated, only for reasons of which he/she becomes aware after the appointment was made.

In order to avoid arbitrators being challenged, article 17.1 of the SAA obliges all arbitrators to be and remain independent and impartial throughout arbitration, without maintaining any personal, professional or commercial relationship with the parties. For this purpose, the person/s proposed as arbitrator/s must disclose – from the time of their appointment and without delay – any circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence.

The procedure under which the challenge of an arbitrator shall take place is established in article 18 of the SAA. The parties may agree on a procedure for challenging arbitrators but failing such agreement, a party who intends to challenge an arbitrator must state the grounds for the challenge within 15 days after becoming aware of the acceptance, or of any circumstances that may give rise to justified doubts about the arbitrator's impartiality or independence.

Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitrators will decide on the challenge. If the challenge under any of the precedent procedures is not successful, the challenging party may submit the challenge as grounds for objecting to the award.

Are the IBA Guidelines on conflict of interest taken into account?

With regard to the IBA Guidelines on conflicts of interest, they apply as previously explained in respect of the IBA Rules on evidence. That is to say, the IBA Rules (in general) are not positive law in Spain; the reason why they are not mandatory, but only taken into consideration as inspiration in Spanish arbitration proceedings – specifically, in order that the impartiality principle should reign during the arbitration proceeding.

This indicative character has been declared, among others, by the Appeal Court of Madrid, in the ruling nº 506/2011, on 30 June 2011, and by the Supreme Court of Justice of Madrid, in the ruling nº 92/2017, on 23 March 2017. It is remarkable that this Supreme Court of Justice has specifically declared that these IBA Rules are balanced with the issuing of rulings about arbitrators' conflict of interests.

Terminating an arbitrator's mandate

As stated in article 38 of the SAA, an arbitrator's mandate is terminated when the arbitral proceeding terminates, either if it is with a final award or if: (i) the claimant withdraws his claim, unless the respondent takes exception thereto and the arbitrators acknowledge a legitimate interest on his part in obtaining a final settlement of the dispute; (ii) the parties mutually agree on the termination of the proceedings; or (iii) the arbitrators find that continuation of the proceedings is unnecessary or impossible.

There are other exceptional reasons why an arbitrator's mandate may expire before the termination of the arbitral proceeding based on grounds of abstention and/or challenge affecting their impartiality and/or independence, as well as on the failure or impossibility of the arbitrator to act. As stated in article 17 of the SAA, an arbitrator should abstain or, on the contrary, be challenged by the parties only if circumstances that give rise to justifiable doubts regarding his impartiality or independence arise, or when the eligible arbitration is not qualified according to the qualification requirements agreed by the parties. According to article 18 of the SAA, the parties are free to agree on a procedure for the challenging of

© Published and reproduced with kind permission by Global Legal Group Ltd, London

arbitrators; failing such agreement, article 18.2 of the SAA provides for the procedure to follow. In connection to the failure or impossibility of the arbitrator to act, article 19 shall be considered.

Immunity of arbitrators

As previously indicated, arbitrators are subject to a very high standards of liability since they are not afforded immunity from suit. In this sense, they are responsible for the damages and prejudices caused when acting in bad faith, temerity or wilful misconduct, as determined in article 21.1 of the SAA.

Secretaries to the Arbitral Tribunal

The SAA does not contain any provisions determining the Secretaries of the Arbitral Tribunal's activities.

Thus, this matter is individually regulated by each arbitral institution, which is entitled to freely define the duties, competences and working tasks of this administrative organism. By way of example, the ICC rules provide an open list of the Secretary of the Court's powers: to receive the claims; to confirm the numbers of arbitrators and their identification; to issue certified copies of the arbitration awards; to request the payment of the provision of funds of the arbitration proceedings; to prepare notes and other type of documents to the parties, arbitrators or whosoever's information, etc.

Interim relief

What types of interim relief are available to parties?

At the request of a party and without prejudice of any contrary agreement signed by the parties, arbitrators are allowed to grant any interim measures deemed necessary in connection with the object of the dispute, as established in article 23 of the SAA. In such cases, arbitrators may require the claimant to furnish sufficient security.

In connection with such interim reliefs, the SAA does not detail any specific measure; the reason why arbitrators commonly apply by analogy some of the measures listed in article 727 of the Spanish Procedural Law (Act 1/2000, of 7 January 2000), such as preventive seizure of goods; judicial intervention or administration of productive goods; goods depository, etc.

In order to enforce interim measures adopted within an arbitral proceeding, judicial intervention is usually needed.

Can the parties apply to both courts and tribunals for interim relief?

The answer is affirmative. Parties can apply to both courts and arbitral tribunals in order to be granted any interim measure.

Concretely, the SAA establishes that those arbitral decisions on interim measures connected to the subject matter of the dispute, are enforceable before any court. Regardless of the form adopted by arbitral decisions on interim measures, the rules on setting aside and enforcement of the awards will apply to them.

In addition, the arbitration agreement does not prevent the parties, prior to or during the arbitral proceeding, from applying to a court for interim measures, or the court from granting such measures. Article 8.3 in connection with article 11.3 of the SAA allows such possibility.

Can and do national courts order anti-suit injunctions in aid of international arbitration?

The answer to this question is found in article 722 (first paragraph) of the Spanish Procedural Law (Act 1/2000, of 7 January 2000), which regulates the injunctions in arbitration

© Published and reproduced with kind permission by Global Legal Group Ltd, London

proceedings and foreign litigation, determining that whoever may prove to be a party of an arbitration agreement may seek injunctions from the court prior to the arbitration proceedings. Whoever may prove to be a party in a pending arbitration proceedings in Spain may also seek them; or, as appropriate, whoever may have sought the court's certification referred to in article 15 of the SAA (arbitrator's judicial appointment); and/or in the event of institutional arbitration, whoever may have duly filed an application to the relevant institution according to their regulations.

Can and do national courts order anti-arbitration injunctions in aid of domestic litigation?

According to the second paragraph of article 722 of the Spanish Procedural Law, whoever can prove to be a party to any jurisdictional or arbitration proceedings being conducted in a foreign country may seek injunctions from a Spanish court, except in cases where the main matter at issue should solely lie within the competence of Spanish courts.

The foregoing means that anti-arbitration injunctions in aid of domestic litigation cannot be requested if it is proven that the sole competence of a specific matter corresponds to the Spanish courts.

Security of costs

As indicated above, article 23 of the SAA establishes that arbitrators may, at the request of the parties, adopt any interim measures deemed necessary in connection with the object of the dispute, requiring the claimant to furnish sufficient security.

Arbitration award

Formal requirements for an arbitration award

The specific formal requirements for an arbitration award to be valid and enforceable are listed in article 37 of the SAA and may be summarised as follows:

- *Deadline for issuing the award:* within six months of the date of submission of the statement of defence or of the expiration of the deadline therefor, unless otherwise agreed by the parties.
- *Written form:* it has to be issued in writing and signed by the arbitrators. Arbitrators may specify the sense of their votes.
- *Reasoning:* the award has to argue the grounds upon which it is based, unless the award is issued as a way of termination by mutual agreement of the parties. Additionally, it must state the date and the place of arbitration.
- *Costs of arbitration:* it has to contain a specific decision regarding the costs of the arbitration, subject to the agreement of the parties.
- *Notification:* it has to be expressly notified to the parties to the arbitration, according to the form and within the time frame agreed by them, or failing that, by delivering a signed copy of the award to each party.

Time frame for the arbitration award

As specified above, according to article 37.2 of the SAA, and subject to any contrary agreement of the parties, arbitrators must issue the award within six months of the date of submission of the statement of defence or, failing that, of the deadline for its submission.

Unless otherwise agreed by the parties, this term may be extended by the arbitrators for a period of no longer than two months under a duly justified ground. Additionally, the failure to deliver the award on time will not affect its validity, unless otherwise agreed by the parties.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Can an arbitral tribunal order costs for the parties?

Affirmative. An arbitral tribunal may order costs for the parties by reasoning contained in the award. As determined in article 37.6 of the SAA, the arbitrators' decision on arbitration costs shall include: the arbitrator's fees and expenses and, as appropriate, the fees and expenses of the parties' defence or representatives; the cost of the services rendered by the institution conducting the arbitration; and all other expenses incurred in the arbitral proceedings. The arbitral award usually includes an itemisation of the expenses and costs.

Can interest be included in the award and/or costs?

Under the SAA provisions, the possibility of claiming interests on arbitration costs is not expressly regulated. Interests can be included in the final award but only regarding the principal amount claimed in the proceedings.

Challenge of the arbitration award

Can an arbitration award be appealed?

As established in article 43 of the SAA, an arbitral award constitutes *res judicata*, which means that there is no other action against it except for those seeking to set it aside or, as appropriate, the object of a request of review under provisions on final sentences established in our Procedural Law (Act 1/2000, of 7 January 2000). As a general rule, therefore, an award could not be appealed to ordinary jurisdiction in Spain.

On what grounds can an arbitration award be challenged?

An arbitration award can be challenged only if the applicant party is able to allege and demonstrate the occurrence of some of the following grounds, listed in article 41 of the SAA:

- the arbitration agreement does not exist or is not valid;
- the applicant party has not properly received notice of the appointment of an arbitrator and/or of the arbitral proceedings, or otherwise has not been able to present his case;
- when the arbitrators decide about questions not subject to their jurisdiction;
- when the arbitrators have not observed the agreement of the parties regarding their appointment and/or the arbitral proceeding, unless such agreement does not respect any imperative provision of the SAA or, failing such agreement, the arbitrators have proceeded against the SAA;
- when the arbitrators decide about non-arbitrable matters; or
- if the award violates the public order.

Initially, such list of grounds was conceived by the Spanish legislator as restrictive. However, in the last few years, some abuses in the utilisation of some of those reasons (especially, the public order umbrella) are being detected, with the intention of trying to reverse the original conception of the arbitration as a sole-instance proceeding to a second-instance one, to judge once again the merits of the case.

Modifying the arbitration award

Under article 39 of the SAA, the parties are entitled to apply for the correction, rectification, interpretation and/or issuance of an additional award within 10 days of its notification, unless another time is agreed by the parties. These modifications of the award are allowed in the following cases:

- correction of the award if any errors in computation, clerical, typographical or similar errors are identified;

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- interpretation of a specific point or part of the award, when this point or part is not considered sufficiently clear;
- additional award, if the party observes that the award has not decided about any submitted request or claim; and
- rectification of part of the award, in case of partial over-extension regarding non-arbitrable matters or questions not submitted to the decision of the arbitrators.

Recent examples of successful and unsuccessful challenges of arbitral awards

Despite numerous attempts at challenging an arbitral award in Spain, the number that have succeeded cannot be considered relevant. However, the growing interest of some tribunals (Supreme Justice Court of Madrid, by way of example) to control the reasoning of arbitral awards has been noticeable, based on the application of the control of public order test, as previously stated (article 41.1.f) of the SAA). The application of this test has currently allowed ordinary courts to challenge some arbitration awards. However, this test could open a dangerous window, since it could put the Spanish arbitration proceedings at risk (if the validity of the awards is frequently challenged), causing what is known as the international arbitration escape.

It has been additionally observed that some arbitral awards have been successfully challenged based on the bad faith intervention of some arbitrators, by ignoring the third arbitrator's opinion in resolving the dispute (in case of arbitral tribunals composed of three arbitrators).

Enforcement of the arbitration award

Under what convention can an international arbitration award be enforced?

Under the Convention on Recognition and Enforcement of Arbitral Awards made on New York on 29 April 1977 (article 46 of the SAA).

In order to enforce international and domestic arbitration awards, the formal requirements needed in Spain are established in our Procedural Law (article 523 of Act 1/2000, of 7 January 2000) by reference to the Spanish legal system on recognition and enforcement of international rulings.

Can an arbitration award be enforced if it has been set aside at the courts of the seat of arbitration?

Article 45 of the SAA establishes that awards in Spain are enforceable even when action has been brought to set them aside. Nevertheless, in that case, the concerned party may apply to the competent court for suspension of the enforcement, if only to provide security for the value of the sentence plus any damages that may stem from delayed enforcement. The court, upon receipt of the application for suspension, will hear the executant and will deliver a decision on the security to be furnished. The Clerk of the Court will raise the suspension and will order the continuation of the enforcement upon confirmation of dismissal of the action for setting aside the award.

Trends of enforcement – pro-arbitration or anti-arbitration

We can assert that Spain is in favour of arbitration. It is observable, by way of example, in the wording of article 517.2.2º of the Spanish Procedural Law (Act 1/2000, of 7 January 2000), by which arbitral awards are considered to be enforcement titles (together with other titles as judicial rulings); the reason why they are automatically enforceable before the ordinary courts.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Investment arbitration

Bilateral investment treaties

Spain has signed more than 88 bilateral investment treaties (BITs). The last BIT signed was between Spain and Haiti in 2012 and is not yet in force.

Multi-lateral investment treaties

Spain is a member of a large number of multilateral treaties. Regarding investment treaties, Spain has been a signatory of the ICSID Convention since 21 March 1994, and the Energy Charter Treaty since 17 December 1994.

Recent investment arbitration cases

Spain has around 40 arbitration proceedings open in different arbitral tribunals for the reform of the electricity sector and cuts to renewable energies carried out by the Spanish Government between 2010 and 2013. Currently, Spain has lost six arbitrations, which basically have been submitted by six powerful investment funds: Eiser (sentencing Spain to pay €128 million); Antin (sentencing Spain to pay €112 million); Masdar (sentencing Spain to pay €64.5 million); Novaenergía (sentencing Spain to pay €53 million); Greentech (sentencing Spain to pay €45.5 million); and Reeff (currently waiting to be quantified). At the moment, the penalties against the Kingdom of Spain amount to approximately €600 million altogether.

Recent news indicates that many small energy investors are currently taking actions against Spain before the World Bank's International Centre for Settlement of Investment Disputes (CIADI) under the same representation (class action lawsuits), in order to minimise the costs of the arbitration proceeding, which in the past had dissuaded them to sue Spain.

Treatment of investment arbitration awards by national courts

The treatment of investment arbitration awards by our national courts is exactly the same as the enforcement of a court ruling or an award not related to investment. Our Spanish Procedural Law (Act 1/2000, of 7 January 2000) states in its article 517 that arbitration awards shall involve enforcement.

Challenge of awards

Spain has challenged the €128 million Eiser award, arguing there could be a conflict of interest with one of the arbitrators, for being part of the arbitral tribunal in another case concerning the same issue.

Spain has also challenged recognition sought by the winning party, demanding the annulment of the admission.

With regard to the payment of penalties, the Spanish Government has alleged this to be an impossibility, as EU legislation would supposedly not allow it. During the last few months, the European Commission has taken part in such arbitrations, being aligned with the interests of Spain, without any input for the moment. Investment funds are now claiming before the US Courts in order to force Spain to pay, even applying to seize Spanish overseas assets, if necessary.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Luis Cordón Procter
Tel: +34 936 119 232 / Email: luis.cordon@caseslacambra.com

Luis Cordón is the partner who leads the litigation and arbitration department at Cases & Lacambra. He has extensive experience in arbitration, regularly acting as an arbitrator and counsel in arbitral proceedings, both domestic and international, in trading, specialised banking and investment cases.

Luis Cordon has been nominated to act as an arbitrator before the Madrid Court of Arbitration (*Corte de Arbitraje de Madrid*), Spanish Court of Arbitration (*Corte Española de Arbitraje*) and the Barcelona Arbitration Tribunal (*Tribunal Arbitral de Barcelona*), with several awards rendered since 2014. He has also represented his clients in international arbitration cases before ICC, SCC, ICSID and UNCITRAL, among others.

He is a regular lecturer of Barcelona Bar Association and associate professor of international law at ISDE (*Instituto Superior de Derecho y Economía*). He is a member of the International Bar Association Arbitration Committee and the Spanish Club of Arbitration (CEA), where he is currently a member of the drafting sub-committee for Good Governance and Organisation of Arbitral Institutions. He also collaborates in relevant publications, economic journals and specialist magazines, having recently intervened in the *Spain Arbitration Review* publication with the article, "the responsibility of arbitrators and the truncated tribunals", and also in the preparation of the Legal Encyclopaedia of Spanish Arbitration.

Luis Cordón has been recognised by the 2017 edition of *Leaders League* as highly recommended lawyer in International Arbitration and Commercial Litigation.

Before joining Cases & Lacambra, Luis Cordón developed his career in the litigation department of PwC, based in the Barcelona office. Previously, he was a lawyer in the litigation area of Deloitte.

Diana del Moral Bernal
Tel: +34 936 119 232 / Email: diana.moral@caseslacambra.com

Diana del Moral is an associate at Cases & Lacambra in the Litigation and Arbitration practice.

She has experience in litigation and arbitration, focused on banking law as well as corporate and commercial dispute resolution. Before joining Cases & Lacambra, Diana was a member of the Corporate and Civil Law Department of Garrigues, based in Granada.

Diana del Moral has authored various publications on international trade and law, a notable one being "The Boom of International Trade: Expanding the arbitration", published in No. 43 of the magazine *La Gaceta Jurídica de la Empresa Andaluza*, in September 2013.

Cases & Lacambra

Paseo de la Castellana, 8 28046, Madrid / Av. Pau Casals, 22, 08017, Barcelona, Spain
Tel: +34 91 061 24 50 / Tel: +34 93 611 92 32 / URL: www.caseslacambra.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Sweden

Pontus Scherp & Fredrik Norburg
Norburg & Scherp Advokatbyrå AB

Introduction

Sweden has established itself as one of the most favoured places for the resolution of international disputes through arbitration. Sweden has a long history of being perceived internationally as an arbitration-friendly, neutral and reliable jurisdiction. This has attracted parties from all over the world to resolve their disputes by arbitration in Sweden or by using Swedish arbitrators. Arbitration has for a long time also been the preferred dispute resolution method for commercial disputes in Sweden. A large number of Swedish commercial contracts include an arbitration clause. As a result, many Swedish lawyers have a sound knowledge of arbitration law and Swedish courts are experienced in handling challenge proceedings and other arbitration-related matters.

The Arbitration Institute of the Stockholm Chamber of Commerce (the SCC) has had an important role in this development and is one of the main reasons why many international contracts include an arbitration clause designating Sweden as the seat of arbitration. The SCC is an internationally renowned arbitration institute with approximately 200 new cases filed per year, which makes it one of the leading arbitration institutions in the world. Approximately half of the cases handled by the SCC are international. The SCC also plays a leading role as an administrator of investor-state disputes and has a caseload second only to ICSID.

The SCC is committed to conform with the latest developments in international arbitration. A set of revised rules for arbitrations and expedited arbitrations entered into force on 1 January 2017, in time for the SCC's 100-year anniversary.

Another important factor behind Sweden's position as a popular arbitration seat is the modern and flexible arbitration law of Sweden, which is built on the fundamental principle of party autonomy. The Swedish Arbitration Act is the main law governing arbitration in Sweden. The Arbitration Act allows the parties to tailor-fit their dispute resolution to suit their needs, as there are only a few mandatory rules, which are there to ensure due process. The Arbitration Act also offers accessibility to independent and arbitration-friendly courts, which are widely regarded as swift and effective. Lawyers familiar with the UNCITRAL Model Law will find few surprises in the Arbitration Act since it follows the Model Law in substance, with only minor deviations. The act is applicable to both domestic and international arbitration. Sweden has signed and ratified the New York Convention without any reservations. Sweden is also a member of the Energy Charter Treaty (the ECT) and the ICSID Convention.

Efforts are made to ensure that Swedish arbitration law stays in line with the best practices of international arbitration. In 2018, a government bill for revising the Arbitration Act was

© Published and reproduced with kind permission by Global Legal Group Ltd, London

adopted by Parliament. The amendments, which can be described as a fine-tuning rather than a remodelling of the Arbitration Act, enter into force on 1 March 2019. The most significant amendments are discussed in the chapters below and include: a shortened time limit for challenging arbitration awards; tightened grounds for setting aside awards; rules to facilitate multi-party arbitrations; and the possibility for courts in challenge proceedings to allow witnesses to be heard in English.

Arbitration agreement

Lawyers familiar with the UNIDROIT principles will find that Swedish contract law shares many of its traits. The cornerstones are the principles of party autonomy and *pacta sunt servanda*, and it is the common intention of the parties that determines the content of an agreement. This also applies to arbitration agreements governed by Swedish law. Unless otherwise agreed, Swedish law governs the arbitration agreement if the agreed seat of the arbitration is Sweden.

An arbitration agreement is defined in the Arbitration Act as an agreement between two or more parties to refer disputes arising from an identified legal relationship to resolution by one or more arbitrators. The Act thereby stipulates three cumulative requirements that must be fulfilled in order for an arbitration agreement to be valid and enforceable:

(i) an agreement between the parties to refer the dispute to arbitration;

(ii) identification of a legal relationship; and

(iii) an unambiguous reference to arbitration.

Contrary to many other arbitration laws, there is no mandatory requirement that an arbitration agreement must be in writing. This is in line with Swedish contract law, which is based on the formation of an agreement by an offer which is accepted. Oral agreements and implied consent, e.g. declaratory conduct, are sufficient for a party to be bound by an arbitration agreement. However, in order to avoid evidentiary problems, most arbitration agreements are in writing. Having no required form allows arbitrators and courts to be flexible when determining if an arbitration agreement has been concluded.

The requirement of identification of a legal relationship excludes the possibility for parties to enter into an arbitration agreement that covers all future disputes in general. The identification of the legal relationship can be explicit or implicit and, as such, need not necessarily be set out in the arbitration agreement. Typically, the legal relationship consists of a commercial contract or an existing dispute.

For an arbitration agreement to be valid, there must be a reference to arbitration. However, this does not prevent parties from entering multi-tier clauses, i.e. that they shall pursue other forms of dispute resolution procedure (e.g. negotiation or mediation) before resorting to arbitration.

An arbitration agreement is valid and enforceable if the three prerequisites are met. The parties are free to agree on further issues in their arbitration agreement, but the Arbitration Act includes provisions to determine any lack of agreement between the parties concerning aspects such as language of the proceedings, governing law or number of arbitrators.

The scope of the parties' contractual agreement to arbitrate is not only limited by the prerequisites for a valid arbitration agreement, but also by the concept of arbitrability. The arbitrability of a dispute is determined by both Swedish law and the applicable law to the arbitration agreement. All disputes concerning matters which the parties are free to settle by way of agreement are arbitrable under Swedish law. Arbitrability is, therefore, rarely an

© Published and reproduced with kind permission by Global Legal Group Ltd, London

issue in commercial arbitration in Sweden since parties are generally entitled to settle commercial disputes by way of agreement.

The arbitral tribunal may rule on its own jurisdiction under the principle of competence-competence. However, a court has the final say on whether or not the arbitral tribunal has jurisdiction to decide the dispute. Until now, it has been possible to bring a court action for a declaratory judgment regarding the validity of an arbitration agreement not only before, but also at any time during the arbitral proceedings. Under the new amendments of 2019, a dissatisfied party is given 30 days to challenge a positive jurisdictional decision by a tribunal to a competent court of appeal. Other than that, it is no longer possible to bring a separate action before a court regarding the tribunal's jurisdiction after the initiation of arbitral proceedings, unless the other party so allows. However, this does not affect the possibility to challenge an arbitration award for lack of jurisdiction.

To determine whether an issue is covered by an arbitration agreement, a method named doctrine of assertion is applied. The doctrine provides that a circumstance asserted by a claimant shall be assumed to exist when determining jurisdiction under an arbitration agreement. For example, if a claimant asserts that its claim is based on a specific contract, the arbitrators shall assume that this is correct when determining whether the claim is covered by the arbitration agreement. Once the issue of jurisdiction is determined, the asserted circumstances will be adjudicated on the merits.

The doctrine of separability is also applied in Sweden. Thus, the validity of the arbitration agreement is determined independently, and invalidity of the main contract does not automatically affect the jurisdiction of the tribunal under the arbitration agreement.

A fundamental principle in Swedish arbitration law is that a party must consent to be bound by an arbitration agreement. Therefore, third party intervention and joinder require the consent of all original parties. Consent does not have to be recorded in writing and can, as such, be found impliedly or by declaratory conduct. With the new amendments of 2019 mentioned above, the Arbitration Act now has provisions on consolidation of multiple arbitrations. It is required that the parties agree to consolidate, that the same arbitrators are appointed in all of the proceedings, and that the arbitrators deem it advantageous to consolidate.

The SCC Rules contain provisions allowing joinder of additional parties (Article 13) and consolidation of arbitrations (Article 15). Furthermore, under Article 14 of the SCC Rules, a party may under certain circumstances bring claims under multiple contracts in the same arbitration.

In conclusion, Swedish law and the SCC Rules respect the parties' agreement to arbitrate and facilitate the common intention of the parties' agreement: to have an effective, expeditious resolution of the dispute.

Arbitration procedure

The fundamental principle of party autonomy is respected under Swedish law and an arbitration seated in Sweden can therefore be arranged to fit the parties' needs and expectations. The Arbitration Act contains few mandatory rules concerning the conduct of the arbitration procedure, and those that exist serve to protect the principles of equal treatment and due process. The overall aim of the Arbitration Act is to facilitate an impartial, practical and fast procedure, suited to the needs of the parties.

The procedure used by Swedish arbitrators is typically in line with best practices for the

© Published and reproduced with kind permission by Global Legal Group Ltd, London

conduct of international arbitration, and the use of international "soft law" rules and guidelines, such as the IBA Rules on the Taking of Evidence, is widespread. The procedure is therefore predictable and normally in line with the expectations of parties, legal counsel and fellow arbitrators from other jurisdictions.

The arbitral procedure, including its commencement, is primarily determined by the parties' agreement (including agreed institutional rules). Failing such agreement, the Arbitration Act generally leaves it to the arbitral tribunal to decide the conduct of the proceedings. Provisions are in place to expedite the procedure when the parties have not specifically agreed to regulate the arbitration procedure by, for example, choosing institutional rules. In practice, institutional rules are applied in most arbitration proceedings seated in Sweden.

Unless otherwise agreed by the parties, arbitration is formally commenced by the filing of a request for arbitration. The following information must be included in a request for arbitration for an arbitral proceeding to be deemed initiated:

(i) an express and unconditional request for arbitration;

(ii) a statement of the issue which is covered by the arbitration agreement and which is to be resolved by the arbitrators; and

(iii) a statement of the party's choice of arbitrator, if the party is required to appoint an arbitrator.

Under Swedish law, a party has an absolute right to a hearing prior to the tribunal's determination of an issue on the merits. However, the parties may agree to exclude that right and it is only absolute in the regard that it may not be denied by the arbitral tribunal. If the tribunal denies a hearing, despite a request from a party, it may be considered a violation of due process and a subsequent challenge could lead to the award being set aside. If the parties have not chosen a venue for the hearing, it is for the arbitral tribunal to decide. Nothing prevents a hearing from being held in a different country than at the seat.

The SCC Rules contain provisions on "summary procedure" in Article 39. In cases where, e.g., a party has made allegations that are manifestly unsustainable, or when an award could not be rendered in favour of a party as a matter of law even assuming alleged facts are true, the tribunal may, upon request of a party, decide issues of fact or law by summary procedure.

The parties are free to agree on rules of evidence. Failing such agreement, it is a general rule that arbitration is adversarial and, therefore, it is for the parties to invoke and present the evidence they wish to rely on. The parties are free to present any and all evidence, in whatever form, that they wish to rely on. Evidence may only be refused by the arbitrators in cases where the arbitrators either find that the evidence is manifestly irrelevant, or if refusal is justified having regard to the time at which the evidence is submitted.

Arbitrators may, upon request by a party, order the other party to produce evidence, including documents and objects. The parties are free to agree on the procedure for the production of documents and other evidentiary issues. Failing such agreement, the arbitrators may decide these issues at their discretion. In international arbitration, arbitrators seated in Sweden are commonly guided by the IBA Rules on the Taking of Evidence in Commercial Arbitration in this regard. The IBA Rules are familiar to Swedish counsel and arbitrators also in the sense that the approach to document production in the IBA Rules is similar to the approach in domestic court proceedings.

Production orders issued by arbitrators are not enforceable in Sweden, although in practice many parties agree to follow such orders and other procedural decisions issued by the arbitrators during the arbitration. However, Swedish courts are authorised to assist the

© Published and reproduced with kind permission by Global Legal Group Ltd, London

arbitration process in the taking of evidence. Thus, upon request by a party and after approval of by the arbitrators, a party may file a document request with a district court, and this court may order production of documents held by the other party or a third party.

Court assistance can also be obtained when a party would like to examine a witness under oath. Under Swedish law, arbitrators cannot administer oaths, and a witness is not obliged by law, as before a court, to appear and give testimony before an arbitration tribunal.

Decisions on the production of documents and witness testimony rendered by a district court under these provisions are enforceable. It should be noted that the same court assistance may also be sought if the arbitration is seated outside Sweden, e.g. in case the documents requested or the witness to be examined are located in Sweden.

Arbitration proceedings in Sweden are private unless otherwise agreed between the parties. Moreover, the arbitrators must adhere to the principle of confidentiality when they perform their duties. The SCC and other arbitration institutions are also bound by the provisions on confidentiality to the extent set out in their respective arbitration rules. However, the parties are not bound by a duty of confidentiality unless this has been agreed between them. Witnesses and experts are bound by a duty of confidentiality to the extent this has been agreed with them or if this follows from professional rules.

From March 2019, the Arbitration Act has a new provision on applicable substantive law in a dispute, under which the tribunal is bound by the parties' choice of law. In the absence of such agreement, the tribunal may decide on the applicable law, giving the tribunal a wide discretion in this regard. Previously there was no express provision on this matter in the Arbitration Act, although the established principle was to respect the principle of party autonomy, i.e. that a choice agreed between the parties should be followed.

Arbitrators

An objective of the Arbitration Act is to expedite arbitration proceedings with impartial and independent arbitrators and prevent any obstructing behaviour from a party or a selected arbitrator. To achieve this, the competent courts are authorised to make swift and final decisions on the challenge of an arbitrator, as well as appointing arbitrators when a party is passive.

There are no mandatory requirements in the Arbitration Act about the composition and appointment of the arbitral tribunal other than that the arbitrators must be impartial, independent and have legal capacity. The test for impartiality and independence is based on objective grounds. It does not have to be concluded that the arbitrator is actually partial; the decisive factor is whether the arbitrator may *appear* partial. Hence, the relevant test is whether there is any circumstance that may diminish confidence in the arbitrator's impartiality. When assessing the impartiality of an arbitrator, the Swedish Supreme Court has referred to the IBA Guidelines for Conflict of Interest in International Arbitration, as well as to other international rules and guidelines. This confirms the development of Swedish arbitration law to be closely linked to the developing best practices in international arbitration.

If the number of arbitrators is not specified in the arbitration agreement, the default rule under the Act provides for three arbitrators. Previously, the SCC Rules also had a default rule of three arbitrators. Under the current rules, however, the Board shall decide whether the Arbitral Tribunal shall consist of a sole arbitrator or three arbitrators, having regard to the complexity of the case, the amount in dispute and any other relevant circumstances.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Secretaries to an arbitral tribunal are frequently appointed. Article 24 of the SCC Rules governs the appointment and tasks of an administrative secretary. The provision provides that the parties must approve the appointment and that the arbitral tribunal shall consult the parties regarding the tasks of the administrative secretary.

With respect to multi-party arbitration, there are new provisions in the Arbitration Act on how to appoint arbitrators when there are multiple claimants or respondents. If the parties have not agreed on how to appoint arbitrators, and if the parties on either side cannot agree on an arbitrator, a district court can appoint all members of the tribunal. This system is intended to guarantee that the principle of equal treatment is respected. The SCC Rules are similar, except that it is the SCC that appoints the tribunal if the parties on either side are not able to jointly appoint an arbitrator.

Other than this, assistance by a district court to appoint an arbitrator is available in the following situations under the Arbitration Act:

(i) if the respondent fails to appoint an arbitrator within 30 days after receipt of request for arbitration;

(ii) if the two party-appointed arbitrators fail to appoint a third within 30 days after the second arbitrator's appointment;

(iii) if the parties have agreed that they shall appoint an arbitrator jointly but the parties fail to agree on an arbitrator within 30 days from the date of the notification of one party regarding the question of such joint appointment; or

(iv) if the parties have agreed that a third party shall appoint an arbitrator and this party fails to appoint one within 30 days after the third party was requested to undertake the appointment.

The competent district court generally handles the application for the appointment of an arbitrator swiftly, by a single judge and without an oral hearing. A final decision of the district court to appoint or remove an arbitrator may not be appealed.

A party may request that an arbitrator is removed if the arbitrator is partial or lacks independence, as well as if the arbitrator delays the proceedings. If the parties have not agreed on a different procedure, the challenge is to be tried by the arbitral tribunal including the challenged arbitrator. Under the Arbitration Act, the parties may agree that an arbitration institute shall determine challenges against an arbitrator, and institutional rules often contain procedures in this regard. Under the SCC Rules, for instance, the SCC Board may release an arbitrator if challenged by a party.

If the tribunal (or institute) decides to remove the challenged arbitrator, the decision is final and cannot be appealed. However, if the challenge is denied by the tribunal, a party has 30 days from the decision to request that the challenge is tried by a district court. The district court's decision to remove an arbitrator is final, but if the challenge is denied by the district court, the decision may be appealed to the appellate court within 30 days.

A party who wishes to remove an arbitrator must make such request within 15 days from the date of becoming aware of the appointment and the circumstances giving rise to the challenge. If the party fails to make such a request within 15 days, the right to challenge is deemed forfeited.

An arbitral tribunal shall receive reasonable compensation for its work and expenses. The fees are set by the tribunal or the arbitration institute, but the parties may bring an action before a competent court to have the fees reviewed and possibly reduced. The Supreme Court has interpreted the right to appeal fees to include fees that are set by an arbitration

© Published and reproduced with kind permission by Global Legal Group Ltd, London

institute. It should, however, be noted that with respect to fees determined by an arbitration institute, this right to review probably should be regarded as a formal right rather than a substantive one. The court would most likely find that the parties are bound by their agreement to let an arbitration institute decide the fees.

The arbitral tribunal or the arbitration institute may, and normally does, require the parties to provide security for the arbitrators', and, when applicable, the arbitration institute's fees and expenses. If a party refuses to pay its part of the advance on costs, and the other party therefore pays the advance for both parties, it has been held by the Supreme Court that a specific agreement is needed between the parties for the arbitral tribunal to be able to order a separate award on the non-paying party's portion of the advance on costs. The SCC Rules include a provision that aims to provide such authorisation for the tribunal.

Interim relief

The arbitral tribunal and the courts have concurrent jurisdiction to order interim measures unless the parties agree otherwise. Thus, the parties have the choice of selecting the forum that best suits their particular needs.

Swedish courts are authorised to grant a number of different interim measures before or during the arbitral proceedings including, for example: prohibitive measures to restrain a party from carrying out certain actions; positive measures to require a party to take certain action; and measures aimed at ensuring the future enforcement of the final award.

The courts have a wide discretion to grant enforceable orders for interim relief. The courts are also authorised to order *ex parte* measures as well as to impose interim measures on third parties. The parties are not prevented from seeking interim measures from a court by having already applied for, or even been granted, an interim measure by the arbitral tribunal.

The arbitral tribunal is afforded extensive powers to order interim measures. These powers include the authority of the arbitral tribunal to order a party to secure evidence or to undertake certain actions to secure the claim which is to be adjudicated in the dispute. It is for the arbitral tribunal to decide when the granting of interim measures is justifiable. The Arbitration Act essentially allows the arbitral tribunal to grant the same kinds of interim measures as the UNCITRAL Model Law, including ordering a party to:

(i) maintain or restore the *status quo* pending determination of the dispute;

(ii) 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;

(iii) provide a means of preserving assets out of which a subsequent award may be satisfied; or

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

As in many other jurisdictions, an order issued by an arbitral tribunal is not enforceable in Sweden. In practice, however, many parties comply with such orders, and a party's failure to comply may affect the outcome of the arbitration. Tribunals are not empowered to order interim measures against third parties.

The courts and the arbitral tribunal normally require the requesting party to provide security for any loss which may be suffered by the other party as a result of the interim measure.

The SCC Rules contain a possibility to appoint an emergency arbitrator that is authorised to try and grant a request for interim relief prior to the constitution of an arbitral tribunal. The SCC shall seek to appoint such emergency arbitrator within 24 hours from a request, and a

© Published and reproduced with kind permission by Global Legal Group Ltd, London

decision must be rendered by the emergency arbitrator within five days of the referral of the request to the arbitrator.

Arbitration award

Swedish law contains few formal and material requirements regarding the award. The few that exist are in place to ensure the enforceability of the award by providing certain minimum requirements. Unless otherwise agreed by the parties, the prerequisites for the content of the award are the following:

(i) the arbitral tribunal must apply and base its award on the applicable law or rules of law, i.e. not decide the dispute *ex aequo et bono*, or as *amiable compositeur* unless agreed upon by the parties;

(ii) the arbitral tribunal must limit its determination to the parties' respective request for relief;

(iii) the arbitral tribunal cannot base its award on facts other than those presented by the parties; and

(iv) the arbitral tribunal must consider all claims submitted to it.

Furthermore, clear instructions to the parties as to how to appeal the award must be included in an award whereby the tribunal has concluded the proceedings without ruling on the merits. The award must also contain instructions to the parties on how to appeal the decision regarding compensation of the arbitrators, which may be done by application to the district court within three months from the date the party received the award. Deviations from any of these requirements may make the final award challengeable and mean it could eventually be set aside. Such award may also be difficult to enforce.

The statutory minimum requirements as to the form of the award are the following:

(i) the award must be made in writing;

(ii) the award must be signed by the arbitrators;

(iii) the award must state the seat of arbitration; and

(iv) the award must state the date upon which the award is made.

If the award does not fulfil the requirements of being in writing and signed by the arbitrators, it may still be rectified by amendment in order to avoid invalidity of the award. The fact that the award does not contain information about the seat or the date it was made does not automatically lead to invalidity of the award.

There are no formal requirements for the deliberations and the tribunal may organise the deliberations as it sees fit. Every arbitrator has a right to take part in the resolution of the dispute and be given an equal opportunity to influence the award. This right is, however, not unlimited and if two arbitrators are in agreement on the outcome, the third arbitrator cannot prolong the deliberations by demanding continued discussions in order to persuade the others. The majority of the arbitrators may decide an issue if an arbitrator fails to participate in the deliberations without a valid excuse. A dissenting arbitrator is entitled to attach a dissenting opinion to the award.

The arbitral tribunal may not render a default award. Thus, even if a party fails to take part in the proceedings, the award must be based on an adjudication of the merits of the case including all arguments and evidence filed with the arbitral tribunal. Such an award has the same validity as any other award.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The parties can request that the tribunal records a settlement agreement in a consent award, which is then enforceable and recognisable under the New York Convention. It also renders the dispute *res judicata*.

In the final award, the tribunal may order a party to compensate the other party for legal costs incurred in the arbitration together with interest. The Arbitration Act does not contain any provisions on how the legal costs should be distributed. However, as a general rule, the costs are distributed in accordance with the principle that costs follow the event, i.e. that the losing party will be ordered to compensate the winning party's reasonable legal costs. Under the SCC Rules, when apportioning the costs of the arbitration, regard may also be taken to each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances.

The parties are free to agree on any time limits with respect to the rendering of the award. If the parties have not done so, there are no specific time limits under the Arbitration Act. The default time limit for rendering the award under the SCC Rules is six months from the date upon which the case was referred to the arbitral tribunal, but upon request from the arbitral tribunal this time limit may be extended by the SCC. According to recent statistics, for the majority of cases administered under the SCC Rules, the award has been rendered within 6-12 months.

Challenge of the arbitration award

A Swedish arbitral award is final and binding as of the day it is rendered and cannot be appealed on the merits. The award may only be challenged on certain, narrowly defined formal and procedural grounds. Swedish arbitration law adheres to the principle of the finality of the awards and the parties are considered to have waived their rights to challenge the award on the merits. Furthermore, only rarely can a ruling of the competent court on the challenge be appealed to a higher court, as the main rule is that such judgments and decisions cannot be appealed unless the court of appeal allows it. An additional requirement for a leave to appeal from the Supreme Court has been introduced in the Arbitration Act through the amendments of 2019. This also enables the Supreme Court to limit its re-examination to specific issues.

There is a distinction in the Arbitration Act between an action to declare an award invalid *ab initio* and an action to set aside the award. The grounds for invalidity are limited to the protection of the public interest and the rights of third parties. Such actions do not have to be initiated within a certain time. The grounds for setting an award aside are designed to protect the interests and individual rights of the parties participating in the arbitration. It should be noted that a ground for challenge may be deemed to have been forfeited by a party if the party does not make an objection to the procedural irregularity during the arbitration procedure.

The time limit for challenging an arbitration award before the Swedish courts has been shortened from three to two months, calculated from the date the award was received by the party challenging the award, with the new rules entering into force on 1 March 2019. However, the old rules still apply if the arbitral proceedings were initiated before this date. Under the new rules, courts of appeal in challenge proceedings are also able to allow witnesses to be heard in English, without translation into Swedish.

Furthermore, the grounds for setting aside an award when the arbitrators have exceeded their mandate have been tightened. It is now expressly stated in the Arbitration Act that only irregularities that likely influenced the outcome can lead to an award being set aside.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Previously, it was not entirely clear whether an excess of mandate by the arbitrators should always lead to the award being set aside, irrespective of whether the outcome was affected. In all, the amendments align with the ambition of restricting challenges and upholding the finality of awards.

International parties choosing Sweden as their seat can enter into an agreement in which they waive in advance their right to challenge an award on grounds for setting aside an award, but the grounds for invalidity of awards cannot be waived beforehand. The Arbitration Act allows the tribunal to correct, amend and interpret the award after it has been rendered. This possibility exists to avoid unnecessary and costly involvement of courts.

In practice, it is very rare for an award to be set aside or declared invalid.

Enforcement of the arbitration award

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention) has been in effect in Sweden since it was ratified without reservations in 1972. Since then, the provisions of the Convention have been incorporated in the Arbitration Act.

Swedish courts generally have an arbitration-friendly approach, and the provisions of the New York Convention are only seen as minimum requirements. Therefore, an award may be recognised even though it would not be recognised by courts in another contracting state.

The limited grounds for refusal, the burden of proof of the challenging party and the general pro-enforcement attitude of the courts, have resulted in very few cases where enforcement has been refused.

Investment arbitration

Stockholm is one of the leading fora for investment treaty arbitration. About 120 of the bilateral investment treaties (BITs) entered into between states provide that disputes between the investor and the host states are to be resolved by arbitration under the auspices of the SCC Rules. The SCC Rules include a set of provisions on investment treaty disputes, supplementing the SCC ordinary Arbitration Rules. Furthermore, the ECT designates arbitration under the SCC Rules as one of the dispute resolution methods available to foreign investors protected by the ECT.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Pontus Scherp
Tel: +46 8 661 20 80 / Email: pontus.scherp@norburgscherp.se

Pontus Scherp is a Partner of the disputes specialists law firm Norburg & Scherp Advokatbyrå AB. He specialises in international and domestic arbitration and in commercial litigation before Swedish courts. Pontus Scherp is a Fellow of the Chartered Institute of Arbitrators (FCIArb) and he serves regularly as arbitrator in international and domestic arbitration proceedings. He regularly speaks at international and domestic conferences relating to dispute resolution. Pontus Scherp is recommended for arbitration and dispute resolution by various institutions such as Chambers and Partners (*Chambers Global* and *Chambers Europe*), *The Legal 500*, Leaders League, Euromoney Legal Media Group, the *Global Arbitration Review* and *Who's Who Legal.*

Fredrik Norburg
Tel: +46 8 658 20 80 / Email: fredrik.norburg@norburgscherp.se

Fredrik Norburg is an experienced arbitration and litigation lawyer based in Stockholm, Sweden and one of two founding partners of Norburg & Scherp Advokatbyrå, a specialist firm for arbitration and litigation founded in 2013. Fredrik Norburg has worked as a dispute resolution specialist at other firms since 1999. In 2003 he founded Young Arbitrators Sweden (YAS) at the SCC Institute, and in 2004–2012 he was the secretary of the Swedish Arbitration Association (SAA). Fredrik Norburg acts as counsel in Swedish and international arbitration under, e.g. the SCC Rules, the UNCITRAL Rules and the ICC Rules, and in commercial litigation before Swedish courts of all instances. He is also regularly appointed as an arbitrator in Swedish and international arbitration. Fredrik Norburg is recognised in *Chambers & Partners*, *The Legal 500,* and *Expert Guides*.

Norburg & Scherp Advokatbyrå AB

Birger Jarlsgatan 15, SE-111 45 Stockholm, Sweden
Tel: +46 8 420 035 00 / Fax: +46 8 501 215 91 / URL: www.norburgscherp.se

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Switzerland

Michael Bösch, Patrick Rohn & Simon Hohler
Thouvenin Rechtsanwälte KLG

Introduction

For more than a century, Switzerland has been one of the preferred venues for hosting international arbitrations. Switzerland's arbitration-friendly approach, political neutrality, well-developed legal system, sophisticated arbitration community, geographically convenient location, excellent infrastructure as well as openness of mind to different values, cultures and perceptions continue to make it a leading place for arbitrating international disputes.

International arbitrations in Switzerland are governed by Chapter 12 of the Swiss Private International Law Act ("**PILA**") provided that: (i) the seat of the arbitral tribunal is in Switzerland; (ii) at least one of the parties to the arbitration had neither its domicile nor its habitual residence in Switzerland at the time of the conclusion of the arbitration agreement; and (iii) the parties did not exclude the application of Chapter 12 PILA, and agree on the application of the third part of the Swiss Code of Civil Procedure (which contains the rules for domestic arbitration proceedings) by making an express declaration in the arbitration agreement or in a subsequent agreement (article 176 PILA). Chapter 12 PILA, the *lex arbitri* for international arbitrations in Switzerland, is hereinafter also referred to as "**Swiss Arbitration Law**". An unofficial English version is available at: swissarbitration.org/Arbitration/Arbitration-Rules-and-Laws.

The Swiss Arbitration Law – which is not based on the UNCITRAL Model Law (but there are no fundamental differences) – gives paramount importance to party autonomy for most issues and, in the absence of an agreement between the parties, allows for wide discretion of the arbitral tribunal. The Swiss Arbitration Law is currently under revision (see last chapter for further information on the revision).

Switzerland is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("**New York Convention**"). As Switzerland withdrew its reciprocity reservation in 1993, also the recognition and enforcement of awards rendered by an arbitral tribunal seated in a non-member state of the New York Convention is governed by the New York Convention.

There are different arbitration and arbitration-related institutions active in Switzerland. The Swiss Chambers' Arbitration Institution ("**SCAI**") is an arbitration institution which was formed by six major chambers of commerce (Zurich, Geneva, Basel, Berne, Ticino and Vaud) and administers arbitrations under the Swiss Rules of International Arbitration ("**Swiss Rules**"). The Swiss Rules, initially adopted in 2004, were based on the UNCITRAL Arbitration Rules, to which changes and additions necessary for institutional arbitrations, as well as to reflect modern practice and comparative law in international arbitration, have been made. The Swiss Rules were revised and modernised in 2012.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

A remarkable feature of the Swiss Rules is that the arbitral tribunal has jurisdiction to hear a set-off defence even if the relationship out of which the defence is said to arise is not within the scope of the arbitration clause, or falls within the scope of another arbitration agreement or forum-selection clause (article 21(5) Swiss Rules). If the amount in dispute does not exceed CHF 1 million, the Swiss Rules foresee an expedited procedure where the award shall be rendered within six months from the date on which the file was transmitted to the arbitral tribunal by SCAI (article 42 Swiss Rules). Of course, the parties may also agree on the application of the expedited procedure rules in the event of a larger amount in dispute.

Another important arbitration institution in Switzerland is the Court of Arbitration for Sport ("**CAS**") in Lausanne. The CAS provides for services in order to facilitate the settlement of sports-related disputes through arbitration and mediation by means of procedural rules adapted to the specific needs of the sports world. CAS arbitrations are governed by the Code of Sports-related Arbitration (CAS Code).

The Arbitration and Mediation Centre of the World Intellectual Property Organisation (WIPO), based in Geneva, offers alternative dispute resolution options for the resolution of international commercial disputes between private parties, in particular regarding IP, technology and domain name disputes.

Arbitration agreement

In terms of form, an arbitration agreement is valid if it is made in writing, by telegram, telex, telefax or any other means of communication (including email) which permits it to be evidenced by text (article 178(1) PILA). The arbitration agreement can also be contained in by-laws of a company or in general terms and conditions. Even an exchange of drafts containing an arbitration clause during contract negotiations may suffice to fulfil the form requirement.

In terms of substance, the arbitration agreement is valid if it conforms either to the law chosen by the parties (specifically to govern the arbitration agreement), or to the law governing the subject matter of the dispute, in particular the law governing the main contract, or to Swiss law (article 178(2) PILA; principle of *favor validitatis*).

Under Swiss Arbitration Law, any disputes involving an economic interest may be the subject matter of an arbitration (article 177(1) PILA). Accordingly, all claims with a financial value for one of the parties are, in principle, arbitrable. Therefore, also disputes regarding intellectual property rights, annulment of decisions of corporations or associations, competition law, etc., are arbitrable.

Swiss Arbitration Law recognises the doctrine of separability (principle of autonomy of the arbitration clause or doctrine of severability) by stating that the arbitration agreement cannot be contested on the ground that the main contract is not valid (article 178(3) PILA). Accordingly, the main contract and the arbitration agreement are treated as two separate contracts, and the invalidity of the main contract does not in and of itself trigger the invalidity of the arbitration agreement and *vice versa.*

The arbitral tribunal shall itself decide on its jurisdiction (article 186(1) PILA; principle of competence-competence). It shall decide on its jurisdiction notwithstanding any potential action on the same matter between the same parties already pending before a state court or another arbitral tribunal, unless there are serious reasons to stay the proceedings (article 186(1*bis*) PILA).

In principle, the arbitral tribunal is only obliged to examine its own jurisdiction if a party

© Published and reproduced with kind permission by Global Legal Group Ltd, London

has raised an objection in this regard. Such a plea of lack of jurisdiction must be raised prior to any defence on the merits (article 186(2) PILA).

The arbitration agreement is a contract and as such, in accordance with the principle of "privity of contract", can only produce its effects *inter partes*, i.e. between the contracting parties. It follows that, as a matter of principle, third parties are neither bound by an arbitration agreement nor can they rely thereon. This general rule is subject to a number of exceptions. Case law and legal doctrine have identified several situations where an arbitration agreement can be "extended" to a non-signatory under Swiss law, e.g.:

- *Succession, assignment or other forms of transfer*: Under Swiss law, an arbitration agreement may be transferred by way of assignment, succession, subrogation as well as in case of insolvency.
- *Valid representation*: According to Swiss law on agency and representation, a party can be bound by an arbitration clause formally entered into by another person.
- *Implied consent*: An arbitration agreement can be extended to a non-signatory if the latter has participated in the conclusion or performance of the contract containing the arbitration agreement, and its intent to be bound by the arbitration agreement can be inferred from that participation.
- *Piercing of corporate veil*: While the legal independence existing between a corporate body and its shareholders has to be respected and is usually enforced under Swiss law, exceptional circumstances may allow to disregard the legal independence and to "pierce the corporate veil" in order to apply an arbitration clause to a non-signatory party (i.e. the shareholder/parent company). To that effect, the party requesting the extension of the arbitration clause must establish that the company which signed the arbitration clause was used by its shareholder to hide behind the separate legal entity and that such behaviour constitutes an evident abuse of right.
- *Third-party beneficiary contract*: In case of a so-called genuine contract in favour of a third party, i.e. a contract in which the parties confer a right on a third party (the beneficiary), and that third party has an own independent right to compel performance of the contract, this third party can actively rely on the arbitration clause in the contract in order to bring its own claim against the contracting party.

The so-called "group of companies doctrine" does not apply in Switzerland, i.e. the existence of a group of companies does not automatically result in a binding effect of the arbitration agreement on non-signatory companies of that group.

Arbitration procedure

The parties may, directly or by reference to rules of an arbitral institution, determine the arbitral procedure; they may also submit the arbitration procedure to a procedural law of their choice (article 182(1) PILA). If the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary (article 183(2) PILA). Regardless of the procedure chosen, the arbitral has to ensure the equal treatment of the parties and their right to be heard in adversarial proceedings (article 182(3) PILA).

Swiss law does not stipulate how proceedings have to be initiated. In the absence of an agreement in this regard, the claimant can start the proceeding by appointing its party-appointed arbitrator and request the respondent to do the same. If need be, assistance from a state court is available for constitution of the arbitral tribunal.

If the place of arbitration has not been determined by the parties or by the arbitral institution,

© Published and reproduced with kind permission by Global Legal Group Ltd, London

it shall be fixed by the arbitral tribunal (article 176(3) PILA). Also, the language shall be determined by the arbitral tribunal failing an agreement of the parties.

The arbitral tribunal shall itself conduct the taking of evidence (article 184 PILA). The parties may agree on the procedural rules that the arbitral tribunal shall follow for the taking of evidence, directly or indirectly by reference to arbitration rules. Otherwise, the arbitral tribunal has wide discretion in this regard. Often, arbitral tribunals seek guidance in, but will not see themselves bound by, the IBA Rules on the Taking of Evidence in International Arbitration. Accordingly, it is common that the parties are requested to file written witness statements and that counsel will examine the witnesses in the hearing. That said, there is usually also no US-style discovery, but the parties may request the production of specific documents which are relevant to the case and material to its outcome, not in the requesting party's possession but likely in the counter party's possession or under its control. How the recently adopted Prague Rules (Rules on the Efficient Conduct of Proceedings in International Arbitration) will come into play in arbitration in Switzerland remains to be seen.

While the right to be heard includes the right to submit evidence and to request appropriate evidence-taking measures, an arbitral tribunal is allowed to refrain from assessing pieces of evidence presented by a party if the presented evidence is unfit to support the alleged fact, or if the fact to be proven by this piece of evidence is already sufficiently established by other evidence and the arbitral tribunal concludes that the additional evidence would not change its assessment. This so-called "right to an anticipatory assessment of evidence" has just recently been confirmed by the Swiss Federal Supreme Court (Decision 4A_550/2017 of 1 October 2018 as well as Decision 4A_65/2018 of 11 December 2018).

While hearings are usually held in practice, Swiss Arbitration Law does not require this. The hearing usually includes opening statements as well as witness and expert examinations. Closing statements are frequently replaced with post-hearing briefs filed after the hearing.

If the assistance of a state court is necessary for the taking of evidence, the arbitral tribunal, or a party with the consent of the arbitral tribunal, may request the assistance of the state court at the seat of the arbitral tribunal (article 184(2) PILA). The court at the place of arbitration also has jurisdiction for any further judicial assistance (article 185 PILA). In practice, interventions of Swiss courts are very rare. Procedural orders made by an arbitral tribunal cannot be challenged before Swiss courts.

The principle of *iura novit curia* or *iura novit arbiter* applies in international arbitrations in Switzerland. Therefore, the arbitral tribunal is deemed to know the law, must apply it *ex officio* and, as consequence, the parties do not have to prove the law. Arbitrators are also not limited by the legal submissions of the parties and can apply other legal provisions or principles for their decision. However, in case the arbitral tribunal intends to base its decision on legal provisions/principles that were not addressed during the proceedings and their relevance was not foreseeable by the parties, the arbitral tribunal must give the parties the opportunity to present their position on these legal issues. Otherwise, such surprise might constitute a violation of the right to be heard (see Decision 4A_525/2017 of 9 August 2018).

Swiss Arbitration Law is silent on the issue of confidentiality. While arbitrations in Switzerland are considered to be private and not open to the public, it is not settled yet whether and to what extent arbitration proceedings are confidential. Under the Swiss Rules, the parties, arbitrators, tribunal-appointed experts, the secretary of the arbitral tribunal and the SCAI undertake to keep confidential all awards and orders as well as all materials submitted by another party in the framework of the arbitral proceedings (article 44 Swiss Rules).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Arbitrators

There are no restrictions under Swiss Arbitration Law as to who may act as an arbitrator. The arbitrator must be (and remain throughout the proceedings) independent and impartial and should meet the qualifications agreed upon by the parties (article 180(1) PILA).

If the parties have not agreed on the number of arbitrators, the arbitral tribunal shall consist of three members. If expedited proceedings under the Swiss Rules apply, generally only one person will sit as arbitrator.

The arbitrators are to be appointed in accordance with the agreement of the parties (article 179(1) PILA), be it directly as per the arbitration agreement or by way of reference to an institutional rule containing provisions on the appointment of the arbitrator(s). Absent such an agreement, the court at the place of arbitration has jurisdiction to appoint arbitrators (article 179(2) PILA) unless a summary examination shows that no arbitration agreement exists between the parties (article 179(3) PILA).

An arbitrator may only be challenged if she or he does not meet the qualifications 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 doubt as to her or his independence or impartiality (article 180(1) PILA). A person asked to take the office of an arbitrator must disclose any circumstances that might raise reasonable doubts about her or his independence or impartiality. This duty continues throughout the proceedings.

Any ground for challenge must be notified to the arbitral tribunal and the other party without delay (article 180(2) PILA). The failure to timely challenge the arbitrator will result in the forfeiture of the right to challenge the arbitrator.

Absent an agreement of the parties to the contrary, the court at the place of arbitration has jurisdiction to decide challenges of arbitrators (article 180(3) PILA). The decision of the court is final and cannot be appealed. In case the parties designated an authority for the decision on the challenge of an arbitrator (usually by way of reference to institutional rules), the designated authority's decision is final in the sense that it cannot be appealed directly. However, such decision can be challenged indirectly in setting aside proceedings arguing an improper constitution of the arbitral tribunal.

Even though the IBA Guidelines on Conflicts of Interest in International Arbitration are not binding, unless agreed by the parties, these rules play an increasing role in practice. The Swiss Federal Supreme Court even qualified these guidelines in one of its decisions as a "valuable working tool" and relied on the guideline's "green list" to hold that the situation in question did not affect the challenged arbitrator's independence or impartiality.

Swiss Arbitration Law is silent on the issue of immunity of arbitrators from liability. According to the majority view of legal doctrine, arbitrators may only be held liable in case of wilful intent or gross negligence. Swiss Rules stipulate an exclusion of the arbitrators' liability except if the act or omission is shown to constitute intentional wrongdoing or gross negligence (article 45 Swiss Rules).

Interim relief

Unless the parties have agreed otherwise, the arbitral tribunal as well as the state courts have a concurring jurisdiction to order provisional or conservatory measures.

Swiss Arbitration Law currently contains no express regulation of emergency arbitrator proceedings, i.e. the proceedings for interim relief prior to the constitution of the arbitral

© Published and reproduced with kind permission by Global Legal Group Ltd, London

tribunal. Under the Swiss Rules, urgent interim relief can be requested from an emergency arbitrator unless the parties have agreed otherwise (article 43 Swiss Rules).

Swiss Arbitration Law does not contain a specific list of interim measures which may be ordered by an arbitral tribunal. It is the prevailing view that arbitral tribunals are not limited to the interim measures available under the *lex fori* of Swiss state courts. Arbitral tribunals have wide discretion as to the contents of provisional measures. While there has been a debate as to which measures can be granted with regard to the securing of monetary claims, the current understanding seems to be that monetary claims can be secured in a variety of forms, including freezing orders (*ad personam*), deposits of money in escrow, interim payment orders, etc. However, the attachment of assets (*ad rem*) as foreseen in the Swiss Debt Enforcement and Bankruptcy Act is considered not to fall within the authority of an arbitral tribunal.

Security for costs, i.e. security for the future claim for reimbursement of the costs incurred in the arbitration, constitutes an interim measure in the sense of article 183(1) PILA and can be requested from an arbitral tribunal, under specific circumstances also in the form of an (enforceable) award.

It is controversial in Swiss legal doctrine whether anti-suit or anti-arbitration injunctions may be ordered by the arbitral tribunal.

If a party does not voluntarily comply with the provisional measures ordered by the arbitral tribunal, the arbitral tribunal may seek the assistance of the state court (article 183(2) PILA). It is controversial whether private sanctions for non-compliance, in particular penalties or "*astreintes*", can be imposed by the arbitral tribunal in case of failure to comply with the ordered interim measures, especially where there is no respective agreement among the parties. It is the prevailing view that the order of interim measures of an arbitral tribunal cannot be combined with a threat of public-law or criminal-law sanctions in case of non-compliance, in particular according to article 292 Swiss Criminal Code.

Award

The award has to be rendered in conformity with the rules of procedure and in the form agreed by the parties. In the absence of such an agreement, the arbitral award shall be rendered by a majority or, in the absence of a majority, by the chairperson alone (article 189 PILA).

The award has to be in writing, supported by reasons, dated and signed. The signature of the chairperson is sufficient (article 189 PILA). The parties may agree that no reasons are to be given.

Swiss Arbitration Law does not stipulate any time limit for the rendering of the award. The Swiss Rules only stipulate a time limit for the rendering of the award in expedited proceedings, in which the award shall be made within six months from the date on which the SCAI secretariat transmitted the file to the arbitral tribunal (article 42(1)(d) Swiss Rules).

Swiss Arbitration Law is silent on the allocation and recovery of arbitration costs. Absent any agreement of the parties, the arbitral tribunal has a wide discretion in this regard. In general, arbitral tribunals tend to follow the principle of "costs follow the event".

Interest is a substantive law issue under Swiss law. If Swiss law is the law applicable to the merits of the case, pre- and post-award interest can be awarded. The interest rate foreseen by Swiss law is 5% per year.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Challenge of the award

Awards can only be challenged before the Swiss Federal Supreme Court and only for the following exhaustive grounds (article 190(2) PILA):

- the sole arbitrator has been improperly appointed or the arbitral tribunal has been incorrectly constituted;
- the arbitral tribunal has wrongly assumed or denied jurisdiction;
- the arbitral tribunal has decided beyond claims submitted to it (*ultra petita*) or failed to decide one of the claims submitted to it (*infra petita*);
- the principle of equal treatment of the parties or their right to be heard has been violated; or
- the award is incompatible with public policy.

Challenges of an arbitral award must be filed with the Swiss Federal Supreme Court within 30 days from the notification of the arbitral award to the parties. The proceedings are very streamlined and the Swiss Federal Supreme Court renders its decision on average in about seven months from the date of the award.

Unless the applicable regulations do not require the original copy of the award to be sent to the parties, the notification of the award by telefax or email does not trigger the 30-day time limit for challenging the award. In particular, as held by the Swiss Federal Supreme Court in a recent decision, in ICC arbitrations only the serving of the original copy of the award triggers the 30-day time limit for challenging the award; the receipt of the previous courtesy copy by email from the ICC does not cause the said time limit to start running (Decision 4A_40/2018 of 26 September 2018).

Only awards (final or interim awards) can be challenged, not procedural orders. Whether a decision qualifies as award or procedural order depends on its content and not on the labelling by the arbitral tribunal as the former or the latter. In a recent decision, the Swiss Federal Supreme Court confirmed this "substance over form" approach by requalifying a decision of the arbitral tribunal labelled as "procedural order" into an interim award (Decision 4A_136/2018 of 30 April 2018).

Due to the very limited grounds for challenging an award and the arbitration-friendly policy of the Swiss Federal Supreme Court, the success rate in set-aside proceedings is very low. In fact, statistics show that less than 8% of the challenges are successful.

The parties may exclude the possibility to challenge the arbitral award by express statement in the arbitration agreement or a subsequent written agreement provided that none of the parties has its domicile, its habitual residence or place of business in Switzerland (article 192(1) PILA).

While Swiss Arbitration Law is silent in this regard, the Swiss Federal Supreme Court has held that arbitral tribunals may correct or interpret arbitral awards upon request of a party. Such a request for correction or interpretation of the award does not interrupt the time limit for the challenge of the award with the Swiss Federal Supreme Court.

Even though Swiss Arbitration Law also does not contain any provisions on the revision of awards, the Swiss Federal Supreme Court has held that the revision of an award can be requested in case the award has been influenced by a crime or felony to the detriment of the applicant, or in case the applicant has discovered relevant facts or convincing evidence, which the applicant was unable to rely on in the previous proceedings even though they already existed at the time of the rendering of the award.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

In a decision in the year 2017, the Swiss Federal Supreme Court has indicated that parties cannot request a revision of an award in case they have validly excluded the possibility to challenge the award (Decision 4A_53/2017 of 17 October 2017).

Enforcement of the award

An award rendered by an arbitral tribunal seated in Switzerland is final and thus enforceable as of its notification.

The recognition and enforcement of foreign arbitral awards in Switzerland is governed by the New York Convention (article 194 PILA), also if the arbitral award was rendered by an arbitral tribunal seated in a non-member state of the New York Convention.

Based on the New York Convention, foreign arbitral awards are recognised and enforced in Switzerland upon an application accompanied by: (i) a duly authenticated original award or a duly certified copy thereof; (ii) an original of the arbitration agreement or a duly certified copy; and (iii) translations of the award and the arbitration agreement, if necessary. Swiss courts tend to avoid a formalistic approach regarding these requirements. Accordingly, where the authenticity of the award or the arbitration agreement is not in dispute, ordinary copies (without legalisation or certification) are sufficient. In addition, the Swiss Federal Supreme Court has held that Swiss courts may dispense with the requirement of translation of the award into an official language of Switzerland if the award is in English.

In Switzerland, the procedure for enforcing arbitral awards varies depending on the relief granted. While arbitral awards granting monetary relief are enforced in debt-collection proceedings in accordance with the Swiss Debt Collection and Bankruptcy Act, arbitral awards granting non-monetary relief (e.g. specific performance or declaratory relief) are enforced in accordance with the provisions in the Swiss Code of Civil Procedure.

Revision of the Swiss Arbitration Law

The Swiss Arbitration Law is currently being revised with the purpose of modernising it and enhancing the attractiveness of Switzerland as a place for international arbitration.

After the release of a preliminary draft in January 2017 and a consultation procedure in which the cantons, political parties, academics, arbitration organisations and practitioners provided feedback on the preliminary draft, the Swiss Federal Council released the draft bill concerning the revised Swiss Arbitration Law in October 2018. As a next step, this draft bill will be discussed in the Swiss Parliament, which will decide whether and to what extent the proposed amendments will be adopted.

Besides correcting certain stylistic inconsistencies, the proposed amendments shall implement the Swiss Federal Supreme Court's jurisprudence, clarify certain open issues and enhance the user-friendliness of Swiss Arbitration Law.

The following proposed amendments are of particular relevance:

- Appointment of arbitrators: In case the parties have not stipulated a seat of the arbitral tribunal or in case they stipulated that the seat is in Switzerland, the state court first seized is competent for the appointment of the arbitrator(s).
- Express provision stipulating the parties' duty to object immediately: It is well established case law in Switzerland that a party who considers that its procedural rights were violated must raise an objection immediately. A failure to do so results in the forfeiture of its rights to complain about that violation at a later stage, e.g. in setting-

© Published and reproduced with kind permission by Global Legal Group Ltd, London

aside proceedings. This principle will now be expressly stipulated in article 182(4) PILA.

- Assistance of Swiss state courts in foreign arbitral proceedings: According to the new article 185a PILA, a foreign arbitral tribunal as well as the parties to foreign arbitral proceedings can directly address Swiss state courts for assistance in the enforcement of interim measures as well as for the taking of evidence, if the interim measures will be enforced in Switzerland or if the taking of evidence is to take place in Switzerland, respectively.
- Express provision on correction, explanation and amendment of awards as well as revision: The proposed bill will implement express provisions as to the correction, explanation and amendment of awards as well as regarding the revision of awards. Both remedies are in practice already available but are not explicitly stipulated in Chapter 12 PILA.
- Language of written Submissions to the Swiss Federal Supreme Court: The proposed bill foresees that filings in matters of international arbitration with the Swiss Federal Supreme Court may also be made in English. Already today there is no need to file a translation of the challenged award in annulment proceedings, if the award is drafted in English. However, the possibility to file an action for annulment (or the request for revision) directly in English is new. Nevertheless, the decision of the Swiss Federal Supreme Court itself will continue to be issued in one of the official languages only – and not in English – and the same applies for all procedural orders issued by the Swiss Federal Supreme Court.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Michael Bösch
Tel: +41 44 421 45 45 / Email: m.boesch@thouvenin.com

Michael is particularly specialised in commercial arbitration where he has extensive expertise in national and international arbitrations conducted under the most common rules such as ICC, LCIA and Swiss Rules but also *ad hoc*. In doing so, Michael has acted both as counsel and as arbitrator in more than 35 arbitral proceedings. He also represents clients in litigation. He is co-author of the Thouvenin arbitration newsletter published on www.thouvenin.com, and the global head of the Arbitration and ADR section with Interlaw (www.interlaw.com), one of the world's leading law firm networks.
Who's Who Legal has recognised Michael as a 'Future Leader' in arbitration for several years. *Who's Who Legal* recognises him as a 'Future Leader' also in litigation, and he is moreover recommended by *The Legal 500* for his litigation work.

Patrick Rohn
Tel: +41 44 421 45 45 / Email: p.rohn@thouvenin.com

Patrick specialises in domestic and international commercial litigation and arbitration (including ICC, Swiss Chambers, WIPO), with a particular focus on disputes relating to distribution, licensing, unfair competition and intellectual property. Further, Patrick represents clients in complex contractual, corporate (including post-M&A, joint venture) and insolvency-related disputes up to the Appeal Court and the Federal Supreme Court, and he has considerable expertise related to cross-border asset tracing and recovery, and the enforcement of foreign judgments and arbitral awards. He is recognised by *Who's Who Legal* and *The Legal 500* and is listed by the International Distribution Institute and the Swiss Chambers' Arbitration Institution as an arbitrator with specific experience in the field of distribution (IDArb list of specialised arbitrators).

Simon Hohler
Tel: +41 44 421 45 45 / Email: s.hohler@thouvenin.com

Simon specialises in domestic and international commercial arbitration and state court litigation as well as in enforcement and legal assistance matters. He frequently represents clients in disputes concerning contract and commercial law, construction law, M&A transactions and sport law matters.
Having advised parties, as well as acted as counsel, arbitrator and secretary to arbitral tribunals in numerous institutional arbitrations (e.g. Swiss Chambers, ICC and CAS) and *ad hoc* arbitrations, Simon has extensive expertise in domestic and international arbitration. He has further represented clients in various state court proceedings, including obtaining and defending against interim measures, the freezing of assets as well as the enforcement of judgments. Simon is a co-author of the Thouvenin arbitration newsletter.

Thouvenin Rechtsanwälte KLG

Klausstrasse 33, 8008 Zurich, Switzerland
Tel: +41 44 421 45 45 / URL: www.thouvenin.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

UAE

Daniel Brawn & Maria Palmou
Galadari Advocates & Legal Consultants

Introduction

The UAE is a civil law jurisdiction, and comprises a federation of seven Emirates (Abu Dhabi, Dubai, Sharjah, Ajman, Umm al Quwain, Ras al Khaimah and Fujeirah). Until recently, arbitration procedure was governed by Articles 203 to 218 (the "Arbitration Chapter") of Federal Law No. 11 of 1992, the Law of Civil Procedure. After 10 years of discussion, Federal Law No. 6 of 2018 on Arbitration (the "Arbitration Law") was brought into effect on 16 June 2018, repealing and replacing the Arbitration Chapter.

The Arbitration Law is broadly based upon the United Nations Commission on International Trade Law of 1985 and amended in 2006 (the "Model Law"), in an effort to align the UAE arbitral framework with international standards. Article 2 of the Arbitration Law provides that the Arbitration Law applies to any arbitration seated in the UAE, whether new or ongoing, unless the Parties have agreed that another law will apply, provided there is no conflict with the public order and morality of the State; and to any international commercial arbitration seated outside the UAE, if the Parties have chosen the Arbitration Law to apply.

The Arbitration Law will not apply where the seat of arbitration is the Dubai International Financial Centre ("DIFC"). The DIFC is a free-zone within the Emirate of Dubai, empowered by federal legislation to enact autonomously its own regulatory and legal framework for all civil and commercial matters, and has its own independent courts which operate in the English language and apply common law procedure. The DIFC has its own Arbitration Law No. 1 of 2008, which is also based upon the Model Law and which applies to arbitrations seated in the DIFC. Parties may provide in their contracts for the DIFC as the seat of the arbitration, irrespective of whether there is any connection of the parties or the matter in dispute with DIFC. Abu Dhabi has a similar free-zone located in the Abu Dhabi Global Market ("ADGM"), which is also an autonomous common law jurisdiction with its own laws and courts, including an arbitration-specific legal framework (Arbitration Regulations 2015).

There are numerous arbitration institutions based in the UAE. A non-exhaustive list includes the following:

- The Dubai International Arbitration Centre ("DIAC"), which is currently the busiest arbitration centre in the Gulf region. The rules in force are the 2007 Arbitration Rules; the proposed new edition has not materialised. The default language of arbitration is English.
- The Abu Dhabi Commercial, Conciliation and Arbitration Centre ("ADCCAC"), which is often the preferred venue for the resolution of disputes by Abu Dhabi-based parties. The rules in force are the 2013 Procedural Regulations of Arbitration. The default language of the arbitration proceedings is Arabic, unless the parties agree otherwise.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- The DIFC-LCIA Arbitration Centre was established in 2008 in association with the London Court of International Arbitration ("LCIA"). The rules in force are the DIFC-LCIA Arbitration Rules 2016, which are largely modelled on the LCIA Arbitration Rules. The DIFC-LCIA Arbitration Centre is independent of the DIFC Courts, but its Awards may be ratified through the DIFC Court, and are increasingly popular.
- The Sharjah International Commercial Arbitration Centre ("Sharjah Tahkeem") is based in the Emirate of Sharjah and was established in 2009 under the auspices of the Sharjah Chamber of Commerce and Industry. The Rules of Arbitration are now in their second edition.
- The Ras Al Khaimah Centre of Reconciliation and Commercial Arbitration is based in the Emirate of Ras Al Khaimah; it was established in 2008 and forms part of the Ras Al Khaimah Chamber of Commerce and Industry. Its arbitration rules are contained within its Articles of Association.
- The Emirates Maritime Arbitration Centre is based in DIFC, and was established by the Dubai Government to provide specialised maritime mediation and arbitration services. Its Arbitration Rules are effective as of June 2016, and provide for a hybrid form of *ad hoc* arbitration, with some case management.
- The Islamic Centre for Reconciliation and Arbitration is a non-profit independent organisation active since 2007, facilitating the resolution of Islamic finance and banking disputes under Islamic Shari'a, under its own Rules of Arbitration and Reconciliation.
- The Securities and Commodities Authority arbitrations are conducted before its own panel, under its own rules.

Parties may combine the rules of their choosing with any seat within the UAE, which in turn will determine the applicable arbitration law and curial courts. However, the selection of the DIFC or ADGM as the seat must be explicit. For example, if the arbitration clause simply refers to "Dubai" as the seat, then "onshore Dubai" will be the seat and the Arbitration Law will apply, not the DIFC Arbitration Law.

There is no sovereign immunity as such under UAE law, and government entities may agree to arbitration as a means of dispute resolution, but only within the UAE and not foreign arbitration. However, no claim may be brought against government entities without first obtaining consent from the Ruler's Court, a process that aims primarily to promote amicable settlement. In any event, an arbitral award (or court judgment) may not be enforced by means of seizing or attaching public property (Article 247 CPC and other legislation specific to certain Emirates).

The UAE is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "New York Convention") without any reservations, under Federal Decree No. 43 of 2006, which entered into force on 19 November 2006.

Other multilateral conventions relating to the recognition and enforcement of arbitral awards, to which the UAE is a party, include the following:

- The Riyadh Convention on Judicial Cooperation between States of the Arab League (1983), which entered into force in 1999.
- The GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications (1987), which entered into force in 1995.
- The ICSID Convention (1965) ratified by the UAE in 1982.

In addition, the UAE is a party to numerous relevant bilateral treaties.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Arbitration agreement

The Arbitration Law requires that the arbitration agreement be evidenced in writing and allows parties to meet this requirement through any correspondence, including electronic mails (Article 7). This provision is similar to Article 7 of the Model Law.

Article 6 of the Arbitration Law recognises the severability of arbitration agreements. In line with Article 16 of the Model Law, the nullity, rescission or termination of the main contract does not have any effect on the arbitration clause and does not suspend the arbitral proceedings, provided that the arbitration clause is considered valid (i.e. it is not deemed null and void due to the absence of a party's legal capacity). Furthermore, arbitration rules of local institutes explicitly provide for the separability of the arbitration clause from the main contract (for example, Article 6.1 of the DIAC Arbitration Rules).

Article 8 of the Arbitration Law gives effect to Article 8 of the Model Law: the UAE courts are required to dismiss any action that falls within the scope of an arbitration agreement, provided Respondent takes the point at the first opportunity.

Article 4 provides that the person who signs an arbitration agreement must be specifically authorised to enter into the arbitration agreement, otherwise the agreement is considered null and void. This authorisation is usually in the form of a power of attorney or board resolution. Proof of a signatory's authority is not required under the Model Arbitration Law.

A further point to note is that, although the Arbitration Chapter of the Law of Civil Procedure has been replaced, Article 58(2) (which has not been replaced) requires that a lawyer representing a client in arbitration must have a special power of attorney. This is slightly at variance with Article 33 of the Arbitration Law, which requires that the arbitral tribunal may request proof of the authority granted to the representative "in such form as the Arbitral Tribunal shall specify".

Arbitration procedure

By Article 23 of the Arbitration Law, the parties may agree on the procedures to be followed in the arbitration, including the rules of procedure of a foreign arbitral institution, but to the extent that the parties do not agree, the tribunal may decide procedure.

Where institutional rules apply, the arbitration will commence in accordance with the relevant provisions, usually with the filing of a request for arbitration to the arbitration institution. In *ad hoc* arbitration, the arbitration will commence by means of a notice of arbitration sent by the claimant to the respondent. The notice will usually include the claimant's proposal for the appointment of arbitrator(s) or a proposed process for such appointment (for example, appointment by an arbitration institution or the court).

Article 27 provides that the date of commencement of the arbitration is the date following the date on which the composition of the tribunal is completed (i.e. the appointment of the Chair in a three party tribunal), unless the Parties agree otherwise. In contrast, Article 21 of the Model Arbitration Law provides that the arbitral proceedings are deemed to have commenced on the date on which the request for arbitration is received by the respondent. The commencement date is significant, because by Article 42 the final award should be issued within six months of that date (unless the parties agree otherwise), although that period can be extended.

Article 28 of the Arbitration Law provides that, unless the parties agree otherwise, the arbitral tribunal may hold the arbitration hearings: (a) at any physical venue it deems appropriate; or (b) through modern means of communication and technology (e.g., video conferencing).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

By contract, the Model Arbitration Law does not provide the option for the arbitral tribunal to hold hearings through modern technological means. The Arbitration Law introduces technological advances in an effort to provide flexibility to international arbitrators and parties.

The UAE is a civil law jurisdiction, and therefore disclosure requirements in litigation before courts are generally very limited and a litigant is generally not obliged to disclose detrimental information. While contracting parties are free to choose their own process, and therefore agree to more extensive disclosures, parties based in the UAE, and generally parties more familiar with civil law doctrines and practices, are reluctant to accept wider disclosure requirements. In addition, the common law principle of "without prejudice" communications is not recognised in the UAE legal system. Consequently, documents marked "Without Prejudice" (usually correspondence relating to settlement negotiations) may be produced and will be admitted by the arbitral tribunal, unless the parties expressly agree to treat such correspondence as confidential and not disclose it in the arbitration.

The principle of *kompetenz-kompetenz* of an arbitral to rule on its own jurisdiction is recognised in Article 19 of the Arbitration Law, and again, local arbitration rules include explicit provisions to this effect (for example, Article 6.2 of DIAC Arbitration Rules). The tribunal may rule on a plea either as a preliminary question or in a final award. If the tribunal rules as a preliminary question, a party may request the competent court to review and make its own determination on the matter, whereas a final award can only be challenged under Article 53.

Article 22 of the Arbitration Law permits the arbitral tribunal to allow a third party to join the arbitral proceedings, following the request of either party or the third party itself, provided that the third party is a party to the underlying arbitration agreement.

Articles 33 and 48 of the Arbitration Law provide for the confidentiality of the arbitration. However, there are no provisions in the Arbitration Law for the ratification process in the local courts to be kept confidential.

Arbitrators

By Article 9 of the Arbitration Law, the default number of arbitrators is three, if the parties have not agreed otherwise. The qualifications required of arbitrators are provided for in Article 10 of the Arbitration Law. In keeping with international practice, when a potential arbitrator is approached, s/he must disclose in writing anything which relates to their possible independence or impartiality.

The parties are free to agree the appointment of arbitrator(s) whom they consider suitable, usually by reference to the appointment provisions of the arbitration rules that the parties have adopted (for example, Articles 8–11 of the DIAC Arbitration Rules, Articles 5–8 of the DIFC-LCIA Arbitration Rules). In *ad hoc* arbitrations, if the parties fail to agree, the arbitrator(s) will be appointed by the court upon application of one of the parties, and the court's decision cannot be appealed.

The arbitrator must not be a minor, legally incapacitated, under guardianship, deprived of his civil rights following criminal conviction, or bankrupt. There are no restrictions regarding nationality, gender or faith. Some arbitration rules of local institutions do provide that the sole arbitrator or the chairman of the tribunal may not be of the same nationality as any party unless agreed otherwise (for example, Article 10 of the DIAC Arbitration Rules, Article 6 of the DIFC-LCIA Arbitration Rules).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

It should be noted that in the past, the grounds for disqualification of an arbitrator have been interpreted by the UAE courts narrowly (for example, an arbitrator will not be disqualified simply on the basis that he works for the same law firm as the counsel of one of the parties).

An important legislative development was that in 2016, Article 257 of the Penal Code (Federal Law 3 of 1987) was amended to the effect that an arbitrator, expert, translator or investigator could be imprisoned for failing "to maintain the requirements of integrity and impartiality". To a heart-felt sigh of relief from the arbitral community, Federal Decree-Law 24 of 2018 removed the word "arbitrator" from the list.

Interim relief

By Article 21.1 of the Arbitration Law, unless otherwise agreed by the parties, the arbitral tribunal is vested with the power to order interim measures for the preservation of evidence, goods and assets. By Article 21.2, the tribunal may require the party requesting interim measure to provide security to cover the costs of such measures, and if the tribunal subsequently decides that the requesting party was not entitled to such measures, the tribunal may order that party to bear any damage occurring from the enforcement of the order. By Article 21.3, the tribunal may amend, suspend or repeal the order, upon the request of one of the parties or on its own motion. Local arbitration rules also include detailed provisions to this effect (for example, Article 31 of the DIAC Arbitration Rules, Article 25 of the DIFC-LCIA Arbitration Rules, Article 25 of the ADCCAC Procedural Regulations of Arbitration).

Under this provision, the tribunal can issue any provisional orders or take other interim or conservatory measures it considers necessary. This may include measures relating to the conservation, storage, sale or disposal of documents or goods which form part of the subject matter of the dispute (such as an order for deposit with a third party or an order for the sale of perishable goods); or in general, order on a provisional basis any relief which the tribunal would have power to grant in a final award.

Arbitration award

An arbitral award must be rendered in writing and signed by the arbitrators. A welcome development is that by Article 41.6 of the Arbitration Law, the award can be signed electronically and outside the seat of the arbitration. Previously, signatories had to be physically present in the UAE when they signed the award. Article 42.1 provides that the Tribunal shall issue the award by the date agreed upon by the parties, and if no date is agreed upon, the award shall be issued within six months from the date of the first arbitration hearing. This six-month deadline can be extended for up to six months with the agreement of the parties, or for a longer period by making a request to the court of arbitral institution.

Article 50 of the Arbitration Law permits the Tribunal to correct clerical or mathematical errors in its award, upon the request of one of the parties or on its own initiative. Furthermore, Article 51 provides the parties with the right, within 30 days from the date the award was received and with a notice to the other party, to request the Tribunal to deal with any claims made during the course of the arbitration that have been omitted from the award.

UAE law formally recognises payment of interest on commercial debt at a rate not exceeding 12%. The courts routinely award interest at a rate of 9% *per annum*, but that is from the date on which the claim was commenced, not the date upon which payment should have been made. The parties are free to stipulate an agreed rate of interest in their contract.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Notably, an arbitral tribunal may award compound interest if so agreed by the parties, unlike courts that will only award simple interest.

In this context, a Court of Cassation decision interpreted the wording of DIAC Arbitration Rules (Article 37.10 and Article 2.1 of the Appendix – Costs of Arbitration thereof) as not to include legal costs within the meaning of the arbitration costs. Similar limitations to the tribunal's power may apply on the face of the wording of Article 28 paragraphs 7 and 9 of the ADCCAC Procedural Regulations of Arbitration. On the other hand, Article 28.3 of the DIFC-LCIA Arbitration Rules expressly provides the power of the tribunal to award reasonable legal costs and expenses incurred by a party.

Generally, costs are allocated on the basis of the parties' relative success in the arbitration or in accordance with the principle that costs follow the event. An award on costs may be made after the issuance of the award on the merits of the dispute.

The award becomes *res judicata* with regard to its subject matter upon its issuance.

Enforcement and challenge of arbitral award

The enforcement of an arbitral award is subject to ratification by the courts (Article 52). The ratification process commences with a filing of an ordinary court action before the competent court of appeal. This development should improve the rapidity of the ratification process, as it will be dealt by judges with more in-depth knowledge. By Article 54.2, a party may challenge the award within 30 days of the date the award was notified to the party. By Article 55.1, the documents that must be submitted in support of the application remain the same as under the old Law: the original or certified copy of award; a copy of the arbitration agreement; an Arabic translation of the award (if it is not rendered in Arabic); and a copy of the minutes of deposit of the award in court. By Article 55.2, the court of appeal has 60 days to respond to the request for ratification, unless there are grounds for setting the award aside. The grounds for refusing ratification are set out in Article 53, which cover the invalidity of the award and procedural irregularities.

By Article 56.1, a party's request for annulment does not stay enforcement of the award, but the court may order a stay of enforcement at the request of one of the parties. Articles 56.2 and 56.3 prescribe the time limits. The court decision on the stay of enforcement must be provided within 15 days from the date of the first hearing of the request, and the court must reach its final decision within 60 days.

Domestic awards

There is consistent jurisprudence that the court will not review the merits of the award. The court will only ascertain whether the arbitration was conducted in accordance with the requirements of the Arbitration Law, that the award meets the requirements with regard to its form and content, and that enforcement of the award will not violate public policy. Challenge of the award by the losing party is allowed only on the grounds set out in Article 53 of the Arbitration Law, essentially for defects of the arbitration agreement or procedural irregularities. In particular, an award may be nullified only if:

- the arbitration agreement doesn't exist;
- a party was incompetent or incapacitated to conclude the arbitration agreement;
- a party was incapacitated to dispose of the disputed right under the law governing his/her capacity;
- a party was unable to present its case as a result of improper notification of the

© Published and reproduced with kind permission by Global Legal Group Ltd, London

appointment of an arbitrator or the arbitration proceedings, or as a result of the arbitral tribunal's breach of due process rights, or any other reason beyond the party's control;

- the award excludes the application of the law agreed by the parties;
- there are irregularities to the formation of the tribunal or the appointment of an arbitrator;
- there are irregularities with the arbitration proceedings; or
- the award settles matters outside the scope or exceeds the limits of the arbitration agreement.

The court may invalidate an award on its own motion only if:

- the subject matter of the dispute can't be settled by arbitration; or
- the award violates the public order.

UAE courts have been known to cite public order as a ground for refusing ratification, or for allowing nullification of arbitration awards, and considerations of public order are of great importance. The definition of public order is found in Article 3 of the Law of Civil Transactions (UAE Federal Law No. 5 of 1985 as amended, the Civil Code) and is deemed to include: matters relating to personal status such as marriage, inheritance and lineage; matters related to systems of government, freedom of trade, circulation of wealth; and rules of individual ownership and the other rules and foundation upon which society is based, in such a manner as not to conflict with the definitive provisions and the fundamental principles of the Islamic *Shari'a*.

In the past, UAE courts had a tendency to invoke "public order" for such violations as improper signing of the award, and whether the subject matter of a particular dispute could be referred to arbitration. Today, however, the courts are more supportive of the arbitration process, if the parties have genuinely chosen arbitration over court proceedings.

Foreign awards

Enforcement of foreign arbitration awards is subject to essentially the same conditions applicable for the enforcement of foreign court judgments (Articles 235 and 236 of the Law of Civil Procedure), although by Article 238, provisions of relevant international treaties to which UAE is a party will supersede those conditions.

As explained above, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) has been incorporated in the UAE legal system since 2006. Therefore, enforcement of foreign arbitration awards is subject to the conditions set out in Article V of the New York Convention, unless enforcement under another available bilateral or multilateral treaty is more favourable (Article VII(1) of the New York Convention).

While there have been cases in the past where the UAE courts did not apply the New York Convention within the strict terms of its provisions (for example, refusing enforcement of an international award for breach of a procedural requirement to examine witnesses under oath), in the past decade or so the UAE courts have tended to enforce international arbitration awards under the terms of the New York Convention, in compliance with its terms. In this context, the courts have confirmed that domestic arbitration awards will be viewed in accordance with the procedural requirements of UAE law, while international arbitration awards are viewed in accordance with the requirements of the New York Convention.

For completeness, in the rare instances where the New York Convention (or some other multilateral or bilateral treaty) would not apply, the conditions of Articles 235 and 236 CPC for the enforcement of foreign arbitration awards are the following:

© Published and reproduced with kind permission by Global Legal Group Ltd, London

- reciprocity (Article 235.1 CPC);
- the UAE courts did not have jurisdiction to try the dispute (Article 235.2(a) CPC);
- the arbitration tribunal had jurisdiction at the seat of the arbitration (Article 235(2)(b) CPC);
- the parties to arbitration were properly notified and represented (Article 235.2(c) CPC);
- the arbitration award has acquired the force of *res judicata* in accordance with the law of the seat of the arbitration (Article 235.2(d) CPC);
- the award does not conflict with a judgment of the UAE courts and does not conflict with *bonos mores* or the public order of the UAE (Article 235.2(e) CPC); or
- the subject matter of the dispute is arbitrable under the laws of the UAE and is capable of enforcement under the laws of the seat of the arbitration (Article 236 CPC).

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Dr. Daniel Brawn
Tel: +971 4377 8100 / Email: daniel@galadarilaw.com

Dr. Brawn is Senior Counsel at Galadari Advocates & Legal Consultants, a leading law firm based in Dubai, UAE. Daniel is an English lawyer, a Fellow of the Chartered Institute of Arbitrators and a Chartered Arbitrator. He sits as an arbitrator himself, and serves regularly as lead counsel in international commercial and construction arbitrations, both institutional and *ad hoc*. He has over 20 years of experience in international construction projects. He is the Course Director of the Chartered Institute of Arbitrator's training courses in Dubai, he teaches and lectures extensively, and is the author of numerous conference papers and articles on obscure legal topics.

Maria Palmou
Tel: +971 4377 8100 / Email: maria@galadarilaw.com

Maria joined Galadari Advocates & Legal Consultants in 2015 as a Senior Associate. Based in Dubai, she focuses on commercial and dispute resolution work within the Arbitration, Corporate and Construction teams.

With degrees in both Law and Business, Maria's education and prior work experience enables her to have a deep understanding of financial and commercial principles. She has a wide range of experience across the corporate, commercial and construction sectors, with both front-end and dispute-resolution capabilities.

Her extensive involvement in arbitration and court litigation processes, as well as her experience in mergers & acquisitions and privatisation, commercial contracts and agreements, enables Maria to offer clients a comprehensive skill set.

Galadari Advocates & Legal Consultants

P.O. Box 7992, Dubai
Tel: +971 4377 8100 / Fax: +971 4393 7755 / URL: www.galadarilaw.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

USA

Martin Jackson, Sam Choi & Daniel R. Perez
Sidley Austin LLP

Introduction

The United States has a national policy favouring arbitration, and courts in the United States routinely enforce arbitration agreements and awards. The liberal policy favouring arbitration is codified in the Federal Arbitration Act,[1] first enacted in 1925, which provides the statutory framework for the recognition and enforcement of arbitration agreements and awards.

While the United States has a dual legal system comprised of a federal court system and separate court systems in each of the 50 states, to the extent that federal and state laws differ concerning arbitration, the Federal Arbitration Act pre-empts state law that "discriminat[es] on its face against arbitration . . . [or] covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements."[2] As a result, the pro-arbitration mandate of the Federal Arbitration Act is applied broadly in both federal and state courts.

The statutory provisions of the Federal Arbitration Act are divided into three chapters. The first chapter requires courts to respect and "enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted."[3] It also authorises courts to stay proceedings and to compel arbitration, and empowers arbitrators to summon witnesses.[4] The first chapter also establishes procedures for converting awards into U.S. judgments and sets forth narrow grounds for vacating, modifying and correcting arbitral awards.[5]

The second chapter of the Federal Arbitration Act implements the New York Convention.[6] This chapter establishes a strong presumption in favour of arbitration of international commercial disputes, and federal district courts have subject matter jurisdiction over actions that arise under the New York Convention.

The third chapter of the Federal Arbitration Act implements the Panama Convention.[7] If both the New York Convention and the Panama Convention apply to a case involving judicial assistance with respect to the enforcement of an international arbitration agreement or award, the Panama Convention governs if the majority of the parties to the arbitration agreement are citizens of states that are signatories to the Panama Convention.[8] The United States has also ratified and implemented the ICSID Convention.[9]

Arbitrations may generally be grouped into three categories: (1) investor-state arbitrations governed by the ICSID Convention; (2) commercial and investor-state arbitrations falling under the New York or Panama Convention; and (3) domestic arbitrations within the scope of Chapter 1 of the Federal Arbitration Act. Pursuant to Section 202 of the Federal Arbitration Act, all arbitration agreements and awards arising out of a legal relationship (whether contractual or not) that are considered commercial in nature, are governed by the New York

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Convention unless the relationship giving rise to the agreement or award is solely between U.S. citizens and (i) does not relate to property located abroad, (ii) does not envisage performance abroad, and (iii) has no other reasonable relationship to a foreign state.[10] Arbitration agreements and awards made in the United States that fall under the New York or Panama Convention pursuant to Sections 202 and 302 of the Federal Arbitration Act are commonly referred to as "non-domestic" agreements or awards.[11] However, the United States will only apply the New York and Panama Conventions to a foreign arbitration award if the award is made in the territory of another contracting state.[12]

The Federal Arbitration Act does not mandate substantive law or a specific set of arbitration rules or procedures for either domestic or international arbitrations. As a result, contracting parties are free to reach agreement on applicable law, as well as arbitral rules and procedures. The three most prominent arbitration institutions based in the United States are: the American Arbitration Association ("AAA") and its international division, the International Centre for Dispute Resolution ("ICDR"); JAMS Mediation, Arbitration and ADR Services ("JAMS"); and the International Institute for Conflict Prevention & Resolution ("CPR").[13] Each institution administers international and domestic arbitrations covering all types of disputes and has specific international arbitration rules. The International Court of Arbitration of the International Chamber of Commerce ("ICC") also has an office in New York, which administers ICC international arbitrations based in North America.[14]

Arbitration agreements

U.S. courts interpret and construe the terms of arbitration agreements, including arbitration provisions in investment treaties, like other contracts in accordance with the governing substantive law and rules of construction.[15] The Federal Arbitration Act specifically provides that courts must "enforce [arbitration agreements] according to their terms."[16]

While some jurisdictions require various formalities for the formation of a valid arbitration agreement, the Federal Arbitration Act only requires arbitration agreements to be in writing and provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[17] Parties are free to limit the scope of their arbitration agreement and courts generally honour narrow arbitration agreements where the parties have made clear that only certain matters or issues fall within the scope of such agreement.[18]

Arbitrability

The "arbitrability" of a particular dispute, meaning whether a dispute is subject to arbitration,[19] is "an issue for judicial determination unless the parties clearly and unmistakably provide otherwise[.]"[20] Previously, U.S. courts were split on whether a court could refuse to enforce an agreement to arbitrate and decide arbitrability issues even when the parties had delegated the authority to resolve arbitrability issues to the arbitrator if the assertion of arbitrability was "wholly groundless". On January 8, 2019, in *Henry Schein, Inc. v. Archer & White Sales, Inc.,*[21] the U.S. Supreme Court unanimously rejected the "wholly groundless" exception and held that "[j]ust as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator."[22]

The Supreme Court's decision in *Schein*, however, did not resolve a circuit disagreement regarding whether the selection of arbitral rules that contain a provision authorising an arbitral tribunal to determine its own jurisdiction (a competence-competence clause) "clearly and unmistakably" indicates that the parties intended to place the authority to determine issues of arbitrability solely with the arbitrator. A majority of courts that have addressed this issue have

© Published and reproduced with kind permission by Global Legal Group Ltd, London

determined that the inclusion of a competence-competence clause in the arbitral rules chosen by the parties (like the ICDR, ICC, and UNCITRAL rules) constitutes clear and unmistakable evidence that the parties agreed to submit arbitrability issues to arbitration.[23] In order to avoid a dispute, parties should clearly specify whether they intend to arbitrate issues related to the formation, validity, and scope of the arbitration agreement and should not rely exclusively on the incorporation of arbitral rules containing competence-competence language.

Separability

A long-standing U.S federal legal principle is the doctrine of separability (also known as severability). At bottom, where the parties have included an agreement to arbitrate within a separate contract and one of the parties challenges the validity of the contract, the doctrine requires the strict enforcement of the arbitral agreement, even if the remainder of the parties' agreement is unenforceable or invalid.[24] In such cases, the dispute must be referred to arbitration pursuant to the arbitral agreement; courts may consider the validity of the agreement to arbitrate only if the challenging party specifically argues that the arbitral agreement itself is invalid.[25] Generally speaking, even if the entire remainder of a contract is arguably *void ab initio*, if the agreement to arbitrate itself is enforceable, then any challenges to the validity of the agreement as a whole must be arbitrated.[26]

Arbitration procedure

The Federal Arbitration Act does not designate arbitral rules or procedures for arbitrations and there are no default rules that apply to international arbitrations seated in the United States. Contracting parties are free to select *ad hoc* arbitration rules and procedures or specific rules established or administered by arbitral institutions. The ICDR, ICC, JAMS and CPR all have established rules and procedures specifically for international arbitrations.[27]

While the Federal Arbitration Act does not specify particular arbitration procedures, it provides certain due process protections by permitting federal district courts in which an arbitration award is made to vacate the award where the arbitrators were guilty of misconduct in refusing to hear evidence pertinent and material to the controversy.[28] Similarly, under the New York Convention, an award may be vacated only in the courts of the country where the arbitration occurred or the country whose procedural law governed the arbitration.[29] The substantive grounds for non-recognition or non-enforcement of an award falling within the scope of the New York Convention are set forth in Article V of the convention.

While there are no default arbitration rules or procedures at the federal level, some states like California and Texas have adopted default arbitration rules and procedures.[30]

Arbitrators

In the U.S., contracting parties can establish the number of arbitrators that will hear and decide disputes arising from their agreement and the manner by which the arbitrators are to be appointed. Such decisions are generally set forth in the arbitration agreement. Another option for the appointment of arbitrators is to identify a particular set of arbitration rules that will govern the arbitration in the parties' arbitration agreement, which provides for the number of arbitrators and the manner of appointment.[31]

In the event that the parties' arbitration agreement does not identify any manner by which arbitrators are to be appointed and the parties are otherwise unable to agree on appointment of the arbitrators, Section 5 of the Federal Arbitration Act provides that any party to the controversy may apply to a court for appointment of the arbitrator(s) and the court shall designate and

© Published and reproduced with kind permission by Global Legal Group Ltd, London

appoint an arbitrator or arbitrators[32] Section 5 also provides a default rule that "unless otherwise provided in the agreement the arbitration shall be by a single arbitrator."[33]

Challenge to arbitrators

U.S. courts are not likely to entertain any pre-award challenges to an arbitrator. While Section 10 of the Federal Arbitration Act provides that a court can vacate an award "[w]here there was evident partiality or corruption in the arbitrators,"[34] the Federal Arbitration Act does not similarly empower the courts to remove an arbitrator prior to the rendering of an award, and multiple courts have concluded that they lacked authority to entertain pre-award challenges.[35]

However, each of the major U.S.-based arbitration institutions has rules and procedures for challenging arbitrators.[36] Those rules generally provide that an arbitrator may be challenged and replaced for objections such as lack of independence, partiality, or failure to participate in the proceedings. In considering arbitrator challenges based on alleged conflicts with respect to foreign awards, courts may look to the relevant conflict or independence rules in place in the jurisdiction where the arbitrator practises.[37]

Arbitrator immunity

Arbitrators may be afforded immunity from liability through the rules of the administering arbitral institution and/or applicable U.S. state or federal law. For example, Article 38 of the ICDR Rules provides that an arbitrator "shall not be liable to any party for any act or omission in connection with any arbitration under th[e] Rules, except to the extent that such a limitation of liability is prohibited by applicable law."[38] The JAMS and CPR international arbitration rules contain similar limitations on arbitrators' liability.[39]

U.S. federal courts have separately ruled that arbitrators are immune from suit for acts or omissions within the scope of their duties and within their jurisdiction because "their role in deciding disputes is functionally equivalent to the role of judges."[40] State laws may provide similar protections for arbitrators. For example, California and New York courts have both endorsed arbitral immunity in dismissing claims against arbitrators based on their acts performed in their arbitral capacity.[41]

Interim relief

Interim relief may be obtained through federal and state courts, an emergency arbitrator, or an arbitral tribunal. While the Federal Arbitration Act does not address the availability of judicial interim relief in aid of international arbitration, the majority of federal courts have concluded that they are empowered to provide certain interim relief.[42] These judicial decisions affirm that U.S. courts have authority to order interim relief to preserve the *status quo* prior to the commencement of or during arbitral proceedings, and to protect "the meaningfulness of the arbitration process."[43]

Certain states similarly provide interim relief in aid of international arbitration. By way of example, the California Code of Civil Procedure provides that "[i]t is not incompatible with an arbitration agreement for a party to request from a superior court, before or during arbitral proceedings, an interim measure of protection, or for the court to grant such a measure."[44] New York likewise authorises the New York state courts to "entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state . . . ."[45]

A party to an arbitration may also seek interim relief under the rules of the administering arbitral institution (assuming those rules provide for such relief). The ICDR, CPR, and JAMS international rules all grant arbitrators broad authority to order interim or conservatory measures

© Published and reproduced with kind permission by Global Legal Group Ltd, London

that they deem necessary.[46] And, in the event an arbitral tribunal has not been appointed, these arbitral rules also provide for the appointment of an emergency arbitrator who can order interim or conservatory measures on an expedited basis.[47]

Disclosure in aid of arbitration proceedings

A potentially powerful tool for disclosure in aid international arbitration proceedings is contained in 28 U.S.C. § 1782. This statute empowers U.S. courts to assist in gathering evidence to be used for foreign proceedings. The statute reads, in pertinent part: "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation."

While the availability and use of Section 1782's procedures for investor-state arbitrations is relatively settled,[48] U.S. federal courts are divided on whether a tribunal in an international commercial arbitration is considered a "foreign or international tribunal", as required by Section 1782 to obtain disclosure. For example, in *In re Ex Parte Application of Kleimar N.V.*,[49] the court noted that while there was a lack of certainty on the issue, *dictum* in the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*,[50] stating that the term "tribunal" as used in Section 1782 encompassed arbitral tribunals, suggested that "private foreign arbitrations, in fact, [are] within the scope of Section 1782."[51] Other courts post-*Intel* have decided to the contrary, holding that Section 1782 may not be used to obtain disclosure in aid of a private foreign arbitration proceeding.[52]

In addition to determining whether an arbitral tribunal is a "foreign or international tribunal" for the purposes of Section 1782, courts considering whether to grant an application for disclosure pursuant to Section 1782 must decide whether the four *Intel* factors identified by the Supreme Court weigh in favour of granting a Section 1782 request. These four factors are: (1) whether the person from whom discovery is sought is a participant in the foreign proceedings, such that the need for Section 1782 aid may be decreased; (2) the nature of the tribunal and whether the foreign tribunal would be receptive to U.S. federal-court judicial assistance; (3) whether the Section 1782 application "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and (4) whether the requests are "unduly intrusive or burdensome."[53] After due consideration of these factors, a federal district court may exercise its discretion in determining whether to grant a Section 1782 application.

Arbitration awards

Neither the Federal Arbitration Act nor the New York Convention impose any requirements as to the form of an arbitration award, although certain states in the U.S. do impose specific requirements.[54] With respect to recognition and enforcement, before exercising jurisdiction under the Federal Arbitration Act, U.S. courts must determine that an order issued by an arbitrator or tribunal is both an "arbitration award" within the meaning of the Federal Arbitration Act, and that it is sufficiently final for purposes of federal law to permit review.

With respect to whether an award is an "arbitration award" under the Federal Arbitration Act, in a recent, February 2019 decision, the Court of Appeals for the Ninth Circuit held that an arbitrator's order does not constitute an "arbitration award" under the Federal Arbitration Act or the New York Convention unless it resolves an existing dispute.[55] Where the parties had entered into a settlement agreement prior to referring the matter to arbitration, the Ninth Circuit held that the award issued with respect to the previously settled claims did not constitute an

© Published and reproduced with kind permission by Global Legal Group Ltd, London

"arbitration award" because, "[h]aving settled their dispute, [the parties] had nothing to arbitrate."[56] The Ninth Circuit stressed, however, that its decision did not encroach on parties' ability to reduce settlements reached during arbitration into arbitral awards.

With respect to whether an award is sufficiently final to permit judicial review, U.S. federal courts are not permitted to review arbitrators' interlocutory rulings.[57] However, interim or partial awards may be deemed final and reviewable in circumstances where the interim or partial award "finally and conclusively dispose[s] of a separate and independent claim."[58] If an interim or partial award is a "final" award within the meaning of the Federal Arbitration Act, the limitations period for a petition to vacate or enforce the award may begin during the pendency of the arbitration.[59] Accordingly, parties to an interim or partial award should analyse whether such an award is considered "final" in order to ensure that the applicable statute of limitations will not bar a subsequent petition to enforce, vacate or modify the award.

U.S. courts may have either "primary jurisdiction" or "secondary jurisdiction" over an award governed by the New York or Panama Convention. The country in which, or under the law of which, an award was made is said to have "primary jurisdiction" over the award, while all other Convention signatories possess "secondary jurisdiction" over the award.[60] The distinctions between primary and secondary jurisdiction have a significant impact on the conduct of post-award proceedings in U.S. courts.

Challenges to arbitration awards

The Federal Arbitration Act permits parties to apply to a state or federal court on limited grounds for an order vacating an arbitral award.[61] An application to vacate, modify or correct an arbitration award must be made within three months after the award is made.[62] An order by a U.S. court vacating an arbitration award will preclude the conversion of an arbitration award into a U.S. judgment and may also provide a defence to enforcement of an arbitration award under the New York and Panama Conventions in jurisdictions outside the United States.[63] Under the New York Convention, only a court with primary jurisdiction over an award may vacate it.[64] In contrast, courts with secondary jurisdiction over an award may only refuse enforcement of the award and such refusal does not preclude enforcement elsewhere.[65]

Section 10 of the Federal Arbitration Act provides the *exclusive* grounds for *vacatur* of a domestic arbitration award.[66] The federal courts of appeal disagree as to whether Section 10 of the Federal Arbitration Act or Article V of the New York Convention (as implemented by 9 U.S.C. § 207) supplies the grounds for vacating non-domestic awards. The majority view is that Section 10 of the Federal Arbitration Act provides the grounds for vacating non-domestic awards because the New York Convention permits courts of primary jurisdiction to vacate an arbitration award in accordance with their domestic law.[67] However, the Court of Appeals for the Eleventh Circuit has held that a non-domestic arbitration award may only be vacated based on one of the Article V grounds for refusing enforcement of an arbitration award under the Convention.[68]

Enforcement of arbitration awards

Before an award creditor may invoke the assistance of U.S. courts in pursuing an award debtor's assets in the United States, the award creditor must convert the arbitration award into a domestic judgment.[69] Section 9 of the Federal Arbitration Act establishes procedures for converting arbitration awards into domestic judgments and provides that a petition to confirm must be granted unless the award is vacated or modified in accordance with Sections 10 or 11 of the Federal Arbitration Act.[70]

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Sections 207 and 302 of the Federal Arbitration Act provide for the enforcement of arbitration awards governed by the New York and Panama Conventions, respectively. Generally, where U.S. courts possess only secondary jurisdiction over an arbitration award falling under the New York or Panama Convention, they may only refuse enforcement on the grounds enumerated in those Conventions.[71] However, U.S. courts have concluded that, "[e]ven though the New York Convention does not list personal jurisdiction as a ground for denying enforcement, the [U.S. Constitution] requires that a court dismiss an action, on motion, over which it has no personal jurisdiction."[72]

The requirement of a jurisdictional nexus between an award debtor and the United States has become increasingly onerous following the Supreme Court's decision limiting U.S. courts' general jurisdiction over foreign corporations in *Daimler AG v. Bauman,* 571 U.S. 117 (2014).[73] Not without controversy, the Court of Appeals for the Second Circuit has held that Article III of the New York Convention, which mandates the recognition and enforcement of Convention awards "in accordance with the rules of procedure of the territory where the award is relied upon",[74] permits dismissal of enforcement petitions pursuant to the U.S. doctrine of *forum non conveniens*.[75]

An application for confirmation pursuant to Section 9 of the Federal Arbitration Act must be filed within one year after the award is made.[76] In contrast, a petition to enforce an award falling under the New York or Panama Convention must be filed within three years following the issuance of the award.[77] In addition, some federal appellate courts have held that, where an arbitration award has been reduced to judgment in a foreign jurisdiction, the Federal Arbitration Act does not prevent award-creditors from obtaining enforcement of the foreign judgment even though it is based upon a time-barred award.[78] Once an award-creditor has obtained a state or federal judgment enforcing an arbitration award, it may avail itself of statutes providing for the registration of federal and sister-state judgments to pursue a debtor's assets in other U.S. states.

Investment arbitration

The United States is a signatory to the ICSID Convention.[79] Investment treaties frequently provide investors with a choice with respect to the rules that will govern arbitrations commenced pursuant to the treaties' dispute resolution provisions.[80] The procedures applicable to post-award proceedings in U.S. courts relating to investor-state awards vary depending on whether or not the award is made pursuant to Chapter IV of the ICSID Convention. While post-award proceedings involving non-ICSID awards, such as those made pursuant to the UNCITRAL rules, are generally governed by the Federal Arbitration Act,[81] the Federal Arbitration Act does not apply to ICSID awards.[82] In contrast with the summary proceedings for award enforcement under the Federal Arbitration Act, award creditors must commence a plenary civil action in federal court in order to enforce an ICSID award.[83]

Enforcement of an ICSID award is not subject to any merits defences because U.S. courts are required to accord ICSID awards the "same full faith and credit" accorded the judgments of U.S. states.[84] However, ICSID-award creditors may still encounter significant difficulties in enforcing an ICSID award against a foreign state (or instrumentality) and satisfying a resulting judgment. Multiple courts have concluded that 22 U.S.C. § 1650a does not relieve award creditors of the need to satisfy the jurisdictional, service and venue requirements of the Foreign Sovereign Immunities Act (FSIA).[85] In addition, any attempt to collect foreign state property in the United States would need to comply with the FSIA's execution immunity provisions.[86]

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Acknowledgments

The authors gratefully acknowledge the contribution to this article of Sidley Austin LLP partner Marissa Alter-Nelson and associate Gaëlle Tribié.

* * *

Endnotes

1. 9 U.S.C. § 101, *et seq.*
2. *See Kindred Nursing Ctrs. L.P. v. Clark,* 137 S. Ct. 1421, 1426 (2017).
3. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (quoting *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013)).
4. 9 U.S.C. §§ 3-7.
5. 9 U.S.C. §§ 9-11.
6. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 ("New York Convention"). See also 9 U.S.C. §§ 201-208.
7. Inter-American Convention on International Commercial Arbitration of January 30, 1975, Pub. L. No. 101-369, 104 Stat. 448 (1990) ("Panama Convention"). See also 9 U.S.C. §§ 301-307.
8. 9 U.S.C § 305.
9. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1720 ("ICSID Convention"). See also 22 U.S.C. § 1650a.
10. See 9 U.S.C. § 202. The Panama Convention's scope of application is identical. See 9 U.S.C. § 302.
11. See *Zeiler v. Deitsch*, 500 F.3d 157, 164 (2d Cir. 2007) (stating that where arbitration involved assets located in Israel and Israeli residents, the arbitration "should be considered a non-domestic arbitration for purposes of the [Federal Arbitration Act]" "even though the arbitration took place in New York").
12. See *Belize Soc. Dev. Ltd. v. Gov't of Belize,* 668 F.3d 724, 731 n.3 (D.C. Cir. 2012). See also 9 U.S.C. § 304.
13. AAA (http://www.adr.org); ICDR (http://www.icdr.org); JAMS (http://www.jamsadr.com); CPR (http://www.cpradr.org).
14. ICC, SICANA, Inc. (https://iccwbo.org/contact-us/contact-sicana/).
15. *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 37 (2014).
16. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010) (citing *Volt Information Servs., Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989).
17. 9 U.S.C. § 102.
18. *Volt Information Servs.*, 489 U.S. at 479 ("parties are generally free to structure their arbitration agreements as they see fit"); *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 344 (2011) ("parties may agree to limit the issues subject to arbitration" (citation omitted)).
19. *BG Grp.*, 572 U.S. at 34.
20. *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 77, 83 (2002) (internal citations omitted).
21. 139 S. Ct. 524 (2019).
22. *Schein*, 139 S. Ct. at 530.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

23. *See, e.g., Oracle Am., Inc. v. Myriad Group, A.G.,* 724 F.3d 1069, 1074-75 (9th Cir. 2013) (noting that the "prevailing view" is that incorporation of the UNCITRAL rules "is clear and unmistakable evidence that the parties agreed the arbitrator would decide arbitrability"); *Green v. SuperShuttle Int'l, Inc*., 653 F.3d 766, 769 (8th Cir. 2011) (same as to AAA rules). But *see, e.g., Riley Mfg. Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 (10th Cir. 1998) (arbitration agreement incorporating AAA rules did not indicate "a specific intent to submit to an arbitrator" the question of arbitrability).
24. *See, e.g., Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).
25. *Buckeye Check Cashing v. Cardegna,* 546 U.S. 440, 448-49 (2006).
26. *See, e.g.*, Buckeye Check Cashing, 546 U.S. at 448-49.
27. ICDR (https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules.pdf); ICC (https://iccwbo.org/publication/arbitration-rules-and-mediation-rules/); JAMS (https://www.jamsadr.com/international-arbitration-rules/english); CPR (https://www.cpradr.org/resource-center/rules/international-other/arbitration/2019-international-administered-arbitration-rules).
28. 9 U.S.C. § 10(a)(3).
29. New York Convention, arts. V(1)(e), VI.
30. Cal. Civ. Proc. Code §§ 1297.191-1297.336 (2019); Tex. Civ. Prac. & Rem. Code §§ 171.041-171.055 (2017).
31. *See*, *e.g.,* ICDR, International Dispute Resolution Procedures arts. 11, 12 (June 1, 2014) ("ICDR Rules"); JAMS International Arbitration Rules & Procedures, art. 8 (Sept. 1, 2016) ("JAMS Rules"); 2019 CPR Rules for Administered Arbitration of International Disputes, Rule 5 (Mar. 1, 2019) ("CPR Rules").
32. 9 U.S.C. § 5.
33. 9 U.S.C. § 5.
34. 9 U.S.C. § 10.
35. *See, e.g., Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895-97 (2d Cir. 1997); *Gulf Gaur. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 489-92 (5th Cir. 2002).
36. See CPR Rules, Rule 7; ICDR Rules, art. 14; JAMS Rules, art. 10.
37. *Belize Bank Ltd. v. Gov't of Belize*, 852 F.3d 1107 (D.C. Cir. 2017) (considering English ethical rules in adjudicating challenge to impartiality of England-based arbitrator-barrister).
38. ICDR Rules, art. 38.
39. CPR Rules, Rule 22; JAMS Rules, art. 1.6.
40. *Owens v. Am. Arbitration Assoc.*, 670 F. App'x 441, 442-43 (8th Cir. 2016); accord, e.g., Austern v. Chicago Bd. Options Exch., Inc., 898 F.2d 882, 886-87 (2d Cir. 1990); *Sacks v. Dietrich, 663 F.3d 1065*, 1069-70 (9th Cir. 2011).
41. *See, e.g., La Serena Props., LLC v. Weisbach*, 186 Cal. App. 4th 893, 900-08 (1st Div. 2010); *John St. Leasehold, L.L.C. v. Brunjes*, 650 N.Y.S.2d 649, 649-50 (1st Dep't 1996).
42. *See, e.g., Toyo Tire Holdings of Americas Inc. v. Cont'l Tire N. Am., Inc*., 609 F.3d 975, 981-82 (9th Cir. 2010); *Albaniabeg Ambietn Sh.p.k. v. Enel S.p.A.*, 169 F. Supp. 3d 523, 529 (S.D.N.Y. 2016). But *see McCreary Tire & Rubber Co. v. CEAT S.p.A*., 501 F.2d 1032, 1037-38 (3d Cir. 1974) (holding that where parties have agreed to arbitrate all disputes, the New York Convention forbids the courts from attaching assets).
43. *Toyo Tire Holdings*, 609 F.3d at 981.
44. Cal. Civ. Proc. Code § 1297.91.
45. N.Y. C.P.L.R. 7502(c).
46. CPR Rules, Rule 13; ICDR Rules, art. 24; JAMS Rules, art. 32.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

47. CPR Rules, Rule 14; ICDR Rules, art. 6; JAMS Rules, art. 3.
48. See, e.g., *In re Chevron Corp.*, 633 F.3d 153, 161 (3d Cir. 2011); *In re Application of Republic of Ecuador v. Douglas,* 153 F. Supp. 3d 484, 487 (D. Mass. 2015); *In re Veiga*, 746 F. Supp. 2d 8, 22-23 (D.D.C. 2010).
49. 220 F. Supp. 3d 517 (S.D.N.Y. 2016).
50. 542 U.S. 241, 258 (2004).
51. *Kleimar*, 220 F. Supp. 3d at 521; *accord, e.g., Chevron Corp. v. Shefftz*, 754 F. Supp. 2d 254, 260 (D. Mass. 2010); *In re Owl Shipping, LLC*, 2014 WL 5320192, at *2 (D.N.J. Oct. 17, 2014).
52. *See, e.g., In re Application of Grupo Unidos Por El Canal S.A.,* 2015 WL 1815251, at *7-8 (N.D. Cal. Apr. 21, 2015); *La Comision Ejecutiva Hidroelecctrica Del Rio Lempa v. El Paso Corp.*, 617 F. Supp. 2d 481, 485 (S.D. Tex. 2008); *see also Nat'l Broad. Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 188-91 (2d Cir. 1999).
53. *Intel*, 542 U.S. at 258, 264-65.
54. For example, Florida, New York and Texas law require written arbitration awards signed by the arbitrators. *See* Fla. Stat. Ann. § 684.0042; N.Y. C.P.L.R. § 7507; Tex. Civ. Prac. & Rem. Code Ann. § 172.141.
55. *See Castro v. Tri Marine Fish Co. LLC*, 916 F.3d 1191, 1198-99 (9th Cir. 2019).
56. *Castro*, 916 F.3d at 1199.
57. *See, e.g., Berkowitz v. Republic of Costa Rica,* 288 F. Supp. 3d 166, 174 (D.D.C. 2018) (collecting cases).
58. *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 282–83 (2d Cir. 1986). Courts have also deemed jurisdictional awards final and reviewable where the parties have agreed to bifurcate an arbitration into jurisdictional and merits phases. *See, e.g., Trade & Transp., Inc. v. Natural Petrol. Charterers, Inc*., 931 F.2d 191, 195 (2d Cir. 1991).
59. *See, e.g., Zeiler,* 500 F.3d at161-62, 168 n.10.
60. *See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287–88 (5th Cir. 2004). U.S. courts have interpreted the phrase "under the law of which the award was made" to refer to the arbitral procedural law governing the arbitration rather than the substantive law governing the parties' agreement. *See, e.g., Belize Soc. Dev. Ltd*., 668 F.3d at 730 (collecting cases).
61. *See* 9 U.S.C. §§ 10-11. The United States Supreme Court has cautioned that "[w]hile the [Federal Arbitration Act] creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction . . .." *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984). Accordingly, parties must commence *vacatur* proceedings in state court absent another basis for invoking federal jurisdiction.
62. *See* 9 U.S.C. § 12. Multiple federal circuit courts have held that the three-month limitations period for vacatur applications is absolute and may not be tolled for equitable reasons. *See, e.g., Cigna Ins. Co. v. Huddleston*, 986 F.2d 1418 (5th Cir. 1993); *Taylor v. Nelson*, 788 F.2d 220, 225 (4th Cir. 1986); *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984).
63. *See Zeiler*, 500 F.3d at 165 n.6 (noting that the distinction between the vacatur of an award and non-enforcement of an award relates to "the remaining force of an unconfirmed award outside this country").
64. *See Karaha Bodas*, 364 F.3d at 287 ("Only a court . . . with primary jurisdiction over an arbitral award may annul that award.").
65. *See Karaha Bodas*, 364 F.3d at 287 (stating that, in secondary jurisdictions, "parties can only contest whether that state should enforce the arbitral award"); Belize Soc. Dev. Ltd.,

© Published and reproduced with kind permission by Global Legal Group Ltd, London

668 F.3d at 730 (holding that post-award proceedings in secondary jurisdictions "ha[ve] no preclusive effect on the [U.S.] court's disposition of [a] petition to enforce pursuant to . . . the New York Convention").

66. 9 U.S.C. § 10.
67. *See, e.g., Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997) (holding that the New York Convention permits "the state in which, or under the law of which, the award is made, . . . to set aside or modify an award in accordance with its domestic arbitral law . . .").
68. *See Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1441 (11th Cir. 1998) (stating that the "award must be confirmed unless appellants can successfully assert one of the seven defenses against enforcement of the award enumerated in Article V of the New York Convention").
69. *Fotochrome, Inc. v. Copal Co., Ltd.*, 517 F.2d 512, 519 (2d Cir. 1975) ("[A] foreign award can never be self-executing in the forum state but must be merged in a local judgment to be effective as a matter of domestic law").
70. See 9 U.S.C. § 9.
71. *Karaha Bodas*, 364 F.3d at 287 ("[C]ourts in countries of secondary jurisdiction may refuse enforcement only on the grounds specified in Article V [of the New York Convention].").
72. *First Inv. Corp. of the Marsh. Is. v. Fujian Mawei Shipbuilding, Ltd*., 703 F.3d 742, 749 (5th Cir. 2012).
73. *See also Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 224-26 (2d Cir. 2014) (dismissing petition to enforce New York Convention award in reliance on *Daimler*).
74. New York Convention, art. III.
75. *See Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011) (dismissing enforcement petition on *forum non conveniens* grounds). But *see TMR Energy Ltd. v. State Prop. Fund of Ukr.*, 411 F.3d 296, 303–04 (D.C. Cir. 2005) (holding *forum non conveniens* dismissal is impermissible where the award-debtor is a foreign state).
76. *See* 9 U.S.C. § 9.
77. *See* 9 U.S.C. §§ 207, 302. The Court of Appeals for the D.C. Circuit has held, in an unreported decision, that the limitations period under 9 U.S.C. § 207 may be equitably tolled. *See BCB Holdings Ltd. v. Gov't of Belize*, 650 F. App'x 17, 19–20 (D.C. Cir. 2016).
78. *See Comm'ns Imp. Exp. S.A. v. Congo*, 757 F.3d 321 (D.C. Cir. 2014).
79. *See* ICSID, Database of ICSID Member States, available at: https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx.
80. *See BG Grp.*, 572 U.S. at 40-41.
81. *See BG Grp.,* 572 U.S. at 31 (addressing petition to vacate pursuant to the Federal Arbitration Act and the New York Convention relating to UNCITRAL award rendered in investment arbitration).
82. *See* 22 U.S.C. § 1650a(a) ("The Federal Arbitration Act (9 USC § 1 *et seq.*) shall not apply to enforcement of awards rendered pursuant to the [ICSID] [C]onvention").
83. *See Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez*., 863 F.3d 96, 120 (2d Cir. 2017). Federal courts possess exclusive jurisdiction over actions to enforce ICSID awards. *See* 22 U.S.C. § 1650a(b).
84. *See* 22 U.S.C. § 1650a(a).
85. 28 U.S.C. § 1601, et seq. *See, e.g., Mobil Cerro Negro,* 863 F.3d at 115, 118 (holding that "actions to enforce ICSID awards against foreign sovereigns must comply with the FSIA's service and venue provisions").
86. *See* 28 U.S.C. §§ 1609-1611.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Martin Jackson
Tel: +1 212 839 5300 / Email: mjackson@sidley.com

Martin Jackson is a partner at Sidley Austin in New York. His international arbitration and litigation practice focuses on disputes involving energy, oil and gas, natural resources, pharmaceutical licensing and distribution, financial services, insurance, joint ventures, and trade secret matters. Martin acts as counsel in disputes under all of the major international arbitration rules and represents clients in a broad range of high-stakes commercial disputes in the U.S., Asia, Latin America and Europe. Martin also serves as the chair of the diversity and inclusion committee for Sidley's New York office and frequently presents on matters impacting diversity in the legal profession and unconscious bias.

Sam Choi
Tel: +1 212 839 5300 / Email: sam.choi@sidley.com

Sam Choi is a senior associate at Sidley Austin in New York. He represents U.S. and foreign clients in complex commercial litigation in U.S. federal and state courts, as well as in domestic and international arbitration matters under the AAA, ICDR, CPR, and ICC rules. His practice is focused on commercial disputes (breach of contract, fraud, breach of fiduciary duty, and other business torts) and bankruptcy disputes. He has substantial experience in the financial services, oil and gas, natural resources, life sciences, and pharmaceuticals industries. Prior to joining Sidley, he served as a law clerk in the U.S. District Court for the Eastern District of Pennsylvania and as a public defender.

Daniel R. Perez
Tel: +1 212 839 5300 / Email: daniel.perez@sidley.com

Daniel R. Perez is an associate at Sidley Austin in Washington, D.C. Daniel has represented both foreign sovereigns and private parties in commercial and investor-state arbitrations as well as in post-award litigation before U.S. federal courts. Daniel regularly litigates arbitration-related issues implicating the Foreign Sovereign Immunities Act, such as the scope of the "arbitration exception" to foreign-state jurisdictional immunity and the interplay between notice provisions in investment treaties and the rules governing service of process on foreign sovereigns under federal law.

Sidley Austin LLP

787 Seventh Avenue, New York, NY 10019, USA
Tel: +1 212 839 5300 / URL: www.sidley.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Zambia

Joseph Alexander Jalasi, Eric Suwilanji Silwamba & Lubinda Linyama
Eric Silwamba, Jalasi and Linyama Legal Practitioners

Introduction

Arbitration in Zambia is fast being appreciated and used by parties as a form of dispute resolution. An important development is the recognition of the Chartered Institute of Arbitrators, Zambia Branch, as an arbitral institution. Previously, the Zambia Association of Arbitrators was the only arbitral institution in the country.

Arbitration in Zambia is governed by the Arbitration Act No. 19 of 2000 ("the Act"). The Act, under the provisions of section 8, incorporates the United Nations Commission on International Trade Law (UNCITRAL) Model Law.

Zambia is a signatory to the New York convention on the Recognition and Enforcement of Foreign Arbitral Awards and there are no reservations with respect to the same. The New York Convention has been domesticated into Zambia by virtue of section 31 of the Arbitration Act No. 19 of 2000.

Zambia has not signed any other treaty with respect to the recognition and enforcement of arbitration awards in Zambia.

The Arbitration Act applies both to domestic and international arbitration proceedings.

The arbitral tribunal has jurisdiction to hear and determine both national and international disputes.

Arbitration agreement

According to the provisions of section 9 of the Act, an arbitration agreement must be in a contract or in the form of a separate agreement. An arbitration agreement must be in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or 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 another. Also, a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement – provided that the contract is in writing and the reference is such as to make that clause part of the contract.

An arbitration clause must state the place of arbitration, method of appointment of the members of the arbitral tribunal and the number, the rules to be applied to the arbitration, the language of arbitration and disputes to be settled by arbitration.

Any dispute which the parties have agreed to submit to arbitration may be determined by arbitration, however, section 6 of the Act provides for matters which are not determinable by arbitration. Section 6 provides as follows:

(a) an agreement that is contrary to public policy;

© Published and reproduced with kind permission by Global Legal Group Ltd, London

(b) a dispute which, in terms of any law, may not be determined by arbitration;

(c) a criminal matter or proceeding except in so far as permitted by written law or unless the court grants leave for the matter or proceeding to be determined by arbitration;

(d) a matrimonial cause;

(e) a matter incidental to a matrimonial cause, unless the court grants leave for the matter to be determined by arbitration;

(f) the determination of paternity, maternity or parentage of a person; or

(g) a matter affecting the interests of a minor or an individual under a legal incapacity, unless the minor or individual is represented by a competent person.

An example of an arbitral award being set aside is the case of ***Zambia Telecommunications Co. Ltd v Celtel Zambia Ltd SCZ No. 34 of 2008***. In this case, the Supreme Court set aside an award on the grounds of public policy for the reason that the chairman of the arbitral tribunal failed to disclose the fact that he had been appointed to another tribunal by one of the lawyers in an arbitration he was chairing. According to the court, it is public policy that a person ought to be tried by an impartial tribunal.

The standard for refusing is quite stringent and is based on a case-by-case analysis.

The principle of separability of an arbitration agreement applies in Zambia. An arbitration agreement is treated as a separate and independent agreement which survives the termination of the underlying contract. The provisions of section 9(1) of the Act state that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Arbitration procedure

Where parties have not agreed on how to commence arbitral proceedings, Article 21 of the UNCITRAL Model Law states that arbitral proceedings in respect of a particular dispute will commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Arbitral hearings can take place outside the seat of arbitration. Under Article 20 of the UNCITRAL Model Law, 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.

The provisions of Article 19 of the UNCITRAL Model Law are applied with respect to the rules of evidence, and the same states that the parties are expected to agree on the procedure, which includes the mode of receiving evidence. If the parties do not agree, the arbitral tribunal will determine the procedure in such manner as it considers appropriate. The arbitral tribunal is conferred with powers to determine the admissibility, relevance, materiality and weight of any evidence.

The rule on privilege is the same as that under English common law. It exists with respect to the client-lawyer relationship. The rule of client-lawyer relationship is that the privilege is for the client and can only by waived by the client.

Once privilege is raised, evidence cannot be adduced.

With respect to the rule on disclosure, Article 14 (3) of the Act states that the arbitrator may make:

(a) any order it considers appropriate to compel the attendance of a witness before it to give evidence or produce documents;

© Published and reproduced with kind permission by Global Legal Group Ltd, London

(b) to order any witness to submit to examination on oath or affirmation before the arbitral tribunal, or before an officer of the tribunal or any other person in order to produce information or evidence for use by the arbitral tribunal;

(c) to order the discovery of documents and interrogatories; and

(d) to issue a commission or request for the taking of evidence out of jurisdiction.

The IBA Rules are only taken into account by the tribunal where the same have been agreed upon by the parties.

Where the parties have not agreed regarding expert evidence, the provisions of Article 26 (1) of the UNCITRAL Model Law state that the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal; additionally the tribunal may require a party to give the expert any relevant information or to produce, or to provide access to any documents, goods or other property for his inspection.

Counsel is not obligated to take into account the LCIA and IBA guidelines unless the parties choose otherwise.

Regulation 7 of the Arbitration (Code of Conduct and Standards) Statutory Instrument No. 12 of 2007 provides that an arbitrator shall not disclose to anyone who is not a party to the arbitral proceedings any information or documents that are exchanged in the course of the proceedings except with the consent of the parties concerned or when ordered to do so by a court or otherwise required to do so by law; or when the information discloses an actual or potential threat to human life or national security.

Further, Rule 25 and 26 of the Arbitration (Court Proceedings) Rules Statutory Instrument No. 75 of 2001 extends confidentiality to applications relating to arbitral proceedings and prescribes how custody of records, registers and documents are to be kept confidentially by the court.

Arbitrators

Where the parties fail to agree on the appointment of an arbitrator, under the provisions of section 12(3) of the Act and Article 11 (3) of the UNCITRAL Model Law, the arbitrator shall refer the matter to an arbitral institution such as the Zambia Association of Arbitrators ("ZAA") and the Chartered Institute of Arbitrators Zambia Branch ("CLArbZB").

The provisions of Article 13 of the UNCITRAL Model Law state that the parties to the arbitration proceedings may agree on a procedure to take in order to challenge an arbitrator. Article 13 provides as follows:

1. The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.
2. Failing such agreement, a party who intends to challenge an arbitrator shall, within 15 days of becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
3. If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within 30 days of receiving notice of the decision rejecting the challenge, the court or other authority specified in Article 6 to decide on the challenge – which decision shall be

© Published and reproduced with kind permission by Global Legal Group Ltd, London

subject to no appeal. While such request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

An arbitrator's mandate can be terminated under the following grounds as stipulated under the provisions of Article 14 (1) of the UNCITRAL Model Law:

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his function or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

Regulation 24(2) of the Arbitration (Code of Conduct and Standards) Regulations, Statutory Instrument No. 12 of 2007 grants immunity to the arbitrator, unless alleged misconduct is proven to be a violation of the code of conduct and standards.

There are no rules governing the conduct of secretaries to the arbitral tribunal.

Article 16 of the UNCITRAL Model Law, applicable to Zambia by virtue of section 8 of the Act, allows an arbitral tribunal to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

The arbitrators' jurisdiction is confined to the scope of the reference to arbitration. The arbitrator has no jurisdiction to deal with matters which are outside the scope of the matter conferred to him by the Arbitration Clause. The limitation of the scope of reference is also with respect to counter or cross claims. This position was stated in the case of ***Hybrid Poultry Zambia v NFC Africa Mining PLC Appeal No. 46 of 2016***.

Under section 10 of the Arbitration Act, the High Court – or indeed any other court – has no jurisdiction to hear a matter where a contract embodies an arbitration agreement. Section 10 of the Act provides as follows:

> "*A court before which legal proceedings are brought in a matter which is subject to an arbitration agreement shall, if a party so requests at any stage of the proceedings and notwithstanding any written law, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*"

The Supreme Court of Zambia has passed a number of decisions where they have given effect to section 10 of the Act. In the case of ***Zambia National Holdings Limited and Another v The Attorney General (1993 /1994) Z.R. 115***, it was held that where parties have agreed to settle any dispute between them by arbitration, the court's jurisdiction is ousted unless the agreement is null and void, inoperative, or incapable of being performed. This principle of law reinforces the freedom that the parties have to arbitrate as opposed to being forced to litigate whenever there is a dispute, as was held in the case of ***Leopard Ridge Safaris Limited v Zambia Wildlife Authority (2008) Z.R 97***. Further, in the case of ***Konkola Copper Mines Plc – Appeal No. 118/2006,*** emphasis was placed on the fact that a court has discretion not to stay proceedings and refer the parties to arbitration, where the Plaintiff demonstrates that the arbitration agreement is null and void, inoperative or incapable of being performed.

In the case of ***Audrey Nyambe v Total Zambia Limited Appeal No. 29 of 2011***, it was held that in determining whether a matter is amenable to arbitration or not, it is imperative that the wording used in the arbitration clause itself is closely studied.

Individuals or entities who are not party to an arbitration agreement cannot be bound by an arbitration to which they are not privy. The position of the Zambian Courts is set out in the

© Published and reproduced with kind permission by Global Legal Group Ltd, London

case of ***Ody's Oil Company Limited v The Attorney General and Constantinos James Papoutsis (2012) Z.R. 164***, Volume 1 at page 182 where it was held that a party who is not party to the arbitration agreement cannot be bound by the terms and outcome of an arbitration agreement to which they are not privy.

Interim relief

An arbitrator may grant an interim order or other measures under the provisions of section 14 of the Act and these include:

(a) to grant an interim injunction or other interim order;

(b) to order the parties to make a deposit in respect of the fees, costs and expenses of the arbitration;

(c) to make any order it considers appropriate to compel the attendance of a witness before it to give evidence or produce documents;

(d) to order any witness to submit to examination on oath or affirmation before the arbitral tribunal, or before an officer of the tribunal or any other person in order to produce information or evidence for use by the arbitral tribunal;

(e) to order the discovery of documents and interrogatories;

(f) to issue a commission or request for the taking of evidence out of jurisdiction; and

(g) to detain, preserve or inspect any property or thing in the custody, possession or control of a party which is in issue in the arbitral proceedings, and to authorise for any of those purposes any person to enter upon any land or any building in the possession of a party, or to authorise any sample to be taken or any observation to be made or experiment to be carried out which may be necessary or expedient for the purpose of obtaining full information or evidence.

An arbitrator is not obliged to seek the assistance of a court but is merely at liberty to seek assistance.

Under section 11 of the Act, the court may grant the following interim reliefs:

(a) an order for the preservation, interim custody, sale or inspection of any goods which are the subject matter of the dispute;

(b) an order securing the amount in dispute or the costs and expenses of the arbitral proceedings;

(c) an interim injunction or other interim order; or

(d) any other order to ensure that an award which may be made in the arbitral proceedings is not rendered ineffectual.

The Arbitration (Court Proceedings) Rules, Statutory Instrument No. 75 of 2001 provides for the procedure to make an application to court.

In practice, the national court will grant interim relief to parties who are the subject of an arbitration agreement on the merits of each case, and will apply the principles of granting an injunction; namely, the prospect of success and whether the damage can be atoned for in damages. In the case of ***Roraima Data Services v Zambia Postal Services Corporation 2011/HN/ARB/01*****,** the court's approach was that it granted the interim injunction pending arbitration on the reasons that damages would be totally inadequate, and it would be manifestly unjust to confine the plaintiff to its damages for breach should it succeed in its claim before the arbitrator.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Anti-suit injunctions are yet to be tested in the Zambian jurisdiction; however, suffice to state that in the event of an application for an anti-suit injunction, the Zambian courts will be guided by the principles of English law pursuant to the provisions of Section 10 of the High Court Act, Chapter 27, Volume 3 of the Laws of Zambia.

Security for costs can be granted by national courts and the arbitral tribunal pursuant to the provisions of sections 11(2) (b) and 14(2) (b) of the Act.

The jurisdiction of the Arbitration Tribunal is limited to the reference; in the case of ***Savenda Management Limited v Stanbic Bank Zambia Limited Appeal No. 002/2015 (2017) ZMSC 79***, the court emphasised this position.

Arbitration award

Under the provisions of Section 16(1) of the Act, the award shall be made in writing and shall be signed by the arbitrator(s); and in arbitral proceedings with more than one arbitrator, the signature of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under Article 30 of the UNCITRAL Model Law. The award shall state its date and the place of arbitration as determined in accordance with Article 20(1) of the UNCITRAL Model Law. After the award is made, a copy signed by the arbitrators shall be delivered to each party.

The arbitral tribunal is not subject to a time limit in which to render its award.

Under the provisions of section 16 (5) of the Act, unless otherwise agreed by the parties, the arbitral tribunal may make an award allocating the costs and expenses of the arbitration including legal and other expenses between the parties. However, where the award does not specify otherwise, each party shall be responsible for their own legal and other expenses and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration.

In the case of an arbitration which, under Article 1(3) of the UNCITRAL Model Law is international and in which the parties have not agreed on interest, pursuant to section 16 (7) of the Act, the arbitral tribunal may award simple or compound interest in accordance with the law applicable to the arbitration; or in any case, simple or compound interest in accordance with the law applicable in Zambia to Judgment debts, on the whole or any part of any sum, and in relation to such period and at such rate as specified in the arbitral award.

Challenge of the arbitration award

Under the provisions of section 17 of the Act and Article 34 of the UNCITRAL Model Law, an award may be set aside on proof of the following grounds:

(i) a party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of Zambia;

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(iii) the award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to

© Published and reproduced with kind permission by Global Legal Group Ltd, London

arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with this Act or the law of the country where the arbitration took place; or

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

An arbitral award can be corrected or amended pursuant to the provisions of Article 33 of the UNCITRAL Model Law. Article 33 provides as follows:

1. Within thirty (30) days of receipt of the award, unless another period of time has been agreed upon by the parties:
   (a) a party, with notice to the other 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; and
   (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

   If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty (30) days of receipt of the request. The interpretation shall form part of the award.
2. The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this chapter on its own initiative within thirty (30) days of the date of the award.
3. Unless otherwise agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal, within thirty (30) days of receipt of the award, 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 sixty (60) days.
4. The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.
5. The provisions of Article 31 shall apply to a correction or interpretation of the award or to an additional award.

Rule 23 of the Arbitration (Court Proceedings) Rules, 2001, Statutory Instrument No. 75 of 2000 provides for the procedure for setting aside an arbitral award.

In the case of ***John Kunda (suing as Country Director and on behalf of the Adventist Development and Relief Agency (ADRA)) v Keren Motors (Z) Limited (SCZ/8/91/2011)*** *[2012] ZMSC*, the court held that "setting aside of an award should not be used as a means to review the arbitral tribunal on the merits".

In the recent case of ***Savenda Management Limited v Stanbic Bank Zambia Limited Appeal No. 002/2015 (2017) ZMSC 79*** at page J24 of the Judgment, the court stated as follows:

> "*Allowing the said application would amount to changing the decision of the Arbitrator with regard to the period within which the payment should have been made. In our view, courts do not have jurisdiction to sit as appellate courts to review and later arbitral decisions.*"

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Enforcement of the arbitration award

International arbitration awards are enforced under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and this has been domesticated into Zambian legislation by virtue of section 31 of the Arbitration Act.

In order to obtain the recognition and enforcement of the arbitral award, the provisions of Article 4 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards state that the party applying for recognition and enforcement shall at the time of application supply a duly authenticated original award or duly certified copy and the original agreement or a duly certified copy. Where the award or agreement is not made in an official language of the country in which award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of the documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

The courts regularly recognise and enforce arbitration awards; an example is the case of ***U and M Mining Zambia Limited v Konkola Copper Mines PLC [2013] EWHC 260***.

Investment arbitration

Zambia has a number of bilateral investment treaties, with the Belgium-Luxembourg Economic Union (2001), China (1996), Cuba (2000), Egypt (2000), Finland (2005), France (2002), Germany (1994) and the United Kingdom (2009).

Zambia has domesticated the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States ("ICSID") through the enactment of the Investments Dispute Convention Act, Chapter 42, Volume 4 of the Laws of Zambia.

As previously stated, national courts recognise and enforce foreign awards, as held in the case of ***U and M Mining Zambia Limited v Konkola Copper Mines PLC [2013] EWHC 260***.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Joseph Alexander Jalasi, Jr.
Tel: +260 211 256 530 / Email: jjalasi@ericsilwambaandco.com

Joseph Alexander Jalasi, Jr. (LL.B. (Hons) UNZA); and Post-graduate Legislative Drafting Diploma (ZIALE), MCIArb (UK) is the Head of Tax, Mining, Corporate, and the Banking and Finance Department. He has several years in litigation and has held various public offices. He is a founding partner of the firm. The many reported cases to his credit in the Zambian Law Reports are sufficient testimony. Mr. Jalasi served as Chief Policy Analyst Legal Affairs at State House under the late President Levy Mwanawasa. He also served as legal advisor to former President Rupiah Banda.

Mr. Jalasi is a member of the Chartered Institute of Arbitrators and the Zambia Association of Arbitrators and has been involved in arbitral proceedings both as an advocate and an arbitrator.

Eric Suwilanji Silwamba, SC
Tel: +260 211 256 530 / Email: essilwamba.sc@ericsilwambaandco.com

Eric Suwilanji Silwamba, SC (LL.B. (Hons) UNZA); and Post-graduate Legislative Drafting Diploma (ZIALE), MCIArb (UK) is the principal partner, and a vastly experienced practitioner who has been conferred with rank and dignity of State counsel. He has several years of experience in both private practice and has held various public offices. In the field of litigation, Mr. Silwamba has had the opportunity of attending to some of the most complex litigation cases. Mr. Silwamba is former Minister of Presidential Affairs and former Minister of Justice. Mr. Silwamba is a member of the Chartered Institute of Arbitrators and the Zambia Association of Arbitrators.

Lubinda Linyama
Tel: +260 211 256 530 / Email: llinyama@ericsilwambaandco.com

Mr. Linyama is a partner of Eric Silwamba, Jalasi and Linyama Legal Practitioners. He has acquired vast experience in diverse areas of litigation *inter alia*; Commercial Law, Criminal Law, Administrative Law, Mining Law and General Business Law; Corporate advisory in major areas of Company Law, Secretarial Services for various locally owned and Multi-National Companies operating in Zambia and corporate compliance and has conducted due diligence in matters related to business and mining sectors.

Equipped with negotiating skills, Mr. Linyama was part of the Main and Sub-Committees of the negotiations with the government of the Republic of Zambia and the Chinese investors on the Multi-Facility Economic Zones (MFEZ) for the Chambishi and Lusaka Areas of the Republic of Zambia and was involved in drafting the Investment Promotion and Protection Agreement for the MFEZ, Lead Counsel in the acquisition of Mining Companies, Nominated Law Association of Zambia Member and also a Member of the current Zamseed Administration Committee. He is currently serving as Board Chairman of Zambia Railways Limited.

Eric Silwamba, Jalasi and Linyama Legal Practitioners

At William Burton Place, 12 Chilekwa Mwamba Road, off Lubu/Saise Roads, Longacres, Lusaka, Zambia
Tel: +260 211 256 530 / URL: www.ericsilwambaandco.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Other titles in the **Global Legal Insights** series include:

- **AI, Machine Learning & Big Data**
- **Banking Regulation**
- **Blockchain & Cryptocurrency Regulation**
- **Bribery & Corruption**
- **Cartels**
- **Commercial Real Estate**
- **Corporate Tax**
- **Employment & Labour Law**
- **Energy**
- **Fintech**
- **Initial Public Offerings**
- **Litigation & Dispute Resolution**
- **Merger Control**
- **Mergers & Acquisitions**
- **Pricing & Reimbursement**

Strategic partner: